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Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)

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CATEGORICAL LIABILITY FOR MANIFESTLY UNREASONABLE DESIGNS: WHY THE COMMENT d CAVEAT SHOULD BE REMOVED FROM THE RESTATEMENT (THIRD)

INTRODUCTION

Section 402A is dead; long live the *Restatement (Third) of Torts: Products Liability.* In approving the substantive provisions of Tentative Draft No. 2 of the new products liability *Restatement* in 1995,[1] the American Law Institute (A.L.I.) effectively repealed the most frequently cited, and arguably the most influential, section of the *Restatement (Second) of Torts.*[2] Although it will be several years before the entire new *Restatement* is released, Tentative Draft No. 2, which defines "[l]iability for the sale or distribution of defective products," represents the first and most important chapter.[3] For the time being, section 402A remains the law in jurisdictions that have adopted it either judicially,[4] or through legislative enactment.[5] But by endorsing the first portion of the new *Restatement,* the A.L.I. has acknowledged that

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1 In May 1995, the American Law Institute approved, subject to editorial revision and an opportunity for additional discussion, sections 1 through 8 and section 11 of Tentative Draft No. 2 of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, 1995) [hereinafter RESTATEMENT (THIRD) OF TORTS]. *See, e.g., ALI Approves Products Liability Restatement,* 63 U.S.L.W. 2734 (May 30, 1995).

2 Henry J. Reske, *Experts Tackle Torts Restatement,* A.B.A. J., Aug. 1992, at 18. The text of § 402A reads:

> Special Liability of Seller of Product for Physical Harm to User or Consumer:
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to bis property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller bas exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

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

3 RESTATEMENT (THIRD) OF TORTS, *supra* note 1, at ch. 1.

4 *See* State Chart—Acceptance of Strict Liability, 1 Prod. Liab. Rep. (CCH) ¶ 4016 (Nov. 1988 & Apr. 1989). Thirty-seven states and the District of Columbia adopted the Restatement's version of strict products liability. *Id.* Seven states and Puerto Rico adopted other variations. *Id.* Delaware, Massachusetts, Michigan, North Carolina, and Virginia have not yet recognized strict products liability. *Id. See generally* 2 AMERICAN LAW OF PRODUCTS LIABILITY § 16:9 (3d ed. 1987) (listing states that have adopted RESTATEMENT (SECOND) OF TORTS § 402A), §§ 16:13-17 (listing states that bave adopted alternative strict liability approaches), § 16:18 (listing states that have rejected strict products liability).

5 *See* ARK. CODE ANN. § 4-86-102 (Michie 1996); IND. CODE ANN. § 33-1-1.5-3 (Burns 1992); ME. REV. STAT. ANN. tit. 14, § 221 (West 1964); OR. REV. STAT. § 30.920 (1988); S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976).

after three decades of judicial application and interpretation, section 402A has become a legal anachronism.

The last thirty years have witnessed an explosion in products liability litigation. Pressed by social policy considerations, judges have had to strain the language of section 402A in order to accommodate lawsuits brought by litigants who claimed they were injured through the use of defective products. As a result, although section 402A has remained the root of contemporary products liability doctrine, its relevance to modern situations has steadily declined.[6] Consequently, the A.L.I. chose to open its new *Restatement of Torts* with a restatement of American products liability law.[7] In May 1992, the Institute officially commenced the project by appointing Professors Henderson and Twerski co-reporters of the products liability chapters of the *Restatement (Third) of Torts*.[8] Since then, the co-reporters have released two tentative drafts and a series of intermediate drafts of the first chapter, covering the basis of manufacturer liability and affirmative defenses based on user misconduct.[9]

As is the case with any revision of the law, the new *Restatement* has faced substantial criticism from its inception. The plaintiffs' bar objected to the selection of co-reporters Henderson and Twerski, whose previous work, including a co-authored proposal for revising section 402A, exhibited a strong pro-business bent.[10] In addition, critics have repeatedly argued that the co-reporters' position runs against the current of existing law on liability for defective desigu. Specifically, these

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6 *See* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1513 (1992) [hereinafter *A Proposed Revision*] ("[D]octrinal developments in products liability have placed such a heavy gloss on the original text of and comments to section 402A as to render them anachronistic and at odds with their currently discerned objectives.")

7 The decision to revise the *Restatement (Second) of Torts* was announced on March 18, 1992. The decision was reached "because § 402A 'has proven so influential in the development' of modern product liability law" and the existing version is "becoming 'increasingly irrelevant and unresponsive to contemporary needs'." *ALI to Begin Work on Restatement (Third); Professors Propose Revisions to Section 402A*, BNA PROD. LIAB. DAILY, Mar. 18, 1992; *Law Institute Attendees Plan 5-Year Project; Members Agree on Core of Proposed Treatise*, BNA PROD. LIAB. DAILY, May 12, 1992.

8 The A.L.I. announced the names of the reporters and their advisors on June 11, 1992. *See Institute Announces Advisory Committee for Restatement Products Liability Revision*, BNA PROD. LIAB. DAILY, June 11, 1992; *Prominent Law Professors Offered Positions as Co-Reporters on Product Liability Study*, 20 Prod. Safety & Liab. Rep. (BNA) No. 21, at 547 (May 22, 1992).

9 *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, at xxvii-xxix (Introductory Note). The topics covered by the first chapter are "Product Defectiveness," "Rules of Liability Governing Special Product Markets," "Causation," and "Defenses." *Id.* at xix-xxiv.

10 *See, e.g., Already on the Record*, LEGAL TIMES, June 8, 1992, at 3 (reporting allegations that Professors Henderson and Twerski are pro-business in philosophy and are financially backed by business concerns). *See also A Proposed Revision*, *supra* note 6; James A. Henderson, Jr., *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 TOURO L. REV. 107, 111-12 (1993) [hereinafter *Revising Section 402A*] ("For years I had written what was widely viewed, and I think fairly viewed, as pro-defendant material.").

critics contend that adopting a risk-utility balancing test and making proof of a reasonable alternative design an obligatory element of plaintiff's prima facie case amounts to academic tort reform.[11] Consequently, when the co-reporters released Tentative Draft No. 1 for consideration in 1994, intense criticism and opposition in response thereto convinced A.L.I. officials to postpone voting on the draft pending further consideration.[12]

On March 13, 1995, the co-reporters released Tentative Draft No. 2. The second draft's treatment of design defects differed from its predecessor in two respects. First, the co-reporters included a lengthy discussion of case law in support of their approach to design defects.[13] Second, the co-reporters added comment d, which provides a possible exemption from the reasonable alternative design requirement for products with a "manifestly unreasonable design."[14] Comment d incorporates an amendment originally proposed by a member of the plaintiffs' bar and adopted by the A.L.I. at its 1994 meeting.[15] The members of the A.L.I. overwhelmingly approved Tentative Draft No. 2 as modified. This Note addresses the fidelity of comment d to current products liability law and the wisdom of endorsing categorical product liability by exempting selected categories of products from the reasonable alternative design requirement.

This Note argues that the A.L.I. should remove comment d from the new *Restatement.* Unchanged, this comment invites plaintiffs' lawyers to challenge a variety of necessarily dangerous products, including such common and popular products as cigarettes, alcohol, handguns, three-wheel all-terrain vehicles, trampolines, and aboveground pools. Determining whether such products are defective in design would enmesh courts in a web of conflicting social policies and interests that they are not designed to handle.[16] The courts' steadfast rejection of categorical liability indicates their recognition that to embark on such ventures would exceed their institutional limits.[17] Moreover, the co-reporters' inability to satisfactorily confine the breadth of

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11 *See, e.g.*, Roland F. Banks & Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 OR. L. REV. 411 (1993) (arguing that the *Restatement*'s proposed rule "reflects neither the evolution nor the true state of existing products liability law"); Larry S. Stewart, *The ALI and Products Liability: 'Restatement' or 'Reform'*, TRIAL, Sept. 1994, at 29 ("It appears that the reporters may be feeling too much the gravitational pull of tort 'reform.'").

12 *See ALI Hesitates on Lawyer Liability, Products Liability Restatement Efforts*, 62 U.S.L.W. 2734, 2735 (May 31, 1994) [hereinafter *ALI Hesitates*]; Henry J. Reske, *New Torts Restatement Debated*, A.B.A. J., Aug. 1994, at 24.

13 RESTATEMENT (THIRD) TORTS, *supra* note 1, § 2 cmt. c.

14 *Id.* cmt. d.

15 *See ALI Hesitates*, *supra* note 12, at 2735.

16 *See infra* part IV.A.

17 *See infra* part IV.B.1.

comment d's exception compromises the effectiveness of the reasonable alternative design requirement and may, in the long-run, eviscerate it completely.[18]

This Note is divided into four Parts. Part I offers a brief introduction to the concept of categorical product liability. Part II first outlines the *Restatement* process and its objectives, and then discusses the predicament that convinced the A.L.I. to draft a new *Restatement* of American products liability law. Part III discusses design defectiveness under the new *Restatement* and explains the comment d caveat to the general rule rejecting the notion of categorical liability. Finally, Part IV presents the following three-fold argument for removing comment d: (i) categorical liability, even if limited to products with a "manifestly unreasonable design," goes beyond the institutional limitations of the adjudicative process; (ii) courts and legislatures have consistently rejected challenges to entire product categories; and (iii) retaining comment d would create a substantial likelihood that the exception would eventually swallow the rule.

I
PRODUCT CATEGORY LIABILITY

In recent years, a number of plaintiffs and commentators have urged the courts to adopt a theory of products liability that would hold manufacturers and suppliers accountable for product-related injuries even though their products contained no traditional manufacturing, design or warning defects.[19] This proposed theory, often referred to as "product category liability," is based on the idea that certain types of products—perhaps "Saturday Night Special" handgnns, cigarettes or above-ground pools—may pose such extreme risks of injury to the consumer that they should be regarded as inherently defective. Cigarettes, for example, may kill or severely impair the health of too many people to justify the benefit and pleasure they provide to smokers. Likewise, above-ground swimming pools may cause more injuries than they are worth to society. The claim of defectiveness in each of these cases is not based on the manufacturer's failure to make the product safer, but rather on the inherently dangerous nature of the product itself. In other words, the products are allegedly defective because they fail a gross risk-utility analysis: the overall benefit they provide is outweighed by the accident costs they generate. Proponents of categorical liability argne that if the cumulative risk of

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18 *See infra* part IV.C.

19 *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297-1328 (1991) [hereinafter *Closing the Frontier*] (discussing proposals for product category liability).

loss associated with a product significantly surpasses its potential social worth, then the product's manufacturer should be absolutely liable for any harm its product creates.[20]

This concept of categorical liability is a significant departure from established products liability doctrine. Under the traditional approach, a design defect inheres in a manufacturer's failure to adopt an alternative design which would have significantly reduced the risks of injury associated with the product at an acceptable cost and without unduly sacrificing the product's utility.[21] In contrast, categorical liability would hold a manufacturer or seller accountable for any injuries resulting from the use of its products, even in the absence of a safer and feasible alternative design. This observation has led some commentators to view this theory as "liability without defect."[22] Professors Henderson and Twerski point out that under this theory, "[c]ausation alone, rather than the traditional combination of causation and defectiveness, would constitute the plaintiff's prima facie case."[23] If courts were to accept categorical liability, they would, for the first time, impose true nonfault liability for all product-related injuries and, more significantly, for injuries caused by generic characteristics of products.[24] Such an approach cuts against the courts' long-standing and emphatic refusal to convert manufacturers into insurers of their products' safety.[25]

Proponents of categorical liability claim that the categorical liability approach does not dramatically depart from traditional doctrine, and that it merely extends the defect-based standard to entire product categories.[26] They offer several arguments in support of their claim. First, they assert that courts should retain the ability to assess entire categories of products, because some consumers cannot fully and effectively appreciate the excessive risks of harm posed by certain products, and thus cannot approach such risks rationally.[27] Second,

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20 *See e.g.*, Andrew O. Smith, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 375-79 (1987).

21 *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1543 n.41 (1973).

22 *Closing the Frontier*, *supra* note 19, at 1276-77.

23 *Id.* at 1277; *see* Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41, 46 (1982).

24 *Closing the Frontier*, *supra* note 19, at 1277.

25 *See, e.g.*, Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1209 (N.D. Tex. 1985) ("[U]nder Texas law, the manufacturer is not required to insure that its products are completely safe or that they will not cause injury to anyone."); *Closing the Frontier*, *supra* note 19, at 1271-73 (discussing courts' distaste for the concept of absolute liability).

26 *See* Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429 (1994); *see also* Turley, *supra* note 23, at 54.

27 *See, e.g.*, David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in The New Restatement*, 61 TENN. L. REV. 1241, 1254-57 (1994).

proponents of categorical liability maintain that shifting accident costs to manufacturers and suppliers of high-risk products will restrict, if not eliminate, the availability of such products, thus decreasing the level of overall product risk in the marketplace.[28] Finally, proponents argue that imposing categorical liability on manufacturers does not necessarily burden manufacturers in that they can spread the costs of injuries among all product users through increased prices.[29]

In the history of American products liability law, courts have accepted the notion of categorical liability on only three occasions.[30] In each instance, the courts' decisions were subsequently overridden by legislative acts.[31] The A.L.I. and the reporters for the new *Restatement* should follow suit. Strong institutional and policy considerations support the rejection of categorical liability and the removal of Comment d from the new *Restatement.* Proof of a reasonable alternative design should remain an integral part of the plaintiff's prima facie case of design defectiveness.

II
THE RESTATEMENT PROCESS, SECTION 402A, AND BEYOND

The *Restatement (Third) of Torts: Products Liability* represents the A.L.I.'s latest attempt to clarify the rules of the common law and to respond to thirty years of confusion in products liability law under section 402A of the *Restatement (Second).* The success of the new *Restatement* depends largely on its acceptance by the legal community "as *prima facie* a correct statement" of the law of products liability operative in the great majority of American jurisdictions.[32]

A. The Restatement Process and Its Objectives

The A.L.I.[33] first undertook the process of restating the law in 1923 with the subjects of contracts, torts, and conflict of laws.[34] Composed primarily of judges, academics, and practitioners, the Institute sought to bring clarity and order to an ever-growing and diverse com-

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28 *See, e.g.*, Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 118 (La. 1986); Smith, *supra* note 20, at 376; Turley, *supra* note 23, at 46.

29 *See, e.g., Halphen*, 484 So. 2d at 116-18; Smith, *supra* note 20, at 379; Turley, *supra* note 23, at 46. *But cf. Patterson*, 608 F. Supp. at 1213 (rejecting this argument).

30 *See infra* notes 201-203 and accompanying text.

31 *See infra* part IV.B.2.

32 *See* William Draper Lewis, *Introduction* to 1 RESTATEMENT OF PROPERTY viii-ix (1936).

33 The A.L.I. consists of "legal scholars who are responsible for the Restatements in the various disciplines of the law. . . ." BLACK'S LAW DICTIONARY 75 (5th ed. 1979). *See generally* Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. L. REV. 283 (discussing the composition and objectives of the Institute).

34 *See* William Draper Lewis, *"How We Did It" History of the American Law Institute and the First Restatement of the Law, in* ALI, RESTATEMENT IN THE COURTS 1-9 (perm. ed. 1945).

mon law in an effort to promote a "better administration of justice."[35] To this end, the Restatements combined sections of black-letter text with explanatory comments, illustrations, and reporters' notes. In selecting this format, the Institute hoped courts would treat the black-letter sections as highly persuasive, if not mandatory, authority.[36] In addition to its first round of Restatements, the A.L.I. has over the years addressed other subjects, including property, professional responsibility, and judgments. Moreover, the Institute has also developed a number of model codes designed specifically as a guide for statutory enactment.[37]

Despite the prominence and influence of its Restatements, the A.L.I. never intended to act as a legislative body. Early in the Institute's existence, however, some of its members believed that a project which aimed to clarify and order the common law also presented a perfect opportunity to make the law more progressive.[38] For instance, as Dean (later Judge) Herbert F. Goodrich remarked, some legal scholars at the time believed that the Restatements should play a more active role in the social reform of tort law.[39] Although giving the Restatements a more normative outlook attracted significant support, the majority of the Institute's members believed in limiting the process to clarifying perceived confusion within existing law.[40] Accordingly, after a floor debate, the A.L.I. resolved the issue by deciding that its Restatements of the Law should be, "and [are] substantially limited to a statement of the law as it is."[41] This has not, however, prevented the A.L.I. from drawing criticism for asserting rules and policies not attributable to courts or legislatures. In a recent article responding to an A.L.I. study on personal injury and enterprise liability, a retired federal judge attacked the "elitist, privately controlled" Institute and its "tremendous, unfettered, [and] unaccountable power," that allows it, in effect, to legislate and change the common law without trusting "the collective wisdom of the 'common' people"

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35 "The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." *The American Law Institute Certificate of Incorporation*, 68 A.L.I. PROC. 883 (1991).

36 *See generally* N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55 (1990).

37 The A.L.I. developed the MODEL CODE OF EVIDENCE, the MODEL CODE OF CRIMINAL PROCEDURE, and the MODEL PENAL CODE. It also collaborated with the Uniform Law Commissioner on the UNIFORM COMMERCIAL CODE.

38 *See* Hull, *supra* note 36, at 81-85. *See also* Herbert Wechsler, Speech at 61st Annual A.L.I. Meeting (May 15-18, 1984), *in* 1984 A.L.I. PROC. 42, 50-51.

39 *See* Herbert F. Goodrich, *What Would Law Teachers Like to See the Institute Do?*, 8 AM. L. SCH. REV. 494, 494-95 (1936).

40 *See* Hull, *supra* note 36, at 81-85.

41 Goodrich, *supra* note 39, at 505.

as reflected in legislation enacted by their "duly elected federal and state representatives."[42]

The format of the Restatements makes them uniquely unsuited to reforming the law through rules which reflect minority law or entirely novel ideas. Commentators may often elevate Restatement provisions to the level of law, but their effect on courts remains limited to persuasive authority.[43] Thus, even though the black-letter sections aim to be decisive, their acceptance depends on the courts' general "agreement with [the] factual and normative assertions" underlying the legal standards proposed therein and explained in the accompanying comments.[44] If a judge disagrees with the policies underlying the proposed rule, or considers it contrary to the majority view, he will simply ignore it. Thus, although situations may arise in which two equally cogent lines of authority are available, where there is a clear consensus about a point of law, the Restatement should reflect that consensus.[45]

The judiciary's historical respect for the Restatement process further underscores the importance of a consensus approach in drafting Restatement provisions. Section 402A of the *Restatement (Second)* is an unparalleled example of a black-letter provision that attracted a wide judicial consensus and thus provided a standard followed in countless decisions.[46] The courts' continued deference to the Restatements depends in part on the Institute's fidelity to the actual state of the law. Thus, if the A.L.I. is to accomplish its goal of clarifying and unifying the common law, the rules contained in its Restatements must reflect majority positions, or at a minimum must not unduly conflict with established doctrines. Judges who disagree with the Institute's legislative aspirations are likely to stifle any attempts by the Institute to reform an area of the law through illegitimate means.

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42 Paul A. Simmons, *Government by an Unaccountable Private Non Profit Corporation*, 10 N.Y. L. SCH. J. HUM. RTS. 67, 67 (1992) (responding to American Law Institute, Reporters' Study, Enterprise Responsibility for Personal Injury (1991)).

43 *See, e.g., Revising Section 402A, supra* note 10, at 107-08. *But see* Oscar S. Gray, *Reflections on the Historical Context of Section 402A*, 10 TOURO L. REV. 75, 75-76 (1993) (arguing that the Restatement is not law).

44 Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 841 (1994); *see generally* Hull, *supra* note 36.

45 *See* Covey T. Oliver, *The American Law Institute's Draft Restatement of the Foreign Relations Law of the United States*, 55 AM. J. INT'L L. 428, 434 (1961).

46 By March 1, 1991, appellate courts cited to various Restatements a total of 114,145 times. Of that total, about 40% (45,954) were to the *Restatements of Torts*. 14 A.L.I. REP. 1 (Oct. 1991). *See* Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 205-07 (1989/1990).

B. The Aftermath of Section 402A

Perhaps the A.L.I.'s crowning achievement during its first seventy years in existence has indeed been section 402A of the *Restatement (Second) of Torts.* Adopted in 1964, section 402A has since become the nearly universal rule in cases involving product-related injuries. Its accomplishment is amplified by the fact that when it was adopted, the section was supported by a single case[47]and was intended to apply only to latent manufacturing defects.[48] Instead, courts concerned with affording injured consumers easier legal recourse against manufacturers and suppliers took advantage of its broad language and relied upon its underlying policies to significantly restate the duties and responsibilities of product sellers to consumers. In the years following its adoption, courts used section 402A to abolish such deeply entrenched "no duty" rules as the patent danger doctrine,[49] the shifting duty rule,[50] the intended purpose doctrine,[51] and the bystander rule.[52] As a result, plaintiffs could proceed against the manufacturers on theories of generic product defects, defects which inhered in the

47 Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963).

48 *See* George L. Priest, *Strict Products Liability: The Original Intent,* 10 CARDOZO L. REV. 2301, 2311 (1989) (concluding that design defects were not intended to be subject to strict liability).

49 The leading case denying liability where the danger was obvious was Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950). The court held that a manufacturer was "under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all." *Id.* at 804. Campo was reversed in Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y 1976); *accord* Pike v. Frank G. Hough Co., 467 P.2d 229 (Cal. 1970); Palmer v. Massey-Ferguson, Inc., 476 P.2d 713 (Wash. 1970). *See generally* FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 28.5 (1956) (discussing opposition to the idea that the obviousness of the danger should preclude liability); Stanton F. Darling II, *The Patent Danger Rule: An Analysis and A Survey of its Vitality,* 29 MERCER L. REV. 583, 604-09 (1978) (arguing that the patent danger rule serves no purpose significant enough to offset the injustices it produces); Patricia Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products,* 48 N.Y.U. L. REV. 1065 (1973) (asserting that the law surrounding the patent danger rule is confused and in need of reform).

50 For cases denying liability under the shifting duty doctrine, see Stultz v. Benson Lumber Co., 59 P.2d 100 (Cal. 1936); McLaughlin v. Mine Safety Appliances Co., 181 N.E.2d 430 (N.Y. 1962). The foreseeability issue is now treated as a question for the jury. *See, e.g.,* Balido v. Improved Mach. Inc., 105 Cal. Rptr. 890 (Cal. App. 1973); Comstock v. General Motors Corp., 99 N.W.2d 627 (Mich. 1959); Finnegan v. Havir Mfg. Corp., 290 A.2d 286 (N.J. 1972).

51 *See, e.g.,* Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied,* 385 U.S. 836 (1966), *overruled by* Huff v. White Motor Corp., 565 F.2d 104, 109-10 (7th Cir. 1977). Liability for foreseeable misuse is now widely accepted. *See, e.g.,* Findlay v. Copeland Lumber Co., 509 P.2d 28 (Or. 1973); Ritter v. Narragansett Elec. Co., 283 A.2d 255 (R.I. 1971); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *See generally* Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation,* 29 MERCER L. REV. 403 (1978) (discussing trends in tort law including "foreseeable misuse").

52 *See, e.g.,* Elmore v. American Motors Corp., 451 P.2d 84 (Cal. 1969); Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977); Codling v. Paglia, 298 N.E.2d 622 (N.Y. 1973).

design and marketing of the product rather than in its production.[53] By 1980, American courts drew upon section 402A to put in place a liability regime with a remarkably expansive vision of consumers' rights.[54]

Concerned primarily with protecting the rights of consumers, courts readily overlooked the linguistic limitations of section 402A. Eager to respond to what they perceived to be a social injustice, they embellished the section with newly created doctrines that were only loosely connected to the langnage contained therein.[55] Accordingly, courts began categorizing product defects as manufacturing, design, and warning defects.[56] No longer guided by the language of section 402A, courts devised various approaches for determining what constituted each type of defect. More recently, numerous courts and commentators began to question the conceptual appropriateness of strict liability outside of the context of manufacturing defects.[57] As a result, although widespread acceptance of the principles behind section 402A remains, some regard its formulation as "anachronistic and at odds with [its] currently discerned objectives."[58]

The confusion generated by section 402A is especially manifest in the courts' varied treatments of design defects. Section 402A states that one who sells any product in a defective condition, which makes the product unreasonably dangerous to the user or consumer, or to his property, is subject to liability for the harm caused by the prod-

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See also Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625, 626 n.12 (1971).

53 *See* Henderson, *supra* note 21, at 1542-44.

54 *See generally* James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979) (arguing that challenges to the developing consensus on defective products are misguided).

55 *See, e.g.*, MARSHALL S. SHAPO, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE (1993). Shapo writes:

> [I]n products liability, a central component of justice is the vulnerable position of consumers. A related element of justice lies in the moral innocence of the claimant .... [T]he moral innocence of the plaintiff takes on special significance because of its joinder with his or her vulnerability and with the very fact of injury itself.

Id. at 137.

56 *See A Proposed Revision, supra* note 6, at 1515. *See also* Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,721 (1979) (section 104 specifically categorizes the types of product defects for which the manufacturer can be held liable); W. PAGE KEETON ET AL., ON THE LAW OF TORTS § 99, at 695 (5th ed. 1984). Section 99 states that

> a product is defective as marketed ... for any of the following reasons: (1) a flaw in the product that was present in the product at the time the defendant sold it; (2) a failure by the producer or assembler of a product adequately to warn of a risk or hazard related to the way the product was desigued; or (3) a defective design.

Id.

57 *See A Proposed Revision, supra* note 6, at 1517.

58 *Id.* at 1513.

uct.[59] A "defective condition" is defined as one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[60] Comment i similarly defines "unreasonably dangerous" to mean that the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . with the ordinary knowledge common to the community concerning the product's characteristics."[61] Although the circularity of these definitions did not affect cases involving manufacturing flaws, it significantly confused judicial analysis in design cases.[62]

1. Risk-Utility v. Consumer Expectations et al.

In responding to section 402A's definitional inadequacy in the context of design defects, courts have developed a variety of standards to determine when a product is defectively designed.[63] Today, most would agree that the term "defectively designed" refers either to a design that is unreasonably dangerous,[64] or to one that creates an unreasonable risk of harm.[65] However, some would dispute the meaning of the term "unreasonable."[66] A significant majority of American jurisdictions measure the unreasonableness of a product design by some form of risk-utility[67] or risk-benefit[68] analysis. This approach generally requires the courts to compare the risks and benefits of two alternative versions of the product. If the overall risk of loss or injury could have been significantly reduced by adoption of the proposed alternative at a reasonable cost or a reasonable loss of utility, the product design is deemed defective.[69] In applying this test, courts often rely on a series of risk-utility factors developed by Professor Wade.[70]

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59 RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

60 *Id.* cmt. g.

61 *Id.* cmt. i.

62 *See* Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 648-50 (1978) (discussing the confusion generated by § 402A). *See also* 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 28.32A, at 584-88 (2d ed. 1986); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830-32 (1973).

63 *See* 1 M. STUART MADDEN, PRODUCTS LIABILITY §§ 6.5-6.10 (2d ed. 1988).

64 *See, e.g.*, Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

65 Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440 (N.Y. 1980).

66 *See* Sheila Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 598-600 (1980).

67 *See, e.g.*, Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (Mich. 1984).

68 *See, e.g.*, West v. Johnson & Johnson Prods. Inc., 220 Cal. Rptr. 437 (Cal. App. 1985), *cert. denied*, 479 U.S. 824 (1986).

69 *See* Wade, *supra* note 62, at 837-38. For a case using the Wade factors, see Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 883 (Alaska 1979). For a critique of the Wade factors, see W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 AM. U. L. REV. 573 (1990).

70 *See, e.g., Catepillar Tractor*, 593 P.2d at 883 (citing Wade, *supra* note 62, at 839-40).

Other courts define a defectively designed product as one which, at the time of sale or distribution, is in a condition not reasonably contemplated or expected by the ultimate user or consumer.[71] Moreover, some courts have adopted the approach developed by the California Supreme Court in *Barker v. Lull Engineering Co.*,[72] which provides for both of the above tests. Thus, in these jurisdictions, a product is defective in design either when its utility is outweighed by its inherent danger, or when the product fails to perform as safely as a reasonable consumer would expect.[73] Still other courts determine if a product design is unreasonably dangerous based on whether a reasonably prudent manufacturer, aware of the product's propensity to cause harm, would nevertheless decide to place it in the stream of commerce.[74] Regardless of the formulation they adopt, all courts require, either explicitly or in practice, proof that the manufacturer failed to adopt a safer and more cost-effective alternative design before they will impose liability for defective design.[75] In noting the confusion that surrounds the definition of design defect, one commentator remarked, "It may now be true that [design] defect, like obscenity in Justice Stewart's definition, will be discovered by sense impression. Unfortunately 'I know it when I see it' will not suffice as a judicial standard for products liability."[76]

2. Strict Liability v. Negligence

Widespread disagreement among judges and commentators regarding the proper role of negligence principles in design defect law further obscures the meaning of the term "defect" in the context of product design. As one court observed, "[T]here is a split of opinion as to whether a distinction exists between negligence and strict liability theories of recovery when applied to cases based upon design de-

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71 *See generally* Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370 (1974) ("Judgments of liability for consumer product disappointment should center initially and principally on the portrayal of the product which is made, caused to be made or permitted by the seller."). For a critique of this approach, see generally Wade, *supra* note 62, at 832-33.

72 573 P.2d 443, 457-58 (Cal. 1978).

73 Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Ontai v. Straub Clinic & Hosp., Inc., 659 P.2d 734 (Haw. 1983).

74 *See, e.g.*, Nichols v. Union Underwear Co., Inc., 602 S.W.2d 429 (Ky. 1980); Church v. Wesson, 385 S.E.2d 393 (W. Va. 1989).

75 *See* Michael J. Tōke, Note, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL'Y 239 (1996).

76 Aaron D. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 304-05 (1977) (referring to Justice Stewart's concurrence regarding the definition of "obscenity" in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)).

fects."[77] The problem is partly rooted in the language of section 402A. The California Supreme Court in *Cronin v. J.B.E. Olson Corp.*,[78] was the first to note that the "unreasonably dangerous" standard contained in section 402A sounds like negligence, and would thus require the plaintiff to prove the absence of reasonable care on the part of the manufacturer.[79] The court went on to reject the standard and stressed that strict liability is not negligence.[80] Likewise, Professor Wade observed that "the test for imposing strict liability is whether the product was unreasonably dangerous, to use the words of the Restatement . . . . It may be argued that this is simply a test of negligence. Exactly."[81] Moreover, although an overwhelming majority of states have been persuaded by various policy reasons to adopt some form of strict products liability in tort,[82] numerous courts and commentators

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77 Stanley v. Schiavi Mobile Homes, Inc., 462 A.2d 1144, 1148 (Me. 1983).

78 501 P.2d 1153 (Cal. 1972).

79 *Id.* at 1162.

80 *Id.*

81 John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L. J. 5, 15 (1965). *See* Birnbaum, *supra* note 66, at 610 ("When a jury decides that the risk of harm outweighs the utility of a particular design . . . it is saying that in choosing the particular design and cost trade-offs, the manufacturer exposed the consumer to greater risk of danger than he should have. Conceptually and analytically, this approach bespeaks negligence.").

82 *See, e.g.*, Richard W. Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111 (1987). One of the best statements of the policy justifications for imposing strict products liability is found in Justice Traynor's concurring opinion in Escola v. Coca-Cola Bottling Co.:

> [P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring). For a discussion of efficiency goals of tort law, see GUIDO A. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 17-21 (1970); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 23-24 (4th ed. 1992). For a discussion of fairness goals, see Thomas J. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1087-92 (1965); Paul A. LeBel, *Intent and Recklessness as Bases of Products Liability: One Step Back, Two Steps Forward*, 32 ALA. L. REV. 31, 67 (1980). *See also* Suvada v. White Motor Co., 210 N.E.2d 182, 186 (Ill. 1965) ("The losses caused by [the product] should be borne by those who have created the risk and reaped the profit by placing the product in the stream of commerce.").

have argued that such policies are not applicable outside the context of manufacturing defects.[83] Recently, such critics have attacked the use of strict liability in cases other than those involving manufacturing defects on the grounds of moral and political philosophy.[84]

The products liability case law reflects this divergence of views regarding the appropriateness of strict liability in design defect cases. Some courts steadfastly maintain that strict liability is a distinct theory of recovery that is completely devoid of any notions of reasonableness or fault.[85] Such courts impose liability for defective design regardless of the manufacturer's exercise of reasonable care in designing the product.[86] In contrast, other courts suggest that the evaluation of a conscious design choice necessarily implicates the knowledge and conduct of the manufacturer in making that choice. These courts opt to resolve such questions based on pure negligence principles.[87] Between the two doctrinal extremes are judges who believe that drawing any distinction between strict liability and negligence theories, as applied to defective design claims, is futile because the theories are practically identical in such instances.[88]

For critiques of strict liability, see Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons From* Boyle's *Government Contractor Defense*, 63 S. CAL. L. REV. 639, 640 (1990) ("Critics have argued that the expansion of products liability, along with its concomitant uncertainty, has driven useful products off the market, stunted incentives for technological innovation, and harmed the country's ability to compete in the international marketplace."); Theresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 306 (1992) ("the system is out of control because of dramatic increases in the amount of litigation and in the size of damage awards and because legal standards are too open-ended and unpredictable for business. . . ."); Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1298 (1983) (arguing that the large awards from product liability suits "might bankrupt a small corporation, for which the cost of product liability insurance might become prohibitive. . . .").

83 *See, e.g.*, Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 183-84 (Mich. 1984); Bolm v. Triumph Corp., 422 N.Y.S. 2d 969, 973-74 (1979); Fowler v. General Elec. Co., 252 S.E.2d 862, 864 (N.C. 1979); Birnbaum, *supra* note 66, at 649; Wade, *supra* note 62, at 836-37 (1973).

84 David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993).

85 *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443, 456-57 (Cal. 1978).

86 *See, e.g., id.*

87 *See, e.g., Prentis*, 365 N.W.2d at 185-86 (adopting "a pure negligence, risk-utility test in products liability actions . . . where the liability is predicated upon defective design").

88 *See, e.g.*, Flamino v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984) ("[I]n a defective design case, there is no practical difference between strict liability and negligence. The test for an unreasonably dangerous condition is equivalent to a negligence standard of reasonableness . . . ."); Campbell v. B.I.C. Corp., 586 N.Y.S.2d 871, 873 (1992) ("[I]n New York, in a desigu defect case there is almost no difference between a negligence cause of action and one sounding in strict products liability."); *A Proposed Revision, supra* note 6, at 1530-32 ("In our opinion, it is unlikely that the distinction between [strict liability] and the negligence test is sufficiently siguificant to warrant the creation of a separate track for liability.").

C. The New *Restatement*: A Functional Approach to Product Defectiveness

After thirty years under section 402A, American products liability law appears fractured, confusing, and often conflicting. This is especially true for products liability law dealing with design defectiveness. In response to such confusion, the A.L.I. began drafting the new *Restatement* as the first chapter of a larger project aimed at providing stability and clarity in this area of law by rewriting and compiling all of the liability rules governing product-related injury claims.[89] In some respects, this is the first attempt to actually restate American products liability doctrine. In 1964, Dean Prosser drafted section 402A based solely on Justice Traynor's reasoning in *Escola v. Coca-Cola Bottling Co.*[90] and *Greenman v. Yuba Power Products, Inc.*,[91] and on his own sense of the law, as a solution to a perceived social problem.[92] By contrast, the current reporters seek merely to explain and simplify what three decades of judicial evolution has produced: a library of doctrinally inconsistent cases and contentious articles. Hence, according to the reporters, "the time is ripe for a true restatement of products liability law."[93]

The first two sections represent the heart of the new *Restatement* and contain the basic liability standards for all consumer products that are defective at the time of original sale.[94] In order to clarify existing confusion, or at least to mitigate further confusion, section 2 adopts a functional approach to product defectiveness. First, the section tracks accepted common law practice and recognizes three independent categories of product defects: (1) manufacturing defects; (2) design defects; (3) and defects based on a manufacturer's failure to warn. Second, a separate subsection, establishing individual standards for determining when defects are present, addresses each type of defect. Thus, section 2 establishes exclusive causes of action for claims of manufacturing defect, design defect, and failure to warn.[95]

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89 RESTATEMENT (THIRD) OF TORTS, *supra* note 1, at xxvii-xxix (introductory note).

90 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

91 377 P.2d 897 (Cal. 1962).

92 *Cf. A Proposed Revision*, *supra* note 6, at 1526; George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2311 (1989).

93 *See A Proposed Revision*, *supra* note 6, at 1529.

94 The first chapter contains 13 sections. The first three sections define three types of products defects. The ensuing sections address what is a product, who is a seller, what losses are covered, the impact of regulatory compliance and noncompliance, liability for harm caused by prescription drugs and medical devices, liability for defective used products, causation and apportionment of liability in crashworthiness cases, affirmative defenses, and effect of disclaimers on personal injury claims. *See generally* RESTATEMENT (THIRD) OF TORTS *supra* note 1.

95 *Id.* § 2.

In most respects, the format of section 2 reflects a majority approach. The section, however, rejects the traditional doctrinal categories of negligence and strict liability, in favor of an approach that directly addresses the particular nature of each type of defect.[96] Although the standard for manufacturing defects remains one of true strict liability,[97] the standards for design and warning defects are predicated on a concept of responsibility, which is tantamount to negligence.[98] However, because the reporters recognize that many courts insist upon using "strict liability" language even in design and warning cases, section 2 allows courts to "utilize the terminology of negligence, strict liability or the implied warranty of merchantability" to characterize legal claims so long as the functional requirements of section 2 have been satisfied.[99]

The following sections discuss the design defect provision of the new *Restatement* in greater detail.

III

DESIGN DEFECTIVENESS UNDER THE RESTATEMENT (THIRD)

The design defectiveness standard contained in section 2 of the new *Restatement* generally embodies majority common law rules.[100] Under this standard, design defectiveness is measured using a risk-utility analysis to compare the manufacturer's design with any alternative designs proposed by the plaintiff. Liability is imposed if the alternative design would have "reduced the foreseeable risk of harm posed by the product" at an acceptable cost.[101] Comment d, however, contains an exception to this standard which would allow plaintiffs to reach the trier of fact, even in the absence of an alternative design, when the manufacturer's design is found to be "manifestly unreasonable."[102]

A. The Risk-Utility Test

Section 2 of the new *Restatement* explains design defectiveness in terms of "foreseeable risk of harm," and the availability of a safer "reasonable alternative design." The standard, which is contained in section 2(b), reads:

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96 The Reporters state that, "[r]ather than perpetuating confusion spawned by existing doctrinal categories [i.e. strict liability, negligence, and warranty], sections one and two define the liability for each form of defect in [functional] terms directly addressing the various kinds of defects." *Id.* § 1, cmt. a.

97 *Id.* § 2, cmt. a.

98 *Id.* cmt. c.

99 *Id.*

100 *See* Töke, *supra* note 75, at 242-43.

101 RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 2, cmt. c.

102 *Id.* cmt. d.

> (b) 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 or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe[.][103]

Thus, section 2 follows the majority common law rule and adopts a risk-utility analysis as the sole test for design defectiveness.[104] Specifically, the test is (1) whether a reasonable and financially practical alternative design existed at the time of sale or manufacture which would have reduced the foreseeable risks of harm posed by the product, and (2) whether the manufacturer's failure to adopt such a design rendered the product not reasonably safe.[105] Section 2 explicitly rejects all other standards of design defect, including consumer expectations, as independent tests for determining when a product design is defective.[106]

Thus, to evaluate the reasonableness of an "alternative design," and to determine whether its omission by the manufacturer renders the product defective under the new *Restatement*, the trier of fact must balance the benefits associated with the competing designs against

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103 *Id.* cmt. c.

104 *See* 2 American Law of Products Liability 3d § 28:11. at 213 (1987 & Supp 1994); Birnbaum, *supra* note 66 at 605.

See also, e.g., LA. REV. STAT. ANN. § 9:2800.56 (West 1991); MISS. CODE ANN. § 11-1-63 (1993); N.J. STAT. ANN. § 2A:58C-3-a(1) (West 1987); Kotler v. American Tobacco Co., 926 F.2d 1217, 1230 (1st Cir. 1990) (applying Massachusetts's version of products liability law); Hull v. Eaton, 825 F.2d 448, 454 (D.C. Cir. 1987) (stating that "the District of Columbia would follow the risk/utility balancing test referred to by the Maryland courts"); Townsend v. General Motors Corp., 642 So. 2d 411, 418 (Ala. 1994); Dart v. Wiebe Mfg, Inc., 709 P.2d 876, 879 (Ariz. 1985); Soule v. General Motors Corp., 882 P.2d 298, 308 (Cal. 1994); Bond v. E.I. Du Pont de Nemours & Co., 868 P.2d. 1114, 1118 (Colo. Ct. App. 1993); Nacci v. Volkswagen of Am., Inc., 325 A.2d 617, 620 (Del. Super. Ct. 1974); Radiation Technology, Inc. v. Ware Const. Co., 445 So. 2d 329, 331 (Fla. 1983); Banks v. I.C.I. Americas, Inc., 450 S.E.2d 671, 673-74 (Ga. 1994); Toner v. Lederle Lab., 732 P.2d 297, 307 (Idaho 1987); Lamkin v. Towner, 563 N.E.2d 449, 457-58 (Ill. 1990); Miller v. Todd, 551 N.E.2d 1139, 1142-43 (Ind. 1990); Ingersoll-Rand Co. v. Rice, 775 S.W.2d 924, 928-29 (Ky. Ct. App. 1989); St. Germain v. Husqvaraua Corp., 544 A.2d 1283, 1286 (Me. 1988); Phipps v. General Motors Corp., 363 A.2d 955, 959 (Md. 1976); Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 186 (Mich. 1984); Kallio v. Ford Motor Co., 407 N.W.2d 92, 96 (Minn. 1987); Rix v. General Motors Corp., 723 P.2d 195, 202 (Mont. 1986); Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978); Skyhook Corp. v. Jasper, 560 P.2d 934, 938 (N.M. 1977); Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 208 (N.Y. 1983); Azzarello v. Black Brothers Co., 391 A.2d 1020, 1026 (Pa. 1978); Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775, 781 (R.I. 1988); Clayton v. General Motors Corp., 286 S.E.2d 129, 132 (S.C. 1982); Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979); Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774, 779 (Wash. 1975); Sims v. General Motors Corp., 751 P.2d 357 (Wyo. 1988). *But see* Banks & O'Connor, *supra* note 11, at 413; Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMP. L. REV. 167 (1995).

105 RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 2, cmt c.

106 *Id.*

their respective risks of loss or injury.[107] To this end, comment e to section 2 provides a list of ten risk-utility factors that may be considered in the analysis.[108] However, these factors need not exhaust the inquiry. Moreover, the fact that one factor weighs strongly in favor of the reasonableness of the design, is not sufficient to ensure that the manufacturer will escape liability for resulting injuries or loss. Rather, these factors serve primarily as guideposts to the trier of fact in assessing the fitness of the challenged design.[109]

B. Reasonable Alternative Design

By basing the determination of design defect on a risk-utility comparison between two competing versions of the challenged product, section 2 makes the existence of an alternative design an essential element of plaintiff's case. The section follows majority law and places the burden of producing evidence of an alternative on the plaintiff.[110] Moreover, the proposed alternative must reduce the overall level of risk associated with the product. Courts will not impose liability where plaintiff's design, if adopted, would have reduced or avoided the risk of the type of injury suffered, but also would have exposed a different class of users to risks of greater or equal magnitude.[111] Such an alternative design would not be considered to be "reasonable" under section 2. Moreover, the proposed alternative must provide a sufficient

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107 *Id.*

108 *Id.* § 2, cmt e. The ten factors are: (1) magnitude of foreseeable risk; (2) nature and strength of consumer expectations; (3) effects of alternative design on cost of production; (4) effects of alternative design in product function; (5) advantages and disadvantages of the proposed safety features; (6) effects on product longevity; (7) maintenance and repair; (8) esthetics; (9) marketability; and (10) instructions and warnings that accompanied the product. *Id.*

109 *Id.*

110 *See, e.g.*, Townsend v. General Motors Corp., 642 So. 2d 411, 418 (Ala. 1994) ("[P]laintiff must prove that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the [product].") (citing General Motors Corp. v. Edwards, 402 So. 2d 1176 (Ala. 1985)); Jackson v. Warrum, 535 N.E.2d 1207, 1220 (Ind. Ct. App. 1989) ("burden of proof scheme" requires that "plaintiff must prove that a feasible safer alternative product design existed"); Owens v. Allis-Chalmers Corp., 326 N.W.2d 372, 378-79 (Mich. 1982) (defendant's motion for directed verdict granted after plaintiff failed to introduce evidence of "the magnitude of the risks involved and the reasonableness of the proposed alternative design"); Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 208 (N.Y. 1983) ("The plaintiff, of course, is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner."); Wood v. Ford Motor Co., 691 P.2d 495, 498 (Or. Ct. App. 1984) ("[P]laintiff must show that an alternative safer design, practicable under the circumstances, was available.").

See also LA. REV. STAT. ANN. § 9:2800.56 (West 1991); MISS. CODE. ANN. § 11-1-63 (1993); N.J. STAT. ANN. § 2A:58C-3-a(1) (West 1987); OHIO REV. CODE ANN. § 2307.75(F) (Anderson 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 82.005 (West 1993); WASH. REV. CODE § 7.72.030(1) (West 1992).

111 RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 2, cmt e.

increase in overall safety to establish causation between the failure to adopt the design and the plaintiff's injury. As the reporters explain, "[t]he more marginal the added safety provided by the plaintiff's suggested alternative design, the less likely it is that the suggested alternative would have played a sufficient causal role."[112]

Although a plaintiff must prove that an overall safer alternative design existed at the time of manufacture, he need not actually produce a working prototype to demonstrate the proposed design. Rather, section 2 permits the plaintiff to make out a prima facie case of design defect using expert testimony as to the alternative design issue.[113]

1. *Rejection of Categorical Liability*

Section 2's requirement that plaintiffs pursuing design defect claims must prove the existence of a reasonable alternative design effectively forecloses the possibility of imposing liability on an entire product category.[114] Moreover, the reporters maintain that "courts do not impose liability based on a conclusion that an entire product category should not have been distributed in the first instance"; rather, they caution that "the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of such product categories should be prohibited."[115] Thus, under section 2, a plaintiff who is injured while diving into an above-ground pool could not allege that the pool was defectively designed in that the risks associated with all above-ground pools significantly outweigh their social worth.[116] Section 2 would similarly protect from liability manufacturers and distributors of other unavoidably high-risk products, such as cigarettes, handgnns and alcohol. Of course, such manufacturers remain subject to liability if the plaintiff can establish that a manufacturing defect caused his injury, or that the product could have been designed more safely without unduly affecting its utility. This approach is not only consistent with majority common law rules, but it also accurately follows the position advocated by the reporters for the new *Restatement* prior to their appointment.[117]

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112 *Id.* § 2, cmt. c.

113 *Id.*

114 *See A Proposed Revision, supra* note 6, at 1520 ("By referring explicitly to risk reduction through the adoption of a reasonable-cost, safer design, [section 2(b)] makes clear that the social risk-utility balancing employed in judging the reasonableness of product designs will not be undertaken on a categorical basis.").

115 RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 2, cmt c.

116 *Id.* § 2, illus. 4.

117 *See, e.g., A Proposed Revision, supra* note 6, at 1520-21; *Closing the Frontier, supra* note 19, at 1297.

2. *Comment d Caveat*

In Tentative Draft No. 2, the reporters added a caveat to the section 2 requirement that plaintiffs must prove that a reasonable alternative design would have reduced their foreseeable risks of injury. Contained in a new comment d, the caveat leaves open the possibility of liability without traditional defect in situations where the designs of the products are "so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design."[118] This caveat seems to invite the kind of paternalistic judicial scrutiny of products which the reporters strongly opposed in the past. Indeed, if judges were to adopt the reasoning of comment d, they would be free to interfere with consumers' freedom of choice, condemning products as legally defective because "no rational adult, fully aware of the relevant facts, would [in their opinion] choose to use or consume the product."[119] Thus, while section 2 on its face dismisses the concept of categorical liability, comment d validates it under limited circumstances.

Particularly troublesome is comment d's failure to adequately delineate the categories of products which may fall within its scope. Because courts steadfastly reject categorical product liability, the coreporters were unable to substantiate the comment's proposition with any real-world cases. Instead, they supported it by referring to occasional dicta which contemplates the possible existence of "manifestly unreasonable" designs, without offering any indication of the characteristics of such designs.[120] The only possible guidelines for applying the comment are found in a New Jersey statute referred to in the coreporters' note to section 2. The statute provides that proof of a reasonable alternative design is required, unless the court determines based on clear and convincing evidence that:

> (1) The product is egregiously unsafe or ultra-hazardous;
> (2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and
> (3) The product has little or no usefulness.[121]

Unfortunately, the dearth of cases interpreting this part of the statute leaves these guidelines functionally useless.

Comment d departs from the rest of the new *Restatement* in that it is the only provision without substantial support among existing prod-

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118 RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 2, cmt. d.
119 *Id.*
120 *Id. see infra*; part IV.B.3.
121 *See* N.J. STAT. ANN. § 2A:58C-3(b) (West 1987).

ucts liability rules. This departure is explainable in part as a concession to the members of the plaintiffs' bar who, for obvious reasons, strongly support categorical products liability. Faced with vehement criticism from the plaintiffs' bar for drafting a prodefendant restatement, the reporters and the A.L.I. agreed to adopt comment d in order to achieve a more balanced result.[122] Indeed, the language of comment d tracks an amendment proposed by plaintiffs' lawyer Robert L. Habush at the A.L.I.'s May, 1994 annual meeting. The amendment aimed to siguificantly modify the alternative design requirement by excluding from its scope products for which "the extremely high degree of danger posed by [their] use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product."[123] Hence, comment d was clearly intended to keep open the possibility of consumer challenges to entire categories of unavoidably dangerous products. In the next section, this Note argues that the A.L.I. should eliminate comment d from the draft of the new *Restatement.*

IV

THE CASE AGAINST COMMENT D

Whether the substantive provisions of the new *Restatement* will become generally accepted rules in American products liability law remains to be seen. There are some indications that courts already view the liability provisions as highly persuasive authority.[124] In the end, even if the new *Restatement* enjoys only a fraction of the success of section 402A, it will significantly impact the rights and responsibilities of manufacturers and consumers. Thus, before the A.L.I. votes on the final version of the new *Restatement,* its provisions should not only reflect the current state of the law, but they should also be conceptually sound. The caveat contained in comment d to section 2, which provides a possible exception to the reasonable alternative design requirement for products with manifestly unreasonable designs, fails this dual standard.

A. Comment d and the Limits of the Tort Process

The strength of our commitment to providing consumers with a fair opportunity to seek compensation for product-related injuries notwithstanding, we must pay close attention to the abilities and limitations of the means chosen to reach this end. The complex nature of product desigu decisions presents an obstacle to the effective realiza-

122 *See supra* notes 10-15 and accompanying text.

123 *See ALI Hesitates, supra* note 12, at 2736.

124 *See, e.g.,* Smith v. Keller Ladder Co., 645 A.2d 1269, 1271 (N.J. Super. Ct. App. Div. 1994) (referring to *Restatement (Third)* as support for holding).

tion of this social ideal because judges and juries often focus exclusively on the overall social value of a product in deciding liability. The fact that the new *Restatement* limits this categorical approach to products with "manifestly unreasonable" designs does not resolve the problem. The co-reporters' recognition of the possibility of categorical liability and their inability to clearly delineate the scope of comment d's caveat essentially invites the plaintiffs' bar to challenge such socially unpopular products as handgnns, alcohol, and cigarettes, and to pursue manufacturers of other necessarily dangerous products. This section examines the institutional character of adjudication which limits the courts' ability to referee the social desirability of entire product categories.

1. *Polycentric Problems and the Traditional Approach to Design Defectiveness*

Legal commentators have long remarked that courts face the most perplexing problems in cases challenging manufacturers' conscious design decisions.[125] Unlike manufacturing defects, where the flaw in the product tends to defeat the product's intended function, design choices reflect the design engineer's deliberate and calculated judgment to accept certain risks in return for an increase in overall benefit.[126] Therefore, the risks inherent in the final design are an inseparable element of the product's intended function. As a result, whereas manufacturing defects can be evaluated against the manufacturer's own production standards, allegations of defective design require courts to supply an external measure of defectiveness.[127] In

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125 *See* RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 84-88 (1980) (judges cannot make the "multiple, delicate, *marginal* determinations" necessary to evaluate the cost-benefit trade-off); Henderson, *supra* note 21, at 1577-78 (establishing product safety standards is a polycentric problem best suited for legislative response rather than adjudication). *See also* Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 182 (Mich. 1984).

126 *See* Henderson, *supra* note 21, at 1548 (writing that conscious design defects "originate in the conscious decision of the design engineer to accept the risks associated with the intended design in exchange for increased benefits or reduced costs").

127 The court recognized this distinction in Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978). The court stated:

> In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line .... A design defect, by contrast, cannot be identified simply by comparing the injury-producing product with the manufacturer's plans or with other units of the same product line, since by definition the plans and all such units will reflect the same design.

Id. at 454. *See also* Bowman v. Gen. Motors Corp., 427 F. Supp. 234 (E.D. Pa. 1977) (applying Pennsylvania law); *Prentis*, 365 N.W.2d at 182. Professor Birnbaum made the following observation on this difference:

> Conscious design defect cases, however, provide no such simple test. Plaintiff is attacking the intended design itself, arguing that the design created unreasonable risks of harm. In attacking the product's design, the plaintiff

other words, a court's task in a conscious design case is not to determine whether the product which caused plaintiff's injury was properly designed, but rather to decide whether the product, as designed by the manufacturer, violates prevailing social notions of consumer protection.[128] This task requires the court to establish a standard of reasonableness which focuses on the manufacturer's original decision to accept a certain level of risk associated with a design in exchange for increased performance, lower costs, or other benefits. Such analysis necessarily requires the court to weigh various engineering, marketing, and financial factors—a process which by its very nature is ill-suited to judicial execution.[129]

Professor Lon L. Fuller described problems such as those involved in reviewing design decisions as inherently polycentric, or involving many possible outcomes which each affect different and competing factors.[130] Like a spider's web, decisions regarding cost-benefit tradeoffs involve many centers for distributing the effects of pulling a single strand.[131] For example, a change in the composition of an automobile's chassis may reduce the overall weight of the car and thus increase its fuel economy, but it may also have less desirable effects on the car's cost or its ability to withstand collision. Further complicating the problem is the fact that the design decision implicates cost-benefit interests wholly removed from those immediately involved. Thus, in the above example, the manufacturer's decision also affects such macro-social interests as pollution control and energy conservation. Indeed, product design decisions entail society-wide ef-

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is not impugning the manufacturer's product as much as the manufacturer's choice of design. The use of the term "defective condition unreasonably dangerous," therefore, creates serious analytic problems.

Birnbaum, *supra* note 66, at 599-600. *See generally* Henderson, *supra* note 21, at 1547.

128 *See* Henderson, *supra* note 21, at 1553 ("In cases involving conscious design choices, however, plaintiffs are not attacking the means to the ends, but the ends themselves; and the issue of whether those ends are justifiable entails the balancing of competing interests.").

129 *Id.*

130 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

131 *Id.* at 395. Fuller characterized as "polycentric," those situations which resemble a spider web:

> A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.

Id.

fects, many of which are unpredictable, i.e., they go beyond the immediate manufacturer and its consumers.[132]

Legal commentators, including one of the reporters for the new *Restatement,* expressed initial concern about the ability of courts to engage in the kind of polycentric inquiry entailed in reviewing conscious design choices.[133] These commentators' concerns have been quieted over the last two decades, during which design litigation has matured into an accepted, albeit often schizophrenic, area of law.

2. *Comment d Liability and the Practical Limits of Adjudication*

Supporters of comment d, and of categorical liability in general, insist that it is merely an extension of the traditional approach to design defectiveness. They argue that because courts have mastered design litigation, they will encounter similar success with balancing the wide-range of interests implicated by a categorical approach.[134] However, these commentators ignore the fundamental differences between categorical liability and the traditional approach to design defectiveness, which compound the polycentricity problems in the assessment of design choices for entire product categories.

a. *The Traditional Standard of "Defect" and Comment d Liability*

At the center of traditional products liability doctrine is the idea that a product must be defective in some way before its manufacturer

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132 Fuller's ideas were further explained and developed in James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law,* 51 IND. L.J. 467, 469-77 (1976).

133 *See* Henderson, *supra* note 54, at 779-80. Professor Henderson observed:

> The adjudicatory process is most appropriate for resolving issues by the application of rules sufficiently specific and defined to permit the parties to argue rationally that a proper application of the rules dictates a certain result. The adjudicatory process is inadequate as a method of resolving, on a case-by-case basis, the vague question of whether or not risks presented by a particular product are unreasonable. When forced to make such decisions, courts must resolve complex and often times highly technical issues of design alternatives equipped only with legal principle reduced to its most basic degree of generalization: a balancing test. In effect, the courts are forced to second-guess the designers; they are forced to redesign the product themselves. The result is to push the adjudicatory process to the brink of arbitrariness.

Id. (footnotes omitted). *See also* EPSTEIN, *supra* note 125, at 84-90 (agreeing with Professor Henderson). For judicial concurrence with this criticism, see Dawson v. Chrysler Corp., 630 F.2d 950, 962-63 (3d. Cir. 1980) (recognizing in dictum that design decisions are polycentric), *cert. denied,* 450 U.S. 959 (1981).

For explicit rejection of this view, see MARSHALL SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 9.09[2], at 9-15 (1987) ("a [properly instructed] jury can perform the necessary balancing test as well as any individual or agency"); Aaron D. Twerski et al., *The Use and Abuse of Warnings in Product Liability: Design Defect Litigation Comes of Age,* 61 CORNELL L. REV. 495, at 525-28 (1976) (design defect cases are not truly polycentric and courts are competent to judge them). *See also* Bowman v. General Motors Corp., 427 F. Supp. 234, 242, 245-46 (E.D. Pa. 1977).

134 *See, e.g.,* Turley, *supra* note 23, at 49-54.

will be held legally responsible for injuries resulting from its use. Although individuals still debate the precise meaning of the term "defect" in the context of conscious design, the general concept of "defect" is an accepted part of American products liability law.[135] Indeed, courts have unanimously rejected absolute liability for product-related injuries and the view that manufacturers are insurers of their products' safety.[136] By requiring that the product be defective before imposing liability, courts have refused to second-guess every manufacturer's decision which results in a residuum of risk. Rather, courts have opted for a less intrusive approach which merely encourages manufacturers to consider the risks and benefits of available alternative designs and to select the alternative that most accurately reflects society's notion of reasonable product safety. Only if the manufacturer's choice is later found to be unreasonable within that framework will courts hold it responsible for any injuries caused by the product's design.[137]

By conditioning liability on a finding of defect, courts have declined to regulate product availability and have refused to declare that certain types of products desired by consumers are simply bad for them. Instead of embracing what would amount to judicial prohibition, courts have left some of the responsibility for product-related injuries on consumers who chose to use a particular product.[138] In essence, courts have opted to forgo paternalistic arrogance in favor of encouraging safe product use.[139] Thus, with respect to conscious design choices, the traditional concept of "defect" reflects a balanced approach to consumer safety. On the one hand, it encourages manufacturers to distribute products that are as safe as reasonably possible; on the other hand, it declines to interfere with the consumers' freedom of choice by unduly inhibiting product availability.

This balanced framework for design liability has played a paramount role in rendering manufacturers' conscious design decisions

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135 *See, e.g.*, Patterson v. Gesellschaft, 608 F. Supp. 1206, 1209 (N.D. Tex. 1985) ("[T]he manufacturer is liable for injuries resulting from a product only if that product is 'defective'—i.e.," has something wrong with it.); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963) ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."); Baughn v. Honda Motor Co., 727 P.2d 655, 659 (Wash. 1986) ("Where there are no design or manufacturing defects in the product, and where the warnings concerning its use are adequate, a manufacturer is not liable for an accident and resulting injuries.").

136 *See, e.g.*, Rhodes v. R.G. Indus., 325 S.E.2d 465, 467-68 (Ga. Ct. App. 1984); Owens v. Allis-Chalmers Corp., 326 N.W.2d 372, 379 (Mich. 1982); Richardson v. Holland, 741 S.W.2d 751, 753 (Mo. Ct. App. 1987).

137 *See supra* part III.A.

138 *See* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY, PROBLEMS AND PROCESS 491-557 (1992).

139 *Id.*

adjudicable within the institutional bounds of the tort system. To effect the appropriate allocation of responsibility between manufacturers and product users, courts have increasingly turned to a risk-utility analysis with an emphasis on the availability of a reasonable alternative design.[140] Specifically, this approach provides the courts with a workable process for evaluating complex design decisions by supplying a series of objectively verifiable risk-utility factors and a means of using those factors to compare the product design at issue and the proposed alternative.[141] A given product is deemed defective in design only where the proposed alternative would have reduced the product's foreseeable risks of harm without unreasonably affecting its utility.[142] By making liability conditional on the availability of an overall safer alternative design, this process allows the courts to maintain a proper balance between safety concerns and product availability and narrows the focus of judicial inquiry to a risk and benefit comparison between the design in question and the proposed alternative. The extent of judicial interference with manufacturers' decisions and consumer choice is thus reduced to marginal changes in the product.

The potential for categorical liability embodied in comment d to section 2 of the new *Restatement* rejects the traditional defect standard and ignores the accepted allocation of responsibility between manufacturers and product users by authorizing courts and juries to decide the social desirability of entire categories of products. As such, it broadens the scope of judicial inquiry to include social considerations which the courts did not have to address under the traditional approach. For example, in order to accurately assess the overall social benefit of a product, courts will have to consider the potential economic effects of removing the entire product category from the market. In the past, courts have expressly rejected such evidence as irrelevant to determining whether a product design is defective and thus inadmissible in products liability cases.[143] Likewise, comment d would require the courts to assess the net value of various categories

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140 *See supra* note 104 and accompanying text. *See also* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1073 (4th Cir. 1974) (stating that each design case requires "a delicate balancing of many factors"); Dart v. Wiebe Mfg., 709 P.2d 876, 880 (Ariz. 1985) (adopting risk-utility where no consumer expectations exist on a complex design); Light v. Weldarc Co., 569 So. 2d 1302, 1304 (Fla. Dist. Ct. App. 1990) (recognizing that risk-utility balancing is required to give accurate meaning to "unreasonably dangerous" in a design context).

141 James A. Henderson; Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1334 (1991) (stating that "[o]nly risk-utility balancing can serve as a workable standard for defining defect"); Henderson, *supra* note 54, at 774-78.

142 *See supra* notes 105-09 and accompanying text.

143 *See* Cipollone v. Liggett Group, Inc., 644 F. Supp. 283, 288 (D. N.J. 1986) (holding that a product's utility may not "be established by looking to whether the defendant 'reasonably' believed that its profits would be sufficient to maintain a livelihood, hire employ-

of products to consumers of those products. Even if the courts could obtain the relevant data, it is unlikely that any judge or jury would be able to perform the necessary balancing of all of the competing interests within the confines of a traditional trial.[144]

Thus, the problem with comment d is that it goes far beyond existing design liability doctrine. Rather than expanding the concept of defect, comment d eliminates it and, as such, removes the constraints on judicial inquiry which made adjudication of design claims possible in the first place. If their analysis goes beyond a comparison of the relative risks and benefits of different versions of the same product, the courts will undoubtedly become caught up in the web of interests affected by entire categories of products.

b. *The Courts are the Wrong Forum to Address the Social Desirability of Entire Product Categories*

Some have described the potential impact of categorical liability as being tantamount to a death warrant for any industry that supplies a product which could be declared legally defective because of its high-risk character.[145] Although such a characterization may overstate the practical effects of comment d, the application thereof would undoubtedly interfere with the operations of affected companies, and would severely restrict the availability of the products at issue. In light of these potentially severe consequences, one should consider whether the judicial system is the proper forum for resolving comment d-type cases, or whether resolution of such polycentric issues should be left to the legislatures.

Proponents of categorical liability assume that the courts can conduct the type of broad evaluation necessary to assess the overall social desirability of entire categories of products.[146] However, the judicial process is not designed to perform the extensive investigations required to accurately resolve such polycentric issues.[147] Rather, it merely focuses on the past conduct of the parties before the court.[148] This is not to say that judges never consider future occurences in reaching their decisions. Indeed, judges may, and often do, take so-

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ees, or pay taxes"). Instead, the benefits to consumers may only be balanced against the risk to those consumers. *Id.* at 289-90.

144 *See* Henderson, *supra* note 21, at 1547.

145 *See Closing the Frontier, supra* note 19, at 1314. *See also* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1205 (7th Cir. 1984).

146 *See supra* text accompanying notes 143-44.

147 *See, e.g.*, Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985); Baughn v. Honda Motor Co., 727 P.2d 655, 658 (Wash. 1986). *See generally* Harvey M. Grossman, *Categorical Liability: Why the Gates Should be Kept Closed*, 36 S. TEX. L. REV. 385 (1995) (asserting categorical liability has no place in American products liability doctrine).

148 Lillian R. BeVier, *Judicial Restraint: An Argument from Institutional Design*, 17 HARV. J.L. & PUB. POL'Y 7, 11 (1994).

called legislative facts into account.[149] The judiciary, however, lacks the instruments or techniques needed to ascertain and evaluate vast amounts of relevant social and behavioral data. This limitation is perpetuated by a system-wide antagonism toward the idea of judicial lawmaking, as well as by restrictive rules of evidence and procedure aimed at preserving traditional types of adjudication.[150] One judge articulated this problem in the context of product category liability: "If mini-trail bikes are to be declared illegal in this state, the Legislature, which can hold public hearings and consider all viewpoints and aspects of the matter, is the appropriate body to decide."[151]

In addition to the procedural limits on the courts' fact-gathering capabilities, the judiciary is subject to other institutional limitations which render it less capable than other institutions to address highly polycentric issues. Adjudication is primarily concerned with resolving disputes regarding the rights and responsibilities of parties to particular lawsuits. As one commentator observed, framing issues in terms of rights naturally leads to outcomes with an "on/off" quality.[152] In other words, the product is either defective, in which case the injured consumer is entitled to compensation, or the product is not defective, in which case the consumer is precluded from recovering. Polycentric problems, on the other hand, ordinarily implicate a wide range of potential outcomes, each involving tradeoffs between conflicting social values.[153] This predicament is best illustrated by the Swine Flu vaccine dilemma in the 1970s, where Congress made a full and fair determination that the overall benefits of the vaccine were worth the risks.[154] From an institutional perspective, such a solution would not have been possible through adjudication.

Moreover, if the solutions to highly polycentric problems are to be sustained, the wide range of social interests implicated requires that such solutions are reached through a politically legitimate process. Legal process theorists have long counseled against the use of the judicial process to achieve such macro-social policies.[155] Focusing

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149 *See* Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-04 (1942).

150 *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 47-51 (1977).

151 Baughn v. Honda Motor Co., 727 P.2d 655, 658 (Wash. 1986).

152 *See* David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 553 (1988).

153 Fuller, *supra* note 130, at 393-95. Fuller demonstrates this through an analogy of the problem of assigning football players to positions on a team. There are a large number of possible outcomes, and the assignment of each player to any one position has an effect on the optimal positions for other team members. *Id.* at 395.

154 *See generally* Nina S. Appel, *Liability in Mass Immunization Programs*, 1980 B.Y.U. L. REV. 69 (discussing congressional response to Swine Flu epidemic).

155 *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 298 (1977); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 343

on the principal division of power between the courts and the legislature, these theorists argue that the political independence of federal judges deprives such judges of legitimacy once they move into the realm of promoting social policy.[156] Thus, the resolution of polycentric problems should be left to the legislature, because its composition and deliberative processes are better suited to achieving a social consensus. In the products liability context, this conclusion is underscored by the historically swift legislative responses overriding judicial findings of product category liability.[157]

In sum, the judicial process is not equipped to serve as a referee in debates over the social desirability of entire product categories. Moreover, the concept of categorical liability contained in comment d presumes an institutional legitimacy to resolve such issues that is simply not present. The judiciary's nearly unanimous rejection of categorical liability, as discussed in the next section, suggests that it too is aware that issues affecting whole categories of products should be left to the legislature.

B. Comment d is Unsupported by Case Law

In recent years, a significant number of plaintiffs have approached the courts, arguing that the traditional concept of defect should not apply to certain high-risk categories of products. Although these plaintiffs advanced no particular rationale for selecting product categories for such special treatment, their targets have included cigarettes,[158] alcoholic beverages,[159] handguns,[160] above-ground pools,[161] and all-terrain vehicles.[162] With only three exceptions,[163] the courts have emphatically rejected these unconventional arguments and reas-

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(1991); BeVier, *supra* note 148, at 10-12; Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119, 124-27 (1994).

156 A problem with governmental power to enact "good" social policies without popular consent is that it necessarily includes the power to enact "bad" social policies without popular consent. Even more fundamentally, the essence of a system of government based on the consent of the governed is that the question of whether a social policy is "good" gets answered by the governed.

Graglia, *supra* note 155, at 124.

157 *See infra* part IV.B.2.

158 *See, e.g.*, Kolter v. American Tobacco Co., 731 F. Supp. 50, 52 (D. Mass. 1990), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *vacated*, 112 S. Ct. 3019 (1992); Gianitsis v. American Brands, Inc., 685 F. Supp. 853, 855 (D.N.H. 1988); Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1159 (E.D. Pa. 1987).

159 *See* Maguire v. Pabst Brewing Co., 387 N.W.2d 565, 568-70 (Iowa 1986).

160 *See* Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1328 (9th Cir. 1986) (applying California law); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1266 (5th Cir. 1985) (applying Louisiana law); Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985).

161 *See* O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983).

162 *See* Baughn v. Honda Motor Co., 727 P.2d 655, 658 (Wash. 1986) (en banc).

163 *See infra* notes 201-03 and accompanying text.

serted the conceptual soundness of the traditional requirement of defect. In the three instances in which courts embraced the idea of categorical liability, state legislatures quickly enacted statutes reversing the courts.[164] The clear implication is that the judiciary and the legislatures recognize that categorical product liability falls within the legislatures' sphere of governance. In the end, comment d finds its sole judicial support in dicta traceable to a single footnote.[165]

1. *Judicial Reluctance to Embark on Categorical Liability*

In seeking to hold manufacturers and suppliers accountable for injuries resulting from the use of their products, even in the absence of a safer alternative design, plaintiffs have often relied on one or both of the following conceptual approaches. First, plaintiffs have sought to extend the conventional risk-utility balancing test to entire product categories.[166] Second, plaintiffs have argued for strict liability where manufacturers and distributors of selected categories of high-risk products are engaged in ultrahazardous or abnormally dangerous activities.[167] With a few notable exceptions, both approaches have been emphatically rejected by the courts.

a. *Attempts at a Categorical Application of the Risk-Utility Test*

As traditionally applied, risk-utility balancing considers the desirability of competing designs of the same product, rather than the desirability of the product itself.[168] Professor Wade was the first to suggest expanding this approach and using it to evaluate the generic usefulness of an entire line of products.[169] To this end, Professor Wade proposed a list of seven factors the courts should consider in determining whether a product was "reasonably safe."[170] Although the manufacturer's ability to reduce or eliminate the risks inherent in the

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164 *See infra* part IV.B.2.

165 *See infra* part IV.B.3.

166 *See infra* part IV.B.1.a.

167 *See infra* part IV.B.1.b.

168 *See supra* part III.A.

169 *See* Wade, *supra* note 62, at 844 (discussing unavoidably dangerous products such as knives).

170 Dean Wade proposed that courts, in reaching a conclusion about a product's risk and utility, should consider:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
> (2) The safety aspects of the product . . . .
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.

product by adopting an alternative design is one of the seven factors in Wade's approach, it is not a threshold requirement for liability. In recent years, a number of plaintiffs have urged the application of this approach to product categories posing a high risk of injury in order to determine whether the risks outweigh the social usefulness of the products, and thus whether their manufacturers should be held accountable for any resulting injuries.[171] In essence, they want judges and juries to consider whether a product is so dangerous that it should not have been marketed at all.

The steadfast judicial response to demands for categorical products liability has been an emphatic refusal to depart from the requirements of the traditional defect-based approach.[172] By characterizing

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(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability . . . .

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 837-38.

171 *See, e.g.*, Shipman v. Jennings Firearms, Inc., 791 F.2d 1532 (11th Cir. 1986) (no liability imposed on gun manufacturer because no desigu defects); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985) (no liability under risk-utility test); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987) (no recovery on risk-utility theory); Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1210 (N.D. Tex. 1985) (no liability despite assertion that handguns are unreasonably dangerous); Troja v. Black & Decker Mfg. Co., 488 A.2d 516 (Md. Ct. Spec. App. 1985) (refusing to impose liability in absence of reasonable alternative design); O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983) (imposing liability even though no alternative design was available); Baughn v. Honda Moter Co., 727 P.2d 655 (Wash. 1986) (en banc) (considering risks associated with mini-trail bikes).

172 *See, e.g.*, Kotler v. American Tobacco Co., 926 F.2d 1217, 1225 (1st Cir. 1990) (applying Massachusetts law to cigarettes), *vacated*, 505 U.S. 1215, *reaff'd on remand*, 981 F.2d 7 (1st Cir. 1992); *Shipman*, 791 F.2d at 1534 (applying Florida law to handguns); Moore v R.G. Indus., Inc., 789 F.2d 1326, 1327-28 (9th Cir. 1986) (applying California law to handguns); *Perkins*, 762 F.2d at 1268 (applying Louisiana law to handguns); *Gunsalus*, 674 F. Supp. at 1159 (applying Pennsylvania law to cigarettes); Caveny v. Raven Arms Co., 665 F. Supp. 530, 532 (S.D. Ohio 1987) (applying Ohio law to handguns), *aff'd*, 849 F.2d 608 (6th Cir. 1988); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773 (D. N.M. 1987) (applying New Mexico law to handguns), aff'd, 843 F.2d 406 (10th Cir. 1988); *Patterson*, 608 F. Supp. at 1209 (applying Texas law to handguns); Hilberg v. F.W. Woolworth Co., 761 P.2d 236, 240 (Colo. Ct. App. 1988) (manufacturer not liable for injuries caused by .22 caliber rifle), *overruled on other grounds*, Casebolt v. Cowan, 829 P.2d 352, 360 (Colo. 1992); Delahanty v. Hinckley, 564 A.2d 758, 761 (D.C. 1989) (rejecting application of "abnormally dangerous activity" doctrine to handguns), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990); Riordan v. International Armament Corp., 477 N.E.2d 1293, 1298 (Ill. App. Ct. 1985) (handguns not "unreasonably dangerous" under consumer expectation test); Richardson v. Holland, 741 S.W.2d 751, 756-57 (Mo. Ct. App. 1987) (rejecting strict liability effect of doctrine); *Baughn*, 727 P.2d at 661 (no manufacturer liability for mini-trail bikes); *see also* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988) (cigarettes not "unreasonably dangerous"); Coulson v. DeAngelo, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986) (no strict liability for guns); Trespalacios v. Valor Corp. of Fla., 486 So. 2d 649, 650 (Fla. Dist. Ct. App. 1986) (no liability for shotguns if not defective); King v. R.G. Indus., Inc., 451 N.W.2d 874, 875 (Mich. Ct. App. 1990) (no liability for handguns if not defective); Koepke v. Crossman Arms Co., 582 N.E.2d 1000, 1001 (Ohio App. 1989) (risk-benefit test inapplicable); Dauphin Deposit Bank & Trust Co. v. Toyota Motor Corp., 596 A.2d 845, 849 (Pa. Super. Ct. 1991) (rejecting risk-utility test in case involving alcoholic beverages); Hite v. R.J. Reynolds Tobacco

categorical liability as a form of judicially-imposed prohibition, courts have frequently commented that it falls outside of their realm of competence.[173] In *Baughn v. Honda Motor Co.*,[174] for example, the Supreme Court of Washington heard the appeal of a case involving two young boys who were injured while riding a mini-trail bike on a public roadway. The plaintiff, a parent of one of the boys, urged the court to consider the risks and benefits of the entire line of mini-trail bikes in determining whether Honda should be held responsible for the boys' injuries.[175] In affirming a judgment for the defendant, the court refused to abandon traditional strict liability principles and impose liability "[w]here there are no design or manufacturing defects in the product, and where the warnings concerning its use are adequate. . . ."[176] Moreover, the court characterized the approach advocated by the plaintiff as "transform[ing] strict product liability into absolute liability,"[177] explicitly noting that declaring a product illegal is a decision that should properly be left to the state's legislature.[178]

Although *Baughn* involved a relatively innocuous product, categorical liability has been similarly denounced by courts confronted with challenges to more socially vilified products, such as handgnns and cigarettes. For instance, in *Patterson v. Rohm Gesellschaft*,[179] the mother of a murder victim brought a products liability claim against the manufacturer of the handgun used by the assailant. Acknowledging that the handgun was not defective in the traditional sense, that it performed as intended, and that it was equipped with all of the necessary safety features, the plaintiff urged instead that the gun was defective "in its design because handguns simply pose risks of injury and death that 'far outweigh' any social utility they may have."[180] Referring to this argument as "delightfully nonsensical,"[181] the court reiterated that in the context of design defectiveness, the risk-utility balancing test does not apply unless the challenged defect could have been remedied by adopting a reasonable alternative design.[182] More-

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Co., 578 A.2d 417, 421 (Pa. Super. Ct. 1990) (rejecting "inherently dangerous" test for cigarettes), *appeal denied*, 593 A.2d 842 (Pa. 1991).

173 *See, e.g., Patterson*, 608 F. Supp. at 1216 ("[T]he judicial system is, at best, ill-equipped . . . . [T]his is a matter for the legislatures, not the courts."); *Baughn*, 727 P.2d at 658 ("[T]he Legislature, which can hold public hearings and consider all viewpoints and aspects of the matter, is the appropriate body to . . . decide.").

174 727 P.2d 655 (Wash. 1986) (en banc).

175 *Id.* at 660.

176 *Id.* at 659.

177 *Id.* at 660 (citation omitted).

178 *Id.* at 658.

179 608 F. Supp. 1206 (N.D. Text. 1985).

180 *Id.* at 1208.

181 *Id.* at 1211.

182 *Id.* at 1212.

over, the court expressed particular concern about maintaining a proper symmetry between legislative and judicial acts:

> [Plaintiff's claim] is a misuse of tort law, a baseless and tortured extension of products liability principles. And, it is an obvious attempt—unwise and unwarranted, even if understandable—to ban or restrict handguns through courts and juries, despite the repeated refusals of state legislatures and Congress to pass strong, comprehensive gun-control measures.[183]

In *Gunsalus v. Celotex Corp.*,[184] plaintiff, a smoker who developed lung cancer after approximately forty-five years of smoking defendant's cigarettes, argued, *inter alia*, that he should be able to recover in strict liability "because the risks caused by cigarettes outweigh their social utility."[185] Here too, the court declined to subject an entire product category to risk-utility analysis, noting that doing so would turn suppliers into insurers of their products' safety.[186] Like the *Baughn* and *Patterson* courts, this court felt that such decisions are beyond the institutional bounds of the judiciary, declaring that: "[categorical liability] impermissibly allows judges to decide cases based upon their own views of social or personal utility. Whether products should be banned or whether absolute liability should be imposed for their use are determinations more appropriately made by the legislative branch of government."[187]

b. *The "Ultrahazardous Activity" Approach*

Courts have long imposed liability without regard to reasonable care upon actors who engage in ultrahazardous[188] or abnormally dangerous activities.[189] In a seminal case, *Rylands v. Fletcher*,[190] the House of Lords held the defendant liable for flooding plaintiff's coal mine despite the fact that the defendant had exercised all reasonable care in maintaining a water reservoir. Invariably, after failing to persuade the courts to expand the traditional defect standard by weighing the risks and benefits of entire product categories, plaintiffs in products cases beseeched the courts to apply the ultrahazardous activity doctrine to products posing a high degree of unavoidable risk.[191] Argu-

183 *Id.* at 1208.
184 674 F. Supp. 1149 (E.D. Pa. 1987).
185 *Id.* at 1159.
186 *Id.*
187 *Id.*
188 *See* RESTATEMENT OF TORTS §§ 519-524 (1938).
189 *See* RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1965).
190 1 Ex. 256 (1866), *aff'd*, 3 L.R.-E. & I. App. 330 (H.L. 1868).
191 *See, e.g.*, Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1203 (7th Cir. 1984) (rejecting attempt to impose strict liability for sale of nondefective product); Burkett v. Freedom Arms, Inc., 704 P.2d 118, 120 n.3 (Or. 1985) (plaintiffs alleged that manufacture of handguns was "ultrahazardous").

ing that manufacture and distribution of such high-risk products as handguns or cigarettes should be deemed ultrahazardous or abnormally dangerous activities, these plaintiffs sought to hold the defendant manufacturers accountable for any injuries resulting from use of their products despite the absence of defect in the traditional sense.

In considering this proposed extension of the ultrahazardous activity doctrine, the courts have consistently held it inapplicable to the manufacture and distribution of high-risk products.[192] The courts usually point to three characteristics which differentiate distribution of products from situations envisioned by the Court in *Rylands*. First, the scope of the ultrahazardous activity doctrine is generally limited to certain inherently dangerous nonnatural activities involving land, such as blasting, storing large quantities of water, and storing explosives. A person who engages in such use of his land is held to have assumed all of the risks involved, and he cannot escape liability merely by showing that he has exercised all reasonable care. Courts in products cases have accepted this land-based requirement on its face. Thus, where the manufacture and distribution of products involves land only in a tangential manner, courts have refused to subject manufacturers and distributors to the ultrahazardous activity doctrine.[193]

Second, a major rationale behind *Rylands* and other decisions involving ultrahazardous activities is the idea that when an actor creates a risk against which others cannot protect themselves, he alone must bear the ultimate responsibility for any resulting harm.[194] As between two parties, it seems intuitive that the party who exposes the other to a

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192 *See, e.g.*, Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1327-28 (9th Cir. 1986) (applying California law to handguns); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1266 (5th Cir. 1985) (applying Louisiana law to handguns); *Martin*, 743 F.2d at 1203-05 (applying Illinois law to handguns); Caveny v. Raven Arms Co., 665 F. Supp. 530, 531-32 (S.D. Ohio 1987) (applying Ohio law to handguns), *aff'd*, 849 F.2d 608 (6th Cir. 1988); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 774 (D.N.M. 1987) (applying New Mexico law to handguns), *aff'd*, 843 F.2d 406 (10th Cir. 1988); Hammond v. Colt Indus. Operating Corp., 565 A.2d 558, 563 (Del. Super. Ct. 1989) (handguns); Delahanty v. Hinckley, 564 A.2d 758, 761 (D.C. 1989) (rejecting application of "abnormally dangerous activity doctrine" to handguns), *aff'd*, 900 F.2d 368; Coulson v. DeAngelo, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986) (no manufacturer liability for guns); Riordan v. International Armament Corp., 477 N.E.2d 1293, 1297-98 (Ill. App. Ct. 1985) (handguns not "unreasonably dangerous"); Maguire v. Pabst Brewing Co., 387 N.W.2d 565, 568-70 (Iowa 1986) (beer); Richardson v. Holland, 741 S.W.2d 751, 756 (Mo. Ct. App. 1987) (rejecting strict liability effect of doctrine); Burkett v. Freedom Arms, Inc., 704 P.2d 118, 120 (Or. 1985) (handguns); Knott v. Liberty Jewelry & Loan, Inc., 748 P.2d 661, 664-65 (Wash. Ct. App. 1988) (handguns).

193 *See, e.g.*, *Perkins*, 762 F.2d at 1267-68 (applying Louisiana law); *Martin*, 743 F.2d at 1203-04 (applying Illinois law); *Caveny*, 665 F. Supp. at 531-32 (applying Ohio law); *Riordan*, 477 N.E.2d at 1297; *Richardson*, 741 S.W.2d at 755; *Burkett*, 704 P.2d at 120-21.

194 *See* Rylands v. Fletcher, 1 Ex. 265 (1866), *aff'd*, 3 L.R.-E. & I. App. 330 (H.L. 1868). Judge Blackburn's opinion from the Exchequer Chamber noted:

> [T]here is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in

risk of injury or loss should be held accountable for the consequences of his actions. This rationale, however, does not extend to those who supply the instrumentalities used as part of the high-risk activity. In most instances, such suppliers provide a common product which is non-dangerous in itself, and which does not become hazardous until it is used by the buyer. Accordingly, although courts have applied the ultrahazardous activity doctrine to those whose use of certain products poses an unreasonable risk, they have consistently refused to apply it to those who merely supply such products.[195]

Finally, for the ultrahazardous activity doctrine to apply, the activity in question must be unusual or nonnatural.[196] The doctrine is applicable if, as in *Rylands*, one party engages in activity or conduct which is not a matter of common usage under the circumstances.[197] In conducting unusual activities, a party generates risks that others cannot expect and thus cannot protect against, thereby justifying the imposition of strict liability for resulting injuries. The manufacture and distribution of products, however, is a common activity, which does not fall within the scope of this doctrine. This proposition is true regardless of the magnitude of the product's inherent risk of injury. As the court in *Caveny v. Raven Arms Co.* pointed out in the context of handguns: "Without a doubt manufacturing and distributing handgnns is a matter of common usage. Indeed, approximately two million handguns are sold annually."[198]

In addition to their recognition of the conceptual mismatch between the ultrahazardous activity doctrine and categorical liability, courts addressing this issue have also voiced concerns about the open-endedness of the doctrine,[199] as well as the legitimacy of judicial inter-

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any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what they pleased . . . .

Id. at 287.

195 *See, e.g.*, Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (noting the difference between the dangerous use of a handgun and its manufacture and sale); Delahanty v. Hinckley, 564 A.2d 758, 761 (D.C. 1989) ("[H]andgun marketing cannot be classified as abnormally dangerous.").

196 *See, e.g., Caveny*, 665 F. Supp. at 532 (applying Ohio law to handguns); Armijo v. Ex Cam, Inc., 656 F. Supp 771, 774 (D. N.M. 1987) (applying New Mexico law to handguns), *aff'd*, 843 F.2d 406 (10th Cir. 1988).

197 *See e.g.*, City of Northglenn v. Chevron U.S.A., Inc., 519 F. Supp. 515 (D. Colo. 1981) (storage of large amounts of gasoline near residential area); Lutheringer v. Moore, 190 P.2d 1 (Cal. 1948) (fumigation using poisonous gases); Largan v. Valicopters, Inc., 567 P.2d 218 (Wash. 1977) (en banc) (crop spraying).

198 *Caveny*, 665 F. Supp. at 532 (citation omitted).

199 The *Perkins* court voiced its fear as follows:

There is also nothing inherent in the logic of the arguments that would prevent their application to the manufacturers of any instrumentality that can be used dangerously, such as knives, lead pipes, explosives, automobiles, alcohol, and rolling pins. Indeed, most consumer products marketed to the general public have both legitimate and harmful uses. We

ference with product availability. The court in *Martin v. Harrington & Richardson, Inc.* explained its refusal to apply the ultrahazardous activity doctrine to handguns with the following statement:

> [The right] to bear arms is protected, at least against all restrictions except those imposed by the police power, by the Illinois Constitution. . . . The State of Illinois regulates, but does not ban, the possession of handguns by private citizens. . . . Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns.[200]

The courts' conclusive refusal to expand both the traditional risk-utility test and the ultrahazardous activity doctrine to encompass whole product categories is strong evidence of the conceptual failure of categorical liability. Moreover, the manner of this refusal strongly suggests that the judiciary is well aware that such issues are for the legislature to resolve.

2. *Legislative Repudiation of Judicial Experiments With Categorical Liability*

Despite the judiciary's general reluctance to embark upon categorical liability, a few plaintiffs did find judges who were receptive to their arguments. Specifically, three courts have allowed plaintiffs to state a cause of action in strict liability absent proof of reasonable alternative design: (1) the Supreme Court of New Jersey in *O'Brien v. Muskin Corp.*;[201] (2) the Maryland Court of Appeals in *Kelley v. R.G. Industries, Inc.*;[202] and (3) the Supreme Court of Louisiana in *Halphen v. Johns-Manville Sales Corp.*[203] In each instance, the legislatures of the respective states responded by enacting products liability statutes consistent with traditional doctrine.

O'Brien, a 1983 decision, was the first and most celebrated judicial decision to extend the risk-utility analysis to a product category and to impose design defect liability where the product was not defective in the traditional sense. The case involved an appeal of a products liability suit filed by a young man who was paralyzed after diving head first into a neighbor's above-ground swimming pool. The plaintiff con-

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> cannot accept the argument that the manufacturer should become an insurer of all uses of those products, both legitimate and illegitimate, simply by virtue of having marketed them.

Perkins, 762 F.2d at 1269.

200 Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (citations omitted).

201 463 A.2d 298 (N.J. 1983).

202 497 A.2d 1143 (Md. 1985).

203 484 So. 2d 110 (La. 1986).

tended that his injuries resulted when he dove into the pool and the slippery bottom of the pool caused his hands to slip apart, thereby allowing his head to strike the bottom.[204] In seeking to recover against both the manufacturer and the retail seller, he argued that the vinyl used by the manufacturer to line the bottom of the pool was so slippery as to constitute a desigu defect, even though plaintiff was unable to show that an alternative, less slippery material was available.[205] The defendant contended that this failure of proof barred plaintiff's claim under accepted principles of design defect doctrine.

In rejecting the defendant's arguments, the New Jersey Supreme Court relied on Professor Wade's approach and asserted that the existence of an alternative design is only one factor to be considered in evaluating a product's defectiveness.[206] Viewing the evidence presented in the light most favorable to the plaintiff, the court concluded:

> To establish sufficient proof to compel submission of the issue to the jury for appropriate fact-finding under risk-utility analysis, it was not necessary for plaintiff to prove the existence of alternative, safer designs. . . . [E]ven if there are no alternative methods of making bottoms for above-ground pools, the jury might have found that the risk posed by the pool outweighed its utility.[207]

The court thus concluded that certain products with no alternative designs may be so inherently dangerous and so socially useless that, under the risk-utility approach, their manufacturers should be held accountable for any resulting injuries.

Advocates of categorical liability found *O'Brien*'s bold departure from the traditional defect standard quite attractive. Any euphoria, however, was quite brief. In 1987, the New Jersey legislature passed a statute which effectively overturned the *O'Brien* rule and reestablished the existence of a reasonable alternative design as a threshold element of design defect claims.[208]

Kelley v. R.G. Industries, Inc.,[209] decided by the Maryland Court of Appeals in 1985, was the second judicial attempt at categorical liability. In *Kelley*, the plaintiff was injured when an unidentified assailant shot him during an armed robbery. Subsequently, the plaintiff filed a products liability claim against the manufacturer of the handgun used in the shooting. He alleged, *inter alia*, that the gnn, which is commonly referred to as a "Saturday Night Special," was defectively

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204 *O'Brien*, 463 A.2d at 302.

205 *Id.*

206 *Id.* at 306.

207 *Id.*

208 N.J. STAT. ANN. § 2A:58C-3 (West 1987). *See also* Smith v. Keller Ladder Co., 645 A.2d 1269 (N.J. Super. 1994) (applying § 2A:58C-3).

209 497 A.2d 1143 (Md. 1985).

designed.[210] Unlike the *O'Brien* court, the court in *Kelley* rejected the risk-utility analysis and the imposition of strict liability.[211] Nevertheless, after an extensive review of Maryland's anti-gun legislation and its underlying policies, the court stated that it would be "entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products."[212] Viewing the chief purpose of Saturday Night Special handguns as facilitating criminal activity, the court concluded that strict liability was warranted under the circumstances.[213] The court relegated to individual judges and juries the task of determining which weapons fell within the "Saturday Night Special" category.[214]

Although the path to categorical liability chosen by the *Kelley* court differed markedly from the rationale of *O'Brien*, the legislative response was the same. Three years after the court's decision, the Maryland legislature prohibited the imposition of strict liability against manufacturers and distributors of firearms subsequently used in criminal activities.[215]

The third case, *Halphen v. Johns-Manville Sales Corp.*, plaintiffs' third and last success with categorical liability, involved a wrongful death action brought by the widow of a shipyard worker who contracted cancer of the lining of the lung from repeated exposure to asbestos products supplied by the defendant.[216] In responding to a certified question, the Supreme Court of Louisiana recognized that some types of products may be "unreasonably dangerous per se," and that manufacturers of such products may be held strictly liable for resulting injuries "solely on the basis of the intrinsic characteristics of

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210 *Id.* at 1145.

211 *Id.* at 1149. The court refused to extend the risk-utility analysis to "impose liability on the maker or marketer of a handgun which has not malfunctioned." *Id.*

212 *Id.* at 1159.

213 *Id.*

214 *Id.* at 1159-60. The court wrote:

> There is no clear-cut, established definition of a Saturday Night Special, although there are various characteristics which are considered in placing a handgun into that category. Relevant factors include the gun's barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco and Firearms, and other related characteristics. Additionally, the industry standards, and the understanding among law enforcement personnel, legislators and the public, at the time the weapon was manufactured and/or marketed by a particular defendant, must be considered. Because many of these factors are relative, in a tort suit a handgun should rarely, if ever, be deemed a Saturday Night Special as a matter of law. Instead, it is a finding to be made by the trier of facts.

Id.

215 MD. ANN. CODE of 1957 art. 27, § 36-I (1995 Supp.).

216 484 So. 2d 110, 112 (La. 1986).

the product."[217] The court termed this approach "the purest form of strict liability,"[218] and reserved it for product categories with respect to which "a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product."[219] However, as in New Jersey and Maryland, the court's venture into categorical liability was promptly rebuffed by the legislature. In 1988, two years after *Halphen* was decided, the Louisiana legislature adopted legislation expressly requiring proof of a reasonable alternative design in all design defect cases.[220]

The fact that legislatures have decisively overridden every instance of judicial imposition of categorical liability demonstrates the legislatures' cognizance of their exclusive responsibility to act in that area. This, in itself, is a strong argument for rejecting judicial evaluation of entire product categories.

3. *The Infamous* Wilson v. Piper Aircraft Corp. *Footnote*

Comment d is not utterly without judicial support. *Wilson v. Piper Aircraft Corp.*[221] was the first judicial decision to suggest that under limited circumstances plaintiffs need not present evidence of a reasonable alternative design, thus implying that the traditional concept of defect is not universally applicable. In *Wilson*, the Oregon Supreme Court heard the manufacturer's appeal of a products liability suit filed following the crash of a small airplane which killed four of its occupants and injured another. Plaintiffs, the personal representatives of two of the passengers killed in the crash, alleged, *inter alia*, that the airplane was defective in design because its carbureted engine was overly susceptible to icing and a fuel-injected engine would have prevented the accident.[222] In addressing the sufficiency of plaintiffs' evidence, the court found that the evidence presented was insufficient to prove that a fuel-injected engine was "not only technically feasible but also practicable in terms of cost and the overall design and operation of the [airplane]."[223] The court remanded the case for a new trial, emphasizing that evidence of a reasonable alternative design "is part of the *required proof* that a design feature is a 'defect' . . . ."[224]

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217 *Id.* at 113.

218 *Id.* at 114.

219 *Id.*

220 LA. REV. STAT. ANN. §§ 9:2800.56-2800.59 (West 1991). The statute does not, however, apply retroactively. *See* Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1264 (La. 1991).

221 577 P.2d 1322 (Or. 1978).

222 *Id.* at 1331.

223 *Id.* at 1327.

224 *Id.* at 1327 (emphasis added).

Given the absolute nature of its holding, the *Wilson* court attempted to mitigate its impact on injured consumers. In an often-cited footnote, the court explained the risk-utility approach it adopted:

> [T]he court's task is to weigh the factors bearing on the utility and the magnitude of risk and to determine whether, on balance, the case is a proper one for submission to the jury. . . . There may be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative). If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce.[225]

Although no court outside of Oregon has expressly adopted the *Wilson* footnote, a number of courts have echoed its reasoning. For example, in *Armentraut v. FMC Corp.*[226] the Colorado Supreme Court cited *Wilson* for the proposition that although plaintiffs challenging the design of a product must, as a general rule, present evidence of a safer and reasonable alternative design, such evidence may not always be necessary.[227] Similarly, although Minnesota follows the majority approach requiring proof of a safer alternative design, the Minnesota Supreme Court in *Kallio v. Ford Motor Co.*[228] relied on *Wilson* for its statement that "[c]onceivably, rare cases may exist where the product may be judged dangerous because it should be removed from the market rather than redesigned."[229] Additionally, the New Jersey legislature codified this potential exception in its products liability statute.[230]

The implication of *Wilson* and its progeny is that courts may impose categorical liability where the product has negligible social utility and an exceedingly high risk of injury. Despite its apparent following, however, the *Wilson* footnote has never actually been utilized to hold manufacturer liable for distributing a product which it could not have redesigned. When confronted with real cases, the courts in Oregon, Colorado, and Minnesota have adhered to the traditional defect standard and have persistently required plaintiffs to present evidence of a

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225 *Id.* at 1328 n.5.
226 842 P.2d 175 (Colo. 1992).
227 *Id.* at 185 n.11.
228 407 N.W.2d 92, 93 (Minn. 1987).
229 *Id.* at 97 n.8.
230 *See* N.J. STAT. ANN. § 2A:58C-3-b(1)-(3) (West 1987).

reasonable alternative design.[231] Thus, the extent to which the *Wilson* court meant what it said is unclear. For the time being, its proposition remains mere dictum.

Using the dictum in the *Wilson* footnote to carve out an exception to the new *Restatement*'s design defect standard would itself be manifestly unreasonable. Because the *Restatement* is supposed to reflect majority law, and since comment d's exception is not based on any valid cases, the reporters and the A.L.I. should remove the comment from future drafts.

C. Comment d May Eviscerate Section Two

It is a platitude that exceptions can swallow rules. An exception to an otherwise definite rule may indicate the rule's inherent weakness, or it may reflect the lawmakers' dissatisfaction with the rule's substantive content.[232] In the end, the exception often outlasts the rule.[233] Perhaps comment d's greatest weakness lies in the fact that the co-reporters were unable to find any real-world examples of products that satisfy the "manifestly unreasonable design" standard.[234] Therefore, perhaps the co-reporters had to content themselves with offering two hypothetical scenarios in which the comment might apply.[235] Although this failure is completely understandable in light of the consistent judicial and legislative rejection of categorical liability, it results in an exception without delineated bounds. Indeed, because most consumer products sold to the general public lend themselves to both beneficial and harmful uses, nothing inherent in the logic of comment d would prevent plaintiffs from challenging any products that are unavoidably dangerous, such as knives, darts, automobiles and motorcycles. Moreover, by failing to satisfactorily distinguish

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231 *See, e.g.*, Wood v. Ford Motor Co., 691 P.2d 495, 498 (Or. Ct. App. 1984) ("[P]laintiff must show that an alternative safer design, practicable under the circumstances, was available."); Armentrout v. FMC Corp., 842 P.2d 175, 185-85 (Colo. 1992) ("[T]he existence of a feasible alternative is a factor in the risk-benefit analysis of the unreasonable dangerousness of the product design."); Kallio v. Ford Motor Co., 407 N.W.2d 92, 96 (Minn. 1987).

232 For example, in the heyday of products liability, courts manifested their dissatisfaction with the privity doctrine by fashioning numerous exceptions to the rule. *See, e.g.*, Cedars of Lebanon Hosp. Corp. v. European X-Ray Distribs. of Am., 444 So. 2d 1068, 1070-72 (Fla. App. 1984) (discussing gradual abrogation of privity doctrine through judicially created exceptions). *See generally* Cornelius W. Gilliam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 152-55 (1958) (discussing various devices employed by the courts to circumvent privity rule).

233 *See, e.g.*, Henningsen v. Bloomfield Motors, 161 A.2d 69 (1960) (The Supreme Court of New Jersey eliminated the privity requirement in warranty actions and established that manufacturers are liable to all foreseeable users and consumers for breach of the implied warranty of safety.); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

234 *See supra* text accompanying notes 120-22.

235 *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 2 cmt. d.

products that fall within its scope from products that still require claimants to show the availability of a reasonable alternative design, comment d indicates that the section 2 rule for design defectiveness is itself in some way unsatisfactory. Thus, when courts finally decide where to draw the line, it is the rule of section 2 which is likely to crumble.

Additionally, because notions of public policy and consumer safety are pervasive in products liability law, courts often err in the consumers' favor.[236] This is most evident in the evolution of section 402A from a rule intended to apply to foodstuffs and manufacturing-type defects, into a comprehensive doctrine applicable to all types of products and several kinds of defects.[237] Consumer-minded courts are therefore likely to read prodefendant rules narrowly and to stretch their exceptions in order to provide at least some redress to injured plaintiffs. As a result, before the A.L.I. carves out an exception to section 2(b)'s requirement that claimants challenging the design of a product must point to a safer reasonable alternative available at the time of manufacture, it should examine comment d and its virtues with the greatest of care. Otherwise, a concession to the plaintiffs' bar may eventually subvert the new *Restatement's* central and most efficacious provision.

In sum, before the A.L.I. succumbs to political pressures and retains comment d's exception to the reasonable alternative design requirement, it must consider that the exception may render the application of section 2 design liability just as uncertain and fragmented as the design liability doctrine it is meant to replace. Comment d may seem attractive because it leaves certain classes of injured plaintiffs—who would otherwise be completely barred from recovery—with a possible forum to obtain compensation. But, because the comment would place the judiciary in the role of a legislature, and because it finds no support in case law, the risk of returning to the conceptual morass of the past should compel the A.L.I. to remove comment d from the new *Restatement.*

CONCLUSION

The primary benefit of the new *Restatement's* standard for defective product design is its ability to capture the majority approach to

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236 *See, e.g., Closing the Frontier, supra* note 19, at 1270 (characterizing common law developments between 1960 and 1980 as "substantially proplaintiff"). *See generally* Henderson, *supra* note 54.

237 *See* RESTATEMENT (SECOND) OF TORTS (Tentative Draft No. 6, 1961); 38 ALI PROC. 349 (1964). *See generally* George L. Priest, *Strict Products Liability: The Original Intent,* 10 CARDOZO L. REV. 2301, 2311 (1989) (concluding that design defects were not intended to be subject to strict liability).

defective design in a relatively straightforward and uniform provision. It replaces a fragmented and diverse doctrine with a single risk-utility test which emphasizes manufacturers' ability to adopt safer alternative designs. In an apparent attempt to appease members of the plaintiffs' bar, the A.L.I. compromised this uniformity by carving out an undefined exception to the alternative design requirement in cases involving products with "manifestly unreasonable designs." The exception is undefined because the judiciary's universal unwillingness to assess the designs of entire product categories prevents any differentiation between the exception and the general rule. The courts' steadfast rejection of categorical liability is explainable, at least in part, as a recognition that such issues should be left to the legislatures.

The American judiciary's historic respect for the *Restatements* requires the A.L.I. to proceed with the utmost care in drafting them. As this Note argues, comment d's exception to the reasonable alternative desigu requirement is unsupported by case law and would place the judiciary in the role of a legislature. Moreover, its failure to define what renders a product design *manifestly* unreasonable jeopardizes the ideals of clarity and uniformity aspired to by the A.L.I. Hence, the A.L.I. should remove comment d from the desigu defect section of the new *Restatement.*

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