

“Waive” Goodbye to Tort Liability: A Proposal to Remove Paternalism from Product Sales Transactions

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I. INTRODUCTION

This Article argues that waivers of tort liability should be permitted in connection with product sales. Currently, sellers cannot limit their liability under tort law for personal injuries caused by defective products even though such waivers are allowed, albeit reluctantly, under principles of negligence and warranty law.

Comment m to section 402A of the *Restatement (Second) of Torts* declares that a products liability claim by an injured consumer "is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands."¹ Section 18 of the *Restatement (Third) of Torts* also provides that disclaimers and limitations of remedies will not bar or reduce personal injury claims against sellers of new products.² For the most part, the courts have faithfully adhered to the *Restatement* position, at least where ordinary consumers are involved,³ by refusing to allow the parties to waive tort liability.⁴

1. RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965). Comment m declares:

The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

Id.

2. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (1998). This provision declares:

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

Id.

3. However, some courts have upheld waivers of liability in transactions between large commercial entities. See *S. A. Empresa de Viacao Aerea Rio Grandense v. Boeing Co.*, 641 F.2d 746, 753-54 (9th Cir. 1981) ("Although the California Supreme Court has not addressed this issue, the California Court of Appeal and three circuits of the United States Court of Appeals applying California law have held that the doctrine of strict liability does not apply between large corporate enterprises which have allocated risks by

Although most of these cases have involved personal injury claims,⁵ the prohibition against waivers has been extended to property damage claims as well.⁶ Furthermore, even when courts have recognized exculpatory agreements between contracting parties, they have generally refused to extend this contractual immunity to claims brought by third parties, such as employees.⁷

In contrast, most courts acknowledge the validity of express waivers

contract."); *Scandinavian Airlines Sys. v. United Aircraft Corp.*, 601 F.2d 425, 428 (9th Cir. 1979) ("Unlike the consumers in *Greenman*, *Seely*, and *Price*, SAS can allocate its risk of loss equally as well as United."); *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 928 (9th Cir. 1979) ("We need not decide whether Westinghouse was subject to strict liability under 402A, but hold that under these circumstances the disclaimer was an effective defense to Idaho Power's strict liability action."); *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239, 245-46 (5th Cir. 1974) (concluding that strict liability claim was foreclosed by disclaimer); *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146, 149 (3d Cir. 1974) ("Since the Code is tolerant of disclaimers and limitation clauses within certain defined limits, that same philosophy would be equally approving of a negotiated waiver of [section] 402A.") (footnote omitted); *Kaiser Steel Corp. v. Westinghouse Elec. Corp.*, 127 Cal. Rptr. 838, 845 (Ct. App. 1976) ("We thus conclude that the doctrine of products liability does not apply as between parties who: (1) deal in a commercial setting; (2) from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning the risk of loss from defects in it").

4. See *Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 737 (D. Haw. 1993) ("With respect to claims for strict liability, David's waiver is thus void as against public policy."); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965) ("Recovery in strict liability is not conditioned on privity of contract, or reliance or notice to the seller of a defect, and the seller cannot disclaim or by contract alter a duty which the law would impose upon him."); *Sipari v. Villa Olivia Country Club*, 380 N.E.2d 819, 824 (Ill. App. Ct. 1978) ("Therefore, we find that the exculpation clause here did not function to preclude the imposition of strict liability on Villa Olivia."); *Haugen v. Ford Motor Co.*, 219 N.W.2d 462 (N.D. 1974), which stated:

It would thus appear that if [plaintiff] should be successful in recovering judgment following trial on the theory of strict liability, and this court, on appeal, adopts the theory of strict liability on the basis of warranty, the disclaimer claimed by Ford under its Basic Warranty and Limitation of Liability would likely not be a limitation on the scope and content of such warranty.

Id. at 471.

5. See *Wheelock*, 839 F. Supp. at 733 (plaintiff killed while paragliding because lines broke); *Greeno*, 237 F. Supp. at 428 (plaintiff injured by defective forklift leased to employer); *Sipari*, 380 N.E.2d at 821-22 (plaintiff injured when defective golf cart overturned).

6. See *Haugen*, 219 N.W.2d at 463-64 (plaintiff's automobile destroyed by fire).

7. See *Velez v. Craine & Clark Lumber Corp.*, 305 N.E.2d 750, 754 (N.Y. 1973) (holding that disclaimer, which was effective between employer and supplier of defective scaffolding, did not preclude injured employee from bringing tort action against supplier).

of liability in negligence law,⁸ including agreements that immunize one party from liability for personal injury caused by his or her own negligent acts.⁹ Such agreements are most often upheld when they involve recreational activities¹⁰ such as automobile racing,¹¹ parachute jumping,¹² mountain climbing,¹³ and white-water rafting.¹⁴ However,

8. See *Winterstein v. Wilcom*, 293 A.2d 821, 824 (Md. Ct. Spec. App. 1972) ("In the absence of legislation to the contrary, the law, by the great weight of authority, is that there is ordinarily no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself."); *Ciofalo v. Vic Tanney Gyms, Inc.*, 177 N.E.2d 925 (N.Y. 1961), which stated:

On the other hand, where the intention of the parties is expressed in sufficiently clear and unequivocal language, and it does not come within any of the aforesaid categories where the public interest is directly involved, a provision absolving a party from his own negligent acts will be given effect.

Id. at 926 (citation omitted); see Julie Ann Springer, Comment, *Releases: An Added Measure of Protection from Liability*, 39 BAYLOR L. REV. 487, 488-89 (1987) ("Despite the existence of compelling policy reasons for holding a person to a certain standard of care in his involvements with other individuals, exculpatory agreements are currently enforced in a majority of states.").

9. See *Gore v. Tri-County Raceway, Inc.*, 407 F. Supp. 489, 491 (M.D. Ala. 1974) ("[A] release of liability from the releasee's own negligence is valid absent any considerations of public policy involved in the situation."); *LaFrenz v. Lake County Fair Bd.*, 360 N.E.2d 605, 607 (Ind. Ct. App. 1977) ("Consequently, it is not against public policy to enter into an agreement which exculpates one from the consequences of his own negligence."); *Lee v. Allied Sports Assocs., Inc.*, 209 N.E.2d 329, 333 (Mass. 1965) ("We conclude that the paper which [plaintiff] signed as a matter of law effectively released the defendant from liability for ordinary negligence to signatories who were within its terms."); *Barnes v. New Hampshire Karting Ass'n*, 509 A.2d 151, 154 (N.H. 1986) ("As long as the language of the release clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence, the agreement will be upheld.").

10. See, e.g., *Williams v. Cox Enters.*, 283 S.E.2d 367, 368 (Ga. Ct. App. 1981) (participating in 10k footrace); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 926 (Minn. 1982) (using health spa); *Ciofalo*, 177 N.E.2d at 927 (using swimming pool); *Boehm v. Cody County Chamber of Commerce*, 748 P.2d 704, 706 (Wyo. 1987) (participating in mock gunfight).

11. See, e.g., *Grbac v. Reading Fair Co.*, 521 F. Supp. 1351, 1358 (W.D. Pa. 1981), *aff'd*, 688 F.2d 215 (3d Cir. 1982); *Schlessman v. Henson*, 413 N.E.2d 1252, 1254 (Ill. 1980); *Morrow v. Auto Championship Racing Ass'n*, 291 N.E.2d 30, 33 (Ill. App. Ct. 1972); *LaFrenz*, 360 N.E.2d at 610; *Winterstein*, 293 A.2d at 824; *Tope v. Waterford Hills Road Racing Corp.*, 265 N.W.2d 761, 765 (Mich. Ct. App. 1978); *Barnes*, 509 A.2d at 156; *Solodar v. Watkins Glen Grand Prix Corp.*, 317 N.Y.S.2d 228, 230 (App. Div. 1971); *Seymour v. New Bremen Speedway, Inc.*, 287 N.E.2d 111, 117 (Ohio Ct. App. 1971); *French v. Special Servs., Inc.*, 159 N.E.2d 785, 788 (Ohio Ct. App. 1958); *Lee v. Beauchene*, 337 N.W.2d 827, 829 (S.D. 1983); *Corpus Christi Speedway, Inc. v. Morton*, 279 S.W.2d 903, 907 (Tex. Civ. App. 1955).

12. See, e.g., *Hulsey v. Elsinore Parachute Ctr.*, 214 Cal. Rptr. 194, 200 (Ct. App. 1985); *Jones v. Dressel*, 623 P.2d 370, 378 (Colo. 1981); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 732 (Minn. Ct. App. 1986); *Cain v. Cleveland Parachute Training Ctr.*, 457 N.E.2d 1185, 1187 (Ohio Ct. App. 1983).

13. See, e.g., *Blide v. Rainier Mountaineering, Inc.*, 636 P.2d 492, 493 (Wash. Ct. App. 1981).

14. See, e.g., *Franzek v. Calspan Corp.*, 434 N.Y.S.2d 288, 290 (App. Div. 1980).

the providers of other less exotic services have also been allowed to avoid liability for their negligence by means of exculpatory agreements.¹⁵

Waivers of liability, or disclaimers, are also valid under the Uniform Commercial Code. Although express warranties cannot be disclaimed,¹⁶ a seller can disclaim the implied warranties of merchantability and fitness under the provisions of section 2-316.¹⁷ In addition, section

15. See, e.g., *Dixon v. Manier*, 545 S.W.2d 948, 950 (Tenn. Ct. App. 1976) (upholding exculpatory agreement in connection with beauty treatment); *Allright, Inc. v. Elledge*, 515 S.W.2d 266, 268 (Tex. 1974) (upholding contract provision between parking garage owner and bailee which limited owner's liability to \$100).

16. See *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 412-13 (8th Cir. 1985) (declaring disclaimer to be inconsistent with express warranty given by seller of power transmission tower components); *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 56-57 (8th Cir. 1980) (concluding that "as is" clause in contract for sale of used airplane did not exclude express warranty that plane was airworthy); *Auto-Teria, Inc. v. Ahern*, 352 N.E.2d 774, 782-83 (Ind. Ct. App. 1976) (holding that general disclaimer was not effective to exclude express warranty that automatic car wash could be coin operated); *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 384 (Minn. 1978) (ruling that express warranty with respect to carryover characteristics of herbicide overrode general disclaimer); *Paulson v. Olson Implement Co.*, 319 N.W.2d 855, 859-60 (Wis. 1982) (finding disclaimer to be inconsistent with express warranty given in connection with sale of grain drying bin). However, a seller can place time limits or other restrictions on the scope of an express warranty. See, e.g., *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986) (upholding time/mileage limitation on express warranty); *Tracy v. Vinton Motors, Inc.*, 296 A.2d 269, 271 (Vt. 1972) (concluding that a 30-day/1000-mile limitation in connection with the sale of a used car was effective).

17. To exclude an implied warranty of merchantability, section 2-316(2) provides that the disclaimer must be conspicuous and must expressly refer to merchantability. See U.C.C. § 2-316(2) (1989). See *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902, 909 (D. Minn. 1985) (concluding that disclaimer on back of contract for the sale of animal feed storage system was not conspicuous); *McCormick Mach., Inc. v. Julian E. Johnson & Sons, Inc.*, 523 So. 2d 651, 653-54 (Fla. Dist. Ct. App. 1988) (concluding that disclaimer in connection with sale of used bulldozer was ineffective because it failed to mention merchantability); *Lee v. Peterson*, 716 P.2d 1373, 1375-76 (Idaho Ct. App. 1986) (holding disclaimer by seller of defective copier machine to be ineffective because of failure to mention merchantability); *Anderson v. Farmers Hybrid Cos.*, 408 N.E.2d 1194, 1200 (Ill. App. Ct. 1980) (ruling that disclaimer printed on the back of contract to sell breeding pigs was not conspicuous). Disclaimers of fitness warranties must also be conspicuous, but no particular language is required to make a valid disclaimer. See U.C.C. § 2-316(2).

In addition, section 2-316(3)(a) of the U.C.C. permits a seller to disclaim implied warranties by selling the used product "as is" or "with all faults." *Id.* Furthermore, section 2-316(3)(b) states that no implied warranties arise with respect to defects that can be discovered by inspection if the seller requests the buyer to inspect the goods and the buyer either inspects the goods or declines to do so. See *id.* § 2-316(3)(b). Finally, section 2-316(3)(c) provides that implied warranties can be disclaimed by course of dealing or trade usage. See *id.* § 2-316(3)(c).

2-719(1) authorizes sellers to limit remedies that would otherwise be available for breach of warranty.¹⁸ For example, the parties may agree that the buyer's remedies shall be limited to repair or replacement of the defective goods.¹⁹ Another common limitation is to exclude damages for consequential losses if the goods are not up to par.²⁰ On the other hand, section 2-719(3) declares that attempts to limit liability for personal injuries is prima facie unconscionable, and courts routinely uphold this presumption.²¹

Thus, a curious anomaly exists in the law. Negligence and warranty claims can be waived or disclaimed, even when personal injuries are involved, but waivers are not permitted for claims based on strict products liability. This inconsistent treatment of waivers is particularly difficult to understand given that warranty claims and strict liability claims may involve the same issues and the same parties. This disparate treatment of warranty and strict liability claims cannot be defended either doctrinally or in terms of public policy. Therefore, this Article proposes that state legislatures and courts modify existing principles of strict products liability law to provide for waivers of tort liability in product sales transactions. This Article examines the advantages and disadvantages of such a change in the current law.

Part II of this Article makes two arguments to justify contractual waivers of tort liability. The first argument maintains that waivers promote economic efficiency by allowing the parties involved in the transaction to shift product-related risks to those who are apparently able to bear them most cheaply. The second argument relies on the concept of personal autonomy; since free will and personal autonomy are essential attributes of our humanity, it follows that individuals must be free to make choices even when those decisions are unwise.

18. See U.C.C. § 2-719(1).

19. See Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28, 61 (1977).

20. See U.C.C. § 2-719(3). This provision declares, in part, that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." *Id.*

21. See *Matthews v. Ford Motor Co.*, 479 F.2d 399, 402 (4th Cir. 1973) (holding that seller failed to rebut presumption that limitation on consequential damages in automobile sales contract was unconscionable); *Ford Motor Co. v. Tritt*, 430 S.W.2d 778, 781-82 (Ark. 1968) (characterizing truck manufacturer's disclaimer as unconscionable to the extent that it applied to personal injuries); *Collins v. Uniroyal, Inc.*, 315 A.2d 16, 18 (N.J. 1974) (declaring that limitation of consequential damages was unconscionable when driver of automobile was killed by tire blowout); *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116, 1120 (Okla. 1978) (invalidating limitation of remedy in personal injury case on grounds of unconscionability); see also *Gladden v. Cadillac Motor Car Div.*, 416 A.2d 394, 402 (N.J. 1980) (refusing to give effect to limitation provision in contract for sale of new car when purchaser suffered property damage).

Parts III, IV, and V discuss some potential consequences of permitting waivers of tort liability in transactions involving the sale of goods. Part III addresses the issue of market failure and describes various conditions that threaten the ability of buyers and sellers to allocate risks efficiently. For example, disparities in bargaining power may enable sellers to shift risks unilaterally to buyers in cases where buyers are not the best risk bearers. Sellers may also take advantage of information asymmetries about product-related risks in order to trick buyers into accepting risks that should properly be borne by sellers. Cognitive limitations pose another problem; psychological studies confirm that many consumers suffer from cognitive impairments that prevent them from evaluating risks objectively, even when they have complete and accurate information. Finally, risk-shifting arrangements between buyers and sellers may adversely affect third parties such as bystanders and employees. Arguably, these conditions, individually and in the aggregate, would seriously impair the market's ability to achieve allocative efficiency if waivers of tort liability were allowed.

Part IV examines the economic and policy considerations that underlie loss-spreading. If permitted, waivers of tort liability will seemingly violate the principle of loss-spreading by enabling sellers to shift losses to buyers, instead of spreading them to other consumers through higher prices. Nevertheless, this section concludes that most buyers also have the capacity to spread losses, principally by means of private or public insurance schemes such as Medicare.

Part V focuses on both corrective justice and the distributional effects of allowing buyers to waive their rights under tort law. Arguably, a rule that allows risk shifting is inconsistent with principles of corrective justice, because it allows the sellers of defective products to escape liability for their wrongful acts and, at the same time, prevents the victims of such wrongdoing from receiving any compensation for their injuries. In addition, if waivers of tort liability are permitted, accident costs will fall disproportionately on certain identifiable groups, such as accident-prone adults, young children, teenagers, employees, and bystanders. While these concerns have merit, this Article concludes that they can be addressed without significantly altering this proposal.

Finally, Part VI contends that any harmful effects associated with waivers of tort liability can be mitigated by various legal and practical considerations. First, federal regulatory standards, which cannot be waived by the parties, typically impose a relatively high floor on product

safety. Second, courts or legislatures may employ a variety of devices to discourage overreaching by product sellers. These include clear statement requirements and other formalities, categorical prohibitions against certain kinds of waivers, and liberal use of the unconscionability doctrine to invalidate unfair agreements. Finally, in many cases, physical limitations and marketing considerations will prevent sellers from using waivers even though it is legal to do so.

All of this supports the conclusion that waivers of tort liability would have a benign effect and therefore should be allowed in product sales. Consequently, existing principles of products liability law should be modified, either by legislation or by court action, to allow at least limited use of these waivers.

II. THE PRIMA FACIE CASE FOR ALLOWING WAIVERS OF TORT LIABILITY

The prevailing system of tort-based products liability does not allow buyers and sellers to allocate product-related risks by means of waivers or other contractual arrangements.²² This rule should be changed to permit waivers. It would be better for this change to be implemented by legislation at the state level, but it could also be done by court decision. Under this Article's proposal, contractual waivers of tort liability would function very much like disclaimers under warranty law. Just as a valid disclaimer would prevent an implied warranty of merchantability or fitness from arising, an express waiver would relieve product sellers of any duty that would otherwise arise under tort law.

This proposal would also allow for partial waivers of tort liability. For example, buyers could assume responsibility for injuries that occurred after a certain period of time, or they could waive their right to recover for injuries that were attributable to specified kinds of product misuse. Buyers and sellers could also agree to limit tort remedies. For example, buyers might waive their right to sue for punitive damages, but retain their right to recover compensatory damages. Buyers and sellers might even agree to limit compensatory damage claims by agreeing to fixed payment schedules or damage caps. Finally, the parties might agree to opt out of the conventional litigation process altogether by providing for mandatory arbitration.

The remainder of this section summarizes the case for changing the current rule to one that will allow waivers of tort liability between buyers and sellers. The first argument is based on the concept of economic efficiency. According to this argument, waivers of tort

22. See *supra* notes 1-7 and accompanying text.

liability are socially useful because competitive markets can allocate resources more efficiently than collective approaches such as tort law. The second argument focuses on personal autonomy and related moral values. It assumes that freedom and personal autonomy are essential to our humanity. It also posits that the concept of personal autonomy supports the right of individuals to take risks. Moreover, personal autonomy embraces the right of individuals to exercise free choice by entering into mutually beneficial agreements with others.

A. *The Economic Efficiency Argument*

Resources can be allocated collectively by the government or they can be allocated by individual transactions in competitive markets. The current system of products liability reflects a collective judgment that most product-related risks should be shifted to product sellers. In contrast, a more market-oriented system of products liability would allow buyers and sellers to shift these risks to the party who is in the best position to minimize them, spread them, or avoid them altogether.

This section starts with the assumption that market transactions maximize welfare by shifting resources from less productive to more productive uses.²³ According to conventional economic theory, individuals place different values on goods and services; consequently, voluntary exchanges increase welfare by enabling people to exchange less valued goods or services for those that they value more.²⁴ Although such a mutually beneficial exchange can occur by means of barter,²⁵

23. See Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U. L. REV. 303, 310 n.38 (1983-1984) (stating that a market is economically efficient if it "allocates each resource to its highest-valued use").

24. A particular allocation of resources is said to be Pareto-optimal when no one's welfare can be increased without harming another. See *id.* at 312. When the existing allocation of resources is not Pareto-optimal, an allocative change that makes no one worse off and at least one person better off is said to be Pareto-superior. See Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221, 226 (1980); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1979-1980). Thus, a Pareto-superior reallocation of resources would be economically desirable in the sense that the new allocation of resources would be closer to Pareto-optimality than the former allocation. See JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 182-83 (1990).

25. For example, assume that A likes apples more than oranges, while B likes oranges more than apples. Assume further that A and B each have five apples and five oranges. If A exchanges his oranges with B in return for B's apples, then A and B will both be better off.

individuals in more developed economies ordinarily use money to purchase the goods and services they desire.²⁶ In the aggregate, therefore, consumers create a demand for goods and services based on their individual preferences, while producers attempt to profit from this demand by providing appropriate amounts of these goods and services.²⁷ Thus, if market transactions are freely allowed, resources should be allocated to their most desired uses and societal wealth should be maximized.²⁸

Risks can be allocated in much the same way that other costs and benefits are allocated. That is to say, the question of what level of risk is appropriate and who should bear this risk can be determined collectively by legislatures, administrative agencies, or courts, or these questions can be left to market forces.²⁹ Arguably, when risks are allocated by the market, someone will voluntarily agree to accept a risk only when he enjoys a comparative advantage as a risk bearer.³⁰ On the other hand, when risks are allocated collectively, it is possible that those decisions will be influenced by political or distributional considerations and will not be based on economic considerations alone. If markets are not seriously impaired, they will generally allocate risks more efficiently than non-market mechanisms.

These principles also apply to the allocation of product-related risks. When products are bought and sold, someone must bear the various economic and physical risks that are associated with their use. Product

26. For example, assume that *A* likes apples and is willing to pay up to \$5.00 a bushel for them. *B* grows apples and is willing to sell them for as little as \$4.00 a bushel. If *A* buys a bushel of apples from *B* at \$4.00 a bushel (or at any price between \$4.00 and \$5.00 a bushel), both *A* and *B* will be better off as a result of the exchange. The \$4.00 price that *B* is willing to accept represents *B*'s cost of production plus a minimum acceptable profit. The difference between what *A* actually pays for the apples and the amount that he would be willing to pay above the actual price paid represents a "consumer surplus" that inures to the benefit of *A*. See Kim D. Larsen, Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045, 2054 (1984) (observing that the consumer surplus "represents the positive difference between the price consumers are willing to pay for a product and the market price they actually pay").

27. See A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1666 (1973-1974).

28. See Mark A. Kaprelian, Note, *Privacy Revisited: Tort Recovery by a Commercial Buyer for a Defective Product's Self-Inflicted Damage*, 84 MICH. L. REV. 517, 526 (1985-1986) ("The underlying economic principle is that rational decisionmakers will make exchanges that maximize utility.").

29. See generally Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1283-319 (1980) (discussing risk management under free market, tort law, and government regulatory regimes).

30. See Roland N. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 31 (1970) ("Voluntary exchange puts the risk bearing on the shoulders of the person with a comparative advantage in bearing it.").

sellers are often the best risk bearers. Their control over the design and production process enables product sellers, particularly manufacturers, to prevent or reduce many product-related risks.³¹ Moreover, sellers typically have greater resources available for compensation and are also able, in many instances, to obtain cheaper insurance than individual consumers.³²

Nevertheless, there may be situations in which consumers have superior risk-bearing capacity. First of all, consumers vary considerably in their attitudes about risk. Differences in age, wealth, or psychological temperament induce some consumers to be risk seekers, while causing others to be risk avoiders.³³ Therefore, it makes sense to offer choices, rather than treating all consumers alike. Waivers of tort liability satisfy this objective by enabling risk seekers to assume more responsibility for product-related injuries, while allowing risk avoiders to retain their rights under tort law.

Second, differences in experience, skill, education, or product use patterns enable some consumers to handle some risks more effectively than others. Thus, the risks associated with a particular product may be so slight for certain consumers that the economic benefit of a reduced sale price would exceed the expected harm to them from a product-related injury. For other consumers, however, the potential risks involved may be sufficiently great that they would not want to give up the protection provided to them by products liability law.

Third, many consumers already have adequate insurance against product-related risks and, therefore, are less concerned about bearing these risks than consumers who have either less insurance protection or none whatsoever. Clearly, these adequately insured consumers would prefer to spend their money on something other than duplicative and unnecessary protection.³⁴ Furthermore, there is evidence to suggest that

31. See David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 711 (1980) ("Manufacturers today, especially those of products that are technologically complex, often are in a far better position than consumers to discover, evaluate, and act upon, dangers that inhere in the products that they make and sell.").

32. See James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 934 (1981) (stating that "manufacturers are believed to be better able to obtain insurance than are consumers, and are assumed to be able to pass on most, if not all, of the insurance costs by raising the prices of products").

33. See Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 3 (1993) (discussing why some people prefer risk).

34. See Owen, *supra* note 31, at 707 (observing that it may not be "fair (or

many consumers do not want to pay for insurance against future pain and suffering.³⁵ To the extent that tort liability is considered to be a form of insurance, it forces consumers to purchase protection against pain and suffering whether they want it or not.³⁶ Waivers of tort liability for those who are otherwise adequately insured would avoid this problem.

Thus, a market-oriented system of products liability can potentially accommodate a variety of individual preferences with respect to product safety by offering consumers a wide range of risk-bearing options.³⁷ In contrast, the tort system is far less flexible. The initial risk allocation decision, which places most product-related risks on the seller, cannot be overridden. This decision will necessarily be inefficient in cases where consumers are actually the superior risk bearers.³⁸ Thus, a liability regime that allows buyers and sellers to allocate product-related risks by private agreement is potentially more efficient with respect to risk allocation than one which shifts such risks irrevocably to the seller.

B. Personal Autonomy

The principle of personal autonomy demands that individuals be free to shape their own destinies.³⁹ This means that people must have the ability to make meaningful choices in their lives without having to justify themselves to others.⁴⁰ The concept of personal autonomy has

efficient) to penalize the prudent consumer who insures himself through health and wage insurance plans by forcing him to pay again through higher prices to overinsure himself and also to insure his less prudent neighbors").

35. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1547 (1987) (declaring that "there is no market for pain and suffering insurance in any society in the world"); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 366 (1988) (observing that "the more purely mental the loss, the less likely a consumer will want to insure against it"). But see Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1791 (1995) (arguing that "the evidence supports the conclusion that, although several significant impediments prevent the emergence of a robust market for insurance against pain-and-suffering losses, consumers in fact do demand such insurance").

36. See Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 691 (1997) (stating that "to the extent that tort law compensates for nonpecuniary losses, it forces consumers to obtain more insurance coverage than they would willingly purchase on a first-party basis").

37. See Pierce, *supra* note 29, at 1283-84 ("In theory, the market . . . can reflect any individual's preference for a high degree of safety while simultaneously permitting others individuals to trade safety for convenience, speed, or whatever else the individual values more than an increment of safety.").

38. See Kaprelian, *supra* note 28, at 537-38 ("As a matter of economic efficiency, allocating the risk of all product defects to sellers by law may prevent the parties from taking advantage of the buyer's superior ability to avoid certain risks.").

39. See JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 23 (1996).

40. See Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN.

deep roots in philosophy and political theory. Intellectuals such as Immanuel Kant, John Stuart Mill, and Friedrich von Hayek have all stressed the desirability of allowing human beings to control their own lives.

The eighteenth century German philosopher Immanuel Kant was one of the first to recognize the moral significance of personal autonomy. Kant characterized as "autonomous" those creatures who possess the capacity to make rational choices.⁴¹ According to Kant, only human beings fit this description. This ability to make free and rational choices thus enables human beings to act in a moral way, since only voluntary acts have moral significance.⁴² Kant did not believe that individuals are entirely free to do as they please; rather, they are subject to moral obligations and duties, and only those who recognize and act in accordance with moral laws can be considered truly autonomous.⁴³ Nevertheless, Kant recognized that if human beings are to fulfill their potential as moral agents, society must respect their right to make choices, even though these choices might not increase either their happiness or their economic well-being.⁴⁴

The nineteenth century English proponent of utilitarianism, John Stuart Mill, also spoke of the need for autonomy and personal freedom. However, unlike Kant, Mill was more concerned with autonomy as an instrument to liberate the human spirit and less with its role in the achievement of moral rectitude. In his book *On Liberty*, Mill wrote:

L. REV. 385, 395 (1996) (declaring that autonomy requires that "individuals have real, meaningful, and valuable options in life and that they enjoy the capacity to choose among them").

41. See MURPHY & COLEMAN, *supra* note 24, at 78.

42. See Thomas C. Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580, 581 (1987) ("Autonomy in Kant's sense is moral self-government, freedom from enslavement by inclination and desire.").

43. See J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 441 (1987) (declaring that, according to Kant, "one has autonomy just in so far as one does in fact make one's choices, not on the basis of one's interests, but out of respect for the demands of morality"); Henry J. Staten, *The Deconstruction of Kantian Ethics and the Question of Pleasure*, 16 CARDOZO L. REV. 1547, 1547-48 (1995) ("It is the job of rationality to recognize moral obligation, and the individual who recognizes it and acts in accordance with it is conceived by Kant as acting 'freely' or 'autonomously,' which for Kant means acting like a rational being and not an animal.").

44. See MURPHY & COLEMAN, *supra* note 24, at 71.

[Liberty] requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.⁴⁵

In this section of *On Liberty*, Mill not only identified the social benefits of personal freedom and free choice, but also pointed out that in a free society people must be allowed to make what appear to be foolish or irrational choices. The Austrian economist and political scientist Friedrich A. Hayek echoed these sentiments in his book, *The Road to Serfdom*:

From this the individualist concludes that the individuals should be allowed, within defined limits, to follow their own values and preferences rather than somebody else's; that within these spheres the individual's system of ends should be supreme and not subject to any dictation by others.⁴⁶

In *On Liberty*, John Stuart Mill made the following observation: If society permits people to make improvident decisions, these individuals must be prepared to live with the consequences if they fail to exercise good judgment.⁴⁷ Thus, Mill acknowledged that autonomy could be a two-edged sword: it offered the prospect of happiness, moral development, and prosperity, but it also could lead to disappointment, grief, and economic ruin.

The concept of personal autonomy has not been confined solely to the domain of philosophers; it has also engaged the attention of political thinkers and practical politicians since the early days of the Republic.⁴⁸ Thus, in the *Declaration of Independence*, Thomas Jefferson declared that "all Men are created equal" and "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."⁴⁹ Later, Jefferson wrote that "[t]he true foundation of republican government is the equal right of every citizen, in his person and property, and in their management."⁵⁰ In the same

45. JOHN STUART MILL, *ON LIBERTY* 12 (Alburey Castell ed., Appleton-Century-Crofts, Inc. 1947) (1859).

46. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 59 (1944).

47. See MILL, *supra* note 45, at 12.

48. See Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305, 1343 (contending that "Jefferson's attempted wall insulating noninjurious acts from government regulation was thus designed primarily to give broad recognition to the value of human autonomy, the first principle of self-government").

49. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

50. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE PORTABLE JEFFERSON 552, 555 (M. Peterson ed., 1975), quoted in Nichol, *supra* note 48,

vein, Jefferson argued that government must allow individuals to "regulate [their] own pursuits of industry and improvement" and recognize and uphold the choices they make.⁵¹ Likewise, James Madison declared that a person enjoys "an equal property in the free use of his faculties and free choice of the objects on which to employ them."⁵² Even today, despite the current popularity of communitarian theories among academic elites,⁵³ traditional attitudes about personal autonomy continue to resonate strongly throughout our political and popular culture.⁵⁴

Furthermore, American courts have long recognized that personal autonomy is an interest that is entitled to legal protection.⁵⁵ As a number of courts have acknowledged, many of the constitutional guarantees found in the Bill of Rights and the Due Process Clause of the Fourteenth Amendment are designed to protect the personal autonomy of individuals against unwarranted interference by institutions of government.⁵⁶ For example, the Supreme Court has held that the

at 1344.

51. Nichol, *supra* note 48, at 1348 (quoting Thomas Jefferson).

52. JAMES MADISON, IN NATIONAL GAZETTE (Mar. 29, 1792), reprinted in THE COMPLETE MADISON: HIS BASIC WRITINGS, at 267 (Saul K. Padover ed., 1953), quoted in Nichol, *supra* note 48, at 1344.

53. See Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 652-54 (1995) (discussing communitarianism).

54. See Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 IND. L.J. 727, 727 (1993) ("To the liberal individual (that is, the typical American), [autonomy] means the ability and the opportunity to *choose* one's course of action and to *act* to effectuate one's choice."); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 833 (1983) ("Notions of individualism still appeal to us, not only because of the power of our traditions, but also because such notions are, at least in part, a true description of human behavior and aspiration."); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 794-95 (1983) ("Our society is committed to the principle that, as long as they do not violate the rights of others, individuals may pursue their own conceptions of the good."); Rosa Eckstein, Comment, *Towards a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended*, 45 U. MIAMI L. REV. 843, 846 (1991) (conceding that "notions of rights and individualism have deep roots in American political culture").

55. Courts often use the term "privacy" or "liberty" to describe interests that they consider to be aspects of personal autonomy. See *infra* notes 56-66 and accompanying text.

56. See U.S. CONST. amend. I-X, XIV. See, e.g., *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (declaring that "outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases" (quoting *Edwards v. California*, 314 U.S. 160, 197 (1941))); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that liberty includes the right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free

Constitution protects reproductive decisions⁵⁷ and marital choices.⁵⁸ Courts have also concluded that public officials cannot force patients in their care to take anti-psychotic drugs⁵⁹ or to submit to life-prolonging medical treatments.⁶⁰ Other constitutionally protected aspects of personal autonomy include the right of individuals to make educational choices,⁶¹ to travel outside the country,⁶² to control their dress and personal appearance,⁶³ and to do whatever they choose in the privacy of their own homes.⁶⁴ Moreover, the interest in personal autonomy protects

men"); *Richards v. Thurston*, 424 F.2d 1281, 1284 (1st Cir. 1970) (concluding that "the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual"); *Ravin v. State*, 537 P.2d 494, 509 (Alaska 1975) (holding that the state "cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals").

57. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (upholding the right of a woman to have an abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (invalidating state restriction on distribution of contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down state ban on the sale of contraceptives to married couples); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (repudiating law that authorized state officials to sterilize certain classes of criminals).

58. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

59. See *Mills v. Rogers*, 457 U.S. 291, 299 (1982) (assuming a constitutionally protected interest); *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976); *Rennie v. Klein*, 462 F. Supp. 1131, 1145 (D.N.J. 1978) ("Individual autonomy demands that the person subjected to the harsh side effects of psychotropic drugs have control over their administration.").

60. See *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 301 (Ct. App. 1986) ("The right to refuse medical treatment is basic and fundamental."); *Barber v. Superior Court*, 195 Cal. Rptr. 484, 489 (Ct. App. 1983) (concluding that "a competent adult patient has the legal right to refuse medical treatment"); *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976) (holding that the right of privacy "is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances").

61. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (declaring that the concept of liberty "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only"); *Meyer*, 262 U.S. at 399 (striking down a state statute that prohibited the teaching of foreign languages in primary schools).

62. See *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (invalidating State Department regulations that attempted to limit the ability of suspected communists to travel abroad).

63. See *Stull v. School Bd.*, 459 F.2d 339, 347 (3d Cir. 1972) (holding that "the governance of the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment"); *Richards v. Thurston*, 424 F.2d 1281, 1284 (1st Cir. 1970) (striking down a high school ban on long hair); *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972) ("The spectre of governmental control of the physical appearances of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty.").

64. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975) (concluding that the right to privacy "would encompass the

the right of individuals to associate with others in order to advance their common social or political agendas.⁶⁵ Finally, courts have occasionally even invoked personal autonomy interests as a basis for invalidating excessive government regulation of private economic activity.⁶⁶

Tort law also protects personal autonomy interests against unwarranted interference by others.⁶⁷ Torts such as battery, false imprisonment, trespass to land, trespass to chattels, and conversion have traditionally protected individuals and their property from the direct

possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest").

65. See *NAACP v. Button*, 371 U.S. 415, 430 (1963) (stating that "there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity"); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (arguing that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (declaring that "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends").

66. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."), *overruled by Day-Brite Lighting, Inc. v. State*, 342 U.S. 421 (1952); *Noble v. Davis*, 161 S.W.2d 189, 191 (Ark. 1942) ("The legislature has no power, under the guise of police regulations, arbitrarily to invade the personal rights and liberty of the individual citizen, to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights."). It must be admitted, however, that courts are now much more tolerant of state economic regulation. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-91 (1955) (upholding state law that prohibited opticians from fitting eyeglasses without prescription from ophthalmologists or optometrists); *Day-Brite Lighting*, 342 U.S. at 424-25 (upholding state statute that required employers to allow employees time off with pay in order to vote in elections); *Olsen v. Nebraska*, 313 U.S. 236, 243-47 (1941) (upholding state law that limited fees charged by private employment agencies); *West Coast Hotel v. Parrish*, 300 U.S. 379, 386-88, 400 (1937) (upholding state minimum wage law for women); *Nebbia v. New York*, 291 U.S. 502, 509 (1934) (upholding state regulation of whole-milk prices); see also Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36-40 (discussing the decline of substantive due process as a limitation on economic regulation).

67. See Judges, *supra* note 33, at 63 (contending that tort law "generally seeks to protect the autonomy of plaintiffs by compensating for and deterring the forced intrusions of defendants' tortious conduct").

application of physical force. Moreover, in recent years some tort doctrines have emerged that more explicitly vindicate personal autonomy. Perhaps the most significant of these new doctrines is that of informed consent, which requires physicians to fully inform patients about the risks and benefits of alternative types of treatment.⁶⁸ Arguably, the duty to warn in products liability law⁶⁹ is also intended, at least in part, to protect personal autonomy.⁷⁰

As the foregoing discussion has suggested, the concept of personal autonomy permits individuals to do many things as long as their activities do not harm others. However, two additional aspects of personal autonomy are particularly relevant to the waiver of liability issue: the first involves voluntary risk-taking and the second involves freedom of contract.

Risk-taking is part of human nature; we routinely take risks in our daily lives.⁷¹ Some individuals voluntarily assume risks for efficiency reasons—because the expected gain from a particular choice appears to them to outweigh its expected losses. Such risk-taking is properly justified on grounds of economic efficiency. For other people, however, taking risks is not just a matter of economic efficiency; it is also an exercise of their personal autonomy.⁷² For these individuals, having the power to encounter physical risks provides immense psychic satisfaction and, more importantly, helps to define their identity, character, and personality.⁷³ Many of the great explorers, military figures, and adventurers of yore exemplify this spirit of freedom and self-reliance.⁷⁴ Even today, many people engage in potentially dangerous sports such as mountain climbing, white-water rafting, skydiving, automobile racing, bungee jumping, and hang gliding. For these people, risk-taking is an affirmation of their personal autonomy and independence.

Finally, the principle of personal autonomy supports the right of

68. See *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972); *Truman v. Thomas*, 611 P.2d 902, 906 (Cal. 1980); *Largey v. Rothman*, 540 A.2d 504, 506 (N.J. 1988); *Scott v. Bradford*, 606 P.2d 554, 556-57 (Okla. 1979).

69. See generally M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221 (1987) (discussing the duty to warn).

70. See Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 913-16 (1994) (discussing the duty to warn in products liability law and its relation to the concept of consent).

71. See Susan Rose-Ackerman, *Progressive Law and Economics—and the New Administrative Law*, 98 YALE L.J. 341, 355 (1988).

72. See Judges, *supra* note 33, at 3.

73. See *id.*

74. Among military figures, Alexander the Great, Julius Caesar, and Napoleon come to mind as commanders who were willing to take chances on the battlefield. Explorers, such as Ferdinand Magellan, Sir Richard Burton, and Sir Henry Stanley, were also risk-takers. Adventurers, who carved out empires in North and South America against great odds, include Hernando Cortes, Hernando de Soto, and Francisco Pizarro.

individuals to maximize their economic welfare by entering into contractual agreements with others.⁷⁵ If each individual is morally entitled to utilize property in a way that increases wealth, it follows that two or more persons should be able to enter into mutually beneficial exchanges or agreements in order to achieve this same goal.⁷⁶ Indeed, courts have affirmed this notion of freedom of contract on numerous occasions, particularly when no countervailing governmental interest is directly involved.⁷⁷

Personal autonomy is an important moral value for most Americans. This principle supports the rights of individuals to take risks and contract with each other in order maximize wealth. Consequently, risk seekers and risk creators should be free to contract with each other in order to shift risks, including the risk of personal injury, in whatever manner best suits their interests.⁷⁸

75. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 475 (1979-1980) ("The libertarian theory of contract law is premised upon the belief that individuals have a moral right to make whatever voluntary agreements they wish for the exchange of their own property, so long as the rights of third parties are not violated as a result.").

76. See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293-94 (1975) (suggesting that "if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world").

77. See, e.g., *Milton Constr. Co. v. State Highway Dept.*, 568 So. 2d 784 (Ala. 1990). The decision states:

Since the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts of justice is to maintain and enforce contracts rather than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare.

Id. at 788 (emphasis omitted) (quoting 17 AM. JUR. 2D *Contracts* § 178 (1964)); *AFSCME/Iowa Council 61 v. State*, 484 N.W.2d 390, 394 (Iowa 1992) ("Freedom of contract is a basic right, protected under the liberty concept of both the Fifth and Fourteenth Amendment [D]ue [P]rocess [C]lauses." (quoting 1 ANTIEAU, MODERN CONSTITUTIONAL LAW § 3:22, at 244 (1969))); *Rossman v. 740 River Drive*, 241 N.W.2d 91, 92 (Minn. 1976) (stating that "public policy requires that freedom of contract remain inviolate except only in cases when the particular contract violates some principle which is of even greater importance to the general public").

78. A number of courts have upheld motorcycle helmet laws on the theory that third parties are adversely affected when motorcyclists are injured. See, e.g., *Simon v. Sargent*, 346 F. Supp. 277, 279 (D. Mass. 1972); *State ex rel. Colvin v. Lombardi*, 241 A.2d 625, 627 (R.I. 1968); see also Comment, *Due Process—Statute Requiring Motorcyclist to Wear Crash Helmet Is Unconstitutional*, 82 HARV. L. REV. 469, 471 (1968-1969). For example, spouses and other family members suffer financially and emotionally when the family wage earner is no longer able to work. In addition, the

III. ECONOMIC EFFICIENCY CONCERNS

Under the current liability regime, judges, juries, and regulatory agencies determine the acceptable level of product safety. In contrast, a more contract-oriented liability regime would allow the level of product safety to be determined, at least to some extent, by market forces. Ideally, such an arrangement would lead to an optimal level of investment in product safety based on consumers' willingness to pay. However, markets do not always operate efficiently. Significant sources of market failure include: (1) disparities in bargaining power between buyers and sellers; (2) information asymmetries between sellers and consumers; (3) cognitive limitations on the part of consumers; and (4) negative externalities. When any of these conditions presents a serious obstacle to market operations, the task of changing the current liability regime becomes particularly challenging.

A. *Disparities in Bargaining Power*

Monopolistic or oligopolistic conditions are said to prevent markets from operating efficiently. A pure monopoly exists when only one firm produces or sells a particular product;⁷⁹ an oligopoly exists when several firms compete in manufacturing or selling a commodity.⁸⁰ While pure monopolies are rare in this country, a number of industries can be fairly characterized as oligopolistic, although foreign competition has reduced their number somewhat in recent years.⁸¹ However, even in relatively competitive market environments, individual consumers may not have sufficient market power to secure adequate protection against personal injury through the bargaining process.⁸² Today, most products are sold

government is forced to provide medical services or disability payments for injured parties who cannot afford to pay these costs on their own. Of course, this argument could be used to support almost any type of paternalistic regulation. In this Article's view, government restrictions on risky conduct can be based legitimately on protecting third parties from *physical* harm, but they should not be justified on the basis of protecting third parties, including the public, from *pecuniary* losses.

79. See Thomas J. Holdych & George Ferrell, *Individual Negotiation of Warranty Disclaimers: An Economic Analysis of an Assumedly Market Enhancing Rule*, 13 U. PUGET SOUND L. REV. 237, 248 (1990).

80. See THOMAS M. CARROLL, MICROECONOMIC THEORY: CONCEPTS AND APPLICATIONS 309 (1983).

81. For example, many drug companies have substantial market power because of patent protection for their products. The cigarette industry is also clearly oligopolistic in character. See Richard C. Ausness, *Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085, 1111 (1990).

82. See Michael B. Metzger, *Disclaimers, Limitations of Remedy, and Third Parties*, 48 U. CIN. L. REV. 663, 687 (1979) ("The average consumer generally lacks substantial bargaining power."); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 328 (1963-1964) ("The comparative helplessness of the modern

through marketing arrangements that provide little opportunity for individual bargaining.⁸³ Thus, if waivers of tort liability were allowed, product sellers, instead of competing for consumers' business by providing meaningful choices, might offer consumers nothing more than self-serving adhesion contracts that take away existing rights without giving anything meaningful in return.⁸⁴

However, product sellers should not be entitled to trample over the interests of consumers so easily. In the first place, with the entry of foreign producers into the American consumer market, there are more sellers than there were in the past. For example, consumer goods from such countries as Canada, China, Germany, Great Britain, India, Japan, Korea, and Mexico are now commonly exported to American markets; this trend is likely to continue, as the North American Free Trade Agreement (NAFTA) and General Agreement of Tariffs and Trade (GATT) treaties have opened American markets even farther to foreign competition.

In addition, thousands of new domestic producers entered the business force during the last decade. Although many of these companies are concentrated in high-tech areas, such as computer software, data transmission, transportation, and biotechnology, new companies have also entered less glamorous sectors of the economy. While the entry of additional producers, either foreign or domestic, into American markets does not guarantee that these markets will operate efficiently, increasing the number of firms in the economy does tend to lead to greater competition and consumer choice. Finally, giant retail sellers, like Sears

consumer generally eliminates the possibility of a free and informed choice to assume a risk, of a course of negotiations which may be evidenced in a contract, or of a true bargain.").

83. See Kronman, *supra* note 54, at 770-71 ("Consumer contracts are often characterized as adhesive, since the consumer has little or no control over the terms of the agreement.").

84. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (declaring that firms with market power often use form contracts to impose unfavorable terms on weaker parties); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960), which states:

Undoubtedly the practice [of offering product warranties] exists, on a large scale; but it is limited, on the part of almost every one, to replacement, repair, or return of the purchase price to make good the original bargain; and it does not extend to compensation for injuries to the person of the buyer, or his other property.

Id. at 1119.

or Walmart, also provide a degree of protection against unreasonable exercises of market power by product manufacturers. Unlike individual consumers, these large retailers have considerable economic leverage. Since large retail enterprises depend on repeat business, they have an incentive to maintain a high level of customer satisfaction by selling safe, high-quality merchandise. Consequently, large retailers can be expected to resist efforts by manufacturers to degrade product quality or shift risk excessively to consumers.

Furthermore, recent research, focusing on the behavior of markets rather than the conduct of individual buyers, indicates that consumers as a group may have substantial influence over the behavior of product sellers—even though they have little economic power as individuals.⁸⁵ First of all, consumers can often find meaningful differences in contract terms among various sellers if they are willing to shop around for the best deal. Moreover, if enough consumers engage in this behavior to sustain a competitive equilibrium, other consumers who do not shop around will also benefit from their efforts because the terms offered to comparison shoppers will also be made available to all potential buyers.⁸⁶ Finally, it appears that product sellers are generally willing to create safe and high-quality products if they believe that consumers will pay for them.⁸⁷

Thus, if waivers of tort liability are allowed, it is unlikely that product sellers will try to force unwanted risks onto consumers. Instead, every reason exists to believe that product sellers will take advantage of waivers to offer consumers more choices with respect to risk allocation.

B. Information Asymmetries

In order to make economically rational choices about risk allocation, consumers must possess complete and accurate information about product safety. Unfortunately, consumers are often unable to obtain sufficient information to make intelligent decisions about the products they buy.⁸⁸ In contrast, product sellers are familiar with the design and

85. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 608 (1982) ("Consumers exercise power in the market not through their conduct during individual transactions, but through the mechanism of demand, backed by dollars.").

86. See Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1450 (1983) ("Hence, if enough shoppers exist to sustain a competitive equilibrium, that the nonshoppers do not read is irrelevant; they benefit from the shoppers' efforts.").

87. See *id.* at 1414.

88. See James M. Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64,

quality of their wares and, therefore, can usually predict how dangerous they will be.⁸⁹ However, not only are product sellers reluctant to disclose what they know about the safety characteristics of their products,⁹⁰ but on occasion they have actively misrepresented the quality of their products to the public.⁹¹ Moreover, even when accurate information is available, consumers often are unwilling to expend the time and energy necessary to search for it, particularly when they are buying inexpensive household products.⁹²

These information asymmetries may affect the efficiency and fairness of contract terms, including waivers. Waivers normally are located within form contracts and are not subject to negotiation. For consumers, the purchase of a product is typically a one-shot transaction, and the costs of closely examining the contract terms will not exceed the

71-72 (1970-1971) ("The complex information required in discriminatory choices among product qualities is costly to produce, and individuals, as independent buyers, may not be willing to purchase such information in optimally preferred quantities."); Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 392 (1990) (concluding that "the consumer is rarely in as good a position as the seller to know the pitfalls and dangers of the product"). But see Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819, 828 (1992) ("No specific studies establish that consumers have or lack sufficient information to make optimal decisions respecting product risks.").

89. See Owen, *supra* note 31, at 711 ("Manufacturers today, especially those of products that are technologically complex, often are in a far better position than consumers to discover, evaluate, and act upon, dangers that inhere in the products that they make and sell."); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1289 (1974) (declaring that "producers possess considerable information about their goods, notably with respect to safety considerations, that is not available to consumers").

90. See Lindley J. Brenza, Comment, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. CHI. L. REV. 277, 291 (1987) (concluding that manufacturers may be "unwilling to disclose information from their greater experience with the product to the consumer").

91. See Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965). Cowan states:

To put the matter bluntly, a large proportion of mass products are consciously made as inferior as the traffic will bear and are advertised by conscious misrepresentation as far superior to their known quality. The combination of low quality production and high quality lying makes it impossible for those using the products of mass manufacture to distinguish good merchandise from bad without the services of a general testing laboratory.

Id. at 1087.

92. See Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1129 (1983).

benefits.⁹³ For sellers, however, the contract, including waiver provisions, is a repeat transaction upon which sellers will devote considerable effort and resources.⁹⁴ Consequently, consumers, deprived of adequate information about product quality and contract terms, may be unable to determine whether the level of protection offered by product sellers is fairly priced or appropriate to their needs.

On the other hand, product safety information is now more readily available to buyers than it was in the past. For example, government agencies and private organizations, such as the Consumer Union, transmit a great deal of information to the public in printed form and through the Internet. In addition, recent research suggests that warranties and other contract terms may serve as an indicator of product quality and safety.⁹⁵ This is because a producer whose product is more reliable than average can afford to offer greater warranty protection than its competitors because its warranty costs will be lower.⁹⁶ This enables consumers to make relatively informed judgments about product quality simply by looking at warranty terms, even though they have had no firsthand experience with a particular product.⁹⁷ The same principle presumably applies to waivers, which resemble warranties because they tell us how much confidence sellers have in their products.⁹⁸ For example, if Manufacturer A attempted to shift more product-related risks to buyers than its competitor, Manufacturer B, a consumer would rightly suspect that Manufacturer A's product was more dangerous than Manufacturer B's.

93. See William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 545 (1985) (stating that it may be inefficient for a consumer to study a disclaimer when expected damages are low).

94. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) (discussing why sellers invest more than buyers in sales contracts).

95. See George L. Priest, *A Theory of Consumer Product Warranty*, 90 YALE L.J. 1297, 1303 (1981).

96. Professor Priest states:

A consumer, however, may look to the warranty as a "signal" of product reliability because reliability is correlated negatively with the costs of warranty coverage; that is, the more reliable the product, the lower the costs of warranty coverage for the manufacturer, and the more extensive the coverage for the consumer.

Id. (footnote omitted).

97. See *id.* "Thus, although a consumer has neither experience with nor knowledge of a product, he may infer its mechanical reliability by inspecting the terms of the warranty alone." *Id.*

98. This is not to say that a seller will not resort to double-talk or "legalese" to obfuscate the true nature of the warranty or waiver they are offering to the buyer.

C. Cognitive Limitations and Heuristic Biases

Economists typically employ a "rational choice" or "expected utility" model of decision-making to describe the behavior of consumers in the marketplace. This model assumes the existence of rational persons who make choices that are intended to maximize their overall utility.⁹⁹ When risk or uncertainty is involved, rational people take into account the probability of various alternative events occurring.¹⁰⁰ In the real world, however, rational decision-making is often constrained by the inability of human beings to process information properly.¹⁰¹ These cognitive limitations cause people to make risk-allocation decisions that are contrary to the laws of probability or expected utility.¹⁰² For example,

99. See Hasen, *supra* note 88, at 394. According to Hasen:

The central methodological actor of economics is *homo economicus*, a "rational person" possessing complete and transitive preferences. *Homo economicus* computes the costs and benefits of alternative choices based on her personal preferences, which economists take as given and stable over time. That is, in pursuit of self-interest, she seeks to maximize her subjective expected utility.

Id. (footnote omitted). Hasen also observes that "[i]n conditions of risk or uncertainty, *homo economicus*'s subjective view of the probability of an event occurring is calculated into the making of a decision." *Id.*

100. See Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 750 (1990). Professors Noll and Krier state that when the various outcomes of an action are uncertain, the action must be evaluated according to its expected value. The decision maker then identifies each possible outcome and assigns it a probability. Finally, the decision maker calculates the expected value, or probability-weighted sum, of all of these possible outcomes. *See id.*

According to Hasen, the rational choice model assumes the existence of certain characteristics about the decision-making process under conditions of risk or uncertainty: (1) cancellation, (2) transitivity, (3) dominance, and (4) invariance. The cancellation assumption posits that if event *A* is preferable to event *B*, then the probability of event *A* occurring is preferable to the probability of event *B* occurring. According to the transitivity assumption, if event *A* is preferable to event *B*, and event *B* is preferable to event *C*, then event *A* is also preferable to event *C*. The dominance assumption posits that if a particular alternative is preferable to another in one situation and at least as good as this second alternative in all other situations, then the first alternative should be chosen. Finally, the invariance assumption holds that rational persons will make the same choice among various alternatives regardless of how these alternatives are represented. *See* Hasen, *supra* note 88, at 394 n.10.

101. This condition is often referred to as "bounded rationality." Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1199 (1994).

102. *See* Eisenberg, *supra* note 94, at 213 (declaring that "actors characteristically violate the standard rational-choice or expected-utility model, due to the limits of cognition"); *see also* Baruch Fischhoff, *Cognitive Liabilities and Product Liability*, 1 J.

empirical evidence shows that people frequently overestimate their ability to manage risk¹⁰³ or assume that generally applicable risks will somehow not apply to them.¹⁰⁴ People also tend to reject or discount information that contradicts preexisting beliefs or biases.¹⁰⁵ In addition, many individuals give too little weight to future costs or benefits while overestimating the value of present costs and benefits.¹⁰⁶ Furthermore, people tend to disregard very low probability risks¹⁰⁷ and refuse to take precautions against them.¹⁰⁸

In addition, people use certain decision-making rules, known as

PROD. LIAB. 207 (1977). Fischhoff states that

people have a great deal of difficulty making proper decisions under conditions of uncertainty, in part because probabilistic processes are counterintuitive, in part because they lack proper training in decision making, and in part because they lack the cognitive capacity for combining the large amounts of information often involved in making decisions.

Id. at 207-08.

This Article's treatment of cognitive limitations and heuristic biases is based largely on discussions of these subjects in law reviews. Those who wish to peruse the social science literature should consider looking at some of the following works: JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE (1984); HERBERT A. SIMON, 2 MODELS OF BOUNDED RATIONALITY (1982); Paul Slovic et al., *Regulation of Risk: A Psychological Perspective*, in REGULATORY POLICY AND THE SOCIAL SCIENCES 241 (Roger G. Noll, ed., 1985); Amos Tversky & Daniel Kahneman, *Rational Choices and the Framing of Decisions*, in DECISION MAKING: DESCRIPTIVE, NORMATIVE, AND PRESCRIPTIVE INTERACTIONS 167 (David E. Bell et al. eds., 1988); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493 (1979).

103. See Noll & Krier, *supra* note 100, at 754 (concluding that "people tend to underestimate the degree to which their own knowledge and judgments are imperfect").

104. See Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1186-88 (1998) (discussing the so-called "third-person effect" in the context of consumers' decisions to accept the health risks of smoking).

105. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 42 (1989) ("A person who has established a certain view of the world or of himself may wall out information that threatens the maintenance of those views."). Social scientists and legal commentators often refer to this phenomenon as "cognitive dissonance." Latin, *supra* note 101, at 1234.

106. See Eisenberg, *supra* note 94, at 223. Professor Eisenberg refers to this as "faulty telescopic faculties." *Id.*

107. See Hanson & Logue, *supra* note 104, at 1197 (declaring that "below a certain threshold, consumers discount risks altogether, treating them as if they were zero"); Hasen, *supra* note 88, at 414 (declaring that "consumers generally mistake low probabilities for zero probability").

108. See Fischhoff, *supra* note 102, at 213 ("It also seems as though for most risks there is some minimum probability of occurrence below which the risk is ignored and no protective action taken, no matter how cheap it is."); Latin, *supra* note 101, at 1245 ("Social science findings indicate that people often ignore low-probability risks even when catastrophic harm is threatened if the risks materialize.").

heuristics, which tend to result in systematic errors.¹⁰⁹ These include availability, representativeness, framing, and anchoring heuristics. When the availability heuristic is applied, one who makes a judgment about the probability of an event occurring will rely upon similar comparable events instead of searching for objective probabilistic data. Consequently, the vividness of an event will often have a greater impact on the decision than its actual frequency.¹¹⁰ For example, people wrongly assume that murders are more common than suicides because murders are more dramatic and receive more media coverage than suicides.¹¹¹

The representative heuristic explains why individuals often rely on a small portion of data, which they consider to be representative of the whole, instead of basing their decision on all of the available data.¹¹² The representativeness heuristic often involves reasoning by analogy from previous experiences.¹¹³ Unfortunately, this may lead to erroneous conclusions when people treat unduly small samples as representative of the whole set of data.¹¹⁴

Other heuristics also affect the way people make risk-assessment decisions. According to conventional rational choice theory, preferences are supposed to be invariant—a decision to choose one option over another does not depend on how the choice is characterized or presented.¹¹⁵ However, empirical studies indicate that the way a choice is "framed" often affects the decision.¹¹⁶ For example, when

109. See Eisenberg, *supra* note 94, at 218 (stating that the use of heuristics leads to systematic errors in decision-making).

110. See Alan L. Dorris & M.F. Tabrizi, *An Empirical Investigation of Consumer Perception of Product Safety*, 2 J. PROD. LIAB. 155, 162 (1978) (suggesting that "it is not only the actual frequency of occurrence but the drama, publicity and notoriety surrounding the event which influence subjective judgement"); William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1117 (1984) ("Because of this 'availability heuristic,' useful but straightforward and bland information may be slighted in favor of flashy, emotive information.").

111. See Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385, 399 (1989).

112. See Eisenberg, *supra* note 94, at 222 ("[A]ctors seldom collect all relevant data before making decisions. Rather, they usually make decisions on the basis of some subset of the data that they judge to be representative.").

113. See Eskridge, *supra* note 110, at 1117; Noll & Krier, *supra* note 100, at 753.

114. See Eisenberg, *supra* note 94, at 222.

115. See Hasen, *supra* note 88, at 394 n.10.

116. See Noll & Krier, *supra* note 100, at 753 (concluding that the way "people

asked to choose between a certain loss of fifty dollars and a twenty-five percent chance to lose two hundred dollars, test subjects preferred a sure loss when it was described as insurance, but favored a probabilistic loss when it was characterized as a game of chance.¹¹⁷ Anchoring, on the other hand, refers to the tendency of individuals to form an initial impression, or anchor, and then to adjust it in response to subsequent information.¹¹⁸ This means that different starting points will yield different risk estimates that are biased toward the original risk estimate.¹¹⁹

Naturally, cognitive limitations and heuristic biases affect the way consumers evaluate product-related risks. For example, consumers who are excessively optimistic will assume that they can use a product safely, notwithstanding the existence of known risks. In addition, reliance on the availability heuristic may cause consumers to underestimate the seriousness of risks that occur infrequently because they will not be remembered as well as more frequent events. Moreover, use of the representativeness heuristic may lead consumers to discount certain product-related risks. When assessing such risks, people tend to generalize from their own experiences with the product and, if this experience has been good, conclude that the product is safer than it actually is.¹²⁰ The framing effect may also cause consumers to underestimate product-related risks because manufacturers ordinarily choose to frame information and product warnings in a way that downplays product flaws in order to promote sales.¹²¹

Although cognitive limitations are troublesome, they do not pose a threat serious enough to justify a rule that deprives people of the right to choose which risks to accept. In the first place, despite the existence of these cognitive problems, ordinary people still manage to do a relatively decent job of decision-making on most occasions.¹²² Indeed, as

value outcomes depends on how an outcome is characterized or presented”).

117. See Fischhoff, *supra* note 102, at 213.

118. See Ulen, *supra* note 111, at 400 (“In using this heuristic, people first form an initial impression, an anchor, and adjust it according to any additional information they have.”).

119. See Latin, *supra* note 101, at 1237 (“[T]he ‘anchoring’ heuristic [indicates] that ‘different starting points yield different estimates, which are biased toward the initial values.’” (quoting Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY*, *supra* note 102, at 3, 14)).

120. See *id.* at 1231 (“People who generalize from their own experiences may treat this limited sample as ‘representative’ of overall product risks and therefore anticipate continued safety.”).

121. See *id.* at 1241 (“Because manufacturers ordinarily choose to frame information in product warnings in the manner most conducive to product sales, framing effects are also likely to contribute to consumer underestimation of product risks.”).

122. See Schwartz, *supra* note 88, at 833 (declaring that “there is substantial uncertainty respecting whether consumers do misperceive risks and what the effect of

discussed earlier, other areas of the law recognize the right of individuals to engage in risk-taking and to waive their legal rights. For example, spectators and participants in sporting events have always been allowed to expressly waive their rights under tort law. Likewise, the Uniform Commercial Code, as well as its statutory and common law predecessors, have permitted sellers to shift product-related risks to consumers by disclaiming the implied warranties of merchantability and fitness for a particular purpose.¹²³

In addition, denying consumers the right to waive tort liability interferes with personal autonomy. If our society is committed to the notion of personal autonomy, it must allow individuals to make important choices so that they can realize their full potential as human beings. As mentioned earlier, personal autonomy protects bad choices as well as good ones. Therefore, unless a transaction results in serious adverse consequences to a third party or strong evidence exists of fraud or coercion by the seller, buyers should be permitted to waive tort liability.

D. Negative Externalities

A negative externality exists when a party fails to take account of the effects of his or her activity on another.¹²⁴ A negative externality occurs in the context of a market transaction when one party's activities impose a cost on one not involved in the transaction, and this cost is not taken into account by the parties involved in the transaction.¹²⁵ Two types of externality problems may arise if buyers are permitted to waive tort liability. First, one externality problem may result when the seller shifts product-related risks to the buyer. A second potential externality problem may occur when the buyer shifts risks to third parties.

The first type of externality resembles the dilemma that supposedly existed prior to the adoption of strict liability in tort. In the dark days of *laissez-faire*, product sellers, secure in the knowledge that they would

likely misperceptions [is]").

123. See U.C.C. § 2-316 (1989).

124. See Coleman, *supra* note 24, at 231-33.

125. See Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 103 (1994) ("An externality can be defined as a cost associated with a market that is absorbed by a party not involved in the market transaction.").

not be held liable for product-related injuries, showed little interest in product safety because accident costs were largely borne by consumers. Arguably, this problem might arise again if consumers were allowed to waive their rights under tort law. However, since those parties adversely affected participate in the transaction, this scenario does not meet the conventional definition of an “externality.” Nevertheless, the effect of this type of contractual waiver is similar to that of an externality because consumers who sign a waiver without considering the risks of product failure would lose legal rights.

The second type of externality involves transactions in which product-related risks are borne by third parties, such as bystanders or employees. In this circumstance, neither buyers nor sellers have an incentive to engage in accident cost avoidance because neither bears the costs of injuries. This scenario demonstrates a true externality. Consequently, products would be more dangerous than they would be if the parties took accident costs into account in their dealings.

In terms of the first type of market failure problem, the previous discussion of disparities in bargaining power and information asymmetries strongly suggests that product sellers would not be able to force product risks onto gullible or unwilling consumers. Any risk-shifting that occurred as the result of waivers would be voluntary. Even if some consumers underestimate risks because of cognitive limitations, it is doubtful that this would rise to the level of a serious market failure. Therefore, negative externality problems would not prove severe enough to scuttle this proposal.

On the other hand, waivers of tort liability might very well encourage buyers to externalize product-related risks to third parties such as family members, bystanders, or employees. As far as family members are concerned, perhaps it is reasonable to assume that buyers will take their interests into account when they waive tort liability. However, bystanders are more troublesome. There is virtually no way for the parties to take account of their interests within the framework of a sales transaction. On the other hand, it seems unlikely that a large number of complete strangers will be injured by defective products. Since the economic effect of bystander injuries is likely to be minimal, this Article does not address the impact on this group in its discussion of economic efficiency.¹²⁶

Employees are potentially a much more serious problem than bystanders. About sixty percent of all personal injury judgments against

126. Corrective justice and distributional effects with respect to bystanders are more significant and will be discussed below. See *infra* Part V.A; *infra* notes 223-30 and accompanying text.

product sellers involve workplace accidents.¹²⁷ These claims represent a major portion of the overall liability that product sellers are exposed to under the current liability regime. Consequently, product sellers would probably offer employers significant price concessions in return for waivers of tort liability that included the claims of injured workers. In effect, agreements between employers and product sellers could produce significant externalities by shifting accident costs from sellers to employees. Unlike bystanders, however, workers may be brought into the bargaining process since employers and employees could negotiate the issue of tort liability waivers in their employment contracts. If this occurred, employers—and ultimately product sellers—would be forced to internalize at least some of these product-related risks.

IV. LOSS-SPREADING CONCERNS

The goal of accident cost reduction is to minimize all accident costs, including secondary and tertiary accident costs.¹²⁸ For the purpose of this discussion, secondary accident costs include the economic dislocation associated with product-related injuries,¹²⁹ and tertiary costs include the costs of administering a particular accident cost avoidance scheme.¹³⁰ A number of tort theorists contend that secondary accident costs can be reduced if primary accident costs are shifted from individual victims to a large pool of loss bearers.¹³¹ The economic justification for the concept of loss-spreading is based on the declining marginal utility of money theory, which assumes that each additional dollar provides less utility than the previous dollar as a person's wealth increases.¹³² If this theory is correct, the overall utility to society will be

127. See George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 8 YALE J. ON REG. 237, 258 & n.84 (1991).

128. See Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1096 (1993) ("Under economic theory, the optimal level of risk for any particular activity is the level at which the total social cost of accidents is minimized . . .").

129. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 27 (1970).

130. See *id.* at 28.

131. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 794 (1985) ("Spreading the impact of loss over time or among a class of individuals will decrease economic dislocation, thereby reducing secondary costs." (footnote omitted)).

132. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-18 (1961). For more information on the declining marginal

increased if the high-utility dollars lost by accident victims are replaced by lower-utility dollars provided by members of the loss-bearing pool.

Currently, a number of loss-spreading mechanisms exist. Private insurers currently provide an array of insurance products, including health, life, disability, property damage, and liability insurance. Furthermore, modern workers' compensation statutes require employers to act as loss spreaders by providing compensation to their workers on a no-fault basis when they are injured on the job.¹³³ Finally, government programs, such as Medicare and Medicaid, perform a loss-spreading role for veterans, the elderly, and the poor.¹³⁴ However, many legal commentators believe that tort law is a better loss-spreading mechanism because it covers more victims and provides greater protection against injury. For example, any injured party can bring a tort claim, while access to private insurance, workers' compensation, and government health insurance is more limited. Private insurance is available only to those who can afford it; only workers qualify for workers' compensation protection; only veterans are eligible to receive veterans' benefits; only the elderly are entitled to participate in the Medicare program; and Medicaid benefits are limited to the poor. Moreover, tort law provides compensation for such intangible losses as pain and suffering, while private insurance and other loss-spreading schemes generally cover only pecuniary losses.¹³⁵

Nevertheless, tort law does not necessarily provide the best approach to loss-spreading when all factors are taken into account. In terms of individual coverage for injuries and losses, the tort system seems to present one clear advantage over other methods of loss-spreading. That is, any injured party may bring a tort claim. In contrast, access to private insurance, workers' compensation, and government health insurance is restricted. However, the vast majority of people have private insurance. Those lacking insurance generally qualify for some other sort of loss-spreading program, through work, through service in the armed forces, or because they are elderly or poor.¹³⁶ While some groups, such as

utility of money theory, see Croley & Hanson, *supra* note 35, at 1794; Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 70 (1990).

133. See Jeffrey O'Connell, *Balanced Proposals for Product Liability Reform*, 48 OHIO ST. L.J. 317, 320 (1987).

134. See Richard C. Ausness, *Paying for the Health Costs of Smoking: Loss Shifting and Loss Bearing*, 27 SW. U. L. REV. 537, 560 (1997-1998).

135. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 648 (1985) (observing that neither social insurance nor workers' compensation nor private insurance provides compensation for pain and suffering).

136. See Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 193 (1992) (discussing the types of private and social insurance that are available to Americans).

illegal aliens and families of the working poor, do not always receive adequate coverage, only a relatively small percentage of the population is completely unprotected against catastrophic loss.¹³⁷

Another concern is that most loss-spreading arrangements cover only direct pecuniary losses.¹³⁸ Tort law provides more generous compensation, providing not only for pecuniary losses but also for intangible losses such as pain and suffering. However, this is relevant from a loss-spreading perspective only if it is economically efficient to spread nonpecuniary losses. In fact, considerable support exists for the proposition that it is not efficient to spread such losses by means of either first-party insurance or tort liability.¹³⁹

The argument against insuring against nonpecuniary losses rests on the notion that insurance is a mechanism for equalizing the expected marginal utility of money.¹⁴⁰ Those who purchase insurance transfer money from a pre-loss state to a post-loss state, where it will yield greater utility.¹⁴¹ However, because they are not pecuniary in nature, nonpecuniary losses do not affect the marginal utility of money. Therefore, it will not increase an individual's utility to insure against such losses.¹⁴² For this reason, consumers do not demand that private insurers provide insurance against nonpecuniary losses.¹⁴³

The argument against providing compensation for non-pecuniary losses assumes that the optimal damage award that an accident victim should receive is equal to the amount of insurance protection the victim would be willing to purchase prior to the accident from a private insurer.¹⁴⁴ This approach is known as the insurance theory of

137. See George L. Priest, *The Continuing Crisis in Liability*, 1 PROD. LIAB. L.J. 243, 248 (1989).

138. See Sugarman, *supra* note 135, at 648.

139. This approach is discussed in Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 793-96 (1995); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 273-74 (1989); Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 99-104 (1993); Schwartz, *supra* note 35, at 362-66.

140. See Geistfeld, *supra* note 139, at 793-96.

141. See *id.*

142. See *id.*

143. But see Croley & Hanson, *supra* note 35, at 1791 (contending that consumers do want such insurance).

144. See Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 520 (1984) ("The optimal compensatory award is the amount of insurance the victim would have purchased voluntarily, at the

compensation and suggests that it makes no sense to compensate victims for nonpecuniary losses. If this is so, loss-spreading mechanisms, like tort law, that spread nonpecuniary losses are not inherently superior to loss-spreading mechanisms, like private and public insurance schemes, that do not spread such losses.

Furthermore, while additional loss-spreading may be desirable, tort law is a very expensive way to achieve it.¹⁴⁵ The costs of administering the tort system include the costs of attorneys, insurance personnel, and expert witnesses, and the expense of maintaining the courts.¹⁴⁶ A 1986 study by the Rand Corporation Institute for Civil Justice estimated the tort system's administrative costs at \$15 billion to \$19 billion in one year.¹⁴⁷ Adjusting for inflation, this figure might well range between \$21 billion and \$27 billion by now.¹⁴⁸ Assuming that products liability litigation expenses account for roughly ten percent of the tort system's total administrative costs,¹⁴⁹ the resulting sum would be \$2.1 billion to \$2.7 billion. Another way to measure the administrative costs is to compare them with the overall amount of money that is paid out to accident victims. In general, less than half of the money paid by defendants actually goes to compensate accident victims; the rest is spent on litigation expenses and attorneys' fees.¹⁵⁰ In contrast, administrative costs are much lower for private insurance, workers' compensation, and social insurance programs.¹⁵¹ All of this suggests that tort law is a very costly way to spread accident costs. Indeed, the

price implied by the load of the defendant's liability insurance.").

145. See Sugarman, *supra* note 135, at 596 (stating that "the tort system is fabulously expensive to operate in comparison to modern compensation systems").

146. See Ackerman, *supra* note 53, at 687 ("Tort litigation involves not only direct public expenditures to support the court system, but also expenditures to support the phalanx of lawyers, insurance adjusters, expert witnesses, and law professors . . . who are directly or indirectly sustained by such litigation.").

147. See JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION at vii-ix (1986).

148. This is assuming an inflation rate of 3% per year for 13 years, for a total increase of roughly 40%.

149. See Ausness, *supra* note 36, at 687.

150. See Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479, 492 (1987) (stating that plaintiffs, on average, receive about 50% of tort litigation expenditures); Jeffrey O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers*, 1976 U. ILL. L.F. 435, 439 (declaring that only 14¢ of every insurance premium dollar reimburses victims of malfunctioning products for losses not otherwise covered).

151. See Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in TORT LAW AND THE PUBLIC INTEREST 127, 135 (Peter H. Schuck ed., 1991) (estimating that administrative costs amount to 30% for workers' compensation, 15% for private health insurance, and 1% for Social Security programs).

administrative costs associated with tort law may very well exceed the social or secondary accident-cost-avoidance benefits of loss-spreading.

Finally, tort liability is largely unnecessary for those consumers who already have adequate protection against product-related injuries.¹⁵² Presumably, these consumers would prefer to accept some or all product-related risks rather than pay for unwanted protection.¹⁵³ It is unfair to make these consumers pay more for the products they buy in order to purchase insurance they do not need or to subsidize high-risk individuals.¹⁵⁴

V. CORRECTIVE JUSTICE AND DISTRIBUTIONAL CONCERNS

Under the present system of products liability, product-related accident costs are shifted from individual victims to manufacturers and others in the distributive chain. This arguably serves the ends of corrective justice by placing the burden of compensation on the person who has caused the loss. However, consumers who waive their right to compensation under tort law will not be able to shift their losses to product sellers. Arguably, this would frustrate the goals of corrective justice. Moreover, even if buyers and sellers as a whole benefitted from waivers of liability, the losses associated with such waivers would fall disproportionately on certain groups.

A. *Corrective Justice Concerns*

Corrective justice addresses the disposition of wrongful gains and losses.¹⁵⁵ The traditional concept of corrective justice focuses on unjust

152. See Priest, *supra* note 137, at 248 (arguing that "the compensation insurance provided by the legal system is largely redundant").

153. See Brenza, *supra* note 90, at 291 (declaring that "a buyer would prefer to accept this risk rather than pay a higher price that included some insurance component").

154. See Latin, *supra* note 101, at 1199 ("It may also be unfair to make safe consumers, those who choose to create lower risks or can otherwise avoid injuries, subsidize compensation for unsafe or unlucky product users."); Owen, *supra* note 31, at 707 (stating that it is neither fair nor efficient "to penalize the prudent consumer who insures himself through health and wage insurance plans by forcing him to pay again through higher prices to overinsure himself and also to insure his less prudent neighbors"); Comment, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625, 637 (1971) ("It is arguably unfair to force all consumers to pay the increased price when some may wish to purchase 'uninsured' products at lower prices while those who desire insurance may purchase it privately.").

155. See Ausness, *supra* note 81, at 1093.

enrichment, where one party gains something directly at the expense of another.¹⁵⁶ In such cases, restitution satisfies the requirements of corrective justice by returning the property to its rightful owner while, at the same time, depriving the wrongdoer of any ill-gotten gains.¹⁵⁷ According to some theorists, corrective justice also requires those who engage in wrongdoing to compensate injured parties even when they do not directly profit from their wrongful acts at the victim's expense.¹⁵⁸ Under this definition of corrective justice, for example, a speeding motorist who negligently injures a pedestrian would be obligated to compensate the injured party, even though the wrongdoer has not financially benefited from the victim's injury. The idea is that those who maximize self-interest by placing others at risk should be required to compensate those who are injured by their actions.¹⁵⁹

Even though modern products liability law is not fault-based in a formal sense,¹⁶⁰ arguably those who manufacture and sell dangerous products are in fact guilty of wrongdoing. Therefore, those individuals have a moral obligation to compensate those they injure.¹⁶¹ The current system of products liability is consistent with the requirements of corrective justice because it forces sellers to restore victims to their pre-injury state insofar as possible by paying damages. Conversely, allowing product sellers to escape liability for their wrongful acts

156. See Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 602-03 (1998).

157. See Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 330.

158. See Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982).

159. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 177-78 (1973). Professor Epstein identifies four causal paradigms that he believes justify the imposition of liability. The last of these paradigms involves the creation of dangerous conditions that result in harm to others. This paradigm includes three classes of dangerous conditions: (1) explosives and other items that are inherently dangerous; (2) placing an object, not dangerous in itself, in a position where it may do harm; and (3) the sale of products and other objects that are likely to be dangerous when they are defective. See *id.*

160. See RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965) (stating that commercial sellers are liable for injuries caused by defective products even though "the seller has exercised all possible care in the preparation and sale of his product"). However, it appears that the RESTATEMENT (THIRD) OF TORTS has adopted a negligence standard with respect to failure-to-warn and design defect liability. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2 (1998); see also David G. Owen, *The Graying of Product Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1245 (1994) (arguing that "sections 1 and 2 of the new *Restatement* define liability as strict for manufacturing defects, but base liability for design and warnings defects in negligence").

161. See Epstein, *supra* note 159, at 177-78 (concluding that one who produces and sells a defective product can be held liable to the victim under principles of corrective justice).

arguably undermines the principle of corrective justice.

However, the conventional approach to corrective justice requires that someone commit a morally wrongful act before that person can be compelled to provide compensation for an injury.¹⁶² Generally speaking, though, an otherwise wrongful act cannot give rise to a corrective justice claim if the victim consents to it.¹⁶³ The expression "volenti non fit injuria"¹⁶⁴ states this principle eloquently and succinctly. Consumers have no moral right to compensation if they knowingly and voluntarily waive their rights in return for lower prices for the goods they buy.

Of course, this analysis does not apply to consumers who have been coerced or duped into waiving their rights under tort law. Consent obtained in this fashion is not effective either legally or morally. In addition, some victims may assert corrective justice claims because they have not consented in any way to relieve sellers of liability. For example, children may retain the right to assert a claim based on corrective justice when injured by defective goods. Unlike adult victims, children lack the legal capacity to consent to product-related risks. Even if a child injured by a defective product was a member of the buyer's immediate family, waivers of tort liability would not necessarily be imputed to the child.

A similar argument applies to bystanders. The bystander category includes those who have not purchased or used the product and are not members of the buyer's immediate family or guests in the buyer's home. In short, they are strangers who happen to be in the wrong place at the wrong time. Having neither consented to assume any risks nor benefited from the buyer's waiver of liability, a bystander may potentially make a persuasive claim for compensation on corrective justice grounds.

In the absence of an express agreement, employees could also rely on a corrective justice claim. Like bystanders, employees have neither waived their rights nor profited from waivers of liability by their

162. Some commentators have suggested that principles of corrective justice might require one who benefits from a lawful, but dangerous, activity to compensate those who are injured by the activity, particularly nonparticipants. See Ellen Wertheimer, *Pandora's Humidor: Tobacco Producer Liability in Tort*, 24 N. KY. L. REV. 397, 408 (1997) (arguing on corrective justice grounds that tobacco companies should compensate victims of second-hand smoke).

163. See Ausness, *supra* note 81, at 1097. Of course, some acts may be sufficiently reprehensible that they may be sanctioned criminally even if they do not violate the rights of the victim.

164. This translates to: "He who consents cannot receive an injury." For more on this expression and its meaning, see BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

employers. At the same time, workers could presumably agree to allow employers to act on their behalf when they bargain with product sellers. In such cases, the principle of “*volenti non fit injuria*” should foreclose a corrective justice claim by employees if they have authorized their employer to waive tort liability for product-related injuries.

B. Distributional Concerns

A change from the present tort-based system of products liability to a more contract-oriented approach may produce a highly skewed pattern of gains and losses. Product sellers will almost certainly profit from such a change since they will be able to shift some of their existing tort liability to their customers. At the same time, ordinary consumers should also benefit, assuming that the market is reasonably efficient, because they will share in the gains that will be produced by a more efficient distribution of risk. On the other hand, certain groups of affected parties may find themselves worse off if product sellers are permitted to shift liability for product-related injuries. These potential losers include: (1) accident-prone adults, (2) young children and teenagers, (3) bystanders, and (4) employees.

Product sellers, particularly manufacturers, stand to gain if waivers of tort liability are allowed. First, sellers will benefit from lower litigation and insurance costs since they will be able to predict their liability more accurately. In addition, sellers will profit from the fact that they can shift some of their existing liability to others. Finally, in some cases, sellers may be able to get away with spending less on product safety.

In theory, consumers will also benefit from waivers of tort liability. Product sellers cannot compel buyers to waive tort liability, and buyers will consent to such waivers only when it is in their best interest to do so. This will occur when buyers have a comparative advantage over sellers with respect to risk-bearing. Under these circumstances, buyers may agree to assume product-related risks, but only if sellers provide price reductions or other benefits that exceed the risks that buyers are asked to assume. Thus, ordinary consumers will share with product sellers the efficiency gains that arise from contractual risk-shifting. Indeed, if market conditions are right, consumers might very well walk away with the lion's share of these efficiency gains.

Unfortunately, not everyone will be better off if existing products liability rules are changed to allow buyers to waive tort liability. In particular, accident-prone adults, children, employees, and bystanders are likely to be disadvantaged by the establishment of a more contract-oriented products liability regime.

For lack of a better term, the first group of victims considered consists

of accident-prone adults. These careless individuals have been known to injure themselves by ignoring obvious hazards¹⁶⁵ or deliberately bypassing safety devices.¹⁶⁶ *Foster v. Gillette Co.*¹⁶⁷ is illustrative. The plaintiff in that case purchased a hair spray called "The Dry Look." After liberally spraying his hair with this highly flammable concoction, he thoughtlessly lit a cigar.¹⁶⁸ The alcohol in the hair spray thereupon ignited, severely damaging the plaintiff's hair, as well as other parts of his body.¹⁶⁹

*Daniell v. Ford Motor Co.*¹⁷⁰ is another classic example. The plaintiff in the case decided to commit suicide by locking herself in the trunk of her automobile.¹⁷¹ Later, after reconsidering the matter, she attempted to open the trunk. Unfortunately, the automobile manufacturer had neglected to provide a latch inside the trunk; consequently, the plaintiff was forced to spend an additional nine days in the trunk of her car.¹⁷² Eventually, the plaintiff was rescued and promptly demanded compensation from the car manufacturer for her physical and

165. See *Todd v. Societie BIC, S.A.*, 9 F.3d 1216, 1218 (7th Cir. 1993) (parents ignored explicit warning to keep butane lighter away from children, resulting in fire that killed 23-month-old child); *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1322-24 (Colo. 1986) (hospital employee burned by hydrochloric acid in bathroom-cleaning product after using the product without gloves, contrary to printed warning and oral instructions from supervisor); *States v. R.D. Werner Co.*, 799 P.2d 427, 428-29 (Colo. Ct. App. 1990) (plaintiff fell off step ladder because the ladder's back feet were positioned nine inches below its front feet, contrary to written instructions); *Stewart v. Von Solbrig Hosp., Inc.*, 321 N.E.2d 428, 432 (Ill. App. Ct. 1974) (plaintiff further injured when he allegedly walked on broken leg, contrary to doctor's orders); *Harris v. Atlanta Stove Works, Inc.*, 428 So. 2d 1040, 1042 (La. Ct. App. 1983) (plaintiff injured by carbon monoxide poisoning when he ignored instructions to vent space heater).

166. See *McMurray v. Deere & Co.*, 858 F.2d 1436, 1438 (10th Cir. 1988) (plaintiff killed while starting tractor in gear after bypassing starter mechanism); *Campbell v. Robert Bosch Power Tool Corp.*, 795 F. Supp. 1093, 1095 (M.D. Ala. 1992) (plaintiff hit in the eye with debris from disintegrating disc after removing wheel guard from electric sander while not wearing protective goggles); *Reed v. John Deere*, 569 F. Supp. 371, 373-74 (M.D. La. 1983) (plaintiff who allegedly bypassed starter system killed when tractor backed over him); *McNeely v. Harrison*, 226 S.E.2d 112, 113-14 (Ga. Ct. App. 1976) (bystander injured when car owner bypassed safety systems, thereby allowing car to start while in gear); *Wyatt v. Winnebago Indus., Inc.*, 566 S.W.2d 276, 277-78 (Tenn. Ct. App. 1977) (plaintiff injured after connecting battery of motor home directly to starter, thereby bypassing safety systems designed to prevent vehicle from starting while in gear).

167. 161 Cal. Rptr. 134 (Ct. App. 1979).

168. See *id.* at 134.

169. See *id.* at 135.

170. 581 F. Supp. 728 (D.N.M. 1984).

171. See *id.* at 730.

172. See *id.*

psychological injuries.¹⁷³

These are by no means isolated cases.¹⁷⁴ Numerous other individuals have injured themselves while engaging in unbelievably stupid acts, such as diving into shallow swimming pools,¹⁷⁵ consuming large quantities of alcohol,¹⁷⁶ driving recklessly,¹⁷⁷ and hunting small game with rifles while hanging from moving farm machinery.¹⁷⁸ Others have been injured while speeding down a winding, flood-swollen river in a bass boat while drunk and without a life vest,¹⁷⁹ lighting a cigarette in a room filled with propane gas,¹⁸⁰ or riding a motorcycle with the kickstand down.¹⁸¹

173. *See id.*

174. *See* Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1332 (10th Cir. 1989) (plaintiff injured when riding lawnmower tipped over while traveling along steep hill); Bingham v. Hollingsworth Mfg. Co., 695 F.2d 445, 447 (10th Cir. 1982) (plaintiff injured when half-ton pickup truck overturned while towing fully loaded four-ton fertilizer spreader down steep hill); Wyly v. Burlington Indus., Inc., 452 F.2d 807, 809 (5th Cir. 1971) (240-pound college student participating in "National Lap Sitting Contest" to promote wrinkle-free slacks injured when wooden chair collapsed with 14 co-eds on his lap); Bolduc v. Colt's Mfg. Co., 968 F. Supp. 16, 17 (D. Mass. 1997) (decedent removed magazine from automatic pistol and shot himself in the head after having consumed six beers, not realizing that there was a bullet in the chamber); Daigle v. Audi of Am., Inc., 598 So. 2d 1304, 1305 (La. Ct. App. 1992) (used car shopper injured after sticking his hand under the hood of a car while engine was running).

175. *See, e.g.,* Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 112 (3d Cir. 1992) (plaintiff dove head first into shallow swimming pool and broke his neck after consuming five beers and smoking a marijuana cigarette); O'Brien v. Muskin Corp., 463 A.2d 298, 302 (N.J. 1983) (uninvited swimmer injured after allegedly diving into shallow above-ground pool from roof of adjacent garage); Campbell v. Muswim Pools, Inc., 537 N.Y.S.2d 412 (App. Div. 1989) (plaintiff killed while attempting to dive into four-foot-deep above-ground swimming pool).

176. *See* Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690, 691 (Tenn. 1984) (tippler died after consuming half of a fifth of pure grain alcohol); Brune v. Brown Forman Corp., 758 S.W.2d 827, 828 (Tex. Ct. App. 1988) (college student died of acute alcohol poisoning after consuming large quantity of tequila); *see also* Barnes v. Litton Indus. Prods., Inc., 555 F.2d 1184, 1185 (4th Cir. 1977) (prisoner went blind after consuming a bottle of burning alcohol).

177. *See* Binakonsky v. Ford Motor Co., 133 F.3d 281, 284 (4th Cir. 1998) (unlicensed drunken driver killed when van hit tree and burned); LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985, 988 (5th Cir. 1980) (drunken plaintiff killed when tire blew out while driving between 100 and 105 m.p.h.); Daly v. General Motors Corp., 575 P.2d 1162, 1164-65 (Cal. 1978) (drunken attorney, driving without a seatbelt, killed when automobile hit guardrail); Hegwood v. General Motors Corp., 286 N.W.2d 29, 30 (Iowa 1979) (plaintiff killed when automobile tire blew out as she was traveling between 110 and 120 m.p.h.); Chart v. General Motors Corp., 258 N.W.2d 680, 682 (Wis. 1977) (passenger injured when drunken driver lost control of speeding car).

178. *See* Baker v. International Harvester Co., 660 S.W.2d 21, 22-23 (Mo. Ct. App. 1983).

179. *See* Norman v. Fisher Marine, Inc., 672 S.W.2d 414, 417-18 (Tenn. Ct. App. 1984).

180. *See* Andren v. White-Rodgers Co., 465 N.W.2d 102, 104 (Minn. Ct. App. 1991).

181. *See* Bernotas v. Harley Davidson, Inc., 543 F. Supp. 519, 521 (W.D. Pa. 1982).

Another group that might be disadvantaged is young children and teenagers. Almost no one would dispute the fact that young children often exercise bad judgment.¹⁸² Indeed, as *Larue v. National Union Electric Corp.*¹⁸³ illustrates, young children are amazingly adept at converting the most innocuous household products into engines of destruction. The plaintiff in the case, an eleven-year-old truant, was injured while playing with the family vacuum cleaner. His mother left the vacuum cleaner out in the hallway, plugged in; she also removed the hood and two of the filters above the fan housing, thereby exposing the fan.¹⁸⁴ While dressed in his pajamas, the boy sat on the vacuum cleaner's yellow plastic filter support, which rested on a metal casing that covered the vacuum cleaner's fan and engine, turned the machine on, and proceeded to "ride" the machine as if it were a horse.¹⁸⁵ Unfortunately for the eleven-year-old, his penis slipped through an opening in the filter support and into the fan. Sadly, the accident resulted in the partial amputation of the boy's penis.¹⁸⁶

Numerous other children have been injured as a result of unfortunate encounters with such common household products as matches,¹⁸⁷ cigarette lighters,¹⁸⁸ beer bottles,¹⁸⁹ kitchen utensils,¹⁹⁰ household

182. See GARVEY, *supra* note 39, at 91 ("Children often do things that are dumb, thoughtless, impulsive, short-sighted, ill-advised, selfish, and screwy.").

183. 571 F.2d 51 (1st Cir. 1978).

184. See *id.* at 53.

185. See *id.* The child and his sister had missed the school bus that morning and were thus home alone. See *id.*

186. See *id.* However, the experience was not a total loss; a sympathetic jury awarded Michael \$93,750, and this award was affirmed on appeal. See *id.* at 53, 58.

187. See *Bellotte v. Zayre Corp.*, 531 F.2d 1100, 1101 (1st Cir. 1976) (five-year-old child who played with matches burned when top of pajamas caught fire).

188. See *Floyd v. BIC Corp.*, 790 F. Supp. 276, 277 (N.D. Ga. 1992) (young child burned by disposable butane lighter); *Kirk v. Hanes Corp.*, 771 F. Supp. 856, 857 (E.D. Mich. 1991) (three-year-old child burned when five-year-old brother used disposable lighter to set fire to her shirt); *Bean v. BIC Corp.*, 597 So. 2d 1350, 1351 (Ala. 1992) (four-year-old child killed by fire while playing with disposable butane lighter).

189. See *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 189 (1st Cir. 1980) (eight-year-old child hit in the eye by flying glass after throwing empty beer bottle at telephone pole).

190. See *Kelley v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1041 (W.D. Okla. 1989) (eleven-month-old child who pulled crock pot off table injured when contents spilled on him).

cleaners,¹⁹¹ furniture polish,¹⁹² and lawn mowers.¹⁹³ Sometimes, it is the thoughtless actions of adults that cause children to end up in harm's way.¹⁹⁴ For example, in *Erkson v. Sears, Roebuck & Co.*,¹⁹⁵ a two-year-old child was injured while riding in a wooden box attached to riding lawn mower. The box had been constructed by the child's great-grandparents so that the family dog could ride along when one of its owners mowed the lawn.¹⁹⁶ Alas, while this contraption proved to be an efficient means of canine locomotion, it turned out to be less effective as a mechanism for the transport of small children.

Older children are no less likely to be injured than their younger siblings. For years, airguns,¹⁹⁷ firearms,¹⁹⁸ snowthrowers,¹⁹⁹ dirt bikes,²⁰⁰

191. See *Jonescue v. Jewel Home Shopping Serv.*, 306 N.E.2d 312, 313 (Ill. App. Ct. 1973) (eighteen-month-old child injured as a result of ingesting household cleaner left out by parents).

192. See *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 81 (4th Cir. 1962) (fourteen-month-old child died as a result of ingesting furniture polish).

193. See *Wenzell v. MTD Prods., Inc.*, 336 N.E.2d 125, 127 (Ill. App. Ct. 1975) (seven-year-old boy, while operating riding lawnmower, knocked down four-year-old companion and ran over his foot); see also *Porter v. United Steel & Wire Co.*, 436 F. Supp. 1376, 1378-79 (N.D. Iowa 1977) (five-year-old child injured while trying to climb into shopping cart); *Estabrook v. J.C. Penney Co.*, 464 P.2d 325, 326 (Ariz. 1970) (six-year-old boy injured hand while playing on escalator); *Simpson v. Standard Container Co.*, 527 A.2d 1337, 1339 (Md. Ct. Spec. App. 1987) (four-year-old child burned while removing lid from gasoline storage container); *Killeen v. Harmon Grain Prods., Inc.*, 413 N.E.2d 767, 769 (Mass. App. Ct. 1980) (ten-year-old girl injured when she fell down while sucking cinnamon-flavored toothpick); *Brawner v. Liberty Indus., Inc.*, 573 S.W.2d 376, 377 (Mo. Ct. App. 1978) (seven-year-old child burned as he removed lid from gasoline storage container).

194. See *Kerr v. Koemm*, 557 F. Supp. 283, 284-85 (S.D.N.Y. 1983) (three-year-old child injured after falling off running board of farm tractor); *Palmer v. Avco Distrib. Corp.*, 412 N.E.2d 959, 961 (Ill. 1980) (eleven-year-old child injured while riding inside fertilizer spreader); *Winnett v. Winnett*, 310 N.E.2d 1, 2 (Ill. 1974) (four-year-old child injured when fingers became caught in farm machine conveyor belt); *Richelman v. Kewanee Mach. & Conveyor Co.*, 375 N.E.2d 885, 886 (Ill. App. Ct. 1978) (two-year-old child injured when she became entangled in grain auger); *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 68 (Ky. Ct. App. 1973) (five-year-old child injured by falling off farm vehicle into grain auger).

195. 841 S.W.2d 207 (Mo. Ct. App. 1992).

196. See *id.* at 208.

197. See *Salvi v. Montgomery Ward & Co.*, 489 N.E.2d 394, 397 (Ill. App. Ct. 1986) (plaintiff shot in the eye by fourteen-year-old brother while cleaning air rifle); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 616-17 (Pa. 1982) (plaintiff killed by pellet from air rifle fired by fourteen-year-old companion).

198. See *Savage Indus., Inc. v. Duke*, 598 So. 2d 856, 856-57 (Ala. 1992) (ten-year-old hunter injured by shotgun blast after dropping shotgun while climbing tree).

199. See *Romanik v. Toro Co.*, 277 N.W.2d 515, 517 (Minn. 1979) (thirteen-year-old boy injured hand while operating snowthrower machine).

200. See *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 332-35 (4th Cir. 1991) (thirteen-year-old boy, riding unlicensed vehicle designed solely for off-road use, injured when he ran into motorcycle on public highway).

above-ground swimming pools,²⁰¹ and various other products²⁰² have taken their toll on the teenage population. One of the classic cases of this particular genre is *Moran v. Faberge, Inc.*²⁰³ In this case, two teenage girls concluded that they could improve the aromatic qualities of a lighted candle by pouring cologne on it. This decision proved to be unwise because the fragrant elixir immediately burst into flames when it came into contact with the candle.²⁰⁴

When it comes to self-inflicted harm, teenage boys are no slouches either. For example, in *Oden v. Pepsi Cola Bottling Co.*,²⁰⁵ a young scofflaw attempted to steal soft drinks from a vending machine by tilting it toward him.²⁰⁶ As the plaintiff had discovered from previous criminal episodes, this maneuver would cause the drink cans to drop out of the machine.²⁰⁷ Alas, in this case, the machine proved to be too heavy for the plaintiff to handle, and it fell forward and crushed him, thereby provoking a lawsuit against the machine's manufacturer by this enterprising thief's estate.²⁰⁸

Employees might also be adversely affected if waivers of tort liability were permitted. More than half of all personal injury claims against product sellers are now brought by injured workers.²⁰⁹ Although almost any product can cause injury in the workplace,²¹⁰ certain products seem

201. See *Klen v. Asahi Pool, Inc.*, 643 N.E.2d 1360, 1362 (Ill. App. Ct. 1994) (fourteen-year-old boy injured while diving off trampoline into four-foot-deep above-ground swimming pool).

202. See, e.g., *Smith v. Holmes*, 606 N.E.2d 627, 629-30 (Ill. App. Ct. 1992) (fifteen-year-old boy suffered brain damage after hanging himself by the neck on swing-set rope); *Moning v. Alfano*, 254 N.W.2d 759, 762 (Mich. 1977) (twelve-year-old boy hit in the eye with slingshot by eleven-year-old companion); *Zerby v. Warren*, 210 N.W.2d 58, 60 (Minn. 1973) (fourteen-year-old boy died from sniffing model airplane glue).

203. 332 A.2d 11 (Md. 1975).

204. See *id.* at 13.

205. 621 So. 2d 953 (Ala. 1993).

206. See *id.* at 954.

207. See *id.*

208. See *id.*

209. See Priest, *supra* note 127, at 258.

210. See *Employers Nat'l Ins. Co. v. Chaddrick*, 826 F.2d 381, 382-83 (5th Cir. 1987) (electrical lineman injured by blade on tractor); *Blaw-Knox Food & Chem. Equip. Corp. v. Holmes*, 348 So. 2d 604, 605-06 (Fla. Dist. Ct. App. 1977) (employee of potato chip manufacturer injured when he fell into a cooking vat filled with hot oil); *Scoby v. Vulcan-Hart Corp.*, 569 N.E.2d 1147, 1148 (Ill. App. Ct. 1991) (cook in Mexican restaurant injured when his arm became submerged in hot oil in a deep-fat fryer); *Colboch v. Uniroyal Tire Co.*, 670 N.E.2d 1366, 1368 (Ohio Ct. App. 1996) (automobile mechanic injured when tire he was mounting exploded).

to be particularly dangerous. These include punch presses²¹¹ and heavy machinery,²¹² forklifts and tractors,²¹³ cranes,²¹⁴ conveyor belts,²¹⁵

211. See *England v. Gulf & Western Mfg. Co.*, 728 F.2d 1026, 1027 (8th Cir. 1984) (worker at automobile mirror manufacturing plant injured hand while operating punch press); *Bullen v. Roto Finishing Sys.*, 435 So. 2d 1256, 1257 (Ala. 1983) (worker injured when he caught his arm in an embossing machine); *Cavazos v. E.W. Bliss Co.*, 394 N.E.2d 438, 439 (Ill. App. Ct. 1979) (immigrant factory worker injured her hand while operating 22-ton punch press); *Scott v. Dreis & Krump Mfg. Co.*, 326 N.E.2d 74, 77 (Ill. App. Ct. 1975) (worker injured hand while operating press brake); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 923 (Minn. 1986) (worker injured when leg became caught in hydraulic press); *General Elec. Co. v. Schmal*, 623 S.W.2d 482, 484 (Tex. Ct. App. 1981) (employee killed while inspecting malfunctioning piercing press).

212. See *Davis v. Commercial Union Ins. Co.*, 892 F.2d 378, 380-81 (5th Cir. 1990) (employee at cotton gin factory injured after right hand was caught in lint-cleaning machine); *Venturelli v. Cincinnati, Inc.*, 850 F.2d 825, 826 (1st Cir. 1988) (sheet metal worker crushed finger in "plate-shearing" machine); *Hagans v. Oliver Mach. Co.*, 576 F.2d 97, 98 (5th Cir. 1978) (plaintiff's left hand injured by industrial table saw); *Elder v. Crawley Book Mach. Co.*, 441 F.2d 771, 772 (3d Cir. 1971) (two of worker's fingers severed by blade on bookbinding machine); *Baldwin v. Harris Corp.*, 751 F. Supp. 2, 4 (D.D.C. 1990) (printing company employee injured hand while operating paper-cutting machine); *Leach v. Jagenberg-Werke A.G.*, 480 F. Supp. 244, 245 (E.D. Pa. 1979) (paper company employee injured wrist while attempting to fix malfunction in paper-coating machine); *Cooper v. Bishop Freeman Co.*, 495 So. 2d 559, 560 (Ala. 1986) (worker burned arm and hand while operating fabric-pressing machine); *Bullen v. Roto Finishing Sys.*, 435 So. 2d 1256, 1257 (Ala. 1983) (worker injured when he caught his arm in an embossing machine); *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 60 (Neb. 1987) (scrap yard employee injured hand while operating 500-ton guillotine scrap shear known as "the Monster"); *Reid v. Spadone Mach. Co.*, 404 A.2d 1094, 1095 (N.H. 1979) (employee of plastics manufacturer lost several fingers when he stuck his hand in industrial guillotine-type cutting machine); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 141 (N.J. 1979) (worker injured when he caught his hand in the cylinders of a sheet metal rolling machine); *Syler v. Signode Corp.*, 601 N.E.2d 225, 226-27 (Ohio Ct. App. 1992) (maintenance worker at brickyard injured while attempting to repair brick-packaging machine); *Davis v. Globe Mach. Mfg. Co.*, 684 P.2d 692, 694 (Wash. 1984) (worker injured while cleaning glue-spreading machine at lumber mill).

213. See *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 432-33 (3d Cir. 1992) (driver of dumpster injured when brakes failed and vehicle rolled over); *Rolfes v. International Harvester Co.*, 817 F.2d 471, 473 (8th Cir. 1987) (plaintiff run over by tractor after falling off tractor seat); *Mata v. Clark Equip. Co.*, 374 N.E.2d 763, 764 (Ill. App. Ct. 1978) (employee of food packer injured arm while operating forklift); *Marshall v. Clark Equip. Co.*, 680 N.E.2d 1102, 1103 (Ind. Ct. App. 1997) (worker injured while operating forklift); *Figgie Int'l, Inc. v. Tognocchi*, 624 A.2d 1285, 1288 (Md. Ct. Spec. App. 1993) (plant safety director killed while operating "cherry picker" type manlift); *Baccelleri v. Hyster Co.*, 597 P.2d 351, 352 (Or. 1979) (dockworker injured when forklift backed over his legs).

214. See *Reese v. Chicago, Burlington & Quincy R.R. Co.*, 303 N.E.2d 382, 383 (Ill. 1973) (railroad employee killed when "clam shell" bucket fell from crane and struck him); *Suich v. H & B Printing Mach., Inc.*, 541 N.E.2d 1206, 1209-11 (Ill. App. Ct. 1989) (air conditioner repairman injured when gantry crane fell on him); *Lundy v. Whiting Corp.*, 417 N.E.2d 154, 157 (Ill. App. Ct. 1981) (electrician struck by overhead crane at steel plant); *Lutz v. National Crane Corp.*, 884 P.2d 455, 457 (Mont. 1994) (worker electrocuted when crane cable came into contact with high-voltage power line).

215. See *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1222 (5th Cir. 1984) (mechanic killed while performing maintenance work on conveyor belt in pharmaceutical plant); *Union Supply Co. v. Pust*, 583 P.2d 276, 278 (Colo. 1978)

chainsaws,²¹⁶ scaffolding,²¹⁷ construction equipment,²¹⁸ farm machinery,²¹⁹ and toxic or flammable chemicals.²²⁰ Although careless employees account for their share of these work-related injuries,²²¹ employers also

(worker injured when he caught right arm in "nip point" of conveyor belt at sugar beet factory); *Karabatsos v. Spivey Co.*, 364 N.E.2d 319, 320 (Ill. App. Ct. 1977) (United Parcel employee injured when his arm was caught in cylinders of conveyor belt); *Banks v. Iron Hustler Corp.*, 475 A.2d 1243, 1244 (Md. Ct. Spec. App. 1984) (worker injured when his hand was caught in conveyor belt).

216. See *Nettles v. Electrolux Motor AB*, 784 F.2d 1574, 1576 (11th Cir. 1986) (lumberjack injured when chain saw "kicked back" while he was sawing down a tree).

217. See *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 638 (D.C. Cir. 1988) (window washer injured when one side of scaffolding dropped because U-clips had been installed incorrectly); *Young v. Up-Right Scaffolds, Inc.*, 637 F.2d 810, 812 (D.C. Cir. 1980) (carpenter injured when scaffolding fell apart); *Jackson v. Harsco Corp.*, 673 P.2d 363, 364 (Colo. 1983) (painter injured by collapse of aluminum scaffolding leg); *English v. Crenshaw Supply Co.*, 387 S.E.2d 628, 629 (Ga. Ct. App. 1989) (construction worker paralyzed from the neck down after falling from scaffolds that failed); *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909, 911 (S.D. 1987) (building washer injured when scaffold platform gave way); *Klein v. R.D. Werner Co.*, 654 P.2d 94, 95 (Wash. 1982) (plaintiff fell 25 feet when horizontal scaffolding plank collapsed).

218. See *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1472-73 (10th Cir. 1990) (operator of pipelayer machine killed in collision when vehicle's brakes failed on steep hill); *Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854, 855 (Ala. 1981) (coal miner killed when earthmoving machine rolled over and crushed him); *Shultz v. Linden-Alimak, Inc.*, 734 P.2d 146, 148 (Colo. Ct. App. 1986) (construction worker injured when struck by counterweight on personnel hoist); *Niffenegger v. Lakeland Constr. Co.*, 420 N.E.2d 262, 264 (Ill. App. Ct. 1981) (construction worker injured when asphalt-spreading machine ran over his foot); *Strang v. Deere & Co.*, 796 S.W.2d 908, 909-10 (Mo. Ct. App. 1990) (backhoe operator injured when vehicle tipped over while laying cable).

219. See *Loos v. Farmer's Tractor & Implement Co.*, 738 F. Supp. 323, 323 (S.D. Ind. 1990) (plaintiff injured right hand while inspecting engine compartment of combine); *Bates v. John Deere Co.*, 195 Cal. Rptr. 637, 639-40 (Ct. App. 1983) (operator of cotton-picking machine injured foot while trying to remove rock from rollers); *Ostendorf v. Brewer*, 367 N.E.2d 214, 216 (Ill. App. Ct. 1977) (farm worker burned by gasoline which escaped from tractor's fuel tank); *Perdue Farms Inc. v. Pryor*, 646 N.E.2d 715, 717 (Ind. Ct. App. 1995) (repairman injured lower back while attempting to repair jammed feed auger at turkey farm); *Schuh v. Fox River Tractor Co.*, 218 N.W.2d 279, 281 (Wis. 1974) (farmer suffered leg injury from crop blower fan).

220. See *McCurley v. Whitaker Oil Co.*, 388 S.E.2d 412, 413 (Ga. Ct. App. 1989) (worker at steel plant injured from exposure to fumes from trichloroethylene cleaning agent); *Oatis v. Catalytic, Inc.*, 433 So. 2d 328, 330 (La. Ct. App. 1983) (worker became disabled after inhaling toxic phosgene gas at chemical plant); *Hernandez v. American Appliance Mfg. Corp.*, 827 S.W.2d 383, 385 (Tex. Ct. App. 1992) (plaintiff burned while installing kitchen countertop when flammable formica glue he was using was ignited by flame from gas water heater).

221. See *McNeal*, 836 F.2d at 640 (window washers put scaffolding safety clips on backwards); *Employers Nat'l Ins. Co. v. Chaddrick*, 826 F.2d 381, 383 (5th Cir. 1987) (electrical lineman rode on "skidder" even though it was not designed for this purpose);

contribute to the problem by removing safety equipment from industrial machinery,²²² failing to transmit warnings to their employees,²²³ and tolerating dangerous practices in the workplace.²²⁴

Bystanders are another group that might suffer if the current liability rules were changed. Bystander cases tend to fall into certain patterns. These include situations that involve drivers²²⁵ or pedestrians²²⁶ who are struck by motor vehicles, shoppers who are injured by debris from exploding soft drink bottles²²⁷ and other products,²²⁸ bystanders who are

Bates, 195 Cal. Rptr. at 640 (employee ignored proper procedures by clearing rock from cotton-picking machine with foot while machine was running).

222. See, e.g., *Baldwin v. Harris Corp.*, 751 F. Supp. 2, 4 (D.D.C. 1990) (employer disengaged safety device on paper cutter); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 923 (Minn. 1986) (employer removed safety bar from hydraulic press).

223. See *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 372 (4th Cir. 1983) (employer failed to warn employee that meat grinder might start up even when turned off); *Younger v. Dow Corning Corp.*, 451 P.2d 177, 179 (Kan. 1969) (employer failed to pass along warning to employees about danger of exposure to chemicals); *Jodway v. Kennametal, Inc.*, 525 N.W.2d 883, 888 (Mich. Ct. App. 1994) (employer failed to warn employees about risk of inhaling cobalt dust).

224. See, e.g., *Cook v. Branick Mfg., Inc.*, 736 F.2d 1442, 1444 (11th Cir. 1984) (employees at tire-recapping shop routinely failed to use safety pins while inflating tires).

225. See *Passwaters v. General Motors Corp.*, 454 F.2d 1270, 1272 (8th Cir. 1972) (motorcyclist cut by exposed decorative flanges on hubcap of car during collision); *Williams v. National Trailer Convoy, Inc.*, 549 F. Supp. 305, 306 (D. Colo. 1982) (plaintiff's vehicle struck when mobile home being towed on highway crossed over into plaintiff's lane); *Sullivan v. Green Mfg. Co.*, 575 P.2d 811, 813 (Ariz. Ct. App. 1977) (plaintiff's vehicle struck by truck pulling loaded cotton trailer that could not stop in time because of inadequate brakes); *Caruth v. Mariani*, 463 P.2d 83 (Ariz. Ct. App. 1970) (brake failure caused automobile to hit plaintiff's car in the rear); *Elmore v. American Motors Corp.*, 451 P.2d 84, 85 (Cal. 1969) (when driveshaft came loose automobile went out of control and struck plaintiff's car); *Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 517 P.2d 406, 409 (Colo. Ct. App. 1973) (brake failure caused dump truck to run into plaintiff's car); *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581, 582 (Del. 1976) (brakes on rented truck failed, causing truck to run into rear end of plaintiff's car as it was stopped at an intersection); *Chrysler Corp. v. Alumbaugh*, 342 N.E.2d 908, 911 (Ind. Ct. App. 1976) (while traveling on highway, plaintiff's vehicle struck by another automobile that in turn had been hit by a pickup truck whose brakes had failed); *Hampshire v. Ford Motor Co.*, 399 N.W.2d 36, 37 (Mich. Ct. App. 1986) (driver of stolen car crossed over center line and struck plaintiff's vehicle); *Osborne v. International Harvester Co.*, 688 P.2d 390, 393 (Or. Ct. App. 1984) (plaintiff injured when she collided with truck that had broken down in the wrong lane of traffic); *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 631 (Tex. 1969) (defective brakes caused truck to run into rear of plaintiff's car).

226. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 82 (Fla. 1976) (road grader backed into and ran over plaintiff as she was crossing the street); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 10 (Iowa 1977) (seven-year-old boy killed when automobile went out of control in school yard); *Ford Motor Co. v. Cockrell*, 211 So. 2d 833, 834 (Miss. 1968) (dump truck spontaneously started up and pinned plaintiff against another truck).

227. See *Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703, 704 (Ky. Ct. App. 1975) (soft drink bottle sitting on floor exploded, injuring plaintiff as she was removing soft drinks from self-service cooler).

hurt by objects ejected by power tools,²²⁹ repairmen who are injured while attempting to fix defective products,²³⁰ children who come into contact with dangerous machinery,²³¹ and those who come to the rescue of others in peril.²³²

Each of these categories of potential victims could argue that allowing waivers of tort liability would be unfair because it would cause them to bear a disproportionate share of any harm that results. Each of these claims will be addressed separately. Accident-prone adults probably have the weakest argument for special treatment. They are not a very sympathetic lot, and it seems unfair and paternalistic to deprive buyers and sellers of the benefits of rational decision-making in order to protect mature adults from the consequences of their foolish behavior.

Young children and teenagers seem to have a stronger claim for compensation than accident-prone adults. One reason is that they are not as morally culpable as adults. Unlike adults, the bad judgment of young children, and even teenagers, is usually due to inexperience and lack of maturity rather than carelessness or indifference. Thus, it is easier to view children as morally innocent and more deserving of protection than adults. However, one might argue that children and teenagers are part of a family unit. When a member of the family, typically a parent, purchases a product and waives tort liability in return for a lower price, the entire family benefits financially from this transaction and, therefore, should be bound by its terms. Under this reasoning, waivers would be

228. See *Moss v. Polyco, Inc.*, 522 P.2d 622, 624 (Okla. 1974) (container of drain cleaner spilled on plaintiff while she was using steak house's restroom).

229. See *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 778 (N.D. Ind. 1969) (customer at automobile dealership struck in the jaw by bolt thrown by lawnmower).

230. See *Skarski v. Ace-Chicago Great Dane Corp.*, 485 N.E.2d 1312, 1314 (Ill. App. Ct. 1985) (plaintiff injured while trying to repair refrigeration unit attached to trailer).

231. See *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1454 (10th Cir. 1987) (thirteen-year-old boy's arm cut off by circular saw blade on bush cutter operated by his uncle); *Komanekin v. Inland Truck Parts*, 819 F. Supp. 802, 805 (E.D. Wis. 1993) (five-year-old boy severely injured when his arm became entangled in the moving drive-shaft of a propane gas delivery truck); *Howes v. Hansen*, 201 N.W.2d 825, 826 (Wis. 1972) (two-year-old child injured by power riding lawnmower).

232. See *Fedorchick v. Massey-Ferguson, Inc.*, 438 F. Supp. 60, 61 (E.D. Pa. 1977) (plaintiff struck by runaway earth loader while attempting to rescue driver who was thrown from vehicle), *aff'd without opinion*, 577 F.2d 725 (3d Cir. 1978); *Court v. Grzelinski*, 379 N.E.2d 281, 282 (Ill. 1978) (fireman injured while trying to extinguish fire in another's automobile); *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 326 (Tex. 1968) (plaintiff injured while reaching over escalator handrail to help small child who had fallen down on escalator).

effective against children as well as adults.

Employees arguably deserve protection from unilateral decisions by their employers that subject them to increased risk. However, in many instances workplace safety issues are negotiated between employers and employees or their representatives. In such cases, one can argue that employees voluntarily agree to accept greater risks and presumably get something in return from their employer for doing so.

Of all these groups, bystanders most clearly occupy the moral high ground. Unlike accident-prone adults, bystanders are seldom at fault, and when they do fail to look out for themselves properly, they are subject to liability under the comparative fault doctrine. Furthermore, unlike children, bystanders seldom benefit, even indirectly, from risk-shifting arrangements between buyers and sellers. Finally, unlike employees, bystanders cannot be viewed as having consented to waivers of tort liability by others acting in their stead.

VI. SOURCES OF LEGAL AND PRACTICAL PROTECTION FOR CONSUMER INTERESTS

Some may feel that the liability regime described above gives buyers and sellers too much freedom to determine who will bear the consequences of product-related risks. These skeptics may doubt that an unregulated market can assure the maintenance of an acceptable level of product safety, or they may feel uncomfortable with the distributive effects of a system that enables sellers to shift virtually all product-related risks to consumers. Assuming these concerns are valid, they may be lessened by the existence of a number of mechanisms that protect consumer interests. For example, federal regulations already establish a minimum level of safety for virtually all products. In addition, legislatures and courts have the power to employ a variety of techniques to control overreaching by product sellers. Finally, a number of practical considerations effectively limit a product seller's ability to shift product-related risks to customers.

A. *Federal Product Safety Standards*

At the present time, federal agencies regulate many aspects of product safety.²³³ For example, the Consumer Product Safety Commission promulgates safety standards for consumer products²³⁴ and administers

233. See generally Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1214-17 (1996) (describing the regulatory responsibilities of various federal agencies).

234. See 15 U.S.C. §§ 2051-2084 (1994 & Supp. IV 1998).

certain "transferred acts," such as the Flammable Fabrics Act,²³⁵ the Child Protection and Toy Safety Act of 1969,²³⁶ and the Poison Prevention Packaging Act of 1970.²³⁷ The Environmental Protection Agency, acting under the auspices of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), oversees the manufacture, sale, and use of pesticides and herbicides.²³⁸ The National Traffic and Motor Vehicle Safety Act of 1966 authorizes the Secretary of Transportation to establish safety standards for automobiles and other motor vehicles.²³⁹ Consequently, Federal Motor Vehicle Safety Standards currently govern many aspects of motor vehicle safety.²⁴⁰ The Food and Drug Administration is empowered by the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act to regulate the development, testing, manufacture, and sale of chemical drugs, biological products, and medical devices.²⁴¹ In addition, the Department of Agriculture regulates the processing of such food products as meat,²⁴² poultry,²⁴³ and eggs.²⁴⁴ The Federal Aviation Administration has promulgated safety standards for commercial and private aircraft pursuant to the Federal Aviation Act of 1958.²⁴⁵ Finally, the Department of Labor is authorized by the Occupational Safety and Health Act (OSHA) to formulate occupational health and safety standards, including safety standards for industrial machinery.²⁴⁶

Although some commentators maintain that these standards are inadequate or obsolete,²⁴⁷ the existing network of federal regulations

235. See 15 U.S.C. §§ 1191-1204 (1994 & Supp. IV 1998).

236. See 15 U.S.C. §§ 1261, 1262, 1274, 1278 (1994).

237. See 15 U.S.C. §§ 1471-1474, 1476 (1994).

238. See 7 U.S.C. §§ 136-136y (1994 & Supp. IV 1998).

239. See 49 U.S.C. §§ 30101-30162 (1994 & Supp. IV 1998).

240. See Stephen J. Werber, *The Products Liability Revolution—Proposals for Continued Legislative Response in the Automotive Industry*, 18 NEW ENG. L. REV. 1, 46 (1982-1983).

241. See 21 U.S.C. §§ 301-394 (1994 & Supp. IV 1998); 42 U.S.C. § 262 (1994 & Supp. IV 1998).

242. See Federal Meat Inspection Act, 21 U.S.C. §§ 601, 611 (1994 & Supp. IV 1998).

243. See Poultry Products Inspection Act, 21 U.S.C. §§ 451, 457 (1994).

244. See Egg Products Inspection Act, 21 U.S.C. §§ 1031, 1036 (1994).

245. See 49 U.S.C. §§ 1301-1557 (1994 & Supp. IV 1998).

246. See 29 U.S.C. §§ 651-678 (1994 & Supp. IV 1998).

247. See Anita Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C. L. REV. 677, 687 (1977-1978) ("Manufacturers have enormous power to influence the formation of government standards."); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1147 (1988)

provides some level of protection for consumers. Of course, manufacturers must comply with applicable product safety standards, and consumers are not permitted to waive them. Thus, for products that are subject to federal safety standards, waivers of liability can only affect risks that lie between the floor established by federal law and the ceiling established by tort liability. This assures that even the most aggressive use of waivers by product sellers will not return us to the brutal days of caveat emptor.

B. Clear Statement Requirements and Other Formalities

If legislatures or courts are concerned about the effects of unrestricted use of waivers in sales agreements, they could establish requirements that would provide additional protection to consumers. For example, they could subject waivers of tort liability to some of the same requirements that currently exist for disclaimers under the Uniform Commercial Code. For example, section 2-316 requires that disclaimers of the implied warranty of merchantability be “conspicuous” and refer expressly to merchantability.²⁴⁸ Courts will not enforce disclaimers that fail to comply with these requirements.²⁴⁹ Disclaimers of fitness warranties must also be conspicuous, although they need not specifically mention fitness.²⁵⁰

Reasonably clear statement requirements and other formalities would work just as well under a hybrid tort-contract regime as they do under the Code’s contract-oriented regime. These requirements would protect consumers by alerting them to the fact that the seller has limited its duty in some way, thereby preventing sellers from slipping exculpatory language past consumers by placing it where consumers are unlikely to see it.

(discussing how regulated industries affect safety standards by controlling the agency’s access to information); Mark DeSimone, Comment, *The State of the Art Defense in Products Liability: “Unreasonably Dangerous” to the Injured Consumer*, 18 DUQ. L. REV. 915, 923 (1980) (“[G]overnment regulations which may have been adequate when originally enacted are often obsolete and fall well below the level of safety needed for products manufactured at a later date.”).

248. U.C.C. § 2-316(2) (1989).

249. See *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902, 909 (D. Minn. 1985) (holding that disclaimer on back of sales contract was not conspicuous); *Agrarian Grain Co. v. Meeker*, 526 N.E.2d 1189, 1192 (Ind. Ct. App. 1988) (declaring disclaimer to be ineffective for failure to mention merchantability); *P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co.*, 568 P.2d 1273, 1278 (Okla. 1977) (refusing to enforce disclaimer which failed to mention merchantability); *Christopher v. Larson Ford Sales, Inc.*, 557 P.2d 1009, 1012 (Utah 1976) (concluding that disclaimer on back of contract for sale of mobile home was not effective because it was not conspicuous).

250. See U.C.C. § 2-316(2) (1989).

C. Categorical Restrictions on Waivers

Legislatures or courts could also expressly prohibit waivers that they deem to be inherently unfair to consumers or otherwise offensive to public policy. Although this power should be used sparingly, legislatures or courts could provide that waivers of liability would not apply to children, bystanders, or workers, unless the right to waive workers' rights under tort law had been addressed in a labor contract. They could also prohibit caps on compensatory damages or ban provisions that reduced the time limit for filing claims. Legislatures or courts, if they chose, could even prevent the sellers of certain types of essential consumer products, such as food or drugs, from offering tort liability waivers at all.

D. The Unconscionability Doctrine

Finally, courts could refuse to enforce any waivers of tort liability that they found to be "unconscionable." Courts have traditionally employed the unconscionability doctrine in contract cases. This principle has been codified in section 2-302(1) of the U.C.C.²⁵¹ and has even been applied to invalidate disclaimers that fully complied with the formal requirements of the Code.²⁵² Presumably, courts could invoke the unconscionability principle to strike down unfair or one-sided waivers of tort liability as well.

E. Practical Limitations

In addition to formal legal restrictions, practical limitations affect the ability of sellers to limit their liability for defective products. First, the requirement that the terms of a waiver be specific and must be

251. This provision declares:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id. § 2-302(1).

252. See *Martin v. Joseph Harris Co.*, 767 F.2d 296, 301-02 (6th Cir. 1985) (concluding that exculpatory provisions placed in sales contracts by cabbage seed producers were unconscionable); *Schmaltz v. Nissen*, 431 N.W.2d 657, 661-62 (S.D. 1988) (invalidating exculpatory provisions in seed sales contract on unconscionability grounds).

communicated to the buyer will create insurmountable obstacles for many sellers. Since face-to-face bargaining is generally impracticable, sellers would have to transmit waiver provisions to buyers by means of sales contracts, package labeling, or package inserts. However, these methods of communication are not always effective. For example, formal contracts are seldom used in connection with the sale of inexpensive consumer products that are purchased in supermarkets or discount stores. The only documents that these types of sellers provide are computer-generated sales slips that, at best, describe the item sold and give its price. In theory, the seller could set forth the terms of the waiver on the product itself or on package labeling. However, many consumer products are too small to allow package labeling to serve as a practical means of notifying consumers of the existence of a waiver. Obviously, a manufacturer would have to use very small print indeed to set forth the terms of a waiver on a product package that was only a few inches long or wide. Moreover, if such labeling were used, courts would almost certainly conclude that the small print failed to provide proper notice to the consumer of the terms of the waiver provision. Package inserts might provide more information to consumers and could also employ larger print. However, courts might refuse to give effect to waivers contained in package inserts if consumers could not read them until after they had purchased the product.

As a practical matter, the requirement that sellers provide full disclosure of waiver terms makes it difficult or impossible for sellers to obtain waivers of tort liability unless the products involved are fairly large and expensive. For this reason, contractual waivers of tort liability will probably not be used very often in connection with the sale of inexpensive consumer products, even though they may be dangerous.

Furthermore, marketing considerations may also discourage sellers from attempting to limit their liability. Just as consumers view strong warranties as an indicator of good product quality, they are also likely to view waivers as a tacit acknowledgment by the seller that the product is poorly made or dangerous. Consequently, sellers who demand waivers of tort liability may lose market share, particularly if their competitors employ more consumer-oriented marketing strategies. Therefore, it appears that only those sellers who are willing to give their customers a genuine benefit in return for waiving tort liability are likely to benefit in the long run from the use of waivers.

VII. CONCLUSION

This Article has argued that buyers and sellers should be allowed to shift product-related risks through the use of contractual waivers of tort

liability. These contractual agreements could relieve the seller of all liability, they could partially waive liability, or they could limit the remedies that would otherwise be available to accident victims. Such arrangements are economically efficient because they ensure that product-related risks will be borne by the party with the best ability to bear these risks. Allowing people to determine who should bear such risks is also consistent with the principle of personal autonomy.

Additionally, this Article has attempted to respond to some of the concerns generated by this proposal. For example, market failures might impair the ability of a market-oriented system to achieve economic efficiency. In addition, the loss-shifting function of products liability might be undermined if sellers were able to shift accident costs to individual buyers instead of spreading them to the consuming public. Finally, shifting losses from sellers to consumers might offend principles of corrective justice, and these losses might fall disproportionately on certain groups of victims.

While these concerns are legitimate, they are not significant enough to forego the benefits that will accrue if waivers of tort liability are permitted. First, as this Article has demonstrated, the fear of market failure has been exaggerated. In addition, buyers can often bear risk more efficiently than sellers. Furthermore, distributional and corrective justice concerns can be addressed by placing modest limits on the right to waive tort liability rather than by prohibiting such waivers altogether. Finally, this Article has identified a number of legal and practical considerations that effectively limit the ability of sellers to shift excessive risk to consumers.

All of this leads to the conclusion that the paternalism of existing products liability law should be repudiated. Additionally, buyers and sellers should be allowed to determine for themselves who should bear the risks associated with the manufacture and use of products.

