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## Good Whiskey, Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury

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# **“GOOD WHISKEY,”<sup>1</sup> DRUNK DRIVING, AND INNOCENT BYSTANDERS: THE RESPONSIBILITY OF MANUFACTURERS OF ALCOHOL AND OTHER DANGEROUS HEDONIC PRODUCTS FOR BYSTANDER INJURY**

ROBERT F. COCHRAN, JR.\*

I. INTRODUCTION . . . . .	271
II. FAIRNESS, “GOOD WHISKEY,” AND BYSTANDERS . . . . .	275
A. <i>Corrective Justice, Alcohol Manufacturers and Wrongful Gain</i> . . . . .	275

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\* Professor of Law, Pepperdine University; J.D., University of Virginia, 1976. I would like to thank Ken Abraham, Rus Gough, Carl Hawkins, David Logan, John Noyes, Mark Scarberry, Tom Shaffer, Peter Wendel and Paul Zwier for comments on earlier drafts; David Bragdon, James Fell, and Mark Rosenberg for their assistance in assembling and interpreting studies on alcohol and its costs; and Sally Campbell, Stephen Carter, Pam Davidson, Roger Fredrickson and Jeanne Pepper for their assistance in research.

1. The term “good whiskey” is taken from comment i to the Restatement (Second) of Torts, which states: “Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.” RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) [hereinafter RESTATEMENT].

It may be that the drafters of the Restatement had a little fun choosing the term “good” to describe some whiskey. The American Law Institute Proceedings reflect that the drafters laughed at William Prosser’s suggestion that whiskey is one of “a number of products which, even though not defective, are in fact dangerous to the consumer.” 38 A.L.I. PROC. 87-88 (1961) (statement of William L. Prosser). It would have been hard for the drafters of the Restatement to have chosen a less precise term than “good” to define whiskey that is not defective. The term “good” can mean “desirable,” “[s]uperior to the average,” “[o]f high quality,” or “[p]leasant; enjoyable.” THE AMERICAN HERITAGE DICTIONARY 567 (2d ed. 1982). What is normally referred to as “good whiskey” is whiskey that is of excellent quality, the service of which would be a mark of a superior host. It is a term that would engender within a whiskey drinker a feeling of warmth. Certainly no one could find “good whiskey” to be defective. Other definitions of “good,” such as “[b]eneficial,” “[s]afe,” and even “[o]f moral excellence,” *id.*, if used to describe whiskey, hide the great risks that accompany the consumption of any whiskey. It is questionable whether a product that creates so many costs to society is good in that sense. *See, e.g., infra* part IV.C.1.a (discussing the costs of alcohol to society). Indeed, if an alcohol manufacturer were to assert that its product was good, consumers might claim that it created unrealistic safety expectations about its product.

A complete reading of the quoted portion of the Restatement’s comment, *supra*, reveals that what is meant is not good in the sense of “[s]uperior” or “safe” but good in the sense of “[n]ot spoiled or ruined.” *See* THE AMERICAN HERITAGE DICTIONARY, *supra*, 567. This Article will use the term “good whiskey” in that sense.

B. <i>The Limited Value of Alcohol and Other Hedonic Products: The Inverse of Comment k</i> . . . . .	278
C. <i>The Special Dangers of Alcohol: It Impairs Consumers' Ability to Drive Safely, Impairs Their Ability to "Know When to Say When," and Increases the Likelihood That They Will Be Unable to Compensate Victims</i> . . . . .	280
D. <i>The Bystander's Limited Opportunity to Take Safety Steps</i> . .	281
E. <i>Unreciprocated Risk</i> . . . . .	283
F. <i>The Responsibility of the Intervening Actor</i> . . . . .	285
III. THE CONSEQUENCES OF LIABILITY . . . . .	287
A. <i>Spreading the Risk of Bystander Injury: Court-Imposed Third Party Insurance</i> . . . . .	287
B. <i>Safety and Efficiency</i> . . . . .	289
1. <i>The Cheapest Cost Avoider</i> . . . . .	289
2. <i>Internalizing the Cost of Bystander Injury</i> . . . . .	291
IV. LIABILITY THEORIES . . . . .	294
A. <i>Abnormally Dangerous Activity Liability</i> . . . . .	294
B. <i>Products Liability: Failure to Warn</i> . . . . .	298
C. <i>Products Liability: Negligent Design</i> . . . . .	302
1. <i>Negligence's Cost/Benefit Test</i> . . . . .	303
a. <i>The Costs of Alcohol</i> . . . . .	304
b. <i>The Benefits of Alcohol</i> . . . . .	312
2. <i>Do the Costs Outweigh the Benefits? Who Should Decide?</i> . . . . .	314
3. <i>An Inherent Characteristics Rule for Negligence?</i> . . . . .	316
D. <i>Strict Products Liability: Defective Design</i> . . . . .	317
1. <i>The Consumer Expectations Test</i> . . . . .	317
2. <i>Strict Liability's Cost/Benefit Test</i> . . . . .	319
3. <i>The Inherent Characteristics Rule</i> . . . . .	320
a. <i>A Safer Product?</i> . . . . .	320
b. <i>The Inherent Characteristics Rule and the Bystander</i> . . . . .	322
E. <i>Stricter Liability for Bystander Injury from Dangerous Hedonic Products</i> . . . . .	326
1. <i>Distinguishing the Old Strict Products Liability</i> . . . . .	326
2. <i>A Three-Part Test</i> . . . . .	328
3. <i>The Risk of Greatly Expanded Liability</i> . . . . .	329
4. <i>Support for Greater Bystander Recovery</i> . . . . .	330
5. <i>Support for Stricter Hedonic Product Liability</i> . . . . .	332
V. CONCLUSION . . . . .	335

## I. INTRODUCTION

Alcohol-related traffic accidents kill and seriously injure thousands of innocent bystanders each year.<sup>2</sup> Drunk drivers are subject to liability for these losses, but many drunk drivers are not financially responsible and are either uninsured or underinsured. Some jurisdictions hold servers of alcohol responsible if they negligently serve an intoxicated person who causes an accident,<sup>3</sup> but in many cases there is not a negligent server. Courts have not held alcohol manufacturers subject to liability to injured bystanders.<sup>4</sup> This Article will consider the possibility that courts or legislatures might make manufacturers of alcohol and other dangerous hedonic products subject to liability for injuries to innocent bystanders. Manufacturer liability may be justified both as a matter of corrective justice<sup>5</sup> and because of the consequenc-

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2. The United States Department of Transportation estimates that in 1985 alcohol-related traffic accidents killed 7400 persons who had not been drinking. NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DRUNK DRIVING FACTS (1986) [hereinafter DRUNK DRIVING FACTS], cited in Willard G. Manning et al., *The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?*, 261 J. AM. MED. ASS'N 1604, 1608 (1989)).

3. By 1988, 30 states had enacted dram shop acts that subjected commercial distributors of alcohol to liability. See Robert M. Howard, Note, *The Negligent Commercial Transaction Tort: Imposing Common Law Liability on Merchants for Sales and Leases to "Defective" Customers*, 1988 DUKE L.J. 755, 767 & n.78. In ten other states and the District of Columbia, commercial hosts were subject to negligence liability as a matter of common law. See *id.* at 768 & n.79. Some courts have held social hosts subject to liability. See, e.g., *McGuiggan v. New England Tel. & Tel. Co.*, 496 N.E.2d 141, 146 (Mass. 1986). However, most jurisdictions have rejected social host liability. See, e.g., *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987); *Holmquist v. Miller*, 367 N.W.2d 468, 472 (Minn. 1985) (en banc); *Boutwell v. Sullivan*, 469 So. 2d 526, 529 (Miss. 1985); *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547, 553 (Mo. 1987) (en banc).

4. See, e.g., *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565 (Iowa 1986) (en banc); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578 (Tex. Ct. App. 1987).

5. Professor George Fletcher argued that tort law should primarily concern corrective justice and fairness rather than the economic consequences of a rule; corrective justice considers "whether the victim is entitled to recover and whether the defendant ought to pay." George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540 (1972).

Others argue that tort law should focus on economic consequences. Some advocate enterprise liability, arguing that through imposing liability on enterprises, tort law would spread the risk of injury to enterprises and through them to their customers. See, e.g., Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976). Others advocate that courts impose liability on the cheapest cost avoider, thereby creating an incentive for the lowest accident costs. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 1.2, 6.1 (4th ed. 1992).

Until recently, there had been little discussion among academics about the moral basis of tort law. Articles by philosophy professors Ernest Weinrib and Jules Coleman have sparked a new analysis of the underlying basis of tort law, in part because of their argument that Aristotle's concept of corrective justice is at the root of tort law. Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Jules L. Coleman, *Moral Theories of Torts*:

es that would flow from liability.<sup>6</sup>

Alcohol creates great costs to society. One study found the social costs of alcohol in 1985, including the costs borne by drinkers, to be \$70 billion.<sup>7</sup> Another study found the costs in 1986 to those other than heavy drinkers to be \$25.15 billion.<sup>8</sup> The costs that alcohol imposes on those that do not overconsume is the special concern of this article.

Under the concept of corrective justice, when a defendant receives a wrongful gain and a plaintiff suffers a wrongful loss as the result of defendant's activity, the parties should be returned to their original position,<sup>9</sup> and the defendant should pay for the plaintiff's loss. Obviously, innocent bystanders who are injured in alcohol-related accidents suffer wrongful loss, but do alcohol manufacturers receive any wrongful gain? Profits from sales to those who consume moderate amounts may be legitimate gain. However, profits from sales to those who overconsume may be wrongful gain, not because of the fault of the manufacturer, but because of the misuse of alcohol by those who overconsume. This misuse of alcohol causes manufacturer gains and bystander losses, and therefore corrective justice may dictate bystander recovery from manufacturers.

Alcohol is an hedonic product, a product used primarily for consumer pleasure. Pleasure is important to our society, but it is not as important as other things. Enjoyment of products should not be at the expense of persons who are placed at risk, unless there is a provision for injured bystanders. Perhaps the price of alcohol and other hedonic products should include the risks that those products create to others.<sup>10</sup> Alcohol is especially dangerous because it limits the ability of users to exercise reasonable care. It is addictive and may increase the likelihood that consumers will be indigent. These added

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*Their Scope and Limits* (pts. 1 & 2), 1 LAW & PHIL. 371 (1982), 2 LAW & PHIL. 5 (1983); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989). See also Richard A. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992); and David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993). For a discussion of the implications of corrective justice for alcohol manufacturer liability, see *infra* part II.A.

6. For a discussion of such consequences, see *infra* part III. PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY (1992), advocates, on consequentialistic grounds, a statute that would impose alcohol manufacturer liability for bystander loss.

7. See DOROTHY P. RICE ET AL., THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1985 2 tbl. 1 (1990).

8. Philip Cook, *The Social Costs of Drinking*, in NORWEGIAN MINISTRY OF HEALTH AND SOCIAL AFFAIRS, EXPERT MEETING ON THE NEGATIVE SOCIAL CONSEQUENCES OF ALCOHOL USE 49, 55 (1990) [hereinafter NEGATIVE SOCIAL CONSEQUENCES] (calculating the costs from information in Willard G. Manning, *supra* note 2, at 1607-08).

9. See *infra* note 29 and accompanying text.

10. See *infra* part II.B.

characteristics provide even greater justification for imposing liability on manufacturers of alcohol rather than on manufacturers of other dangerous hedonic products.<sup>11</sup>

Historically products liability law has neglected bystanders, but perhaps bystanders deserve greater protection than consumers.<sup>12</sup> Generally, it is harder for bystanders than for consumers to take steps for their own safety. Also, bystanders usually do not choose to expose themselves to the risk created by the products that cause their injuries.

The consequence of courts imposing liability on manufacturers of alcohol and other dangerous hedonic products would be that manufacturers would pass some liability costs to consumers. It is appropriate, however, that consumers of dangerous hedonic products bear some of the costs that these products create to bystanders. As anti-drug campaigns have emphasized, drug users create the market for drugs and are responsible for the consequences resulting from drug use.<sup>13</sup> Manufacturers and consumers of alcohol subject bystanders to unreciprocated risks.<sup>14</sup> These risks should be spread to those who benefit from the product, in the form of higher alcohol prices.<sup>15</sup> Those who enjoy dangerous hedonic products should pay for the risks that those products create to others.

If bystanders do not recover for their injuries, these losses are external costs not reflected in the decisions of consumers to purchase such products. Such externalities cause economic inefficiency. The cost of bystander injuries should be internalized in the cost of products so that the price will reflect all of the costs that the products create.<sup>16</sup>

Traditionally, in cases in which an intoxicated person caused injury, those who sold the alcohol were not liable because of the intervening culpability of the drinker.<sup>17</sup> In recent years, courts have rejected this rule in many cases involving negligent servers of alcohol.<sup>18</sup> Courts have recognized that persons other than the drinker may be responsible for the loss. If courts hold manufacturers liable for alcohol-related injuries to bystanders, maybe

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11. See *infra* part II.C.

12. See *infra* part II.D.

13. One television commercial showed a police badge that was hit by several bullets and the blame was placed on drug users.

14. See *infra* part II.E.

15. See *infra* part III.A.

16. See *infra* part III.B.2. Liability would cause an increase in price, a decrease in consumption, and an increase in safety. See *infra* text accompanying note 101.

17. See, e.g., *Collier v. Stamatis*, 162 P.2d 125, 127-28 (Ariz. 1945), *overruled by* *Ontiveros v. Borak*, 667 P.2d 200 (Ariz. 1983) (en banc), *superseded by statute*, ARIZ. REV. STAT. ANN. § 4-312 (1989); *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621, 623 (Va. 1986).

18. See, e.g., *Rong Yau Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268, 1277 (D.C. 1987); *Lopez v. Maez*, 651 P.2d 1269, 1275-76 (N.M. 1982).

manufacturers should be entitled to an indemnity cause of action against the drinker.<sup>19</sup> However, the drinker's culpability should not relieve manufacturers of liability.

Injured bystanders might attempt to recover from manufacturers of alcohol or other dangerous hedonic products under abnormally dangerous activity,<sup>20</sup> failure to warn,<sup>21</sup> negligent design,<sup>22</sup> and strict products liability mis-design<sup>23</sup> causes of action. But each of these causes of action presents the bystander with significant difficulties.

This Article will propose a cause of action under which bystanders would not have to prove that the product causing injury was defective, but would instead have to meet three requirements that courts have not generally imposed in strict products liability. Plaintiffs would have to show the following:

- 1) the product is dangerous;
- 2) the product is an hedonic product, that is, that it is primarily used for purposes of entertainment and enjoyment; and
- 3) the plaintiff was a bystander, i.e., one whom the product did not benefit.<sup>24</sup>

Each of these factors presents some justification for imposing strict liability. However, when all of these factors are present, the justification for manufacturer liability is very strong.

Part II of this Article will discuss fairness as a justification for imposing liability on manufacturers of alcohol and other dangerous hedonic products for bystander injury. Part III will discuss the consequences that might flow from such liability. Part IV will consider potential theories under which courts might establish such liability.

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19. See *infra* text accompanying notes 77-80.

20. See *infra* part IV.A.

21. See *infra* part IV.B.

22. See *infra* part IV.C.

23. See *infra* part IV.D.

24. See *infra* part IV.E. James Henderson and Aaron Twerski argue that the American products liability frontier is closed and that it is unlikely that there will be any further dramatic expansion of products liability law. See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991). Although I generally agree with them, the area of bystander liability may be a major exception.

## II. FAIRNESS, "GOOD WHISKEY," AND BYSTANDERS

### A. *Corrective Justice, Alcohol Manufacturers and Wrongful Gain*

At the root of tort liability is the concept, developed by Aristotle, of corrective justice.<sup>25</sup> In recent years, there has been a renaissance of interest in corrective justice among legal commentators and philosophers.<sup>26</sup>

According to Aristotle, there are two types of justice. Under distributive justice, a society distributes its goods based on its concept of desert.<sup>27</sup> "Corrective justice operates when a disturbance 'violates the proportion' established by distributive justice."<sup>28</sup> Corrective justice acts when someone receives a wrongful gain at the expense of another; it restores the parties to the position they had prior to defendant's gain and plaintiff's loss.<sup>29</sup>

When a culpable party causes plaintiff's loss, it is clear that corrective justice requires defendant to reimburse the plaintiff. It is unclear, however, whether Aristotle believed that corrective justice requires that the defendant be at fault.<sup>30</sup> Jules Coleman, citing the rule that one may use the property of another in an emergency but must provide compensation, argues that corrective justice does not require a wrongful act.<sup>31</sup>

Kathryn Heidt discusses the implications of corrective justice when a culpable party cannot pay, but an innocent party gains from the activity of the culpable party. She argues for "second order" liability, for imposing liability on the "innocent gainer." The gainer is innocent, but because the gain is obtained as a result of wrongful activity, it is a wrongful gain. Heidt argues that under principles of corrective justice, the status quo should be restored: "To the extent that the actual wrongdoer cannot compensate the victims, corrective justice requires that the innocent gainers be made to give up their

25. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. V (David Ross trans. 1980); see also Kathryn R. Heidt, *Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347 (1990).

26. See, e.g., Heidt, *supra* note 25; sources cited *supra* note 5.

27. ARISTOTLE, *supra* note 25, at 1130b ll.30-34.

28. Heidt, *supra* note 25, at 352-53 (quoting ARISTOTLE, *supra* note 25, at 1131b ll.31-34).

29. ARISTOTLE, *supra* note 25, at 1132b ll.19-20.

30. Aristotle said that under corrective justice, the judge should return the parties to their original position "if one is in the wrong and the other has been wronged, [and/or] if one inflicted injury and the other received it." ARISTOTLE, *supra* note 25, at 1132a ll.4-6. One translator translates the key conjunction "and," another as "or," and a third omits a conjunction. See Heidt, *supra* note 25, at 363 & nn.78-79 (citing the relevant translations).

Among modern commentators, Posner argues that corrective justice requires that the defendant have committed a wrongful act. POSNER, *supra* note 5, § 8.4. Coleman argues that corrective justice does not require a wrongful act, but merely wrongful gain. Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451, 463-64 (1987).

31. Coleman, *supra* note 30, at 463-64.



gains to compensate the victims."<sup>32</sup> Heidt applies her second order liability theory to creditors of toxic waste dumpers,<sup>33</sup> but it may be that her theory would more readily apply to manufacturers of alcohol.

Most would probably agree that when an innocent bystander is injured by someone who is intoxicated, the party who is intoxicated is the most culpable party. If the bystander looks to the manufacturer for recovery, the question under principles of corrective justice and second-order liability is whether a portion of the manufacturer's gain is wrongful.

As a later section of this article will demonstrate, the benefits of alcohol to our society come through the moderate consumption of alcohol, and the costs come through overconsumption.<sup>34</sup> The profit that manufacturers receive from the moderate consumption of alcohol might be appropriately characterized as legitimate gain; but the profit that they receive from overconsumption of alcohol might properly be considered wrongful gain. Of course, it is probably impossible to stop the wrongful gain without also stopping the legitimate gain. But when those who overconsume alcohol cannot compensate the bystanders that they injure, it may be that profits that manufacturers obtain as a result of overconsumption should be available to those that are injured. Drinkers' overconsumption of alcohol causes both losses to injured bystanders and profit to alcohol manufacturers. When drinkers cannot compensate bystanders, the manufacturers' gains have been at bystanders' expense.<sup>35</sup> Perhaps these profits resulting from overconsumption should be available to those that are injured.

Under corrective justice, the goal is to restore the status quo, to return the parties to the position that they were in before the wrongful loss and the wrongful gain. Bystanders should be returned to the position that they were

32. Heidt, *supra* note 25, at 360 (footnote omitted).

33. Heidt argues that the gain that creditors of toxic waste dumpers make, over and above what they could have obtained had the debtor not engaged in toxic dumping, is wrongful gain that should be available for the cleanup of toxic waste. *Id.* at 376. It is not clear, however, that toxic waste dumpers pay greater interest on debts than other debtors.

Heidt suggests that courts should impose liability only in cases of "extraordinary harm." *Id.* at 359. "An extraordinary harm is one that, although rare, can alter substantially the existing proportionality or social fabric." *Id.* She argues that toxic waste creates an extraordinary harm because it "can cause severe physical injury and death and further that a site polluted with toxic waste can continue to cause serious illness and injury for decades or even centuries." *Id.* Alcohol, likewise, causes extraordinary harm, a substantial number of deaths and serious injuries. See *infra* part IV.C.1.a.

34. See *infra* parts IV.C.1-2 (comparing the costs and benefits of alcohol while discussing whether it is negligent to produce alcohol).

35. Compare Heidt's argument concerning the creditors of toxic waste dumpers: "The dumper's wrongful activity resulted in both the losses to the victims and the gains to the creditors. If the actual wrongdoer, the dumper, cannot compensate the victims, the creditors' gains have, in effect, been at the victims' expense." Heidt, *supra* note 25, at 361 (footnote omitted).

in prior to the injury and manufacturers should pay for those losses that the drinker is unable to pay, at least so long as that payment will not exceed manufacturers' gain from overconsumption.<sup>36</sup>

As to alcohol-related accidents, it appears that the losses of bystanders are less than the gain of manufacturers from overconsumption. A later section estimates that manufacturer liability for bystander loss in 1985 would have resulted in manufacturer payment of \$2.5 billion in damages.<sup>37</sup> In that same year, manufacturer profits from the overconsumption of alcohol in the United States were approximately \$2.6 billion.<sup>38</sup> It appears that as a matter of corrective justice, manufacturers of alcohol should pay for bystander injury.

Of course, if courts impose liability on manufacturers, manufacturers will pass some of the liability costs to consumers in higher prices. However, it may be appropriate that consumers pay a bit more for the dangerous products that they consume. Consumers should not benefit from products at the expense of injured bystanders.<sup>39</sup>

In the early days of strict products liability, several courts justified imposing liability on manufacturers for consumer injury with an argument that rang of corrective justice: manufacturers benefit from the sale of products.<sup>40</sup> This argument had a hollow ring in cases brought by consumers because consumers, as well as manufacturers, benefit from the products that they purchase. However, the courts' reasoning does apply to injured bystanders, who did not benefit from the products that caused their injury. Manufacturers, purchasers, and consumers should bear some responsibility for bystander injuries because they have enjoyed the benefits of the product and, thereby, have placed the bystander at risk.

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36. The more difficult situation would be when the losses outweigh the "wrongful gains" of the "innocent gainers." Heidt proposes that in the case of the creditors of toxic waste dumpers that their wrongful gain serve as a cap on the damages for which they are liable. *Id.* at 376. Heidt proposes that the state use these funds for clean-up, rather than tort damages. *Id.* Heidt also discusses the question of how corrective justice might apply when the gain does not equal the loss. *Id.* at 351-53 & n.25.

37. For a calculation of the estimated damages, see *infra* note 101.

38. Manufacturers' profits were calculated as follows: Ten percent of those that drink consume half of the alcohol. LEBEL, *supra* note 6, at 221 (citing NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT ON ALCOHOLISM AND HEALTH (1987)). Half of alcohol manufacturers' gain, therefore, comes from the overconsumption of alcohol. The total sales of alcohol in the United States in 1985 were \$56,248 million and the median net profit margin within the alcohol industry is 9.4%. Edward Giltenan, *41st Annual Report on American Industry: Beverages and Tobacco*, FORBES, Jan. 9, 1989, at 100. For that year, gross profits (\$56,248 million) X net profit margin (9.4%) X percentage of alcohol overconsumed (50%) = \$2.643 billion.

39. The argument that consumers as a whole bear some responsibility for the injuries caused by the products that they purchase is developed *infra* part II.E.

40. See, e.g., *Suvada v. White Motor Co.*, 210 N.E.2d 182, 186 (Ill. 1965), *impliedly overruled by* *Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248 (Ill. 1988).

*B. The Limited Value of Alcohol and Other Hedonic Products:  
The Inverse of Comment K*

Another justification for imposing liability on manufacturers of alcohol is based on the relative importance of alcohol to our society. It may be that the price of products that are created mainly for the pleasure of consumers should include the costs that such products impose on others. Pleasure is important, but not as important as many other values.

The New Jersey Supreme Court recognized the limited value of hedonic products in *O'Brien v. Muskin Corp.*:<sup>41</sup> "The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item."<sup>42</sup>

The suggestion by the *O'Brien* court that luxury or recreational products might be of less value than other products has been criticized by some commentators as being contrary to economists' practice of measuring the value of products by what consumers are willing to pay for them.<sup>43</sup> Many people pay a lot of money for hedonic products. However, recognizing that certain broad categories of products, such as hedonic products, have less value than necessities is quite consistent with valuing things based on what consumers would pay. The fact that persons may spend more on entertainment than on food does not mean that they value entertainment more than food. Given a choice between *either* food or entertainment, people would be willing to pay

41. 463 A.2d 298 (N.J. 1983), *overruled by statute as stated in* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990).

42. *O'Brien*, 463 A.2d at 306. In *O'Brien* the plaintiff was injured when he dove into an above-ground swimming pool. *Id.* at 301. The court suggested that on remand the plaintiff, in an attempt to show that the risks of above-ground swimming pools outweigh their utility, "might seek to establish that pools are marketed primarily for recreational, not therapeutic purposes." *Id.* at 306.

However, the plaintiff in *O'Brien* was not in as strong a position as is the innocent bystander in the alcohol cases. He was a consumer, the risks of the above-ground swimming pool were obvious, and the product had a warning. *See id.* at 302. *O'Brien* is discussed *infra* at text accompanying notes 284 to 287.

43. An American Law Institute Reporters' Study, in its criticism of a broad risk-utility rule, states as follows:

An open-ended risk-utility test, however, permits juries in adjudicating the legality of designs to presume that necessities provide more social utility than luxuries. In fact, the value of a particular product design is typically measured by the consumers' willingness to pay for the product so designed; so when consumers are adequately informed about risks, tort law should rely on markets to decide what product designs should be produced.

2 AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 48 (1991) [hereinafter ALI STUDY]. The ALI Study recognizes that economists measure value based on what people are willing to pay. It then appears to assume, incorrectly, that what they are willing to pay is the same as what they actually pay. *See id.* at 48-49.

<https://scholarcommons.sc.edu/sclr/vol45/iss2/4>

a lot more for food. When faced with starvation, Esau traded his birthright for a bowl of stew.<sup>44</sup> A modern Esau might trade his swimming pool for a cheeseburger.

People spend their money on the things that are most important to them, but money is subject to diminishing marginal returns. With each additional increment of money, they purchase things that are less important to them. Psychologists have pointed out the rather obvious fact that people have a hierarchy of needs.<sup>45</sup> They strive to meet some needs before they pursue others. Within this hierarchy, pleasure comes after the needs for air, water, food, shelter, and safety.<sup>46</sup>

Within our society, hedonic activities are important, but they are not as important as other activities. The recent trend toward awarding hedonic damages in personal injury cases illustrates the importance we place on

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44. Once when Jacob was cooking some stew, Esau came in from the open country, famished. He said to Jacob, "Quick, let me have some of that red stew! I'm famished!"

...

Jacob replied, "First sell me your birthright."

"Look, I am about to die," Esau said. "What good is the birthright to me?"

But Jacob said, "Swear to me first." So he swore an oath to him, selling his birthright to Jacob.

Then Jacob gave Esau some bread and some lentil stew. He ate and drank, and then got up and left.

So Esau despised his birthright.

*Genesis 25:29-34.*

45. See, e.g., ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* 97 (2d ed. 1970).

46. The hierarchy of human needs has been described as follows:

The Hierarchy of Human Needs Model, developed by Abraham Maslow [*supra* note 45], classifies *needs*, the internal drives for satisfaction that give rise to human behavior.

According to Maslow, when a person behaves in such a way that one need is satisfied, then other needs begin to manifest themselves. There are always needs demanding satisfaction. Certain needs, however, take priority over others. A high-priority need will dominate behavior until it is satisfied, at least partially. Then it will give way to other needs with lower priorities.

Human needs are classified by the model into the following five categories, according to their priorities for satisfaction.

*Basic (survival) needs:* air, water, food, shelter;

*Safety needs:* to know that one's survival is not in jeopardy;

*Belongingness (social) needs:* to be accepted by others; to be a part of one's social environment;

*Ego-Status needs:* to feel significant, effectual, and competent; to have self-esteem;

*Self-Actualization needs:* to grow and expand one's personal horizons; to become all that one can become; to challenge oneself.

WALTON C. BOSHEAR & KARL G. ALBRECHT, *UNDERSTANDING PEOPLE: MODELS AND CONCEPTS* 24 (1977). To the extent that alcohol helps to facilitate social interaction, it may help to meet what psychologists classify as a social need, though one which they classify as secondary to the needs for food, shelter, and safety; to the extent that alcohol merely provides pleasure, they might say that it does not meet a need.

pleasure.<sup>47</sup> However, the fact that hedonic damages have been added at such a late date to the traditional damages, such as pain and suffering, medical expenses, lost wages and property damages illustrates that pleasure is less important than many other social goods.

The argument here is not that the risks of hedonic products outweigh their benefits.<sup>48</sup> Dangerous hedonic products play an important role in our society.<sup>49</sup> People hunt with guns and drive pleasure boats and all-terrain vehicles. Life would not be very much fun or very interesting if we never did anything that carried with it a risk of death or serious injury. The argument here is that those that use hedonic products which cause risk to innocent bystanders, no matter how great the products' entertainment value, should bear the risk of that loss through higher prices.

Precedent exists in products liability law for varying the strictness of the products liability rule based on the importance of the product to society. Comment k of section 402A of the Restatement distinguishes between products that "may be necessary to alleviate pain and suffering or to sustain life" and those products that are "used to make work easier or to provide pleasure."<sup>50</sup> The Restatement relieves manufacturers of health and safety products of many of the risks of liability because those products are so important. A rule that imposed stricter liability on manufacturers of hedonic products than that imposed on products generally would be the inverse of comment k. A later section of this Article argues that comment k may serve as precedent for such a rule.<sup>51</sup>

*C. The Special Dangers of Alcohol: It Impairs Consumers' Ability to Drive Safely, Impairs Their Ability to "Know When to Say When," and Increases the Likelihood That They Will Be Unable to Compensate Victims*

In addition to being a hedonic product, alcohol creates a high likelihood that its consumers will become intoxicated and cause injury.<sup>52</sup> Alcohol

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47. See, e.g., *Katsetos v. Nolan*, 368 A.2d 172, 183 (Conn. 1976) (stating that "just damages" include compensation for the destruction of decedent's ability to enjoy life's activities).

48. A later section considers that argument. See *infra* parts IV.C.1-2.

49. As one court stated, "Sports are absolutely essential to the public welfare." *New Jersey Sports & Exposition Auth. v. McCrane*, 292 A.2d 580, 600 (N.J. Super. Ct. Law Div. 1971), *aff'd as modified*, 292 A.2d 545 (N.J. 1972), *cert. denied*, 414 U.S. 989 (1973).

50. See *Brown v. Superior Court*, 751 P.2d 470, 475-77 (Cal. 1988) (stating that RESTATEMENT, *supra* note 1, § 402A cmt. k, makes this distinction through its exemption of prescription drugs from strict products liability).

51. See *infra* part IV E.5.

52. See *infra* part IV.C.1.a (discussing the costs of the risks created by alcohol use). A parallel exists between alcohol manufacturer cases and negligent entrustment cases. For example, the manufacturer of alcohol could be compared to the manufacturer of a slingshot. In a Michigan Supreme Court case, *Moning v. Alfano*, 254 N.W.2d 759 (Mich. 1977), the court held that marketing a dangerous product, a slingshot, without attempting to limit its availability to

impairs the ability of consumers to limit consumption both in the short term and in the long term. In the short term, for a few hours after consumption, alcohol limits judgment.<sup>53</sup> Consumers may initially intend to consume only a few drinks, but after a few drinks they are likely to believe that they can consume a few more. They are subject to diminishing marginal reasoning ability, which impairs their ability to "know when to say when." In the long run, heavy alcohol use damages the ability of consumers to think clearly, even when not consuming alcohol. Alcohol is addicting; addicts require higher and higher doses to feed their addiction,<sup>54</sup> which creates additional risks of drunk driving and bystander injuries. Of course, these risks are foreseeable to the manufacturer.

Additionally, it is likely that the drinker will be uninsured or underinsured and unable to pay an injured bystander. Alcoholics, in particular, are likely to spend their money on alcohol rather than save it, and they are also likely to be unemployed. They are likely to be uninsured or underinsured, both because they usually spend what money they have on alcohol and because they may have been involved in prior collisions, which makes obtaining insurance difficult. Because alcoholics are likely to be without funds to pay for bystander injuries, alcohol manufacturers bear a special responsibility for these costs.

#### *D. The Bystander's Limited Opportunity to Take Safety Steps*

Historically, products liability law treated bystanders rather badly. The common law denied bystanders a recovery, even when they could show manufacturer negligence.<sup>55</sup> Courts reversed this rule early in the twentieth century and allowed bystanders to recover for manufacturer negligence.<sup>56</sup>

purchasers likely to misuse it, in this case children, could be negligent. *Id.* at 769-70. Similarly, manufacturers of alcohol may be unreasonable in manufacturing a product that they know may be bought by those who are likely to misuse it.

53. See *infra* text accompanying note 185.

54. See *infra* text accompanying notes 188-91.

55. The early common law denied recovery to bystanders who were injured by the negligence of product manufacturers; recovery was limited to those who were in privity with the manufacturer. For example, in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), a mail coach driver was injured as a result of the defendant contractor's failure to keep the coach in good repair in accordance with the defendant's contract with the Postmaster General. *Id.* at 403. Finding for the defendant on the grounds that the plaintiff was not in privity with the defendant, the court stated: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." *Id.* at 405.

56. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.) (rejecting the privity limitation in negligence cases). In *MacPherson* the plaintiff was injured in a defective automobile he purchased from a dealer. The plaintiff sued the manufacturer who sold the automobile to the dealer. *Id.* at 1051. Finding that the lack of contractual privity between the plaintiff and the manufacturer did not bar the plaintiff's recovery, Justice Cardozo stated:

Strict products liability has followed the same pattern, initially denying bystander recovery,<sup>57</sup> and then placing bystanders on an equal footing with consumers.<sup>58</sup> However, it may be that bystanders should receive greater protection than purchasers and consumers.<sup>59</sup>

Fairness may justify providing greater protection to bystanders than to consumers of a product because bystanders have only limited opportunity to take steps for their own safety. Bystanders are likely to undervalue or be unaware of the risk that products create to them.<sup>60</sup> In *Elmore v. American*

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

*Id.* at 1053. Other jurisdictions followed quickly, allowing injured bystanders to recover against negligent manufacturers. The *MacPherson* decision "found immediate acceptance, and at the end of some forty years is universal law in the United States." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 683 (5th ed. 1984) (footnote omitted).

57. For a discussion of cases denying recovery, see Jeffrey Kuta, Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971).

Strict products liability developed initially as a warranty cause of action, based on the theory that a defect in the product violated an implied warranty in the contract of sale between the manufacturer and the purchaser. Therefore, recovery was limited to purchasers in privity with the manufacturer. KEETON, *supra* note 56, § 96, at 681. In *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), the court extended warranty protection to "consumers" even though they were not parties to the original purchase. *Id.* at 81. The Uniform Commercial Code does not take a stand on the issue of whether bystanders should be allowed recovery under a warranty. See U.C.C. § 2-318 (1989). Instead, it gives three alternative provisions, which provide protection to persons ranging from members of the family and guests in the home of the buyer to "any person who may reasonably be expected to use, consume or be affected by the goods." *Id.*

Beginning in the early 1960's, courts recognized strict products liability. See, e.g., *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962) (en banc). However, the drafters of the Restatement and some courts continued to be influenced by warranty law in the development of strict liability. The drafters of the Restatement recognized that courts had not "gone beyond allowing recovery to users and consumers" and took no position on whether bystanders should be allowed to recover under strict liability in tort. RESTATEMENT, *supra* note 1, § 402A cmt. o.

58. See, e.g., *Passwaters v. General Motors Corp.*, 454 F.2d 1270, 1277 (8th Cir. 1972) (predicting Iowa law); *Wasik v. Borg*, 423 F.2d 44, 47 (2d Cir. 1970) (applying Vermont law); *Elmore v. American Motors Corp.*, 451 P.2d 84, 88-89 (Cal. 1969) (en banc); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 16 (Iowa 1977); *Howes v. Hansen*, 201 N.W.2d 825, 831-32 (Wis. 1972).

59. For development of the argument that bystanders should be preferred to consumers because they do not benefit from the product, see *supra* text accompanying notes 39-40. For a more comprehensive discussion of the history of bystanders and products liability law and the justifications for giving greater protection to bystanders, see Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 KY. L.J. 687, 690-92 (1993).

60. See Kuta, *supra* note 57, at 638; Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916, 935 (1964).

*Motors Corp.*,<sup>61</sup> one of the early cases to extend strict products liability protection to bystanders, the California Supreme Court stated:

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, where as the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.<sup>62</sup>

In the case of the dangers of alcohol, bystanders have only limited opportunities to take steps for their own safety. They can stay at home or they can travel in tanks. People should be able to protect themselves through reasonable safety measures or to recover for their injuries.

#### *E. Unreciprocated Risk*

Another justification for bystander recovery is present when bystanders are injured by dangerous products that are not used by everyone. Manufacturers and consumers of products that everyone does not use expose others to unreciprocated risk. Professor George Fletcher argued that "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant — in short, for injuries resulting from nonreciprocal risks."<sup>63</sup> Fletcher would not impose liability for "the background risks that must be borne as part of group living."<sup>64</sup> The case for imposing liability when a defendant merely exposes a plaintiff to a risk that is similar to the risk to which the plaintiff exposes the defendant is not compelling.

Of course, under products liability, when courts impose liability on manufacturers, consumers bear much of the cost through higher prices. Similarly, if courts impose on manufacturers the costs of bystander injury from alcohol-related accidents, manufacturers will pass most of these costs to consumers through higher prices. While some might argue that it is unfair to impose on responsible drinkers the costs created by irresponsible drinkers, it is appropriate that responsible consumers share the cost of the bystander's

61. 451 P.2d 84.

62. *Id.* at 89. The plaintiff was injured when she was struck by a vehicle with a defective drive train. *Id.* at 87.

63. Fletcher, *supra* note 5, at 542.

64. *Id.* at 543.



injury. Even responsible drinkers help to create the danger by helping to create a market for alcoholic beverages. As some anti-drug use advertisements illustrate,<sup>65</sup> both a product's supply and demand result in damage from that product. The risk to innocent bystanders is created, to some extent, by all those who use the product.<sup>66</sup>

Fletcher discusses the rationale for cost shifting in cases of bystander injury from defective automobiles:

In these cases, the ultimate issue is whether the motoring public as a whole should pay a higher price for automobiles in order to compensate manufacturers for their liability costs to pedestrians. The rationale for putting the costs on the motoring public is that motoring, as a whole, imposes a nonreciprocal risk on pedestrians and other bystanders.<sup>67</sup>

In cases in which bystanders are injured due to overconsumption of alcohol, the issue is whether the drinking public imposes on bystanders a nonreciprocal risk.<sup>68</sup>

65. One such television advertisement showed a police officers badge, repeatedly shot with bullet holes, as the announcer stated that drug use is not a victimless crime.

66. It could be argued that the consumer responsibility argument applies to the consumers of all products that cause risk to innocent bystanders. For example, should all automobile users be responsible, through higher prices, for all injuries to innocent bystanders? Two related factors distinguish automobiles and dangerous hedonic products such as alcohol. First, alcohol, unlike automobiles, is manufactured primarily for recreational use. Second, the products can be distinguished on a theory of unreciprocated risk; nearly everyone experiences both the benefits and dangers of automobile use. However, alcohol users enjoy the product's benefit while exposing nonusers to an unreciprocated risk.

67. Fletcher, *supra* note 5, at 570, quoted in Patricia Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065, 1075 (1973). Marschall suggests that Fletcher's theory justifies imposing strict liability on manufacturers for consumer injury because the manufacturer is exposing the consumer to a risk and the consumer is merely using a product. *Id.* at 1074. However, Marschall is unable to reconcile her suggestion that Fletcher's theory supports strict products liability with the Fletcher's statement quoted in the text accompanying this note. Fletcher's statement does not assume that manufacturers of automobiles are exposing all plaintiffs, including consumers, to unreciprocated risk. Marschall incorrectly suggests that "[i]n this passage, Fletcher seems to fall back into the reasonableness paradigm without noticing what he has done." *Id.* at 1075. The consumer, as well as the manufacturer, has exposed the consumer to risk.

As the quote in the text illustrates, Fletcher's concept of unreciprocal risk is consistent with a risk spreading theory. When a group of consumers create an unreciprocated risk to another group, the courts should impose liability and spread the risk to the consumers. See *infra* part III.A.

68. Quite clearly, those who drink and drive expose those who do not to unreciprocated risk. Our current negligence system imposes liability on drunk drivers for bystander injury. In those cases in which the driver has sufficient liability insurance coverage or sufficient assets to compensate the plaintiff, the current system appropriately pays for the bystander's injuries based on the driver's negligence. The question raised in this article, however, is who should pay for those losses that the drunk driver and the drunk driver's insurance do not cover.

Bystanders who do not use or benefit from a product are exposed to nonreciprocal risk.<sup>69</sup> The strongest case based on nonreciprocal risk for imposing liability on alcohol manufacturers is one in which the bystander does not drink. Two-thirds of the population that drink impose a nonreciprocal risk on the one-third that does not.<sup>70</sup> The nondrinker bystander has not helped create the risk that causes the injury and has not exposed others to such a risk.

But, of course, drinkers and bystanders are not mutually exclusive groups. The unreciprocated risk argument loses some of its force when it is applied to bystanders who sometimes drink. Bystanders who drink help to create the same risk that injured them. Nevertheless, Fletcher obviously did not believe that the plaintiff's use of the product should preclude liability — almost all pedestrians in the example that he cites benefit from motor vehicles.

Even though the bystander's prior use of alcohol undercuts the unreciprocated risk argument, recovery by such bystanders is probably justified. The one tenth of Americans who are heavy drinkers are the most likely to endanger others and appropriately would bear a greater percentage of the cost.<sup>71</sup> Bystanders who drink would contribute to funds for paying bystander liability costs. The degree of contribution would be directly proportional to the amount of purchases made.<sup>72</sup>

#### *F. The Responsibility of the Intervening Actor*

The most culpable party in an alcohol-related injury is the drinker who drives while intoxicated and causes the accident. It might be argued that the intoxicated driver's negligence should cut off the responsibility of others. Courts have faced a similar issue in cases in which injured bystanders have alleged that a bar negligently served excessive amounts of alcohol to drivers.<sup>73</sup> The older cases found the intoxicated driver to be a superseding cause of the loss, cutting off the bar's liability.<sup>74</sup>

In recent years, courts have recognized that drinkers may not be the only persons that are responsible for their intoxicated condition. Courts have

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69. The weakness of the nonreciprocated risk argument in cases of motor vehicle manufacturers is that almost all benefit from motor vehicles — even those who do not ride in motor vehicles generally use goods that are transported in them.

70. Even those drinkers that do not drink and drive help to create the risk by creating the demand for the dangerous product.

71. See *supra* note 38.

72. As a practical matter, it would be difficult to apply a rule that only imposed liability when the bystander was not a consumer. It would be difficult to determine how to treat the bystander who consumes alcohol only a few times a year or only during communion services.

73. See sources cited *supra* note 3.

74. See Howard, *supra* note 3, at 767 & n.75. Courts generally find that a foreseeable intervening cause does not cut off the plaintiff's liability. See, e.g., KEETON, *supra* note 56, § 44, at 303. However, courts had denied recovery despite the intoxicated driver being a dependent and quite foreseeable intervening cause.

increasingly imposed liability on bars and social hosts on the basis that it is negligent to serve excessive amounts of alcohol to those persons who will foreseeably cause injury.<sup>75</sup> These cases provide official recognition of the foreseeability that drinkers will overconsume alcohol and cause injury.

The failure of servers to monitor the consumption of alcohol may lead to injury, but the production of alcohol leads to injury as well. Whether the manufacture of alcohol provides a sufficient basis for liability is a different question, which Part IV of this Article will discuss. But the present point is merely that, as in the server liability cases, the culpability of the intervening drinker should not cut off the responsibility of the manufacturer.<sup>76</sup>

If courts impose liability on the manufacturer, it might be that the manufacturer should have an indemnity cause of action against the drinker. Under an indemnity cause of action, a party who pays a judgment is reimbursed in full from another party. Courts allow indemnity in some cases in which the responsibility of one party is substantially greater than that of the party seeking indemnity.<sup>77</sup> An alternative would be to provide the manufacturer with a contribution cause of action against the drinker, which would provide a partial reimbursement.<sup>78</sup>

Allowing the manufacturer to bring an indemnity or contribution action against the drinker would be fair because the drinker should not be relieved of responsibility. It may be that the culpability of the drinker is so much greater than that of the manufacturer that the manufacturer should be entitled to indemnity. The cheapest cost avoider argument, discussed in the next section,<sup>79</sup> also supports a right of indemnity for the manufacturer; where possible, the entire loss should be placed on the drinker to place maximum pressure on the drinker to exercise care.<sup>80</sup>

75. See sources cited *supra* note 3.

76. The cause of action suggested herein is similar in some respects to liability for handgun injury imposed by the Maryland Court of Appeals on manufacturers of "Saturday Night Specials" for injuries occurring to innocent victims who suffer gunshot wounds from the criminal use of the hand guns. See *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985). For a discussion of *Kelley*, see *infra* text accompanying notes 273 to 278.

77. See KEETON, *supra* note 56, § 51, at 343-44.

78. *Id.* § 51, at 344. In some jurisdictions, contribution is pro rata; in others, contribution is allowed on a comparative fault basis. See *id.*

79. See *infra* part III.B.1.

80. A trend exists toward replacing indemnity and pro-rata contribution with comparative contribution. See KEETON, *supra* note 56, § 51, at 344. Comparative contribution has the disadvantage of requiring an additional calculation by the jury and creating an additional subject of negotiation for attorneys, but it probably provides the greatest degree of fairness to the parties. The jury, under comparative contribution, imposes responsibility based on the community's general sense of fairness.

Of course, there is a great risk that the right of either contribution or indemnity will be of no benefit to the manufacturer. There is a high likelihood that the drinker will be uninsured and unable to either pay the plaintiff or reimburse the manufacturer. If courts do not impose liability on the manufacturers, of course, this risk that the consumer will be uninsured or unable to pay

### III. THE CONSEQUENCES OF LIABILITY

When considering a tort rule, courts are influenced not only by fairness, but also by the consequences that the rule might create. This section will explore the effect that imposing liability on manufacturers of alcohol and other dangerous hedonic products for bystander injury might have on prices, safety,<sup>81</sup> and efficiency.

#### A. *Spreading the Risk of Bystander Injury: Court-Imposed Third Party Insurance*

If courts impose liability on a manufacturer for bystander injury, the bystander receives compensation and the manufacturer can spread the risk of the loss by raising consumer prices. Justice Traynor of the California Supreme Court presented the risk spreading argument for strict products liability as follows: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."<sup>82</sup>

The risk-spreading argument recognizes that strict products liability is analogous to an insurance system. If courts impose liability, manufacturers will raise prices. The additional charge acts as an insurance premium. The "premiums" that are collected pay for the losses of injured persons. Those who favor risk spreading argue that it is better for many consumers to bear a small loss, than for the injured to bear a devastating loss.<sup>83</sup>

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will be borne by the bystander. It is appropriate that courts hold manufacturers responsible for the risk that the drinker will be indigent and uninsured or under-insured. It is not only foreseeable that alcohol will cause an accident in which an innocent bystander will be injured, but it is likely that the drinker will be indigent, uninsured, or under-insured as a result of alcohol consumption.

81. One reason often given by courts for imposing liability on the manufacturers of products is that to do so will encourage the production of safer products. *See* cases cited *id.* § 98, at 693 n.4.

82. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (en banc) (Traynor, J., concurring).

83. Guido Calabresi offered the following two propositions to justify risk spreading:

(a) that taking a large sum of money from one person is more likely to result in economic dislocation, and therefore in secondary or avoidable losses, than taking a series of small sums from many people, and (b) that even if the total economic dislocation is the same, many small losses are preferable to one large one, simply because people feel they suffer less if 10,000 of them lost \$1 than if one loses \$10,000.

While the first of these propositions is an empirical generalization not too difficult to accept, the second is in its precise terms a variant of the economist's theory of the diminishing marginal utility of money.

Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517 (1961).

As noted previously, some courts have imposed liability on bars for serving alcohol to intoxicated patrons.<sup>84</sup> One of the reasons that the courts did so was that bars are able to spread the risk of injury through higher prices.<sup>85</sup> Alcohol manufacturers, of course, have an even greater ability to spread the risk of bystander injury because of their bigger customer base. Manufacturers can spread the risk of loss in the many cases in which the bystander has neither a financially responsible drinker nor a negligent server from whom to seek compensation.

The argument that the tort liability system should require consumers to purchase "insurance" with their products for *consumer* injury is somewhat paternalistic; courts should require consumers to purchase "insurance" for their own benefit. Imposing liability would limit consumer options for the sake of the consumer. If courts impose liability on manufacturers, customers *must* purchase "insurance" by paying higher prices. Some consumers may prefer to pay lower costs for products and assume the risk of injury or rely on their own health insurance plans.<sup>86</sup>

In the case of alcohol, however, this claim that spreading the risk of consumer injury is paternalistic meets with strong arguments. The arguments are basically the same as arguments currently made for imposing manufacturer liability for tobacco-related consumer injuries.<sup>87</sup> First, some paternalism is justified because alcohol and tobacco marketing is directed at young people (who may need a little paternalism) and both products are addictive. Second, consumer injury costs resulting from both alcohol and tobacco are borne not only by consumers but also by society through higher health and life insurance costs and through higher welfare costs.<sup>88</sup>

Whatever the merit of the paternalism argument against spreading the risk of *consumer* injuries, it does not apply to spreading the risk of *bystander* injuries. To continue with the insurance analogy: When courts impose liability on manufacturers for consumer injury, they impose on consumers a first party insurance system, which pays for the consumers' injuries. When courts impose liability on manufacturers for bystander injury, they impose on consumers a third party insurance system, which compensates third parties that consumers injure. It may not be the business of the state to protect people from themselves, but it is the business of the state to protect people from each

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84. See sources cited *supra* note 3.

85. See, e.g., Howard, *supra* note 3, at 769 n.84.

86. In addition, some consumers will be unwilling to pay, and the poor may be unable to pay, higher prices. Manufacturers will withdraw some products from the market. See generally James M. Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64 (1970) (predicting the economic consequences of imposing strict liability on product manufacturers).

87. See Richard C. Ausness, *Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085 (1990); Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405 (1991).

88. See Vandall, *supra* note 87, at 418.

other. Therefore, it is legitimate for the state to adopt a tort rule requiring consumers to pay for the injuries that their products cause.

## B. Safety and Efficiency

### 1. The Cheapest Cost Avoider

Guido Calabresi has argued that imposing liability on the party that can avoid a loss at the cheapest cost yields both the greatest level of safety and the highest level of efficiency that a liability rule can yield.<sup>89</sup> The rational, profit-maximizing, cheapest cost avoider is most likely to take safety steps if that party's safety cost is less than its liability cost.<sup>90</sup> Imposing liability on the cheapest cost avoider is the most efficient rule because it yields the smallest sum of accident costs and safety costs.<sup>91</sup>

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89. The cheapest cost avoider is the most likely to adopt safety steps and is able to adopt them at the lowest cost, but will adopt them only when the steps are cost-justified. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84-85 (1975).

90. See *id.* We must be careful not to assume that imposing liability on the manufacturer automatically insures the safest products. That assumption is not necessarily so. Assume the manufacturer could make a product safer, by using a different design, for \$25. The consumer could make the product safe for \$20, or a bystander could make the product safe for \$10. If the bystander's risk of injury has a value of \$15 (for example a .01 risk of a \$1500 injury), the bystander would be the only one of the three who would choose to act safely if faced with the risk of bearing the loss. It might not be fair to impose the loss on a bystander, but that is another matter.

Assigning responsibility to the cheapest cost avoider also has the advantage of being the most economically efficient method of loss avoidance. In the above example, if we impose liability on the consumer, the consumer would not pay \$20 to avoid the \$15 liability. The bystander would not pay \$10 to avoid the risk of loss because the bystander would rather suffer the loss (\$15), recoup the loss from the consumer, and keep the \$10 (rather than pay the \$10 to avoid the loss). If liability is imposed on either the manufacturer or the consumer, there is a net loss to society of \$5 because the liable party would pay \$15 in damages to the bystander, who could have avoided the loss at a \$10 cost.

It is true that if liability is imposed on either the manufacturer or the consumer, that party could pay the bystanders \$11 to avoid the loss. If the transaction costs were low enough that it would be cost-effective for the manufacturer or consumer to find and pay the bystander, they might do so. However, the transaction cost would be a loss to society. If the transaction costs were not low enough that it would be cost-effective for the manufacturer or consumer to locate the bystander, they would not do so, and the parties would not obtain the safe result.

91. See *id.* In the case of consumer injury, there is a debate as to who is the cheapest cost avoider. Compare Buchanan, *supra* note 86 and Roland N. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3 (1970) (both authors asserting that the consumer generally is the cheapest cost avoider) with Guido Calabresi & Kenneth C. Bass III, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74 (1970) (asserting that the manufacturer generally is the cheapest cost avoider).

Although Calabresi has suggested that manufacturers are generally the cheapest cost avoiders, see Calabresi & Bass, *supra*, he and Hirschhoff have also argued that courts must search for the cheapest cost avoider in each case. Guido Calabresi & Jon T. Hirschhoff, *Toward a Test*

But the theory runs into problems when applied to alcohol-related accidents. In such accidents, the alcohol consumer is the cheapest cost avoider. The manufacturer can take some steps to make the product safer, but the consumer can avoid the risk to bystanders by merely not drinking in excess. A reasonable consumer will conclude that the risk of liability for bystander damages from drinking and driving, not to mention the risk of harm to the consumer, is greater than any benefit. A reasonable consumer will not drink and drive.

Unfortunately, not all drinkers are the rational, profit-maximizing actors that economic theory posits. The ability of drinkers to do a cost/benefit analysis is likely to be diminished by the product. As drinkers drink, their ability to evaluate their driving ability diminishes. They become increasingly less likely to "know when to say when." Some drinkers are alcoholics, and they place a value on overconsumption that a reasonable person would consider to be "excessive."<sup>92</sup> Imposing liability on the drinker alone will not yield the levels of safety and efficiency suggested by cheapest cost avoider theory. Courts should keep up any pressure that the risk of liability might impose on drinkers. They should continue to allow injured bystanders to recover from intoxicated drivers and give manufacturers an indemnity cause of action against drinkers;<sup>93</sup> however, courts cannot expect drinker liability alone to yield sufficient levels of safety.

As between the bystander and the manufacturer, the manufacturer is likely to be the cheapest cost avoider. Manufacturers could take some steps to avoid some alcohol-related accidents. Manufacturers might wage more aggressive campaigns to discourage drinking and driving; they might package their alcohol in a way that would make it less dangerous; they might sell it to distributors that would sell it to consumers in a less risky manner.<sup>94</sup> If the costs of bystander loss were sufficiently great, manufacturers could avoid the loss by ceasing its manufacture, though imposition of liability will not raise

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for *Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972). However, as Patricia Marschall has argued, such a search would be "impractical and inefficient" because it would make trials complex and settlement difficult. Marschall, *supra* note 67, at 1100-01.

92. In addition, in many cases, alcoholics will not have sufficient assets to compensate an injured party. The risk of liability would not affect their behavior even if they could think rationally.

93. It is appropriate that courts place pressure on the drinker to act reasonably. Some drinkers may be motivated to act reasonably by the threat of liability for bystander injury, though it would seem that the threat of injury to themselves and the threat of prosecution alone would create reasonable behavior. The proposal herein would not relieve the drinker of liability for bystander injury; as a prior section argued courts should allow manufacturers who pay bystanders under the proposed theory a right of indemnity against the drinker. See *supra* text accompanying notes 77-80. The manufacturer liability proposed herein will not reduce any effect that the risk of liability has on the behavior of drinkers.

94. See generally John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 549-50 (1983) (discussing the incentive to create a safer product that manufacturers will have if costs of accidents are imposed on them).

costs to that level.<sup>95</sup> Bystanders, on the other hand, generally are not in a position to take steps to avoid injuries arising from alcohol consumption. Bystanders are merely engaged in the activity of ordinary life, and they would have to cease normal activity to avoid risks created by drunk drivers.

## 2. Internalizing the Cost of Bystander Injury

If courts imposed liability on alcohol manufacturers for bystander injury, that cost would be internalized in the cost of alcohol, yielding a more efficient result. Currently, the risk of bystander injury from alcohol consumption is likely to be a cost that is external to the purchase of alcohol. The price of alcohol does not reflect the dangers which it creates to bystanders, and the risk of bystander injury only affects consumers to the extent that they think about liability or their moral obligation to the bystander.

However, there is a great danger that consumers will not give sufficient consideration to the risks which the products that they purchase create to bystanders. Some consumers will overlook the risks that their activity will cause to others. A consumer who considers the risk of liability is not as likely as a manufacturer to be affected by the risk because consumers are not as likely as manufacturers to be able to pay the damages of a seriously injured victim.<sup>96</sup> The risk that the consumer will be judgment-proof may be especially great in the case of alcoholics. Consumers of alcohol are especially likely to fail to consider the risks of liability to injured bystanders because alcohol may limit their ability to think clearly.<sup>97</sup>

If courts impose liability on manufacturers of dangerous hedonic products for injuries to bystanders, manufacturers will internalize the cost of bystander injury. They will choose the most efficient combination of safety steps and price increases to cover bystander loss.<sup>98</sup> To the extent that they can do so, manufacturers will pass their costs, whether liability or safety costs, on to consumers.

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95. See *infra* note 101.

96. See Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1137 (1983).

97. See *infra* notes 179-85 and accompanying text (discussing the effects of alcohol on the body).

98. Judge Adams of the Third Circuit Court of Appeals stated in a case extending strict liability for defective products to manufacturers for bystander injury:

Inasmuch as the defective product may well injure persons who have not purchased the product or in any way dealt with the manufacturer, there is no price mechanism by which to insure such persons against the risk of loss. . . . The imposition on manufacturers of strict liability for defective products accomplishes the cost internalization that the price mechanism cannot achieve by placing the complete cost of the injuries on the manufacturer.

*Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 288 (3d Cir. 1980). His argument applies to bystander injuries from nondefective products, just as it does to those from defective products.



Consumers are making a cost/benefit decision whenever they purchase a product. If the market is to work efficiently, the costs of the product should reflect the risks to bystanders, as well as the other costs of the product.<sup>99</sup> When manufacturers pass these costs to consumers, the price of products more nearly reflects the costs which the products create to society. Thus, consumers will be forced, through the higher prices, to take into consideration the losses that products cause.<sup>100</sup>

This article argues that losses from injuries to bystanders should be imposed on manufacturers of alcohol, whatever the ultimate consequences on alcohol's price and consumption. The price of alcohol should include bystander costs; consumers could then determine whether these costs outweigh alcohol's benefits. Imposing liability on manufacturers would be likely to have some beneficial effect on safety. While price increases would not affect some consumers, they would likely affect younger drinkers, who have less disposable income. Reduction in consumption by younger drinkers might have an especially important effect on safety because younger drinkers are much more likely than older drinkers to be involved in alcohol-related accidents.<sup>101</sup>

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99. See Klemme, *supra* note 5, at 158-61 (discussing the theory of enterprise liability generally).

100. Cf. *id.*

101. It is difficult to quantify the effect that imposing liability on manufacturers of alcohol for bystander injury would have on the price, the consumption of alcohol, and safety. The Rice study calculated the costs created by alcohol during the year 1985, so we will attempt to evaluate that year. RICE, *supra* note 7.

An initial difficulty is estimating the damages that courts would impose on manufacturers if they were subject to liability for bystander injury. The Department of Transportation estimates that in 1985, 7400 people who were not drinking were killed in alcohol-related automobile collisions. DRUNK DRIVING FACTS, *supra* note 2, cited in Manning, *supra* note 2, at 1608. According to industry observers, the yearly average wrongful death judgment against alcohol providers in dram shop cases is \$500,000. INS. INFO. INST., *Drunk Driving and Liquor Liability*, DATA BASE REPORTS, May 1991, at 5. This fact suggests that recovery for bystander deaths in one year would be \$3.7 billion.

A second type of liability cost would result from bystander injuries that do not lead to death. The Rice Study calculates alcohol-related losses in 1985 from severe and critical injury to be \$160 million and from minimum and moderate injury to be \$898 million, totalling \$1.058 billion. RICE, *supra* note 7, at 284 tbl. D-8 (adapting Blincoe's Study for the National Highway Traffic Safety Administration, tbl. 5, at 6 (1987)). That figure includes injuries to those who are drinking as well as bystanders. If we assume the percentage of those injured who are bystanders is the same as the percentage of nondrinkers who are killed in alcohol-related accidents (one-third), see *infra* note 104, the loss to bystanders is \$353 million. But this figure does not include recovery for pain and suffering. Using the litigators' rule that pain and suffering damages will be roughly three times the special damages, pain and suffering damages would be \$1.058 billion, for total personal injury damages of \$1.412 billion. Rice estimates property damage from alcohol-related accidents in 1985 at \$842 million. RICE, *supra* note 7, at 284 (adapting Blincoe, *supra*). If we assume that one-third of that figure is bystander loss, bystander property loss totals \$281 million. The total damages for bystander losses would be:

As the price of alcohol increases, however, the danger increases that consumers will purchase unregulated alcohol from manufacturers that have avoided the liability system, as well as the taxation system.<sup>102</sup> James

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Wrongful death	\$3.700 billion
Personal injury	1.412 billion
<u>Property damage</u>	<u>.281 billion</u>
Total	\$5.393 billion

Alcohol manufacturers, however, would not pay that amount. Drunk drivers and their liability insurance companies would bear a substantial portion of bystander losses (directly through the claims of bystanders or indirectly through the indemnity and contribution claims of alcohol manufacturers). Alcohol manufacturers probably would pay, primarily, those amounts that were not paid by drivers' insurance companies. Given the number of uninsured drivers, and the likelihood that a higher percentage of drunk drivers would be uninsured, the sum is likely to be substantial. A recent study found between 19.6% and 28.4% of California drivers to be uninsured. L. MAROWITZ, UNINSURED MOTORISTS: THEIR RATE AND COST TO INSURED MOTORISTS, FINAL REPORT TO THE LEGISLATURE OF THE STATE OF CALIFORNIA iv (December 1991). And, of course, many drivers would not have sufficient insurance to pay a \$500,000 wrongful death judgment. For our purposes, we will make a very big assumption: drunk drivers and their insurance companies would bear half of the \$5 billion bystander loss. Manufacturers are left with liability to bystanders of \$2.5 billion. If we further assume that manufacturers would pass these costs to consumers, the \$2.5 billion in liability costs would be a 4.5% increase in the \$56 billion that consumers paid for alcohol in 1985. See INTERNATIONAL TRADE ADMIN., U.S. DEP'T OF COMMERCE, 1988 U.S. INDUSTRIAL OUTLOOK 42-29 (1988) (reporting that U.S. alcoholic beverage personal consumption expenditures were \$56,248 million).

The effect that such a price increase might have on consumption would depend on the price elasticity of demand for alcohol. A study of the effect of increases in price on U.S. purchases of alcohol over a 40 year period concludes that alcohol has a price elasticity of -.5, David Levy & Neil Shefflin, *New Evidence on Controlling Alcohol Use Through Price*, 44 J. STUD. ALCOHOL 929, 934 (1983), which means that for every 1% increase in price, there would be a .5% decrease in demand. If this price elasticity were consistent for a price increase of 4.5%, that would mean that with such an increase in price, consumption of alcohol would drop 2.25%.

A determination of the effect that such a decrease in consumption would have on safety would require additional speculation. Those who will bear the greatest expense caused by the rise in cost will be heavy alcohol users. The rise in prices is unlikely to have a big impact on the consumption of alcoholics because their demand for alcohol is likely to be very inelastic. But demand among young drivers is likely to be much more elastic in light of the fact that they have less disposable income. See Douglas Coate & Michael Grossman, *Change in Alcoholic Beverage Prices and Legal Drinking Ages: Effects on Youth Alcohol Use and Motor Vehicle Mortality*, 12 ALCOHOL, HEALTH & RES. WORLD 22 (1987). This fact is of special significance since young drivers are involved in a high percentage of fatal accidents. In 1984, 35% of the drivers involved in fatal accidents were under the age of 25, but only 20% of the licensed drivers were under 25. *Id.* at 22 (citing NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN. (1986)). One study of the effect of alcohol price increases on driving safety found that "deaths from motor vehicle accidents appear to decline at a statistically significant rate among all young people when the price of beer increases." *Id.* at 25.

102. See Henderson & Twerski, *supra* note 24, at 1289. Imposing liability on manufacturers can create "what economists refer to as 'second best' problems: targets of burdensome governmental regulation, when possible, will seek to escape the burdens by substituting unregulable (and in this context, possibly riskier) modes of behavior." *Id.* at 1310. These second best problems, of course, can occur whenever products liability is expanded, taxes are raised, or

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Henderson and Aaron Twerski suggest that if courts impose liability on manufacturers for injuries that nondefective products cause to bystanders *and consumers*, black markets would develop and create a great increase in the number of injuries from contaminated alcohol.<sup>103</sup>

Of course, the degree to which an increase in products liability will encourage the development of black markets will depend on the amount of the increase in costs that liability will create. Imposing liability on the manufacturer for bystander injury would have a much smaller impact on the price of most products than imposing liability for both consumer and bystander injury because alcohol causes substantially fewer bystander injuries than consumer injuries.<sup>104</sup> Alcohol manufacturer liability for bystander injury would give rise to alcohol price increases of approximately 4.5%.<sup>105</sup> Such a price increase would be unlikely to generate a substantial increase in the use of unregulated alcohol.

#### IV. LIABILITY THEORIES

The previous sections discussed, both as a matter of fairness and as a matter of consequences, whether manufacturers of alcohol and other hedonic products should be subject to liability for injuries to bystanders arising from product use. This section will consider both the existing theories of liability and a potential theory of liability that might enable bystanders to recover from manufacturers.

##### A. Abnormally Dangerous Activity Liability

Under abnormally dangerous activity liability, defendants are subject to

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a product safety regulation is adopted.

103. *Id.* at 1312.

104. Approximately one-third of the 23,000 people killed each year in alcohol-related traffic deaths are bystanders. Compare Rice, *supra* note 7, at 118 (stating that in 1985 alcohol consumption caused 23,190 traffic deaths) with DRUNK DRIVING FACTS, *supra* note 2, cited in Manning, *supra* note 2, at 1604 (stating that 7400 of those killed in alcohol-related accidents in 1985 had not consumed alcohol). Alcohol also kills a substantial number of consumers through disease. See *infra* notes 179-85.

Another dangerous hedonic product that might give rise to bystander liability under the theory discussed in this article is tobacco. There would be a great difference between the impact of imposing liability on tobacco manufacturers for all tobacco-related injuries and merely imposing liability for bystander injury from second-hand smoke. Whereas tobacco causes approximately 300,000 consumer deaths a year, Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 271 (1977) (citing HAROLD S. DIEHL, TOBACCO AND YOUR HEALTH: THE SMOKING CONTROVERSY 33-34 (1969)), it only causes between 2490 and 5160 bystander deaths each year, David B. Ezra, Note, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1065 (1990) (citing Michael P. Eriksen et al., *Health Hazards of Passive Smoking*, 9 ANN. REV. PUB. HEALTH 47, 62 (1988)).

105. See *supra* note 101.

strict liability for damages caused from their dangerous and in some way unusual activity.<sup>106</sup> This cause of action is based on the theory that, even though defendants may act reasonably, if the activities are unusually dangerous, and the defendants engage in them for their own purposes, the defendants should pay.<sup>107</sup>

Commentators and courts have differed over the justification for abnormally dangerous activity liability. George Fletcher suggests that courts impose this strict liability because the defendants are exposing others to unreciprocated risk.<sup>108</sup> A risk is unreciprocated if a defendant exposes others to a risk to which they are not exposing the defendant. An unreciprocated risk theory may justify imposing liability on alcohol manufacturers for alcohol-related injury to innocent bystanders.<sup>109</sup> Even considering that manufacturers spread liability costs to consumers, the unreciprocated risk

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106. See, e.g., RESTATEMENT OF TORTS §§ 519-20 (1938); RESTATEMENT, *supra* note 1, §§ 519-520; KEETON, *supra* note 56, § 78, at 548-51.

This basis of liability has its roots in *Rylands v. Fletcher*, 3 L.T.R. 220 (H.L. 1868). In *Rylands* the court imposed liability on a defendant who stored water in ponds, which leaked into the plaintiff's underground mining shafts. The defendant was not negligent. Lord Blackburn, justifying his finding of liability in the court below, stated as follows:

[T]he person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief, if it escapes must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape.

*Id.* at 222 (quoting Blackburn, L.).

The House of Lords affirmed the decision for the plaintiff, but justified the holding differently. Whereas Lord Blackburn suggested that the basis of liability was that the thing causing the injury was "likely to do mischief," Lord Cairns based the defendant's liability on a "non-natural use" of the land. *Id.* at 221. A "non-natural use" use is one that is uncommon in the area. *Id.* Lord Cairns contrasted the defendant in *Rylands*, a non-natural user, with the defendant in *Smith v. Kenrick*, 137 Eng. Rep. 205 (C.P. 1849), whom Cairns considered a natural user. *Rylands*, 3 L.T.R. at 221. In *Smith* water leaked from the defendant's mine into the mine of the plaintiff. The distinction between the two defendants is that the defendant in *Smith* engaged in mining, a common activity in the area, and was therefore a "natural" user; the defendant in *Rylands* was engaged in an activity that was uncommon to the area, the storage of water, and was therefore an "unnatural" user. People expected to be exposed to risks from mining in England; they did not expect to be exposed to risks from water in artificial ponds.

Comment f to section 520 of the Restatement states: "The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it . . ." RESTATEMENT, *supra* note 1, § 520 cmt. f. The risks created by alcohol are of great magnitude. See *infra* part IV.C.1.a.

107. RESTATEMENT, *supra* note 1, § 519 cmt. d.

108. Fletcher, *supra* note 5, at 543-56. "If uncommon activities are those with few participants, they are likely to be activities generating nonreciprocal risks." *Id.* at 547.

109. It is true that manufacturers of motor vehicles expose everyone to the risk of injury from automobiles, but almost everyone either travels in or otherwise benefits from motor vehicles. Alcohol greatly exacerbates the risks created by motor vehicles and makes what is a generally reciprocated risk of motor vehicle travel a much greater and unreciprocated risk.

argument may still justify liability. The consumers of alcohol, to whom the risk would be spread, expose bystanders to unreciprocated risks.<sup>110</sup>

Others justify abnormally dangerous activity liability on the grounds that it forces those who engage in such activity to act efficiently.<sup>111</sup> Those who engage in abnormally dangerous activities are capable of making adjustments in their activities in light of the risks, whereas a bystander, who merely engages in the ordinary activities of life, would generally find it difficult to avoid the risk.<sup>112</sup> Thus, between the alcohol manufacturer and the bystander, the manufacturer can generally avoid costs more cheaply.<sup>113</sup>

Section 520 of the Restatement (Second) of Torts states as follows:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.<sup>114</sup>

No one factor must be present for there to be strict liability.<sup>115</sup>

Some of the above-mentioned factors support a bystander cause of action against alcohol manufacturers, others do not. The first three factors support a claim. Production of alcohol creates both a high degree of risk of harm to

110. See *supra* part II.E.

111. See, e.g., POSNER, *supra* note 5, § 6.5.

112. *Id.*; Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 24 (1980).

113. See *supra* text accompanying notes 94-95. The cheapest cost avoider in the over-consumption cases is generally the drinker, and this Article suggests that the pressure of the threat of liability remain on the drinker by giving the manufacturer a right of indemnity against the drinker. See *supra* text accompanying notes 77-80.

Other commentators argue that compensation and risk-spreading justify expanding abnormally dangerous activity liability. Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 395 (1951); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 292-93 (1987). They do not suggest, however, how risk-spreading provides any limits for abnormally dangerous activity liability. If a court were to build a liability system around risk spreading, it is difficult to see any limits to enterprise liability.

114. RESTATEMENT, *supra* note 1, § 520.

115. *Id.* § 520 cmt. f. "Any' one of [the factors] is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily." *Id.*  
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others and a substantial likelihood that the harm will be great.<sup>116</sup> In addition, there is little likelihood that the manufacturer could eliminate the risk with any activity short of terminating production.

The other factors may not support liability. The fourth factor is the "extent to which the activity is not a matter of common usage."<sup>117</sup> The comments to the Restatement suggest that an activity which is not a matter of common usage is one that is not engaged in often or by many.<sup>118</sup> Some cases have suggested that common usage turns not on whether the activity is common, but on whether many people engage in it. For example, although many farmers have their fields dusted, cropdusting is abnormally dangerous because there are not many cropdusters.<sup>119</sup> Plaintiffs suing alcohol manufacturers could argue that although the consumption of alcohol is common within our society, the number of manufacturers is few. Manufacturers might respond that this extension of abnormally dangerous activity liability to alcohol manufacturers would open the door to expanded liability for other products. Automobiles, for example, though they are quite common, are dangerous, and are also produced by a relatively small number of manufacturers.

It may be that behind the "not a matter of common usage" factor is the unreciprocated risk argument for abnormally dangerous liability. Those who engage in dangerous activity that is not a matter of common usage expose others to unreciprocated risk. If unreciprocated risk is behind this factor, it justifies imposing liability on alcohol manufacturers, but not on automobile manufacturers. Automobiles are so common that they do not expose others to an unreciprocated risk. Almost all people avail themselves of the benefits of automobile travel, and therefore expose others to this risk. However, as stated previously, it may be that alcohol manufacturers (and the consumers who would ultimately, through risk spreading, bear the cost) expose others to unreciprocated risk. Therefore, the manufacturing of alcohol may be considered not common.

The fifth factor in determining whether an activity is abnormally dangerous is "inappropriateness of the activity to the place where it is carried on."<sup>120</sup> The risks of alcohol do not turn on the location of its production. Thus, this factor does not support a case against the manufacturer of alcohol.

The sixth factor is the "extent to which [the activity's] value to the community is outweighed by its dangerous attributes."<sup>121</sup> A later section will consider the very complicated question of whether the costs of alcohol outweigh its benefits.<sup>122</sup>

116. See *infra* part IV.C.1.a.

117. RESTATEMENT, *supra* note 1, § 520(d).

118. *Id.* § 520 cmt. i.

119. *Loe v. Lenhardt*, 362 P.2d 312, 316-18 (Or. 1961); *Langan v. Valicopters, Inc.*, 567 P.2d 218, 223 (Wash. 1977) (en banc).

120. RESTATEMENT, *supra* note 1, § 520(e).

121. *Id.* § 520(f).

122. See *infra* parts IV.C.1-2. That section concludes that this question is very difficult and Published by Scholar Commons, 1994

A final problem with imposing abnormally dangerous activity liability on alcohol manufacturers is that courts generally do not treat the manufacture of products as an activity, and therefore do not apply abnormally dangerous activity liability to manufacturers.<sup>123</sup> However, "manufacture and distribution separately are 'activities'—just as much as any other steps in the process of injecting a product into the stream of commerce and human activity."<sup>124</sup>

The underlying principles of abnormally dangerous activity liability may justify not extending liability to manufacturers of some products. As noted previously, when applying the unreciprocated risk justification to products, the appropriate question is whether the purchasers of that product, who would bear most of the liability expenses, expose others to unreciprocated risk.<sup>125</sup> In the case of dangerous products that the vast majority of people use, such as automobiles, the risk is reciprocated and liability is not justified. However, in the case of alcohol the risk is not reciprocated and, therefore, liability may be justified.

As to the cheapest cost avoider justification for abnormally dangerous activity liability, the user of most products may be the cheapest cost avoider and, thus, leaving liability solely with the user is sufficient. As argued previously, however, alcohol misusers are unlikely to be affected by the risk of liability, and, as between the bystander and the manufacturer, the manufacturer is likely to be the cheapest cost avoider.<sup>126</sup>

### B. Products Liability: Failure to Warn

When products cause injury to plaintiffs, plaintiffs may bring negligence, warranty, and/or strict liability in tort causes of action against manufacturers.<sup>127</sup> A plaintiff's theory under each of these causes of action may be that

a legitimate question of fact in negligence cases. *See infra* text accompanying notes 216-21.

123. *See, e.g.,* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984). *Contra* Chapman Chem. Co. v. Taylor, 222 S.W.2d 820 (Ark. 1949) (holding creation of pesticides that caused injury to plaintiff's cotton to be an abnormally dangerous activity); *see also* Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 384-85 (1987) (arguing that the manufacture of some products, such as handguns, might subject the manufacturer to abnormally dangerous activity liability).

124. Smith, *supra* note 123, at 384.

125. *See supra* part II.E.

126. *See supra* text accompanying notes 94-95.

127. Strict products liability first developed, not as a tort theory, but as a warranty theory. The purchaser of a product was able to recover against the seller, not because of any negligence, but because of the failure of the product to meet the actual or implied terms of the contract. Though courts originally developed warranty law through the common law, legislatures codified warranty law, first in the Uniform Sales Act, *see* UNIF. SALES ACT §§ 12, 14, 15, 1 U.L.A. 173, 207, 213 (1950), and now in the Uniform Commercial Code, *see* U.C.C. §§ 2-313 to -315 (1989). In most jurisdictions, strict products liability in tort gives plaintiffs all of the rights that are granted by warranty law, except that under warranty law, plaintiffs can recover for economic

the product was defectively manufactured, had a defective warning, or had a defective design. Under a manufacturing defect theory, plaintiffs must show that the product turned out differently than the manufacturer intended. Since this article is concerned with "good" whiskey, which turned out as the manufacturer intended,<sup>128</sup> it will not discuss defectively manufactured alcohol cases. This section will discuss the failure to warn theory of liability. The following two sections will discuss design defect theories in negligence and strict liability.<sup>129</sup>

The focus of this article is on the bystander's cause of action. Most bystanders will find it difficult to recover under a failure to warn theory. However, a failure to warn theory may help some bystanders, specifically children who are born with birth defects caused by fetal alcohol syndrome. This section discusses the failure to warn theory briefly.<sup>130</sup>

Most courts require plaintiffs to show manufacturer negligence in failure to warn cases, whether the cause of action is in negligence or strict products liability.<sup>131</sup> Courts impose liability on manufacturers that knew or should have known about the risks involved and nonetheless failed to warn.<sup>132</sup> Manufacturers are not required to warn of dangers that are common knowledge<sup>133</sup> or that are extremely unusual. Some miswarning cases against

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damages without showing physical harm and generally they cannot recover such damages under strict products liability in tort. *See, e.g.,* Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965) (en banc). *Contra* Santor v. A & M Karagheusian, Inc., 207 A.2d 305 (N.J. 1965).

In most jurisdictions, injured persons are entitled to the protections of strict products liability law if they are persons that are foreseeably injured in light of the product defect. *See* KEETON, *supra* note 56, § 100, at 703-04. In most situations, bystanders that are injured in accidents arising from over-consumption of alcohol are foreseeable plaintiffs, because the risk that a consumer will drive while intoxicated is foreseeable.

128. *See supra* note 1.

129. *See infra* parts IV.C-D.

130. Several comments provide helpful discussions of this potential theory. Stacy M. Andreas, Note, *A Case for Alcohol Beverage Warning Labels: Duty to Warn of Dangers of Consumption*, 53 MO. L. REV. 555 (1988); Natalie K. Chetlin, Comment, *In Support of Hon v. Stroh Brewery Co.: A Brewing Debate Over Extending Liability to Manufacturers of Alcoholic Beverages*, 51 U. PITT. L. REV. 179 (1989); Rhondetta Goble, Note, *Fetal Alcohol Syndrome: Liability for Failure to Warn — Should Liquor Manufacturers Pick up the Tab?*, 28 J. FAM. L. 71 (1989-90); Clarke E. Khoury, Note, *Warning Labels May Be Hazardous to Your Health: Common-Law and Statutory Responses to Alcoholic Beverage Manufacturers' Duty to Warn*, 75 CORNELL L. REV. 158 (1989).

131. *See* RESTATEMENT, *supra* note 1, § 402A cmt. j; *see also* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973) (applying Texas law), *cert. denied*, 419 U.S. 869 (1974).

132. *Borel*, 493 F.2d at 1088.

133. *See, e.g.,* Height v. Kawasaki Heavy Indus., Ltd., 461 A.2d 757, 758 (N.J. Super. Ct. App. Div.), *cert. denied*, 468 A.2d 244 (1983). The RESTATEMENT, *supra* note 1, § 402A cmt. j, states as follows:

*Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container,



alcohol manufacturers have alleged that the plaintiff was injured because alcohol causes intoxication. These claims have been dismissed on the basis that the dangers of alcohol consumption are common knowledge.<sup>134</sup>

In two recent cases, however, appellate courts have held that alcohol manufacturers may be subject to liability for injuries to consumers for the failure to inform them of risks that are not a matter of common knowledge. In *Hon v. Stroh Brewery Co.*<sup>135</sup> plaintiff's deceased drank two or three cans of beer per night, four nights a week, for six years. He died of pancreatitis at the age of 26.<sup>136</sup> Plaintiff's expert expressed the opinion that the consumption of the beer was a cause of the pancreatitis and that the public is unaware that moderate use of alcohol can cause a serious risk to health.<sup>137</sup> The trial court dismissed the claim.<sup>138</sup> The United States Court of Appeals for the Third Circuit reversed, holding that the finder-of-fact could conclude that the knowledge of this risk is not common knowledge and could find that the manufacturer should have warned consumers of the risk.<sup>139</sup>

In *Brune v. Brown Forman Corp.*<sup>140</sup> the plaintiff's deceased, a college freshman, consumed straight shots of tequila and died from acute alcohol poisoning.<sup>141</sup> The Texas Court of Appeals held that the finder-of-fact must determine whether the risk of death from alcohol poisoning is a matter of common knowledge; thus, the question of common knowledge should have been left to the jury.<sup>142</sup>

as to its use. . . .

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

134. See, e.g., *Garrison v. Heublein, Inc.*, 673 F.2d 189, 191-92 (7th Cir. 1982) (plaintiff suffered physical and mental disabilities after consuming vodka for 20 years); *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 692-93 (Tenn. 1984) (plaintiff's minor son died from ingestion of grain alcohol); *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991) (plaintiff became alcoholic); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 583 (Tex. Ct. App. 1987) (plaintiff struck by drunk driver).

135. 835 F.2d 510 (3d Cir. 1987).

136. *Id.* at 511.

137. *Id.*

138. *Id.* at 510-11.

139. *Id.* at 514.

140. 758 S.W.2d 827 (Tex. Ct. App. 1988).

141. *Id.* at 828.

142. *Id.* at 831. *Contra Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 692-93 (Tenn. 1984) (denying recovery where plaintiff's minor son died from ingestion of grain alcohol).

These two cases will be of little help to bystanders who are injured by intoxicated drivers. Whereas the risk of death from moderate consumption of beer or from one-time overconsumption of tequila are not matters of common knowledge, the risks associated with drinking and driving are common knowledge. Even if a bystander could convince a court that the manufacturer should have included a warning of the risks of drinking and driving, the bystander would have a difficult time showing that the lack of a warning was a cause-in-fact of the loss. The bystander would have to show that had a warning been provided, the drinker would have heeded the warning and the bystander would not have suffered the loss.

The cases that show some prospect for bystander recovery against an alcohol manufacturer under a failure-to-warn theory are cases brought on behalf of children who suffer from a birth defect disorder known as Fetal Alcohol Syndrome (FAS), which is caused by their mothers' consumption of alcohol during pregnancy.<sup>143</sup> FAS is estimated to occur in 1.9 out of every 1000 live births in the United States and is the leading known cause of mental

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143. See *Alcohol Warning Labels: Hearing on S. 2047 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 2d Sess. 24 (1988) [hereinafter *Hearing*] (statement of Enoch Gordis, M.D., Director, National Inst. on Alcohol Abuse & Alcoholism, U.S. Dep't of Health & Human Servs.). For other sources discussing FAS, see NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRAM STRATEGIES FOR PREVENTING FETAL ALCOHOL SYNDROME AND ALCOHOL-RELATED BIRTH DEFECTS (1987) [hereinafter *STRATEGIES FOR PREVENTING FAS*]; PAUL M. ROMAN, U.S. DEP'T OF HEALTH & HUMAN SERVS., WOMEN AND ALCOHOL USE: A REVIEW OF THE RESEARCH LITERATURE (1988); U.S. DEP'T OF HEALTH & HUMAN SERVS., SEVENTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH (1990) [hereinafter *SEVENTH SPECIAL REPORT*].

Clinical diagnosis of FAS requires three characteristics: growth retardation before or after birth; face and head abnormalities such as small head circumference, small eyes, and flattened facial features; and central nervous system dysfunction, such as mental retardation or abnormal neonatal behavior. See, e.g., *STRATEGIES FOR PREVENTING FAS*, *supra*, at 4. Some studies add a fourth characteristic: major organ system malformations. *SEVENTH SPECIAL REPORT*, *supra*, at 139. Follow-up studies show that some children's abnormal face and head features improve with time. Less severely retarded children also improve in psychiatric assessments, but those severely retarded showed no improvement. *Id.* at 140.

Animal studies suggest that binge drinking, resulting in peak blood alcohol levels, may be more damaging to the fetus than the same amount of alcohol ingested over a longer period of time. *Id.* at 144. Other factors not related to alcohol such as smoking, poor diet, and poor general health may both contribute to fetal abnormalities and combine with alcohol use to affect the fetus.

Another adverse effect of heavy maternal alcohol intake on the fetus is Fetal Alcohol Effects (FAE). Children who suffer from FAE have birth defects but do not have all the characteristics of FAS. FAE include eye and ear defects, heart murmurs, fingerprint abnormalities, and other complications or birth defects that can be attributed to alcohol use during pregnancy. See *Hearing*, *supra*, at 24; *STRATEGIES FOR PREVENTING FAS*, *supra*, at 4; ROMAN, *supra*, at 25; *SEVENTH SPECIAL REPORT*, *supra*, at 139. For a helpful discussion of the possibility of an FAS cause of action, see Goble, *supra* note 130.

retardation.<sup>144</sup> One study showed that 2.5% of the mothers who abused alcohol during pregnancy gave birth to a FAS baby.<sup>145</sup>

The risks of FAS are sufficiently significant that a manufacturer should warn consumers of them. The risks were documented in studies published in 1968<sup>146</sup> and 1973,<sup>147</sup> and a manufacturer who failed to warn consumers of the risk after the publication of these studies might be subject to liability. A plaintiff suffering from FAS would have to show that the failure to warn was a cause-in-fact of the injury. In other words, the plaintiff must show that the mother would have heeded a warning had the manufacturer given one. Beginning in 1989, federal law required alcohol manufacturers to warn consumers of the risk of FAS;<sup>148</sup> therefore, the FAS failure to warn cause of action is likely to have a limited life.

### C. Products Liability: Negligent Design

Another products liability theory that the bystander might use against alcohol manufacturers is that of defective design. Defective design can arise as a theory under either a negligence or strict liability cause of action. This section will discuss negligent misdesign; the following section will discuss strict liability misdesign.

During the last twenty-five years, the major area of development of products liability has been strict products liability in tort. However, a recent article by James Henderson and Ted Eisenberg demonstrated that the development of strict products liability slowed during the 1980's and may have come to a "quiet" halt.<sup>149</sup> In another article, Henderson and Aaron Twerski liken the development of products liability to the settlement of the North American continent and suggest that courts have reached the Pacific Ocean, leaving no new territories to be settled. In particular, they suggest that courts have stopped moving toward applying strict products liability based on the dangerousness of an entire category of products.<sup>150</sup>

Though, like the early explorers of North America, we may have pushed quickly to the outer limits of products liability law, vast territories along the way have not even been explored. A manufacturer's negligence for production

144. See *Hearing*, *supra* note 143, at 24.

145. SEVENTH SPECIAL REPORT, *supra* note 143, at 140.

146. Lemoine et al., *Les Enfants de Parents Alcooliques: Anomalies Observees*, 25 SOCIETE FRANCAISE DE PEDIATRIE 830 (1968), cited in Goble, *supra* note 130, at 74 n.20.

147. Kenneth L. Jones et al., *Pattern of Malformation in Offspring of Chronic Alcoholic Mothers*, 1 LANCET 1267 (1973), cited in Goble, *supra* note 130, at 74 n.21.

148. Alcoholic Beverage Labeling Act, 27 U.S.C. § 213 (1988).

149. James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. REV. 479 (1990).

150. See Henderson & Twerski, *supra* note 24, at 1269.

of a category of products may be such a territory.<sup>151</sup> With a slowing, and possibly a halt, to the development of strict products liability, the most fruitful opportunity for development of a bystander's cause of action may not be a new cause of action, but an old cause of action: negligence. This section will consider the possibility that manufacturers are negligent for simply producing alcohol.

### 1. Negligence's Cost/Benefit Test

Alcohol is such a common part of American life that it might be difficult for a judge or jury to consider the possibility that manufacturers might be negligent for creating it. Two-thirds of Americans drink alcoholic beverages, and alcoholic beverages are sold in most restaurants, convenience stores, and grocery stores. Consumption of alcoholic beverages is a well established American custom; service is a sign of hospitality.<sup>152</sup> But as to the issue of negligence, custom is supposed to be merely evidence of reasonable care.<sup>153</sup> An entire industry may engage in a practice that is unreasonable;<sup>154</sup> an entire society may do so as well.

A manufacturer is negligent if it produces a product whose costs outweigh its benefits.<sup>155</sup> The costs and benefits that the finder-of-fact must consider

151. See KEETON, *supra* note 56, § 96, at 688-89.

152. We associate alcohol with summer ("those days of soda and pretzels and beer"), romance ("the days of wine and roses and you"), relaxation ("it's time to relax"), and good times ("it doesn't get any better than this").

153. See, e.g., *In re The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932). When an industry practice is at issue, the court or jury can stand apart from the practice and be objective about whether the practice is unreasonable. Those within our society may have difficulty determining whether alcohol manufacture is unreasonable because they would have to stand apart from the society that has become accustomed to alcohol consumption as a common activity.

154. *Hooper*, 60 F.2d at 740 (stating that the entire business of tugboats "may have unduly lagged in the adoption of new and available [receiving set] devices," but courts must say in the end what is required and reasonable).

155. The Restatement develops the way that the benefits and risks of an activity are weighed in a negligence analysis in the following manner:

#### § 291. Unreasonableness; How Determined; Magnitude of Risk and Utility of Conduct

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

#### § 292. Factors Considered in Determining Utility of Actor's Conduct

In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

include not only the costs and benefits of the product to the consumer, but also the costs and benefits to all of society.<sup>156</sup> In the early days of the development of strict products liability, William Prosser dismissed the possibility that alcohol's costs might outweigh its benefits and render the manufacturer of alcohol negligent.<sup>157</sup> Nevertheless, an evaluation of alcohol's costs and benefits indicates that the question is not so easy to answer. Such an evaluation calls into question the reasonableness of the manufacturer's decision to produce alcohol.

### *a. The Costs of Alcohol*

Alcohol abuse creates tremendous costs, both to the drinker and to the

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(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;

(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;

(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

#### § 293. Factors Considered in Determining Magnitude of Risk

In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

(a) the social value which the law attaches to the interests which are imperiled;

(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;

(c) the extent of the harm likely to be caused to the interests imperiled;

(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

RESTATEMENT, *supra* note 1, §§ 291-93.

The benefits of a product may be balanced against its risks through a formula that was developed by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Judge Hand suggested that whether a defendant acts negligently is a function of three factors: (1) the probability of injury, (2) the gravity of any injury, and (3) the burden of adequate precautions. *Id.* at 173. Judge Hand illustrated the relationship between these factors by an algebraic formula. A person is negligent if B (the burden of adequate precaution) is less than the risk created by the activity, which can be calculated by multiplying P (the probability of injury) times L (the injury that might occur). *Id.* As Judge Hand has acknowledged, the values of these variables are generally "incommensurable." See *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir.), *rev'd*, 312 U.S. 492 (1940). However, the Hand formula helps illustrate the interrelationship between these factors.

156. *Cf. Conway*, 111 F.2d at 612.

157. Prosser has stated:

Where only negligence is in question, the answer as to [products that are unavoidably dangerous, including whiskey,] is a simple one. The utility and social value of the thing sold clearly outweighs the known, and all the more so the unknown risk, and there is no negligence in marketing the product.

William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966).

rest of society.<sup>158</sup> It causes traffic and other accidents, addiction, serious medical problems, birth defects, crime, reduced productivity, and death.<sup>159</sup> This section will discuss each of the costs that alcohol creates to society and the possibility of quantifying those costs. The discussion will draw from two major studies which addressed the social costs of alcohol consumption. The Rice study, published in 1990, attempted to quantify the social costs of alcohol in the United States during 1985.<sup>160</sup> The Manning study, published in 1991, addressed the social costs of alcohol during 1986.<sup>161</sup>

*Traffic and Other Accidents* - Three sources of evidence help establish the effect that alcohol has on traffic accidents. First, performance tests reveal that alcohol impairs driving performance, that the degree of impairment increases with a higher blood alcohol concentration (BAC), and that almost every individual suffers substantial impairment with a BAC above .10%.<sup>162</sup>

Second, accident studies show that a high percentage of drivers involved in fatal crashes were intoxicated. In comparison to a driver who has not been drinking, a driver with a BAC of .05% is about two times as likely, a driver with .10% BAC is seven times as likely, and a driver with .15% BAC is twenty-five times as likely to be involved in a fatal collision.<sup>163</sup> One study found that 43% (19,918) of the 46,386 traffic fatalities in 1987 were alcohol-related.<sup>164</sup>

Substantial disagreement exists over the reliability of using the BAC of drivers involved in fatal accidents to identify accidents that are actually *caused* by alcohol. For example, the study which found 43% of traffic fatalities to be alcohol-related identified an accident as alcohol-related if (a) the investigating officer determined that alcohol was involved, (b) the driver had a BAC of .10% or more, or (c) an officer issued a citation for driving while intoxicated.<sup>165</sup> This study also suggested, however, that this identification process

158. "[A]lcohol is a two-headed beast; it causes behaviors that are destructive of others and society, on one hand, and holds millions in the grip of addiction, on the other." Claude M. Steele & Robert A. Josephs, *Alcohol Myopia: Its Prized and Dangerous Effects*, 45 AM. PSYCHOLOGIST 921, 921 (1990).

159. One study links 60% of fatal pedestrian accidents, 64% of homicides, 75% of stabbings, 50% of marital violence, 67% of sexually-aggressive acts against children to alcohol use. *Hearing*, *supra* note 143, at 61-62 (statement of John A. Morris, Jr., M.D., Vanderbilt Univ. Medical Center); *see also* SEVENTH SPECIAL REPORT, *supra* note 143, at 171-74 (discussing relationship between alcohol use, crime, and family violence).

160. RICE, *supra* note 7.

161. Manning, *supra* note 2.

162. Cook, *supra* note 8, at 64-67 (discussing studies).

163. David A. Sleet et al., *Introduction: Drinking, Driving, and Health Promotion*, 16 HEALTH EDUC. Q. 329, 329 (1989) (citing NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., ALCOHOL AND HIGHWAY SAFETY 1984: A REVIEW OF THE STATE OF KNOWLEDGE 16-18 (1985)).

164. Terry S. Zobeck et al., *Years of Potential Life Lost and Other Trends in Alcohol-Related Fatal Traffic Crashes: 1977-1987*, 14 ALCOHOL HEALTH & RES. WORLD 63, 64 (1990).

165. *Id.*

underestimated the number of accidents that were alcohol-related because police officers often are reluctant to judge whether someone is intoxicated, they do not administer BAC tests consistently, and they commonly do not issue citations for driving while intoxicated in fatal crashes.<sup>166</sup> Other commentators argue that statistics attributing all deaths in alcohol-related accidents to the alcohol overstate the number of deaths actually caused by the alcohol:

The true figure is smaller, in part because some of those accidents involving drunk drivers were not those drivers' fault. Perhaps more important is the possibility that people who drive while drunk often have personality attributes that make them dangerous drivers even while sober. Donelson notes that "Limited research . . . suggests that such personal attributes as hostility, alienation, impulsiveness, inability to cope with stress, and rebelliousness are more frequently found in groups of high-risk drinking drivers." If so, then drunk driving is a marker for dangerous driving, as well being a cause. Thus an intervention that was successful in reforming habitual drunk drivers would not reduce their involvement in serious accidents to the level of the rest of the population.<sup>167</sup>

Regardless of the exact percentage of accidents that alcohol causes, the third type of evidence clearly establishes that alcohol does cause a high percentage of automobile accidents. Studies on the effect of changes in the availability of alcohol, such as changes in excise taxes and in the minimum purchase age, "demonstrate that such interventions have a clear and important effect on traffic fatalities."<sup>168</sup>

The Rice study calculated that alcohol caused 34,863 deaths from traffic, air, water, fire, and other accidents in 1985.<sup>169</sup>

#### *Crime and Suicide -*

Alcohol use has been associated with assaultive and sex-related crimes, serious youth crime, family violence toward both spouses and children,

166. *Id.*

167. Cook, *supra* note 8, at 64-65 (quoting Donelson, *The Alcohol-Crash Problem*, in MICHAEL LAURENCE, *SOCIAL CONTROL OF THE DRINKING DRIVER* (1988)).

168. *Id.* at 65.

169. RICE, *supra* note 7, at 118 tbl. 47. Of these deaths, the Rice study estimated that there were 23,190 motor vehicle traffic accident deaths. *Id.* The Rice study estimate of the number of deaths due to drunk driving is based on the assumption that alcohol caused 51% of the 45,866 traffic accident deaths. *Id.*

Although the 34,863 accident deaths caused by alcohol, coupled with the 8329 alcohol-related deaths from homicide and legal intervention, *id.* at 119 tbl. 47, constitute only 46% of the 94,768 total alcohol-related deaths, the accident and crime deaths account for 80% of the life years lost due to alcohol because of the young ages of many who die from accidents and crime. See Cook, *supra* note 8, at 63 (citing Centers for Disease Control, *Alcohol-Related Mortality and Years of Potential Life Lost-United States, 1987*, 39 MORBIDITY & MORTALITY WKLY. REP., March 23, 1990, at 11).

being both a homicide victim and perpetrator, and persistent aggression as an adult. Alcohol 'problems' occur disproportionately among both juveniles and adults who report violent behaviors.<sup>170</sup>

A study of prison inmates in the United States found that over half had been drinking immediately prior to the offense for which they were incarcerated.<sup>171</sup>

As with traffic accidents, however, the fact that many drink while committing crime does not in itself prove that drinking causes crime. One who has decided to commit a crime may drink for courage or drink to have an excuse.<sup>172</sup> However, other evidence supports the conclusion that alcohol use causes crime. Studies show that drinking engenders aggressive behavior,<sup>173</sup> and that there is a reduction in crime in communities in which alcohol becomes unavailable.<sup>174</sup>

One study estimated the costs of alcohol-related crime to the government and persons other than drinkers to be \$3.1 billion.<sup>175</sup> The Rice study calculated the losses suffered by those who commit crimes while drinking to be \$342 million in private legal defense expenditures and \$2701 million for incarceration.<sup>176</sup> The Rice study estimated the number of alcohol-related deaths resulting from homicide and legal intervention in crime in 1985 to be 8329<sup>177</sup> and the number of suicides committed because of alcohol to be 3828.<sup>178</sup>

*Disease* - Alcohol abuse can lead to a host of medical problems, including malnutrition, damage to the stomach, and pancreatitis,<sup>179</sup> strokes and other heart problems,<sup>180</sup> damage to the immune, endocrine, and reproductive systems,<sup>181</sup> and cancer of the liver, esophagus, nasopharynx, and larynx.<sup>182</sup>

170. Cook, *supra* note 8, at 67 (citing Fagan, *Intoxication and Aggression*, in M. TONRY & J. WILSON, *CRIME AND JUSTICE* (1990)).

171. *Id.* at 68 (citation omitted).

172. *See id.* at 69.

173. *See, e.g., id.* at 68 (discussing studies).

174. *See, e.g., id.* at 69-70.

175. *See* Cook, *supra* note 8, at 55 n.10 (calculating the criminal justice costs from the Manning Study, *supra* note 2).

176. RICE, *supra* note 7, at 20 tbl. 7.

177. *Id.* at 119 tbl. 47.

178. *Id.*

179. Heavy alcohol consumption inhibits the metabolism of proteins, carbohydrates, lipids, vitamins, and minerals, thus impairing the absorption of nutrients into the body. This impairment, combined with the poor eating habits of many alcohol abusers, may cause malnutrition that often accompanies alcohol dependence. SEVENTH SPECIAL REPORT, *supra* note 143, at 116-17.

180. Alcohol can cause degeneration of the heart muscle and cardiac arrhythmias. Heavy consumption is thought to increase hypertension, contribute to poor blood circulation to the heart, and contribute to strokes. *Id.* at 117. However, moderate consumption may have a beneficial impact on the heart. *See infra* note 203.

181. SEVENTH SPECIAL REPORT, *supra* note 143, at 123. Alcoholic men commonly experience



Liver difficulties account for the greatest number of alcohol-related medical problems.<sup>183</sup> The Rice study estimates that alcohol caused 47,748 deaths from disease in 1985.<sup>184</sup> Alcohol abuse also causes both short and long-term brain disorders, inhibiting the ability of the drinker to think clearly.<sup>185</sup>

*Birth Defects* - Abuse of alcohol by pregnant women causes birth defects to their children. One study estimates that in 1984, 7024 children were born with Fetal Alcohol Syndrome (FAS).<sup>186</sup> The Rice Study estimates FAS costs in 1985 to be \$1.6 billion.<sup>187</sup>

*Addiction and its Effect on the Family* - In low doses alcohol acts as a stimulant; in high doses as a depressant. Continued use creates increased levels of tolerance—requiring more alcohol to produce a given effect, and physical and/or psychological dependence.<sup>188</sup> The medical profession

reproductive disorders such as impotence, low testosterone levels, low sperm count, and testicular atrophy. Studies indicate that alcohol use by women may suppress hormonal activity. *Id.*

182. Alcohol is associated with increased risk of cancer of the liver, esophagus, nasopharynx and larynx. *Id.* at 121. Alcohol alone appears not to be a carcinogen, but may negatively affect the enzymes that control carcinogens. *Id.* at 122. For example, one study indicates that the risk of esophageal cancer is much higher when drinking and smoking are combined than when only one habit is sustained. *Id.* at 121. “[A]lcohol may both facilitate and promote delivery of carcinogens and then impair immune protective or repair mechanisms” that would normally fight the cancer. *Id.* at 122.

183. Most metabolism of alcohol takes place in the liver, which can be severely affected by alcohol abuse. Heavy alcohol use results in damage to the liver in three ways: fatty liver, alcoholic hepatitis, and cirrhosis. Abstinence can reverse fatty liver and alcoholic hepatitis, but cirrhosis is permanent. Ten to twenty percent of heavy drinkers develop cirrhosis, the great majority suffer fatty liver, and ten to thirty-five percent develop alcoholic hepatitis. Cirrhosis was the ninth leading cause of death in the nation in 1986. *Id.* at 107. One study estimated that almost fifty percent of deaths due to cirrhosis may be misdiagnosed, so that the cirrhosis mortality rate may be substantially understated. *Id.* at 108. The Rice study attributes 7466 cirrhosis deaths, 1077 fatty liver deaths, and 766 alcoholic hepatitis deaths in 1985 to alcohol. RICE, *supra* note 7, at 118 tbl. 47.

184. RICE, *supra* note 7, at 118-19 tbl. 47. This figure includes deaths that the Rice study lists as “Alcohol - Main Cause,” deaths that it attributes to alcohol from “Malignant Neoplasms,” and diseases listed as “Other Alcohol-Related Causes.”

185. Alcohol abuse is a well known cause of brain damage, resulting in dementia, blackouts, seizures, and hallucinations. SEVENTH SPECIAL REPORT, *supra* note 143, at 123. Short-term or “acute” exposure to alcohol at low doses may result in changes in mood, anxiety level, motor performance, and cognition. At higher doses, alcohol can act as a sedative or anesthetic. *Id.* at 69. Both acute and chronic exposure result in memory disorders, from short periods of memory loss to chronic inability to learn new material. See NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP’T OF HEALTH & HUMAN SERVS., PSYCHOBIOLOGICAL EFFECTS OF ALCOHOL 2 (1988).

186. RICE, *supra* note 7, at 153 (citing Abel & Sokol, *Incidence of Fetal Alcohol Syndrome and Economic Impact of FAS-Related Anomalies*, 19 DRUG AND ALCOHOL DEPENDENCE 51 (1987)).

187. *Id.* at 154 tbl. 65 (adapting figure from Abel & Sokol, *supra* note 186, at tbls. 4-6).

188. SEVENTH SPECIAL REPORT, *supra* note 143, at 69. Physical dependence “manifests itself by intense physical disturbances when . . . alcohol stops being administered.” Psychological dependence is “a condition in which . . . alcohol produces a craving that requires periodic or

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characterizes alcoholism as a disease similar to hypertension, diabetes, and coronary artery disease in that environmental factors activate a genetic predisposition for the disease.<sup>189</sup> Alcoholics may lack internal signaling mechanisms that would allow them to limit their consumption and gauge their level of intoxication. This impaired control, combined with expectations of the desirable effects of alcohol consumption, can lead to a vicious cycle of alcoholism;<sup>190</sup> those with impaired control drink large amounts of alcohol, pass out, and, waking with a hangover, drink more alcohol to feel better. The use of alcohol for relief creates alcohol craving and an increasing tolerance level, requiring more and more alcohol before the desired stimulating effects occur.<sup>191</sup>

Another part of this section discusses alcohol-related crime,<sup>192</sup> but alcoholism has a tremendous effect on those close to the alcoholic that does not show up in crime statistics. In particular, alcoholics cause great problems to other members of their families. As clinical psychologist Robert Deutsch, testifying before a United States Senate Subcommittee, stated:

Alcoholism is a family disease. By that I mean that active alcoholism in a family always affects every family member. . . . In the alcoholic family system, all activities revolve around the common thread: the drug alcohol. The alcoholic family is comprised of two groups: the active and the reactive members. The alcoholic is the active member, while the remaining family members all live in reaction to the alcoholic.

Family members live in a constant hyper-vigilant [s]tate, metaphorically walking through life on emotional eggshells, never knowing when the alcoholic will act out in an intoxicated and uncontrolled fashion, never understanding why the alcoholic in the family drinks and behaves in such an inappropriate fashion.

. . . .

. . . [The] children often grow up with excessive self-blame, anger, and guilt, never feeling special, never experiencing unconditional family love, never trusting significant others in their life [sic]: It is no wonder that these early childhood experiences translate into adult issues, such as a fear of success, interpersonal distrust, poor self-worth, and a shame-based sense of self.<sup>193</sup>

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continuous administration of the drug to produce pleasure or to avoid discomfort." *Id.* at 81. Both kinds of dependence may characterize addiction and be virtually inseparable. *Id.*

189. *Id.* at 6. See generally *id.* at 43-68 (effects of genetics and environment on alcohol use); Ting-Kai Li & Jane C. Lockmuller, *Why Are Some People More Susceptible to Alcoholism?*, 13 ALCOHOL HEALTH & RES. WORLD 310 (1989) (discussing the biological and psychosocial factors that can influence drinking).

190. SEVENTH SPECIAL REPORT, *supra* note 143, at 6.

191. *Behavior: Alcohol Use and Great Expectations*, 132 SCI. NEWS, Oct. 3, 1987, at 218.

192. See *supra* text accompanying notes 170-77.

193. *Breaking the Cycle: The Effects of Alcohol on Families: Hearing Before the Subcomm.*

Studies have linked excessive alcohol consumption with child abuse<sup>194</sup> and spousal abuse.<sup>195</sup> Except in the rare situations where it is reported to police authorities, this abuse and emotional suffering is unaccounted for in the studies that attempt to quantify the costs of alcohol to society.

**Reduced Productivity** - The Rice Study calculated the morbidity costs, "the value of goods and services lost by individuals unable to perform their usual activities because of [alcohol] disorders, or to perform them at a level of full effectiveness," to have been \$27,388 million in 1985.<sup>196</sup> In addition to causing lowered productivity, alcohol is a leading cause of death. Previous sections discussed alcohol deaths due to accidents, disease, and crime. At least three out of one hundred deaths in the United States is directly attributable to alcohol.<sup>197</sup> The Rice Study attributes 94,768 deaths in 1985 to alcohol abuse.<sup>198</sup> It estimated the present value of productivity loss due to alcohol related death in 1985 at \$30,628 million (if discounted at four percent) and \$23,983 million (if discounted at six percent).<sup>199</sup>

**Lost Opportunity Costs** - In addition to these costs, reduced productivity also carries with it lost opportunity costs. If alcohol were not available,

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on Children, Family, Drugs and Alcoholism of the Senate Comm'n on Labor and Human Resources, 102d Cong., 1st Sess. 28 (1991) (statement of Robert Deutsch, Clinical Psychologist, West Hartford, Conn.).

194. E.g., Richard Famularo et al., *Alcoholism and Severe Child Maltreatment*, 56 AM. J. ORTHOPSYCHIATRY 481 (1986).

195. E.g., Brenda A. Miller et al., *Spousal Violence Among Alcoholic Women as Compared to a Random Household Sample of Women*, 50 J. STUD. ALCOHOL 533 (1989).

196. RICE, *supra* note 7, at 93, 98 tbl. 35. On a per person basis, this figure translates to an average lost income by those with alcohol disorders as follows:

Age	Loss per Person		Percent Loss of Income	
	Male	Female	Male	Female
18-24	\$131	\$75	1.4%	0.8%
25-34	807	484	3.0	2.8
35-54	1958	2141	5.5	11.9
55-64	2295	1900	9.3	18.7

*Id.* at 104 tbl. 40.

197. SEVENTH SPECIAL REPORT, *supra* note 143, at 1. Studies have found alcohol use to increase the risk of fatal injury, including suicide, motor vehicle crashes, burns, falls, and drowning. E.g., Robert F. Anda et al., *Alcohol and Fatal Injuries Among US Adults*, 260 J. AM. MED. ASS'N 2529, 2529 (1988). One study showed that the more drinks an individual consumed per occasion, the more likely that person was to die from fatal injuries. For example, persons consuming five to eight drinks per occasion were twice as likely to die as those drinking less than five, and persons consuming nine or more were 3.3 times more likely to die from injuries. *Id.* See generally SEVENTH SPECIAL REPORT, *supra* note 143, at 163-71 (discussing relationship between alcohol use and accidents, suicide, and trauma victims).

198. RICE, *supra* note 7, at 117. "The United States Centers for Disease Control estimates 'alcohol-related mortality' for 1987 to be 105,000, 4.9 percent of all deaths in that year." Cook, *supra* note 8, at 52 (citing Centers for Disease Control, *supra* note 169, at 11).

199. RICE, *supra* note 7, at 131 tbl. 54.

consumers would spend money on something else, and the work, machinery and supplies that go into producing alcohol could be used to produce something else. The net benefit of these other activities is one of the costs of alcohol production. Such opportunity costs would have to be offset by the negative impacts that some of these other activities and products would have—if people could not drink, some would engage in more destructive activities, such as use of heroin. Of course, it would be very difficult to measure the lost opportunity costs of alcohol.<sup>200</sup>

*The Total Cost* - The Rice Study calculated the total cost (in millions of dollars) of alcohol in 1985 as follows:

Treatment	\$6315
Support	495
Morbidity	27,388
Mortality	23,983
Crime Expenditures	4251
Motor Vehicle Crashes	2584
Fire Destruction	457
Social Welfare Administration	88
Victims of Crime (loss of time)	465
Incarceration	2701
<u>Fetal Alcohol Syndrome</u>	<u>1611</u>
<i>Total</i>	<i>\$70,338</i> <sup>201</sup>

These costs, of course do not include the pain and suffering, both physical and

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200. It is not appropriate to consider the jobs created by the alcohol industry as a benefit. [T]he utility associated with capital is not unique to a particular activity over the long run. Jobs and tax dollars lost to one community as a result of disinvestment eventually will surface elsewhere, and hence from a society's point of view it is not meaningful to associate such a generic utility with a particular activity.

Smith, *supra* note 123, at 389 n.94. It is probably more appropriate to treat the jobs created by the alcohol industry as a lost opportunity cost. If most of the people employed by the alcohol industry were not producing alcohol, they would probably be producing something else. Most of the money now spent on alcohol probably would be spent on other products and services.

201. RICE, *supra* note 7, at 4 tbl. 2, 20 tbl. 7.

The Harwood Study calculated the social costs in 1980 to be \$89,526 million. H. HARWOOD ET AL., ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1980 (1984), *cited in* RICE, *supra* note 7, at 32. For a discussion of the differences in results in the Harwood and Rice studies, see RICE, *supra* note 7, at 167-204.

The costs of alcohol to society can be compared with the costs that studies have found tobacco and abuse of other drugs create to society. There were between 300,000 and 360,000 smoking deaths per year in the United States during the 1960's. Garner, *supra* note 104, at 271 & n.20. Estimates of the cost to society from smoking (including the costs to the smokers) range from \$4.23 billion to \$12 billion. *Id.* at 286-90.

Rice studied both the costs of alcohol and the costs of drug abuse and found the costs of drug abuse to be \$44.1 billion. RICE, *supra* note 7, at 2.

emotional, that is experienced by alcoholics and the members of their families.

### *b. The Benefits of Alcohol*

One in every ten Americans is a problem drinker, but many more of the two-thirds of American adults who consume alcoholic beverages do so responsibly.<sup>202</sup> Alcohol consumption in moderation has benefits, such as reducing stress and coronary heart disease<sup>203</sup> and increasing longevity.<sup>204</sup> The major benefits of alcohol are social, including the enjoyment and the pleasant social environment that alcohol creates.

A judge or jury might place a value on alcohol based on testimony of its beneficial effects. Or they might try a more scientific approach and attempt to place a value on alcohol using the methods of economists. Economists attempt to place a value on products by determining the value that consumers place on them. Making such a calculation for any product is difficult; calculating consumer value of alcohol is especially difficult.

In attempting to determine the value that consumers place on alcohol, we can start with what they actually pay. In 1985, the year that the Rice Study evaluated, U.S. consumers spent \$56,248 million for alcoholic beverages.<sup>205</sup> But the value that consumers place on a product is not what consumers *pay*, but what they would be *willing to pay*.<sup>206</sup> Generally people place a higher value on things than what they pay for them—that is why people buy them.

202. Furthermore, more than three million problem drinkers are under 18 years of age. *Hearing, supra* note 143, at 123 (statement of Arnold F. Fege, Director, Governmental Rel., The Nat'l PTA).

203. Ronni Sandroff, *Happy Hour Revisited? Good News: The Alcohol-Breast Cancer Scare Reports Were Exaggerated. But Before You Say "Bottoms Up" . . .*, HEALTH, June 1988, at 31, 34. "Used judiciously, alcohol does reduce anxiety, social discomfort and stress — all of which have been found to contribute to a number of health disorders." *Id.*

Several studies indicate that alcohol, used in moderation, may increase the level of high-density lipoprotein (HDL), which carry cholesterol from tissue to the liver where it can be broken down. High HDL levels are associated with reduced risk of heart disease; therefore, moderate consumption of alcohol may help prevent heart disease. *See id.*; Elizabeth M. Whelan, *To Your Health*, 25 ACROSS THE BOARD, Jan. 1988, at 49, 51. *But see* NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T OF HEALTH & HUMAN SERVS., MEDICAL CONSEQUENCES OF ALCOHOL 3 (1988) (suggesting that alcohol does not raise the level of the particular HDL believed to protect against coronary heart disease). This conflict probably indicates that further research is required on this issue.

204. Whelan, *supra* note 203, at 51. According to data going back to 1926, and confirmed on tens of thousands of people since, light or moderate drinkers tend to live longer than abstainers and heavy drinkers. Numerous studies have shown that people who enjoy about two drinks a day have a chance at longer life than those who drink more or less, including those who don't drink at all. *Id.* at 53. Perhaps as "Jack Rabbit" Smith Johanson, a cross-country skier at age 103, once suggested, "The secret to a long life is to stay busy, get plenty of exercise, and don't drink too much. Then again, don't drink too little." *Id.*

205. 1988 U.S. INDUSTRIAL OUTLOOK, *supra* note 101, at 42-29.

206. *See* POSNER, *supra* note 5, § 1.2.

The difference between what consumers would be willing to pay and what they actually pay is called consumer surplus. The first difficulty in determining how much consumers value alcohol is determining consumer surplus.

Consumer surplus is a function of the elasticity of demand, the degree to which consumers would be willing to pay more for a product than they pay.<sup>207</sup> One study has calculated that as to small changes in price, the elasticity of demand for alcohol is -0.5, which means that for every one percent increase in price, there would be a 0.5% decrease in demand.<sup>208</sup> This calculation suggests that the consumer surplus provided by alcohol may be substantial, but the elasticity of demand has been calculated for only small changes in price. It would be very difficult to calculate how much people would be willing to purchase if there were substantial price increases. A jury, which would presumably be made up of some of the two-thirds of Americans who drink, might have a pretty good sense of this willingness to pay.

A second complication in determining the value of a product is that consumers pay more than money for alcohol. Recall that economists define the value of a product as what consumers are willing to pay for it. One cost that consumers pay for alcohol, in addition to the money that they pay for it, is the risk to which they are willing to expose themselves.<sup>209</sup> To the extent that consumers make an informed choice to expose themselves to these risks, those risks are costs that consumers are willing to pay for the alcohol, and therefore should be considered in determining the value that they place on it.<sup>210</sup>

A third complication in calculating consumer willingness to pay for alcohol is that not all consumers of alcohol willingly and intelligently incur the costs and the risks of alcohol. Some drinkers are not aware of all of the risks that accompany consumption.<sup>211</sup> In addition, the ability of drinkers to evaluate risk diminishes with each drink — drinkers are subject to diminishing marginal reasoning ability<sup>212</sup> — and many drinkers are also alcoholics.<sup>213</sup>

207. Here, elasticity of demand is used to attempt to estimate consumer surplus. An earlier section used elasticity of demand to attempt to estimate the reduction in purchases that would accompany an increase in price. See *supra* text accompanying note 101 (citing Levy & Sheflin, *supra* note 101, at 932-35).

208. Levy & Sheflin, *supra* note 101, at 934.

209. The Manning Study, one of the recent studies of the costs of alcohol, does not address injuries to the consumer as a cost of risk-related habits such as smoking and heavy drinking because this is an internal cost, one that is merely part of the cost that the consumer is willing to pay for the product. See Manning, *supra* note 2, at 1604.

210. Including these costs in a calculation of product benefit properly cancels out some of those costs that we calculated in an earlier section. This problem is avoided by the Manning Study of the costs of alcohol, which evaluates only costs to those other than the drinker.

211. See Christine Godfrey, *Discussion of Professor Cook's Paper*, in *NEGATIVE SOCIAL CONSEQUENCES*, *supra* note 8, at 82, 86.

212. See *supra* note 185 and accompanying text.

213. See *supra* text accompanying notes 188-91.

Christine Godfrey has argued that the alcoholic "derives no pleasure from consumption . . . [and], therefore, receives no benefits from his expenditure on alcohol."<sup>214</sup> It might be argued that the risks of alcoholism are part of the cost that drinkers pay for their pre-addiction drinks, but it is unlikely that consumers intelligently consider this risk when they begin to drink.<sup>215</sup>

## 2. *Do the Costs Outweigh the Benefits? Who Should Decide?*

Whether the costs of alcohol outweigh the benefits is a difficult question. It is a matter which the finder-of-fact should resolve, however, so long as a reasonable person could conclude from the evidence that the costs outweigh the benefits.<sup>216</sup> When we look at alcohol's benefits and costs, it is difficult to say that there is not, at least, a legitimate question of fact.

A court or jury might attempt to place a dollar value on the costs and benefits of alcohol and compare them.<sup>217</sup> On one side of the equation might

214. Godfrey, *supra* note 211, at 86.

215. The Manning Study argues that the costs that alcohol and cigarettes create to those other than consumers should be imposed on the products through taxes. *See* Manning, *supra* note 2, at 1604. It makes the following comment concerning addiction to cigarettes, but the argument applies to alcohol as well:

Smoking tends to start in adolescence or early adulthood, at a time when individuals are not well informed and may not appreciate the consequences of their actions. Cigarettes (and alcohol) are addictive, so it is more difficult to quit than to avoid starting the habit. Because over 85% of smokers begin smoking before age 20 years and some evidence suggests that the proportion of those under 20 years of age who smoke is sensitive to taxes, higher taxes may decrease the number of individuals who become addicted.

Some may see this argument as paternalistic, but it is not, if judged by the tastes of the individual attempting to quit; those tastes arguably determine the economically efficient tax. If the loss in life expectancy of 28 minutes per pack is relevant to economic efficiency because of later regret, an economically efficient tax would be on the order of \$5 per pack, the estimated value of the 28 minutes.

*Id.* at 1608-09 (footnotes omitted). The Manning Study, which in general argued that only costs to those other than consumers should be considered when setting social policy, acknowledged that the problems of consumers' lack of knowledge and addiction may justify imposing additional taxes on alcohol. *See id.*

216. JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE 572 (4th ed. 1992).

217. If a judge or jury decides that the costs of alcohol outweigh its benefits, it will not be the first time that this calculation has been made in this country. In the 1920's this country weighed the costs and benefits of alcohol production and found alcohol wanting. This country adopted the Eighteenth Amendment to the Constitution, prohibiting the production of alcohol. U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

Prohibition was repealed by the Twenty-First Amendment, not because someone discovered a new benefit of alcohol or neutralized one of its risks, but because the sale of illegal alcohol was so profitable that organized crime experienced great growth.

Some might suggest that the experience of this country with prohibition serves as evidence of the damage that imposing liability on alcohol production would cause. However, imposing liability on alcohol manufacturers would not outlaw alcohol production, it merely would require

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be the Rice Study's estimate of the costs of alcohol (\$70,338 million)<sup>218</sup> plus some amount for the pain and suffering of the injured and the emotional pain of the family members of alcoholics plus alcohol's lost opportunity costs (the value of things other than alcohol that would be purchased if alcohol were not available). On the other side of the equation would be the amount that consumers spend on alcohol (\$56,248 million),<sup>219</sup> plus alcohol's consumer surplus (the amount consumers would be willing to pay above what they actually pay), plus costs paid by consumers in things other than cash (such as risk assumed), minus amounts paid by alcoholics as a result of their addiction.<sup>220</sup>

This obviously would be a difficult calculation to make. Many of the required amounts (pain and suffering, opportunity cost, consumer surplus, percentages of purchases resulting from addiction) probably would be impossible to determine. That, however, does not mean that the issue of manufacturer negligence should not be resolved. Juries constantly place a value on things like pain and suffering and death. Juries constantly compare incommensurable factors such as human life and efficiency.

The figures concerning costs and benefits of alcohol might be helpful to

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alcohol to pay its way. Imposing liability on the manufacturer would raise the costs of legal alcohol and might make the production of some bootleg alcohol cost effective. The costs to society that might be created by this possible increase in the black market in unlabeled alcohol are legitimately seen as a cost of imposing liability. However, assuming that the responsibility of alcohol manufacturers is limited to bystander injuries, and the manufacturer is entitled to indemnity from the intoxicated driver, as advocated herein (*see supra* text accompanying note 77-80), the increase in cost is not likely to be so great that many consumers would subject themselves to the dangers of unregulated alcohol.

218. *See supra* text accompanying note 201.

219. *See source cited supra* note 38.

220. If we could assume that all of the costs borne by drinkers, including monetary costs and risks to them of death, injury, etc., are costs that they intelligently and voluntarily choose to pay, we could eliminate those costs from both sides of the equation. Then the jury would only need to compare the costs that alcohol imposes on those other than drinkers, which the Manning Study calculated to be \$25.15 billion, *see infra*, together with the difference between alcohol's consumer surplus and the consumer surplus of the goods that would be purchased if alcohol were not available.

The social costs of alcohol, based on the Manning Study, are as follows (in billions of 1986 dollars):

Nondrinkers' lives lost in traffic accidents	12.3
Net medical and pension costs to those other than the injured drinker (5% discount rate)	5.5
Property damage from traffic accidents	3.6
Criminal justice costs	3.1
Fires and social program costs	.6
	\$25.15

Cook, *supra* note 8, at 55 n.10 (calculating the costs from information in Manning, *supra* note 2, at 1607). The "net medical and pension costs" include medical care, sick leave, group life insurance, nursing home, and retirement pension costs borne by those other than the drinker.

*See Manning, supra* note 2, at 1607.



a jury, but the members of a jury will also have the benefit of their own experience with alcohol (both its costs and its benefits) to help them determine whether it is reasonable for manufacturers to produce it. The jury is likely to include some of the two-thirds of the population who drink. Most will have had some experience with others who drink, including those who have drinking problems. A jury is likely to have a pretty good sense of the costs and benefits of alcohol and to bring the wisdom of the community to this issue. Such a determination may not be as exacting as we might prefer, but, as Judge Hand suggested, the negligence calculation, by nature, requires the court or jury to compare "incommensurable factors."<sup>221</sup>

### 3. *An Inherent Characteristics Rule for Negligence?*

As we shall see in the following section, the inherent characteristics rule in strict products liability prohibits courts from imposing liability for an aspect of the product that is inherent in the product. The plaintiff must present an alternate design of the product that would exclude the dangerous aspect of the product.<sup>222</sup> The justifications for the inherent characteristic's rule would appear to apply to negligence, as well as strict products liability, cases. Surprisingly, it appears that there has been little discussion among courts and commentators on the issue of whether an inherent characteristics rule should apply in negligence cases.<sup>223</sup> William Prosser, in an early discussion advocating the inherent characteristics rule in strict products liability, assumed that there was no inherent characteristics rule in negligence cases.<sup>224</sup> If we assume for present purposes that the inherent characteristics rule applies in strict products liability misdesign cases,<sup>225</sup> the question is whether there is reason for a different rule in negligent design cases.

The key difference, of course, between negligence and strict liability cases is that in negligence, the manufacturer's culpability is at issue. It may be that when a manufacturer's culpability is at issue, courts should not place the inherent characteristics limitation on plaintiff's claims. Otherwise, plaintiffs will be denied the opportunity to establish a claim that is based on culpability, which would undercut the fairness that is at the root of the negligence system.<sup>226</sup>

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221. See *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir.), *rev'd*, 312 U.S. 492 (1940).

222. See *infra* part IV.D.3.a.

223. It may be that courts have not had to deal with the question of whether an inherent characteristics rule should apply to negligent design cases because plaintiffs have focused almost exclusively on strict liability in products liability misdesign cases. Perhaps, with the closing of the products liability frontier, see *supra* text accompanying notes 149-50, plaintiffs and courts will more carefully explore the rules that might apply to a negligent design theory.

224. See Prosser, *supra* note 157, at 23.

225. The discussion in the next section will conclude that either the inherent characteristics rule should not apply in cases of bystander injury, or bystanders should not have to show product defect. See *infra* part IV.D.3.b.

226. In other areas of products liability courts deny plaintiff a strict liability claim for social  
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### D. Strict Products Liability: Defective Design

In strict products liability design defect cases, most jurisdictions determine whether a product is misdesigned under a consumer expectation test, a benefit/risk test, or they allow plaintiff's to recover under either test.<sup>227</sup> However, many jurisdictions do not allow plaintiff to argue that a product is defective because of its "inherent characteristics."<sup>228</sup> This section will discuss the design defect tests, the inherent characteristics rule, and whether this rule should apply to bystander's suing a manufacturer in strict products liability.

#### 1. The Consumer Expectations Test

Under the Second Restatement of Torts, a manufacturer is subject to liability if a product is dangerous beyond the ordinary consumer's expectations.<sup>229</sup> This test appears to be the same as the test applied in warranty cases under the Uniform Commercial Code.<sup>230</sup> Plaintiffs will have difficulty

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policy reasons, but allow plaintiff to seek to prove manufacturer negligence. *See, e.g.*, RESTATEMENT, *supra* note 1, § 402A cmt. k; *see also infra* part IV.E.5.

227. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978).

228. *See infra* text accompanying note 238.

229. RESTATEMENT, *supra* note 1, § 402A(1) (stating that a manufacturer is subject to strict liability if the product is "in a defective condition unreasonably dangerous to the user or consumer"). Comment g to § 402A defines a product in a defective condition as one which is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id.* § 402A cmt. g. Taken literally, of course, the definition would make a portion of the Restatement redundant, for under the Restatement, the product must not only be defective, it must be "unreasonably dangerous." *Id.* § 402A cmt. i.

It is unclear whether the standard to be applied under the Restatement is that of the consumer of the specific product that caused the injury or that of the ordinary consumer. Though comment g defines "defective condition" as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him," *id.* § 402A cmt. g, comment i defines unreasonably dangerous as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* § 402A cmt. i. It is highly unlikely that the drafters intended that the test of whether the product is defective be a subjective one, the expectations of the plaintiff consumer, and that the test of whether the product is unreasonably dangerous be an objective one, the expectations of the ordinary consumer. The two comments are best reconciled by interpreting comment g, the less specific of the comments, in light of comment i. That is, the "ultimate consumer" whose expectations determine whether a product is defective is not the specific consumer that used the product at issue, but one who would ordinarily be the ultimate consumer of such products. Otherwise, the manufacturer would be subject to liability based on the testimony of consumers in their individual cases as to their expectations. Manufacturers would find it difficult to design products so as to protect themselves from liability, and plaintiff/consumers would be tempted to testify concerning their expectations in a self-serving manner.

230. Under § 2-314 of the Uniform Commercial Code, sale of a product by a merchant carries with it an implied warranty of merchantability. U.C.C. § 2-214 (1989). A warranty of

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recovering from the alcohol manufacturer under a consumer expectations theory, except for those plaintiffs who are injured by a risk of alcohol that is not a matter of common knowledge, such as victims of fetal alcohol syndrome.<sup>231</sup> Overconsumption of alcohol creates alcohol's greatest risks, and most of the risks of overconsumption are common knowledge.<sup>232</sup>

When a purchaser or a consumer sues a manufacturer under a misdesign theory, it may be appropriate to limit the right of the consumer to recover based on the ordinary consumer's understanding of the risks created by the product. Consumers, unlike bystanders, have the opportunity to take steps for their own safety and they have benefitted from the product. However, the innocent bystander, who is in no way involved in the decision to purchase and use the product, should not be denied recovery merely because the product's risks are within the ordinary consumer's expectations. Though the consumer expectation test makes some sense when applied to a products liability cause

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merchantability was also implied under the UNIF. SALES ACT § 15(2), 1 U.L.A. 213 (1950). The test for merchantability appears to be the same as the consumer expectations test that is applied in strict products liability in tort cases. Under § 2-314(2)(a) of the U.C.C., a product is merchantable if it would "pass without objection in the trade under the contract description." U.C.C. § 2-314(2)(a). This standard looks to the expectations of those in the trade, which would be the same as the expectations of the ordinary consumer, unless the expectations of consumers and producers in the trade differ. White and Summers report that in most cases in which courts have found breaches of the warranty of merchantability, the products "either did not work properly or were unexpectedly harmful." JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-7, at 351 (2d ed. 1980). White and Summers state that, except for the fact that the strict products liability portion of § 402A of the Restatement does not normally apply to economic losses, a breach of the warranty of merchantability under the U.C.C. and a defect under § 402A are "nearly synonymous" and they "would expect a court to hold that any automobile which was not merchantable was also in a defective condition unreasonably dangerous." *Id.* § 9-7, at 355.

231. See *supra* text accompanying notes 143-48. Those plaintiffs who were in the womb after the risks of FAS became common knowledge would not have a cause of action.

The plaintiff under a consumer expectation theory is in a similar position to a plaintiff under a failure to warn theory concerning risks that are a matter of common knowledge. See *supra* part IV.B. Under either theory, plaintiffs lose if the risk is a matter of common knowledge. In one respect, a consumer expectations design defect case is more advantageous to plaintiffs than a failure to warn case because plaintiffs do not have the causation difficulties in a consumer expectation design defect case that exist in a failure to warn case. In a consumer expectations case, plaintiffs only have to show that if the product did not have the dangerous characteristic, they would not have suffered the loss; whereas in the failure to warn cases, plaintiffs must show that they would have heeded the warning had they known of the danger.

232. In rejecting the claim of bystanders injured by an 18-year-old intoxicated driver who had consumed beer manufactured by the defendant, one court stated:

The ordinary consumer in today's society, with the ordinary knowledge common to the community as to the characteristics of the product, knows of the dangers of driving while intoxicated. Whether or not this particular driver in the instant case knew of the dangers is irrelevant, because comment i [of Restatement § 402A] requires that only the "ordinary consumer" have knowledge.

*Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 583 (Tex. Ct. App. 1987).  
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of action brought by a purchaser or consumer, it does not make sense when applied to a cause of action brought by a bystander. As Harper and James said of earlier limitations on bystander recovery, limiting the bystander to the consumer expectation test is a "distorted shadow of a vanishing privity which is itself a reflection of the habit of viewing the problem [of product injury] as a commercial one between traders, rather than as part of the accident problem."<sup>233</sup> Bystander recovery should not be limited by the expectations of the consumer.

## 2. Strict Liability's Cost/Benefit Test

Strict liability's cost/benefit test is similar to the negligence design defect test. As under the negligence test, the manufacturer is subject to liability if the costs of the product outweigh its benefits.<sup>234</sup> In some respects, however, the strict products liability cost/benefit test differs from the negligence test.

In many jurisdictions, the strict liability cost/benefit test varies from the negligence test in that the cost that courts consider is the cost that is known about at the time of trial,<sup>235</sup> rather than the cost that the manufacturer knew about or should have known about at the time of manufacture. Under the strict liability rule, the manufacturer is responsible for later-discovered risk. This strict liability rule generally will not affect the liability of alcohol manufacturers because manufacturers of alcohol have known about the vast majority of risks of alcohol consumption for a long period of time.<sup>236</sup>

A second difference between cases brought under the negligence cost/benefit theory and strict products liability cost/benefit theory is based, not on a difference in the rule that courts would apply, but on what is likely to be the judge or jury's reaction to the theories' labels. Even if they apply the same cost/benefit test, a judge or jury may be more likely to call a product "defective" under strict products liability than to call a manufacturer "negligent" under negligence. A judge or jury might hesitate to call a manufacturer culpable for engaging in an activity that has been so widely accepted in our society for a long period of time. The strict liability theory does not require the judge or jury to brand the manufacturer "negligent."

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233. 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 28.16, at 1572 n.6 (1956).

234. This cost/benefit test for negligence is discussed *supra* parts IV.C.1-2. In *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455-56 (Cal. 1978), however, the California Supreme Court required the defendant to show that the burden of using an alternative design was greater than the risks of the product. The Supreme Court of Alaska adopted the *Barker* approach in *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885-86 (Alaska 1979).

235. See, e.g., *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974) (en banc); Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 38 (1973).

236. An exception may be the cases of children who are injured by Fetal Alcohol Syndrome whose mothers were pregnant before the dangers of FAS were discovered. See *supra* text accompanying notes 143-48.

### 3. *The Inherent Characteristics Rule*

A final difference between negligence and strict products liability's design defect tests is that under strict products liability, many jurisdictions prohibit courts from finding a defect if the aspect of the product that is alleged to be defective is one of the inherent characteristics of that product.<sup>237</sup> Under this rule, the plaintiff cannot attack an entire category of products, such as alcohol, cigarettes, butter, or asbestos. The plaintiff must present an alternative product. This section will consider whether plaintiffs in a case against an alcohol manufacturer might be able to present an alternative product and whether it is appropriate to apply the inherent characteristics rule to a case brought by a bystander.

#### *a. A Safer Product?*

If a plaintiff argues that the manufacturer should have made a safer product, the trier-of-fact compares the burden of making the product safer with the relative increase in safety of the product proposed by plaintiff. If the burden of making the product safer is less than the increase in safety that the alternative product would provide, the defendant's product is considered defective.<sup>238</sup>

Initially, it might appear that a plaintiff who was injured by one who had consumed hard alcohol might argue that the manufacturer should have produced a less dangerous product, such as wine or beer.<sup>239</sup> A plaintiff could argue that the probability of loss from production of hard alcohol is greater than that from the production of less-intoxicating alcohol because consumption of a small amount of hard alcohol can lead to intoxication faster and therefore carries a greater risk of intoxication.

It would be difficult, however, to show that producing less intoxicating alcohol would be safer. People can become intoxicated by merely drinking a greater amount of the less intoxicating beverages. In fact, studies consistently show that drivers who drink beer are more likely to drive while intoxicated than those who prefer wine or distilled spirits.<sup>240</sup> It may be that the less

237. See, e.g., *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1149 (Md. 1985). Some jurisdictions allow a whole category of products to be defective without a showing of an alternative product. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 545-47 (N.J. 1982).

238. See, e.g., *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 (N.Y. 1983); *Wilson v. Piper Aircraft Corp.*, 579 P.2d 1287 (Or. 1978) (en banc).

239. Plaintiff could argue that the manufacturer should have produced apple juice or bottled water. This argument would be the equivalent of arguing that a reasonable manufacturer would not have produced alcohol, an argument that is considered *supra* part III.C.

240. See, e.g., Dale E. Berger & John R. Snortum, *Alcoholic Beverage Preferences of Drinking-Driving Violators*, 46 J. STUD. ALCOHOL 232, 232 (1985) (discussing several studies). Berger and Snortum conclude that this showing may be the case because beer costs less; beer advertising commonly associates drinking with groups (who may encourage others to drink more and drink longer), with men (who drink more than women), and with risky activity (tending to

intoxicating beverages are more dangerous because drinkers believe that they will not get intoxicated and, as a result, intoxication is more likely to sneak up on them. Plaintiffs injured from overconsumption of beer might argue from these studies that beer is defective and that its manufacturers should create hard alcohol instead. But if beer were not available, those who want to drink might drink harder alcohol, and the enhanced intoxicating character of the harder alcohol will render the same result - intoxication.

Even if a plaintiff could show that generally the elimination of a type of alcoholic drink would create less risk, it would be difficult for plaintiff to show that in a particular case the production of that type of alcohol, rather than another type, was a cause-in-fact of the injury. Had the defendant's product not been available, the drinker might merely have consumed a sufficient quantity of another alcoholic beverage.

A plaintiff might argue that alcohol manufacturers should make non-alcoholic drinks such as L.A. Beer that taste like their alcoholic counterparts. Courts would then have to determine whether the non-alcoholic alternative would be a mere variation of the original product or an entirely different product. Obviously, if plaintiffs could merely argue that the defendant could have produced an entirely different product, frozen vegetables instead of beer, they could defeat the purpose of the inherent characteristics rule. At what point does an alternative product become an entirely different product, rather than a safer variation of the original?

The test of whether the plaintiff's proposed alternative is a safer variation of the original or an entirely new product might be whether the new product retains what the ordinary consumer would consider to be the important characteristics of the original. If it retains the important characteristics, courts could allow plaintiffs to present the proposed product as a legitimate alternative. In the case of alcoholic beverages, it is likely that the ordinary consumer would consider its intoxicating character to be an important characteristic. If one were to ask ordinary drinkers whether consuming alcoholic beverages would alter their consciousness, they would be likely to reply, "We certainly hope so." Thus, courts are likely to find that beverages with no alcoholic content are different products, rather than safer improvements of their alcoholic counterparts.

Under the inherent characteristics rule, a court probably would be precluded from finding that the manufacturer of alcoholic beverages is subject to strict liability for losses suffered from intoxication because the risk of intoxication is probably one of the inherent characteristics of alcoholic beverages.

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attract those who are risky); and beer is "popularly viewed as a drink of moderation that is less dangerous than 'hard' liquor." *Id.* at 238; see also Perry F. Smith & Patrick L. Remington, *The Epidemiology of Drinking and Driving: Results from the Behavioral Risk Factor Surveillance System*, 16 HEALTH ED. Q. 345, 353 (1989) (reporting the following results of a survey: "Among respondents who reported drinking and driving, 76% drank beer predominantly, compared with only 48% of drinkers who denied drinking and driving.").

*b. The Inherent Characteristics Rule and the Bystander*

Many jurisdictions have adopted the inherent characteristics rule based on portions of comment i of section 402A of the Second Restatement.<sup>241</sup> Comment i discusses the possibility of imposing liability on manufacturers of inherently dangerous products. It states:

*Unreasonably dangerous.* [Strict products liability] applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.<sup>242</sup>

Though the language of comment i suggests that the non-defective products listed in it are merely examples of products that have risks that are not beyond the expectations of the ordinary consumer, William Prosser, the Reporter of the Second Restatement, interpreted comment i to mean that products are not defective if the danger that they create is an inherent characteristic of the product.<sup>243</sup>

The inherent characteristics rule asks whether a plaintiff should be denied recovery because the risks of a product are inherent in the product. Should the manufacturer of a product, whose inherent risks outweigh its benefits, be exempt from liability?<sup>244</sup>

One justification for the inherent characteristics rule is that when

241. As noted previously, the RESTATEMENT, *supra* note 1, § 402A cmt. i, defines "unreasonably dangerous" as dangerous beyond the expectations of the ordinary consumer. See *supra* text accompanying note 229.

242. *Id.*

243. See Prosser, *supra* note 157, at 23, quoted in Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161 (Cal. 1972) (en banc).

244. On a becoming jurisdiction, the law deals with the responsibility of the consumer who knows of the risk in its contributory negligence and assumption of the risk rules.

consumers choose to expose themselves to the risks that are inherent in a product, they should be responsible for the losses that they suffer. Consumer responsibility may be at the root of comment i. All of the examples of nondefective products in comment i (sugar, whiskey, tobacco, and butter) expose consumers to risks of which consumers are commonly aware.<sup>245</sup> Even when comment i mentions alcohol, a product that creates great and obvious risks to others, it discusses only the risks to the drinker: "Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics . . . ."<sup>246</sup> If consumers are or should be aware of the inherent risks of a product, it may be reasonable to deny them recovery.<sup>247</sup> But this justification does not apply to innocent bystanders who have not assumed the risk. Bystanders should not be denied recovery based on the knowledge of the consumer.

An additional argument for the inherent characteristics rule is that whether the inherent risks of a product outweigh its benefits is a judgment that is better made by consumers than juries. Consumers make a cost/benefit determination when they decide whether to purchase a product. Some commentators argue that if the consumer is aware of the risks that accompany a product, courts should rely on the consumer's determination that the benefits outweigh the risks.<sup>248</sup> A recent Reporters' Study prepared for the American Law Institute (ALI) advocates the inherent characteristics rule.<sup>249</sup> It states:

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245. It is likely that the drafters of the Restatement did not even consider the rights of the bystander when drafting comment i. Section 402A did not even give the bystanders the right to bring a cause of action. Indeed, comment i gave limited coverage to consumers. *See* RESTATEMENT, *supra* note 1, § 402A cmt. i. However, comment o suggests that the authors did not intend to limit coverage to consumers. *See id.* § 402A cmt. o. While there has been much social pressure exerted by consumers for their own benefit, "there is not the same demand for the protection of casual strangers." *Id.*

246. *Id.*

247. In negligence actions, the law traditionally denied recovery on this basis through the contributory negligence and assumption of the risk defenses. *See generally* KEETON, *supra* note 56, § 65, 68, at 451-53, 480 (discussing these two defenses generally). Under strict products liability, some jurisdictions only deny recovery if the plaintiff is both negligent and assumes the risk, and others apply comparative fault. *See id.* § 102, at 710-12. The inherent characteristics rule would preclude any plaintiff recovery, and may, therefore, be inconsistent with the strict products liability defenses. On the other hand, the inherent characteristics rule may demonstrate a difference between when consumers expose themselves to risks that are inherent in a product and when they expose themselves to risks that result from a manufacturer error. In both cases, the responsibility of the consumers are the same, they expose themselves to risks of which they are aware. However, the manufacturer who exposes a consumer to a risk that resulted from an error may have greater culpability than one who exposes a consumer to a risk that is an inherent characteristic of the product.

Courts have applied the inherent characteristics rule to deny recovery to consumers for risks to which they expose themselves. For example, courts have denied recovery to cigarette smokers on the basis that the risk of cancer is one of the inherent characteristics of cigarettes. *See, e.g.,* Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988); Hite v. R.J. Reynolds Tobacco Co., 578 A.2d 417 (Pa. Super. Ct. 1990).

248. *See, e.g.,* ALI STUDY, *supra* note 43, at 48-49.

249. *Id.* at 48-56.



The risk-utility test apparently permits juries to overrule buyers when deciding whether a product has sufficient social utility. This is an error because a product has sufficient social utility if informed consumers are willing to purchase it given its costs, including accident costs. Under these circumstances the appropriate decision maker is the buyer, not the jury.<sup>250</sup>

Perhaps the ALI Study's analysis is legitimate when applied to consumer injury from most products, but weaknesses in the argument arise when it is applied to bystander injuries, especially those caused by alcohol consumption. First, the ALI Study's argument presumes informed (and presumably rational) consumers. However, such assumptions are not justified as to alcohol consumers. Each drink limits the consumer's ability to rationally evaluate whether to have another and some addicted consumers do not make a free choice at all.

Second, the ALI Study assumes that when purchasing, the consumer will consider the products' costs "including accident costs." Consumers may consider *consumer* accident costs but are less likely to consider *bystander* accident costs. Responsibility for considering the bystander's costs should not be left entirely to consumers.<sup>251</sup>

The ALI Study's strongest argument is that juries would have difficulty balancing all of the costs and benefits of a product. When asked to apply a cost/benefit analysis to an entire category of product, "a jury is asked to act in the same manner as a well staffed regulatory agency, but without the latter's

250. *Id.* at 48-49.

251. Perhaps a consumer who uses a product that causes unreasonable risk to a bystander should be liable to the bystander, but the consumer's liability should not relieve the manufacturer of liability to the bystander, especially when consumer abuse is likely as in the alcohol cases.

The ALI Study does not ignore bystanders. A footnote to the above-quoted portion of the ALI Study text states:

This claim [that "tort law should rely on markets to decide what product designs should be produced"] assumes that firms internalize risks to third parties and consequently reflect these risks in prices. Firms are now required to internalize third-party risks through the bystander liability doctrine, which allows parties outside the chain of distribution to sue the manufacturers of defective products.

ALI STUDY, *supra* note 43, at 49 & n.26. This argument incorrectly assumes that under current law the cost of products internalizes all of the injuries to bystanders. As the footnote correctly states, bystanders may "sue the manufacturers of defective products." *Id.* (emphasis added). The ALI Study correctly sees that reliance on consumer choice to determine the optimal level of safety will only yield the correct result if bystander losses are internalized in the cost of the product, but it advocates a rule that would not internalize the costs of bystander injuries that result from an inherent danger of the product. Manufacturers will only internalize the risks to third parties if courts hold them subject to liability for injuries to third parties. If courts or legislatures do not impose liability on manufacturers for injuries that products cause to bystanders, these injuries become "external costs," costs to society that are not reflected in the product's cost. In determining whether to use a product, the consumers take into consideration the risks that use of the product creates to themselves, thereby internalizing the risks to themselves. The argument that injuries to bystanders should be internalized by imposing liability on manufacturers is developed in a previous section. See *supra* part III.B.2.

perspective, information, and expertise.”<sup>252</sup> Juries may be unwilling to balance risks to life against dollars, an essential task in a cost/benefit analysis.<sup>253</sup> Juries would find it difficult to calculate the benefits of an entire category of products because of the difficulty of determining the value of consumer surplus.<sup>254</sup> The difficulty of calculating all of the costs and benefits of a product is illustrated by the previous attempt in this article to balance the costs and benefits of alcohol.<sup>255</sup>

On the other hand, the benefit/risk calculation that a jury would make of an entire category of products, such as alcohol, lawn darts, or above ground swimming pools, would be similar in many respects to the calculations that juries make in determining negligence all of the time. Often, juries must balance the benefits of an activity against the risk of loss of life. As Judge Hand said, in negligence actions, the jury must compare “incommensurable factors.”<sup>256</sup>

As to widely used products, such as alcohol, some jury members are likely to have personal knowledge of the benefits of the product, possibly enabling a jury to render a fair cost/benefit judgment. The jury will have a fair sense of the costs and the benefits that such products provide to society and will bring the community’s judgment to the issue. The jury may be able to render a more intelligent answer to that question than it can to the question whether the benefits of one automobile design is better than another.

Product manufacturers should not be exempt from bystander liability just because the products’s use creates an inherent risk. Maybe society so commonly accepts alcohol that another product might better illustrate the argument against applying the inherent characteristics rule to bystanders. Assume that a bystander is injured in an automobile collision caused by a driver high on crack cocaine. If the bystander can identify the manufacturer of the cocaine, the manufacturer should not be relieved of liability because addiction and intoxication are inherent dangers of crack cocaine.<sup>257</sup> The

252. ALI STUDY, *supra* note 43, at 53-54.

253. *Id.* at 54.

254. See Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 386-88 (1988).

255. See *supra* part IV.C.1-2. Dissenting in *O’Brien v. Muskin Corp.*, Justice Schreiber rejected the inherent characteristics rule, stating: “[T]he jury will not be cognizant of all the elements that should be considered in formulating a policy supporting absolute liability, because it is not satisfactory to have a jury make a value judgment with respect to a type or class of product . . . .” 463 A.2d 298, 310 (N.J. 1983) (Schreiber, J., dissenting), *overruled by statute as stated in* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990). Justice Schreiber advocated a rule similar in some respects to that discussed in the following section. Based on an abnormally dangerous activities model, Justice Schreiber advocated that the court, rather than the jury, resolve whether the product manufacturer should be subject to strict liability for its inherent characteristics. *O’Brien*, 463 A.2d at 312.

256. See *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir.), *rev’d*, 312 U.S. 492 (1940).

257. The potential liability of manufacturers of crack cocaine differs from alcohol. Because cocaine’s manufacture is illegal, manufacturers would be subject to liability under negligence per se. The legal standard for negligence per se does not protect the manufacturer’s actions does not protect the manufacturer from liability.

drafters of the Restatement probably would not take the position that good crack cocaine is not defective merely because it kills many of its consumers and causes them to take the lives of others.<sup>258</sup>

If courts allow bystanders to recover from manufacturers of products that have inherent risks, the courts have at least two options. One option is to hold merely that the inherent characteristics rule will not apply to injured bystanders. In cases of bystander injury, the jury could determine whether the costs of a category of product outweigh the product's benefits. In cases of consumer injury, consumers have already made this judgment—they have concluded that the product's benefits outweigh whatever risks the product carries. Therefore, it is appropriate in cases of consumer injury to deny consumers the opportunity to have a jury reevaluate this decision. A rule allowing the jury to make a cost/benefit determination in cases of bystander injury would, of course, require the jury in bystander cases to do a difficult cost/benefit analysis, but, as argued above, it may be that the jury, bringing the wisdom of the community to the question, would be able to do so.

An alternative rule, would impose liability on manufactures of dangerous products for bystander injury, irrespective of whether the costs outweigh the benefits. Such a rule would avoid the necessity of a jury's cost/benefit analysis. The rule would be consistent with the ALI Study argument—it would leave consumers to determine whether the costs of a product outweigh its benefits, but the costs that the consumer should consider when purchasing a product should include the costs that the product imposes on bystanders. Recovery by the bystander would internalize the costs of bystander injury in the cost of the product, and leave the cost/benefit choice to the consumer. The following section discusses the possibility of imposing such a rule on manufacturers of dangerous hedonic products.

### *E. Stricter Liability for Bystander Injury from Dangerous Hedonic Products*

Courts might impose liability on manufacturers of dangerous hedonic products for injuries to bystanders through developments in abnormally dangerous activity, negligence, or strict products liability. As this Part has demonstrated, however, there are potential stumbling blocks to liability under each of these causes of action. This section will consider whether courts might impose liability on manufacturers of dangerous hedonic products for bystander injury without requiring bystanders to show a product defect.

#### *1. Distinguishing the Old Strict Products Liability*

One might ask whether it is realistic to talk of expanding strict products

258. Cf. RESTATEMENT, *supra* note 1, § 402A cmt. i (stating that “[g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics”).

liability today. As the 1980's witnessed a revolution at the federal executive level, emphasizing individualism and less government involvement in business, a parallel "quiet revolution" occurred in the courts, as courts slowed the growth and even cut back on the movement toward stricter products liability.<sup>259</sup>

However, the development in products liability that is discussed in this section is consistent with the new products liability's emphasis on individual responsibility, and in fact flows from it. Unlike consumers, who are generally the plaintiffs in products liability actions, bystanders have not chosen to expose themselves to product risks. The difference between the way the old philosophy of products liability law might respond to the problem of alcohol-related injuries and the way that a new philosophy might deal with it can be illustrated by comparing the two recent economic studies of the social costs of alcohol. The Rice Study included as a social cost of alcohol the costs to drinkers, including their lost employment opportunities, medical expenses, and injuries from traffic accidents.<sup>260</sup> It suggested, implicitly, that government should attempt to reduce these costs. The Manning Study included as social costs of alcohol only those costs that drinking imposes on those other than the drinkers, and suggests that public policy should be concerned primarily with these costs.<sup>261</sup>

259. See Henderson & Eisenberg, *supra* note 149.

260. RICE, *supra* note 7.

261. Manning, *supra* note 2.

[The Manning perspective] allocates the bulk of negative consequences to the private sphere of concern, limiting the domain of public concern to those consequences where the drinkers' actions impose involuntary costs ("externalities") on other members of society. In this view, people should be free to choose an unhealthy, risky life style if that is their preference, and if they die young as a result, that is not a public problem except to the extent that there are financial consequences for others. (If their decisions place others at risk, then that is a matter of public concern.) For example, in the [Manning] framework, the only traffic injuries to be "counted" are those in which a drunk driver is responsible for causing an accident in which someone else is hurt, whereas in the public health and economic frameworks, all alcohol related accidents are to be counted. Thus estimates of the cost of alcohol abuse will differ widely depending on the accounting principles that are selected.

Cook, *supra* note 8, at 71-72.

The ultimate implication of the Manning study is that a broad cost/benefit analysis is not necessary. We do not need to calculate the consumer surplus that drinkers experience. We should impose on drinkers the external costs created by alcohol and let them determine whether the product is worth this additional cost. The underlying assumption of the Manning study is similar to that of this article; government should be more concerned about losses that people impose on others than those that they impose on themselves. Costs paid by the consumer are internal costs. The costs that create the greatest inequity, as well as a disutility, are the external costs that alcohol imposes on others. On the other hand, the studies that consider the costs to the consumer as social costs, such as RICE, *supra* note 7, share a common philosophy with those that argue that products liability law should shift losses suffered by consumers to the manufacturer who can spread the risk to all consumers. See *supra* part III.A.

The Manning Study concludes that alcohol does not pay its way, that taxes on alcohol cover only a portion of the costs imposed on society, see Manning, *supra* note 2, at 1608, and that taxes should be raised to a sufficient level to cover the additional external costs. It is

The Rice Study is consistent with the goal of old products liability law which imposed liability on manufacturers for injuries their products created in order to spread the risk of consumer injury. The Manning Study treats only those costs imposed on those other than the consumer as social costs, and is consistent with this article's argument that alcohol manufacturers, and through them, consumers, should bear the cost that they impose on injured bystanders.

## 2. A Three Part Test

It may be that courts or legislatures should hold manufacturers of alcohol and other dangerous hedonic products subject to liability for injuries to innocent bystanders.<sup>262</sup> Under such a rule, plaintiffs would not have to prove that the product is defective,<sup>263</sup> but would have to meet three requirements that courts have not generally imposed in strict products liability cases. They would have to show the following:

- 1) the product is dangerous;
- 2) the product is an hedonic product, that is, that it is primarily used for purposes of entertainment and enjoyment; and
- 3) the plaintiff was a bystander, i.e., one whom the product did not benefit.<sup>264</sup>

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at this point that this article parts company with the Manning Study. Sufficient taxes to internalize the costs might create the proper economic incentives for manufacturers and drinkers, but they would do little to help the injured bystander. Courts or legislatures should allow injured bystanders to recover from manufacturers for their injuries. Other costs of alcohol, which are imposed on society as a whole, might properly be recovered through the tax system. The Manning Study argues that the external costs would be internalized by raising the excise and sales taxes on distilled spirits, wine, and beer (at the time of the Manning Study, the state and federal excise taxes averaged \$0.25, \$0.03, and \$0.09 per ounce of ethanol, respectively) to \$0.48 per ounce of ethanol. *Id.* On January 1, 1991, federal taxes on distilled spirits increased 8%, from \$12.50 to \$13.50 per proof gallon (50% alcohol by volume); beer, 100%, from \$9.00 to \$18.00 per 31 gallon barrel; and wine, 629%, from \$0.17 to \$1.07 per liquid gallon. INTERNATIONAL TRADE ADMIN., U.S. DEPT OF COMMERCE, 1991 U.S. INDUSTRIAL OUTLOOK 33-31 to -32 (1991). Based on the Manning Study's calculation of the social costs of alcohol, it appears that beer and wine still do not pay their way (and this article would argue that what it pays, it pays to the wrong party, the state rather than to injured bystanders) and that distilled spirits more than pay their way (but to the wrong party).

262. Paul LeBel proposes that an alcohol tax fund compensate bystanders that are injured in alcohol related accidents. *See* LEBEL, *supra* note 38, at 212-22.

263. Courts could impose liability for bystander injury on manufacturers of dangerous hedonic products as a matter of law. Juries would not need to make a cost/benefit analysis, prices would include the costs of bystander injury, and consumers would determine whether such products are worth the costs that they create.

264. In addition to showing that the manufacturer should be subject to liability, plaintiff will of course have to show that the manufacturer's production of alcohol was a cause-in-fact and a proximate cause of damages. Cause-in-fact may be a problem in many cases. Traditionally, plaintiffs had to show that without the manufacturer's production of the product, they would not have suffered the loss. In some alcohol cases the drinker may die in the automobile collision. It may be difficult to show the brand of alcohol that the drinker consumed. In such cases, it

Each of these factors, by itself, presents some justification for imposing strict liability. However, when all of these factors are present, the justification for manufacturers liability is very strong. To keep proper incentives on misusing consumers, courts could give manufacturers a right of indemnity against misusing consumers.<sup>265</sup>

Previous sections of this article present the justifications for manufacturer liability when alcohol and other dangerous hedonic products cause bystander injury. Hedonic products merely provide pleasure. Alcohol manufacturers obtain benefits and bystanders suffer losses from the overconsumption of alcohol and under the concept of corrective justice, these manufacturer gains should be available to compensate bystander losses. Alcohol is dangerous, not only because those who consume it are likely to drive negligently, but because the product itself inhibits the ability of consumers to judge when they have had too much.

Bystanders gain no benefit from the product and have not chosen to expose themselves to any risk. It may be that the drunk drivers are the most culpable parties in alcohol-related cases, but there is a substantial possibility that they will be indigent, underinsured, or even uninsured. Alcohol is often the root cause of their financial difficulties. A manufacturer's right of indemnity will keep proper incentives on consumers that are able to pay.

Imposing liability would compensate bystanders for their losses and place pressure on manufacturers to encourage safer use of their products. Manufacturers would spread some of the risk of bystander injury to consumers. It is appropriate, however, that those who enjoy dangerous hedonic products and help to create the risk pay a bit more so that injured bystanders may be compensated. People should not enjoy risky entertainment at the expense of others without providing some mechanism for compensation; they expose others to unreciprocated risk. Imposing liability on the manufacturer would internalize the cost of injury in the price of the product. Consumers could then determine whether the benefits would be worth all of the costs of the product.

### 3. The Risk of Greatly Expanded Liability

Courts may be concerned that imposing liability on manufacturers of dangerous hedonic products for bystander injury would ultimately lead to greatly expanded liability, as the right to recovery is extended beyond bystanders to consumers. If courts allowed *consumers* to recover for injury

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would be appropriate to apply a market share rule, under which manufacturers of alcohol that could have caused the loss bear responsibility for the injury based on their market share of alcohol in the region in which the drinker consumed the alcohol. Cf. *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980) (adopting market share rule for pharmaceutical drugs). Proximate cause should only be a problem in those jurisdictions that cut off liability because of the culpability of the intervening actor, in these cases the drinker. See *supra* text accompanying notes 77-80.

265. See *supra* text accompanying notes 77-80.

from hedonic products, this would be a great extension of liability. There are many hedonic products that create a great risk of consumer injury. Manufacturers of cigarettes, alcohol, footballs, boxing gloves, and a host of other hedonic products that create risks to users, would be subject to hedonic product liability for consumer injury.

But there are strong arguments against extending hedonic product liability to consumers. The best argument against consumer recovery is that consumers have made a choice to expose themselves to the risks that are created by these products. Courts should not impose liability for injuries to consumers resulting from the known, inherent characteristics of products. To do so would be to paternalistically determine that citizens who engage in these activities should pay higher prices so that they can be compensated for losses that they will incur. Informed consumers are in the best position to determine whether the benefits of products outweigh risks to themselves. Consumers should be free to expose themselves to these inherent risks, but they should provide a means for bystander recovery. Bystander loss should be internalized in the price of the product.

Injured consumers might argue that denying them recovery for injuries from dangerous hedonic products, while allowing bystanders such a recovery, would be inconsistent with the rules that apply in strict products liability—assumption of the risk does not preclude recovery in most jurisdictions.<sup>266</sup> However, the differences in the bases for current strict products liability law and the proposed dangerous hedonic product liability justify different rules as to consumers. Courts allow consumer recovery in strict products liability cases based on the assumption that the manufacturer produced a defective product. Hedonic product liability is based, not on the theory that the manufacturer has produced a defective product, but on the theory that all users of hedonic products should share responsibility for losses suffered to injured bystanders. This theory provides no justification for consumer recovery.

#### 4. *Support for Broader Bystander Recovery*

The proposal suggested herein is a new one. There are not cases that apply it, but there are rules that provide some support for both aspects of it, for broader bystander recovery and for greater hedonic product manufacturer responsibility.

As noted previously, the California Supreme Court, in dicta, suggested that “[i]f anything, bystanders should be entitled to greater protection than the consumer or user.”<sup>267</sup> Additional support for bystander recovery can be

266. Some jurisdictions allow plaintiffs a full recovery unless the manufacturer can show that plaintiffs have both assumed the risk and acted negligently; other courts apply comparative fault to the assumption of risk defense in strict products liability. See KEETON, *supra* note 56, § 102, at 710-12.

267. *Elmore v. American Cello Co., Inc.*, 451 P.2d 84, 89 (Cal. 1969) (en banc). For a discussion of *Elmore*, see *supra* text accompanying notes 61 to 62.

found in the abnormally dangerous activity cause of action and in a Maryland case holding manufacturers of handguns subject to liability for injuries to innocent bystanders.<sup>268</sup>

*Abnormally Dangerous Activity Liability*<sup>269</sup> - Warranty has had a great impact on the development of strict products liability in tort,<sup>270</sup> but it may be that abnormally dangerous activity liability is the more appropriate precedent when a product injures a bystander.<sup>271</sup> Warranty law may be the proper precedent when a purchaser or consumer is injured and the suit is between those who benefit from the transaction. But in cases of bystander injury, as in abnormally dangerous activity cases, one that does not benefit from the activity suffers a loss.

Abnormally dangerous activity liability is bystander liability. The Alaska Supreme Court explained its imposition of abnormally dangerous activity liability on defendants for the storage of explosives by stating "[a]s between those who have created the risk for the benefit of their enterprise and those whose only connection with the enterprise is to have suffered damage because of it, the law places the risk of loss on the former."<sup>272</sup> In this respect, manufacturers and consumers of dangerous products are like defendants in the abnormally dangerous activity cases. Manufacturers and consumers of dangerous products benefit from the production of the products. Bystanders who are injured by dangerous products are like plaintiffs in abnormally dangerous activity cases. Bystanders are injured, and do not benefit from the products.

The basis of abnormally dangerous activity liability is that those who engage in a dangerous activity for their own benefit should pay for the losses they cause to bystanders. Perhaps manufacturers and consumers who benefit

268. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985).

269. This article has already discussed the possibility of bystanders pursuing manufacturer liability under abnormally dangerous activity liability. See *supra* part IV.A. This section considers the possibility that abnormally dangerous activity liability might serve as precedent for expanded strict products liability in bystander cases.

270. See *supra* note 127.

271. Though abnormally dangerous activity liability has not had as great an impact on strict products liability as has warranty, it has had some impact. See RESTATEMENT, *supra* note 1, § 524 cmt. a, states that "[s]ince the strict liability of one who carries on an abnormally dangerous activity is not founded on his negligence, the ordinary contributory negligence of the plaintiff is not a defense to an action based on strict liability."

One commentator suggested that courts might extend abnormally dangerous activity liability to impose liability on manufacturers of nondefective dangerous products in cases involving all categories of injured parties, consumers as well as bystanders. Diamond, *supra* note 94, at 531. However, traditional strict liability is bystander liability. Extension of abnormally dangerous activity strict liability to all categories of plaintiffs would go far beyond its underlying theory.

272. *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1212 (Alaska 1978). The RESTATEMENT, *supra* note 1, § 519 cmt. d, states that "[a]bnormally dangerous activity liability is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm which he does to his neighbor. Courts deny recovery to those who engage in the abnormally dangerous activity. See *id.* § 523 cmt. d.



from dangerous products should pay for the losses that such products cause to others. As parts II.E and III.B.1 *supra* argue, the other underlying bases for abnormally dangerous activity liability, unreciprocated risk and imposing liability on the cheapest cost avoider, also justify imposing liability on manufacturers for bystander injury.

*The Kelley Case* - The Maryland Court of Appeals in *Kelley v. R.G. Industries, Inc.*<sup>273</sup> recognized a cause of action that is similar to the proposal discussed herein when it allowed an innocent bystander injured during the commission of a crime to recover from the manufacturer of a "Saturday Night Special" handgun.<sup>274</sup> The court held that abnormally dangerous activity liability did not apply because the activity did not occur on the defendant's land<sup>275</sup> and that strict products liability did not apply because the risk of injury from crime is an inherent risk of these guns.<sup>276</sup> The court, however, adopted a new strict liability cause of action allowing innocent bystanders to recover for injuries caused by "Saturday Night Specials."<sup>277</sup>

The court imposed liability because the risks of "Saturday Night Specials" outweigh their benefits to society, their criminal use is foreseeable, and as between an innocent victim and the manufacturer of a product commonly used in criminal activity, the manufacturer is more at fault.<sup>278</sup> The *Kelley* court's argument differs in some respects from that presented herein. This article does not argue that the risks of alcohol outweigh its benefits or that the manufacturer is at fault. *Kelley*, however, provides support for the cause of action discussed herein by focusing on the bystander as an innocent victim and contrasting the status of the bystander and the manufacturer.

### 5. Support for Stricter Hedonic Product Manufacturer Liability

*Comment K: An Inverse Precedent* - A precedent for basing the strictness of products liability rules on the importance of a product to society can be found in comment k to Restatement section 402A. Courts generally have interpreted comment k to exempt prescription drug manufacturers from the requirements of strict products liability.<sup>279</sup> Most jurisdictions require the

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273. 497 A.2d 1143 (Md. 1985).

274. *Id.* at 1159.

275. *Id.* at 1147.

276. *Id.* at 1149.

277. *Id.* at 1153-60.

278. *Kelley*, 497 A.2d at 1154-59. In *Kelley* the court not only adopted a rule protecting bystanders, but it imposed liability in spite of a highly culpable intervening actor, the criminal. The intervening actor in *Kelley* was more culpable than the drunk driver in the alcohol cases. Some courts have denied injured bystanders in alcohol cases recovery from negligent servers because of the culpability of the drunk driver. See *supra* part II.F.

279. Comment k states as follows:

*Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of *drugs*. An outstanding example is *the vaccine for the Pasteur treatment of rabies*, which not

plaintiff in a products liability action against the manufacturer of a prescription drug to show that the manufacturer was negligent.<sup>280</sup> Among the reasons courts have provided this protection to the product is "the public interest in the development, availability, and reasonable price of drugs."<sup>281</sup>

Courts have protected manufacturers of medical drugs from strict products liability, under comment k, in spite of the fact that the arguments for strict products liability also apply to medical products.<sup>282</sup> Consumers could pay

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uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of *many other drugs, vaccines, and the like*, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many *new or experimental drugs* as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT, *supra* note 1, § 402A cmt. k (emphases added).

Comment k, if taken at face value, would require a negligence standard for any products that are "quite incapable of being made safe for their intended and ordinary use." *Id.* This requirement would include a wide variety of products, including asbestos and alcohol. Though the comment never explicitly limits its application to prescription drugs, all of the references in the comment to protected products are references to prescription drugs. See the portions of Comment k above that are in italics. Since all of the examples enumerated in comment k involve pharmaceutical products, one may reasonably conclude that the drafters intended to limit the scope of this provision to drugs, vaccines, and similar products. Moreover, this interpretation is amply supported by existing case law. Most comment k cases have involved either chemical drugs, antibiotics, vaccines, blood, or medical devices.

The justifications that courts and commentators have advanced for comment k assume that it will be applied to health care products. Courts justify comment k because if health care products are subject to strict liability, some will be taken off the market and the price of others will go up. See, e.g., *Brown v. Superior Court*, 751 P.2d 470, 477 (Cal. 1988).

280. See, e.g., *Plummer v. Lederle Labs.*, 819 F.2d 349, 356 (2d Cir.), *cert. denied*, 484 U.S. 898 (1987); *Brown*, 751 P.2d at 475; *Ferrigno v. Eli Lilly & Co.*, 420 A.2d 1305, 1318 (N.J. Super. Ct. Law Div. 1980).

281. *Brown*, 751 P.2d at 477.

282. One court stated as follows:

[T]he fundamental reasons underlying the imposition of strict liability are to deter manufacturers from marketing products that are unsafe, and to spread the cost of injury from the plaintiff to the consuming public, which will pay a higher price for the product to reflect the increased expense of insurance to the manufacturer resulting from its greater exposure to liability.

These reasons could justify application of the doctrine to the manufacturers of prescription drugs, which is indisputable . . . that the risk of injury from such drugs is unavoidable, that a consumer may be helpless to protect himself from serious harm

a bit more for medical products so that those injured from such products could recover for their loss. The imposition of liability would likely cause manufacturers to take additional safety steps.

Most courts, however, have held that the benefits of spreading the risks of medical products do not outweigh the costs. Imposing strict liability has negative consequences. When additional liability is imposed, manufacturers are likely to either raise prices or withdraw products from the market. If they raise the price of medical products, the poor will not purchase some medical products. Comment k withdraws medical products from the risk of strict liability because the continued availability and development of such products is important to society.

The California Supreme Court, adopting comment k, stated:

[T]here is an important distinction between prescription drugs and other products such as construction machinery, a lawnmower, or perfume, the producers of which were held strictly liable. In the latter cases, the product is used to make work easier or to provide pleasure, while in the former it may be necessary to alleviate pain and suffering or to sustain life.<sup>283</sup>

Comment k protects those products whose availability is most important to society.

Courts might also draw a distinction between products that "provide pleasure" and other products. Hedonic products are at the opposite end of the importance spectrum from comment k medical products. Although hedonic products have value, other products are more important because they provide the necessities of life. Hedonic products provide the optional things of life. There is little reason to be concerned about the failure of prospective buyers to purchase hedonic products and good reason to insure that innocent bystanders are compensated for their injuries by the manufacturers.

*The O'Brien Case* - Additional support for imposing liability on manufacturers of hedonic products can be found in *O'Brien v. Muskin Corp.*<sup>284</sup> In *O'Brien* the plaintiff was injured when he hit his head while diving into an above ground swimming pool manufactured by the defendant.<sup>285</sup> The New Jersey Supreme Court rejected the inherent characteristics rule and remanded the case so that a jury could apply a risk/utility analysis.<sup>286</sup>

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caused by them, and that, like other products, the cost of insuring against strict liability can be passed on by the producer to the consumer who buys the item. Moreover, . . . in some cases additional testing of drugs before they are marketed might reveal dangerous side effects, resulting in a safer product.

*Id.* at 478; see also Richard C. Ausness, *Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should be Applied to the Sellers of Pharmaceutical Products?*, 78 Ky. L.J. 705, 742-53 (1989-90).

283. *Brown*, 751 P.2d at 478 (citations omitted).

284. 463 A.2d 289 (N.J. 1983).

285. *Id.* at 302.

286. *Id.* at 304-06.

The *O'Brien* plaintiff would not be entitled to recovery under the cause of action proposed herein. Though a swimming pool is an hedonic product, the plaintiff was a consumer of the product, not a bystander. He was benefiting from the product and had the opportunity to inspect it for safety, and does not deserve the special protection that this article argues courts should give to bystanders. Nevertheless, the court suggested that hedonic products might be more deserving of liability than other products. The court stated, "The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item."<sup>287</sup> The court's suggestion that hedonic products might be subject to less protection than other products supports the cause of action proposed herein.

## V. CONCLUSION

This article advocates the extension of strict liability to manufacturers of dangerous hedonic products that cause injury to innocent bystanders. Manufacturers of alcohol should be liable to innocent bystanders who are injured in traffic accidents arising from drunk driving. They create a very dangerous product that merely provides pleasure. It is dangerous not only because those who consume it are likely to drive negligently but because the product itself inhibits the ability of consumers to judge when they have had too much. It is ridiculous for manufacturers to suggest that a person who is drinking should "know when to say when."

Drinkers may have chosen to expose themselves to risk of injury, but bystanders gain no benefit from the product and have not chosen to expose themselves to any risk. It may be that drunk drivers are the most culpable parties in these cases, but they are likely to be indigent, uninsured or underinsured, and alcohol is often the root cause of their financial difficulties. If the drinker cannot pay, then the manufacturer should pay. Most of the cost of liability will ultimately be passed on to consumers in higher prices. It is appropriate, however, that those who drink pay a bit more for each drink so that those who are injured may be compensated.

