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THE EASY CASE FOR PRODUCTS LIABILITY LAW:  
A RESPONSE TO PROFESSORS POLINSKY AND SHAVELL

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At least since World War II, tort law has played a more prominent role in the U.S. legal system than in those of other industrialized nations.<sup>1</sup> The emergence in the 1960s and 1970s of the doctrine of strict products liability was in many ways emblematic of this distinctiveness. The new regime was introduced not by legislatures, but by courts.<sup>2</sup> The rationales on which those courts relied were more instrumental than doctrinal.<sup>3</sup> And the rules they fashioned conferred on judges and jurors broad discretion to impose new responsibilities on commercial product sellers. In these respects, the products liability revolution had an ‘only-in-America’ flavor to it.

A mere half-century later, American law is perhaps becoming distinctive for its hostility to the idea that consumers should have the right to obtain redress against manufacturers who have injured them through the sale of defective products. Products liability law has been the subject of sustained attacks. Advocates for business and professionals have insisted that it is a drag on innovation, quality, and competitiveness.<sup>4</sup> Libertarians have complained that its mandatory obligations prevent citizens from trading cost for safety.<sup>5</sup> A coordinated public relations campaign has helped convince many Americans that it is primarily a means by which the foolish and the feckless foist respon-

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<sup>1</sup> See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 127–28 (2001).

<sup>2</sup> See Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 *CARDOZO L. REV.* 2193, 2195–97 (1989); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. LEGAL STUD.* 461, 505 (1985).

<sup>3</sup> See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring) (emphasizing deterrence and compensation rationales for strict products liability).

<sup>4</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 23–24 (2002).

<sup>5</sup> See Epstein, *supra* note 2, at 2202–05; Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *YALE L.J.* 353, 368 (1988).

sibility onto others.<sup>6</sup> Even among those unpersuaded by these criticisms, many are prone to dismiss products liability law as second-rate regulation or insurance — a clumsy governance structure left over from pre-modern times.<sup>7</sup>

Products liability law still has important proponents of various stripes, and the criticisms of it (and of tort law more generally) have not gone unanswered.<sup>8</sup> But the critics — aided by a succession of presidential administrations overtly hostile to tort law, a corresponding shift in the temperament of the judiciary, and ongoing economic insecurity — have been winning the day. Across the country, state courts have (perhaps justifiably) pulled back from liability-expanding decisions such as *Barker v. Lull Engineering Co.*,<sup>9</sup> *Sindell v. Abbott Laboratories*,<sup>10</sup> and *Beshada v. Johns-Mansville Products Corp.*<sup>11</sup> Many state legislatures have imposed general limitations on liability (for example, several-only liability), and some have established regulatory compliance defenses for manufacturers while also partially immunizing retailers from liability for product-related injuries.<sup>12</sup> The U.S. Supreme Court has been quite willing to invoke its authority to interpret federal statutes and the Constitution as a means of untying itself from *Erie*'s mast so as to limit the reach of state products liability law.<sup>13</sup>

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<sup>6</sup> See generally WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

<sup>7</sup> See, e.g., STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* (1989) (arguing that tort law's inefficiencies warrant its replacement by alternative compensation schemes).

<sup>8</sup> See Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1468 (2007) (book review) (noting other authors' rebuttals of many of the main critiques of the tort system).

<sup>9</sup> 573 P.2d 443 (Cal. 1978); see *id.* at 452 (permitting design defect claims to prevail under either a consumer expectations or risk-utility test). Without purporting to overrule *Barker*, the California Supreme Court has since made clear that the risk-utility test is required for all products liability suits that require expert testimony to aid the jury in making the defect determination. *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994).

<sup>10</sup> 607 P.2d 924 (Cal. 1980); see *id.* at 936–38 (allowing persons injured by *in utero* exposure to DES to recover under the theory of market share liability). With a few exceptions, state high courts have consistently declined to extend market share theory to claims alleging injuries caused by asbestos, lead paint, tobacco, and other products. Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. REV. 115, 118 (2006). Some have declined to apply it to DES. See, e.g., *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 345 (Ill. 1990); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 75–76 (Iowa 1986).

<sup>11</sup> 447 A.2d 539 (N.J. 1982); see *id.* at 546 (permitting recovery on a failure-to-warn theory even on the assumption that the danger to be warned of was not knowable at the time of the product's sale). The New Jersey Supreme Court quickly and substantially limited *Beshada*'s reach. See *Feldman v. Lederle Labs.*, 479 A.2d 374, 387–88 (N.J. 1984).

<sup>12</sup> See Carl Tobias, *FDA Regulatory Compliance Reconsidered*, 93 CORNELL L. REV. 1003, 1025–27 (2008) (listing states that have adopted some form of regulatory compliance defense).

<sup>13</sup> See, e.g., *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (holding that the Medical Devices Amendments implicitly preempts design defect liability for devices that meet certain FDA standards); *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (identifying due process require-

With the election of a President who has not shown open antipathy for the tort system, one might expect this tide to turn. In some respects it has.<sup>14</sup> However, the political situation at the federal level may be more receptive to products liability reform than might be supposed. Tort law is appropriately low on the list of this Administration's priorities. To the extent it garners attention, it may not fare well in times of economic crisis, particularly insofar as the White House is imbued with a technocratic outlook that favors expert agencies and systemic solutions over a system of one-off adjudications. Certainly it is conceivable that the present Administration might be tempted to use tort reform as a bargaining chip in its negotiations with political adversaries.<sup>15</sup>

Now into this mix comes an article in the *Harvard Law Review* titled *The Uneasy Case for Product Liability*, authored by Professors A. Mitchell Polinsky and Steven Shavell.<sup>16</sup> The article is not an advocacy piece, nor even a white paper charting a program of law reform. It is instead a brief survey of prior analyses of benefits delivered by, and costs associated with, the application of tort law to injuries caused by widely sold products. Based on that survey, it offers a preliminary assessment of whether tort law, thus applied, is net beneficial to society. While measured in tone, *Uneasy* generates a surprising and stark conclusion: *that it is probably desirable for manufacturers not to be subject to any tort liability for injuries caused to consumers by widely sold products.*<sup>17</sup> Given its message, as well as its timing and placement

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ments for jury instructions on punitive damages); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that the Federal Rules of Evidence require trial courts to assess the scientific validity of expert testimony on engineering questions pertaining to product design).

<sup>14</sup> For example, President Obama has instructed the heads of federal departments and agencies to cease issuing, and to reconsider extant, regulatory preambles that urge courts to interpret federal safety standards as preemptive of state tort liability. Preemption, Memorandum for the Heads of Executive Departments and Agencies (May 20, 2009), 74 Fed. Reg. 24,693 (May 22, 2009).

<sup>15</sup> President Obama has so far suggested only that the federal government should encourage states to experiment with different reforms of medical malpractice law. Amy Goldstein, *On Malpractice Reform, Fine Print Is Still Hazy*, WASH. POST, Sept. 11, 2009, at A7. In raising the possibility of these sorts of tradeoffs, we do not mean to suggest that they would necessarily be inappropriate. Everything will depend on the terms of the bargain.

<sup>16</sup> A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010).

<sup>17</sup> *Id.* at 1491–92 (suggesting that, in light of *Uneasy's* cost-benefit analysis, legislation might be contemplated “that would limit or eliminate product liability in certain industries or for certain widely sold products,” *id.* at 1492). To judges, the authors offer a less radical recommendation, which is that courts consider three factors to weigh against the imposition of products liability, two of which replicate extant doctrine: (a) that there is widespread consumer knowledge of the relevant danger posed by the product and (b) that the design and manufacture of the product were governed by safety regulations. See *id.*; DAVID G. OWEN, PRODUCTS LIABILITY LAW § 10.2, at 627–28 (2005) (observing that the obviousness of a product's danger is a factor in determining whether it is defective); *id.* § 14.3, at 888 (noting that evidence of compliance with safety

and the prominence of its authors, *Uneasy* might be the rare article that escapes the fate of obscurity that awaits most academic legal scholarship.

Unfortunately, *Uneasy* cannot sustain the burden it has set for itself. The evidence it marshals is surprisingly scant, consisting of anecdotes about products that suffered declining sales after being linked to certain injuries, observations about consumers' improved access to safety information, a brief review of inconclusive studies of whether a rule of strict liability better deters the sale of unsafe products than a negligence rule, reminders of the high costs of civil litigation, and a smattering of microeconomic theory. These observations are nowhere near sufficient. In essence, *Uneasy* argues for the elimination of an entire body of law based on the absence of social scientific evidence of a certain sort demonstrating the significance of its contribution to the goals of deterrence and compensation. For anyone prepared to credit criticism on these terms, there is much more to be uneasy about than a branch of tort law: it is doubtful that any body of law measures up to these peculiar standards.

In purporting to demonstrate the absence of a case for the imposition of liability on sellers for injuries caused by defective products, *Uneasy* also vests inexplicable confidence in market incentives and a regulatory system with failings that are exasperating to critics across the political spectrum. Its apparent satisfaction with the level of first-party health insurance enjoyed by injury victims today is no less puzzling. And strikingly missing from the entire picture is any mention of the basic principle that a person wrongfully injured by the sale of a dangerous product should be able to hold the manufacturer accountable for her injuries. When one begins with a more realistic view of what products liability law really is, what place it holds within our political system, and what values it stands to serve, one quickly comes to appreciate that the basic case for products liability law is actually quite easy.

In criticizing *Uneasy* both on its own terms and more generally, we do not mean to deny that products liability law has problems. It is expensive and in some ways unpredictable. On occasion, judges and jurors mishandle scientific information, display insensitivity to business realities, are harsh in their judgments about victim behavior, and issue indefensible judgments about liability and damages. Tort law can also interfere with the operation of other institutions. Lawmakers, judges,

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regulations is relevant to issues of fault and defect). As explained in Part I, *infra*, Polinsky and Shavell use the phrase "product liability" to encompass "[t]he liability of manufacturers of products for harms caused to their customers." Polinsky & Shavell, *supra* note 16, at 1438. That is, they intend for it to capture all instances in which a manufacturer is subject to liability because its product has caused harm to a consumer of the product, *irrespective of the theory of liability*.

and scholars have long wrestled with these deficiencies and others, and they will continue to do so, as they should. *Uneasy* is certainly helpful in reminding us that it is a mistake to consider tort law in isolation from other institutions that can deliver goods such as safety and compensation, and that one must be attentive to the need to shape tort law with an eye toward these other institutions, just as these other institutions should be shaped with an eye toward tort law. However, these are problems that call for relatively fine-grained solutions. They do not provide a reason to embrace skepticism about the value of having tort liability for product-related injuries in the first place.

## I. THE UNEASY CASE

### A. What Is “Products Liability”?

To appreciate *Uneasy*’s aggressiveness, one must get hold of the scope of its argument. Doing so is not easy because the phrase “products liability” has two meanings that generate claims of vastly different breadth, plausibility, and significance.

In its narrower and more common usage, the phrase “products liability” is used to refer to a discrete tort cause of action (and related defenses) that emerged in the 1960s and 1970s. The canonical sources for this new tort include the California Supreme Court’s 1963 decision in *Greenman v. Yuba Power Products, Inc.*<sup>18</sup> and section 402A of the Restatement (Second) of Torts, adopted in 1965.<sup>19</sup> Prior to the mid-1960s, liability for product-related injuries was determined by reference to other generally applicable causes of action, especially negligence,<sup>20</sup> breach of warranty,<sup>21</sup> and fraud.<sup>22</sup> These other claims remain available in substance (and usually in form) to persons injured by products. However, it was expected and has proved to be the case that the new products liability tort would make redress available to injury victims who could not prevail on any of these other claims and would thus often obviate the need for victims to rely on them. This is because the new tort’s liability standard was to be *defect-based* rather than

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<sup>18</sup> 377 P.2d 897 (Cal. 1963).

<sup>19</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>20</sup> See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (permitting negligence actions for injuries caused by carelessly made products irrespective of whether the injured party purchased the product directly from the manufacturer).

<sup>21</sup> See, e.g., *Ryan v. Progressive Grocery Stores, Inc.*, 175 N.E. 105, 106–07 (N.Y. 1931) (holding that an implied warranty action is available against the seller of a food item containing a foreign object).

<sup>22</sup> See, e.g., *Langridge v. Levy*, (1837) 150 Eng. Rep. 863, 868 (Exch.) (holding that where a seller misrepresents a gun’s soundness to the purchaser, the seller can be liable in fraud for injuries to the purchaser’s son caused by a defect in the gun).

conduct-based. There is now a cause of action against a commercial seller who injures a consumer by sending into the stream of commerce a product containing a dangerous defect irrespective, at least to some degree, of how the defect arose. Because the products liability cause of action focuses on the dangerous condition of the product, and not in the first instance on the degree of care exercised by the seller, the phrase “products liability,” used in its narrow sense, is often preceded by the adjective “strict.” However, this label is misleading insofar as it suggests that a seller is subject to liability merely by virtue of sending a product out into the world that happens to cause personal injury or property damage. The product must in addition be *defective* — substandard in one way or another.<sup>23</sup>

In contrast to the narrow usage just described, the phrase “products liability law” is also used to encompass not just the distinctive defect-based cause of action, but *any* recognized ground on which a seller might be held liable for injuries caused by its product. One can get a sense of this broader usage by considering the allegations one might expect to find in a present-day complaint alleging injuries caused by a product. In addition to asserting claims of product defect, the complaint may also contain counts for negligence and breach of warranty, as well as fraud, negligent misrepresentation, consumer fraud, civil RICO, and/or medical monitoring. Some of these causes of action are of uncertain scope and validity. Others, such as fraud, have impressive pedigrees and routinely support substantial judgments. The point is that each type of claim references a distinct legal wrong that might give rise to a manufacturer’s liability for injuries caused by one of its products.

With these clarifications in mind, we can now get a hold of *Un-easy*’s scope. It does not merely purport to demonstrate weaknesses in the case for a pure form of strict liability that divorces manufacturer liability entirely from notions of fault. Nor does it purport to find grounds for questioning the adoption by some courts of particularly aggressive forms of defect-based liability. Indeed, it is not content to demonstrate that tort law for product-related injuries ought to be returned to its pre-1963 condition. Instead, it argues that, in all proba-

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<sup>23</sup> See *Greenman*, 377 P.2d at 901 (holding that liability for product-related injuries attaches only to products containing a “defect in design and manufacture”); RESTATEMENT (SECOND) OF TORTS § 402A(1) (stating that strict liability applies to products sold “in a defective condition unreasonably dangerous to the user or consumer”). Courts have subdivided the concept of defect into three variants: manufacturing defect, design defect, and warning defect. Each kind of defect in some sense connotes fault, at least as to the manufacturer: a product with a manufacturing defect is a lemon that the manufacturer let slip onto the market; one with a design defect was suboptimally designed; one with a warning defect was placed on the market without the warnings that were necessary to make it reasonably safe. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

bility, there is no justification for the application of even plain-vanilla negligence and warranty law to manufacturers of widely sold products. In short, it suggests that our legal system today would probably be doing the right thing if it were to recognize fewer grounds of liability for product-related injuries than were recognized under the old privity rule of *Winterbottom v. Wright*.<sup>24</sup>

Admittedly, the article sometimes uses the phrase “product liability” in a sense that would suggest that it aims only to undermine the case for extensions of liability beyond traditional negligence and warranty principles.<sup>25</sup> Yet the authors’ target must be broader than this. None of their arguments are addressed to the onerousness or costliness of liability beyond fault-based liability. In determining whether to retain “product liability,” they do not assess the deterrent effect of negligence, warranty, and fraud actions for product-related injuries even though such effects surely would have to be assessed if the question at hand is whether it is net beneficial to recognize stricter forms of liability. Their conclusion is not that legislatures or courts should contemplate reconfiguring this part of tort law so that it returns to the pre-1963 status quo. When they engage other scholars, they do not engage them on the issue of whether liability for product-related injuries should be fault-based.<sup>26</sup> They also do not discuss the voluminous literature suggesting that, at least for design and warning defect claims, the concept of defect is largely indistinct from the concept of fault — an idea central to the products liability provisions of the Restatement (Third) of Torts, published in 1998.<sup>27</sup>

In short, the fact that the authors have nothing at all to say about which among several possible forms of tort liability should apply to product-related injuries clearly indicates that they do not mean to address the issue of which among several liability standards might apply. Instead, the burden of *Uneasy* is to defend the far more ambitious claim that products liability law in its broader sense is unjustified —

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<sup>24</sup> (1842) 152 Eng. Rep. 402 (Exch.) (limiting negligence claims against product sellers to direct buyers injured by seller carelessness).

<sup>25</sup> Polinsky & Shavell, *supra* note 16, at 1453 & n.59 (using the phrase “product liability” to refer to the three variants on the defect-based cause of action).

<sup>26</sup> See, e.g., Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 649 (1980) (arguing that, to the extent strict products liability is distinct from negligence, it should be eliminated in favor of negligence); William Powers, Jr., *A Modest Proposal To Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 659–65 (same).

<sup>27</sup> See, e.g., Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 877–99 (2002) (reviewing arguments that design and warning defect claims are de facto negligence claims). For a defense by the Restatement’s Reporters of its negligence-oriented approach to defect-based liability, see James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 882–87 (1998).

that is that any and all tort liability for injuries caused to consumers by widely sold products should be eliminated. If the argument of *Uneasy* were adopted, a person who suffers serious burns when her toaster catches fire during ordinary use would be left remediless *even if* she is prepared to prove that the manufacturer unreasonably neglected the risk of fire in designing and assembling the toaster, or acted with reckless indifference toward that risk.

### B. *The Case for the Uneasy Case*

*Uneasy* begins by positing three possible social benefits that might flow from imposing tort liability on sellers of products for injuries caused to consumers by their products.<sup>28</sup> First, the threat of liability might incentivize manufacturers to sell safer products. Second, the imposition of liability could help ensure that products' prices reflect their true social cost, including an increment representing the cost of foreseeable harm that the product might cause to a purchaser, discounted by the probability of that harm's occurring. Third, liability might provide compensation to injury victims to help cover injury-related expenses including medical care, lost income, and pain and suffering. Against these potential benefits, two types of costs are weighed.<sup>29</sup> First, there are the direct costs of operating the tort system, including primarily the fees collected by lawyers who represent tort plaintiffs and defendants. Second, these direct costs can generate indirect costs.<sup>30</sup>

Now for the accounting. The benefit side of the ledger is examined first. Citing some studies that have attempted to measure the increment of safety attributable to the threat of liability under a regime of defect-based liability, *Uneasy* concludes that there is none, at least with respect to widely sold products, the safety of which is already suitably encouraged by market pressures and the attention of government regulators to product dangers.<sup>31</sup> What about the compensation benefit?<sup>32</sup> *Uneasy* points out that the need for compensation on the

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<sup>28</sup> Polinsky & Shavell, *supra* note 16, at 1443–69.

<sup>29</sup> *Id.* at 1469–72.

<sup>30</sup> For example, insofar as manufacturers and consumers build expected litigation costs into the prices at which they sell and buy products, these higher prices might block what would otherwise be welfare-enhancing purchases.

<sup>31</sup> Polinsky & Shavell, *supra* note 16, at 1458 (surmising from a very small sample of inconclusive industry studies that the safety benefit from products liability is “small”).

<sup>32</sup> *Uneasy* says relatively little about the signaling benefit, but is similarly skeptical that it amounts to much. First it notes that, although prices can communicate information about product risks, consumers can learn about these risks in other ways. *Id.* at 1473–74. Second, it responds to Hanson and Logue's claim that tort law generates a signaling benefit by correcting price distortions introduced by consumers' access to first-party insurance, which may induce them to buy products they would otherwise not buy. *Id.* at 1461 (citing Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*,



part of many Americans is already being met wholly or partly by health insurance, life insurance, disability insurance, and property insurance. To be sure, if insurance coverage is absent or incomplete, tort damages can fill these gaps. However, for the partially insured, insurers' subrogation rights often entail that tort compensation will be passed through the plaintiff to her insurer (so as to reimburse the plaintiff for insurance benefits provided to her). And regardless of whether they are partially insured or uninsured, tort victims typically must pay a chunk of any compensation they receive to their lawyers. In addition, money paid to tort plaintiffs for their pain and suffering is 'low value' money. Dollars do not ease anguish (the argument goes). It follows that, insofar as tort awards compensate for intangible harms, the marginal welfare benefit the victim will extract from those dollars is relatively small. Finally, even if a meager showing can be made on the compensation side of the ledger, a quick examination of costs renders implausible any notion of a *net* compensation benefit. If, as some have suggested, fifty cents of every compensation dollar is going to administrative costs, tort is not an efficient way to transfer money to victims.

*Uneasy* thus generates the striking conclusion that a consumer injured by a widely sold product should not recover in tort from the manufacturer. Nonetheless, it is prepared to endorse suits by victims of *narrowly sold* products.<sup>33</sup> Manufacturers of these products, it supposes, are less likely to be subject to forces other than the threat of tort liability that will tend to induce them to produce safe products. In addition, even with respect to widely sold products, claims by injured bystanders are deemed potentially net beneficial.<sup>34</sup>

## II. THE EMPIRICS OF DETERRENCE

We first consider the case made by *Uneasy* regarding the deterrent effect of tort law as applied to widely sold products. We conclude that its analysis uses an inappropriate metric for assessing tort law's impact and significantly overstates the evidence for concluding that tort law has no deterrent effect.

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76 CORNELL L. REV. 129 (1990), and arguing that coverage is not broad enough to generate a significant distortion). Finally, it argues that, insofar as manufacturers and consumers build expected litigation costs into their pricing and purchasing decisions, the tort system may send distorted signals that block welfare-enhancing transactions. Polinsky & Shavell, *supra* note 16, at 1472.

<sup>33</sup> See Polinsky & Shavell, *supra* note 16, at 1476.

<sup>34</sup> *Id.* at 1490–91. The argument is that manufacturers who injure bystanders do not stand to lose business: their customers are not the ones being hurt.

A. *Measuring Tort Law's Marginal Contribution to Product Safety*

A reader of *Uneasy* might be forgiven for supposing that its cost-benefit calculus rests in part on the claim that tort law as applied to products *does nothing at all* to induce manufacturers to make safer products.<sup>35</sup> But this cannot be the case, for such a claim is overtly contradicted by studies on which *Uneasy* relies. For example, it recounts a 1991 article by Professor John Graham that attempts to measure the contribution of products liability law to automobile safety.<sup>36</sup> After briefly recounting episodes such as the Ford Pinto gas-tank ruptures and the introduction of automatic seat belts, the article speculates for each whether products liability law “was a necessary, sufficient, contributing, or insignificant cause of safety improvements,”<sup>37</sup> concluding that in most instances “liability was a contributing factor in achieving safety improvements.”<sup>38</sup> In an effort to refine these gestalt judgments, the Graham article also looks for a statistical correlation between increases in the incidence of so-called “crashworthiness” liability for automobile-accident injuries and reductions in such injuries.<sup>39</sup> By this method, it finds that products liability law “is one of several forces that induce manufacturers to consider making pro-safety decisions in the marketplace,”<sup>40</sup> and that “[i]n some cases . . . liability seemed to cause safety improvements to occur more quickly than they would have occurred in the absence of liability.”<sup>41</sup>

So *Uneasy*'s proposed rejection of products liability on cost-benefit grounds cannot rely on the claim that tort law, as applied to widely sold products, has no deterrent effect.<sup>42</sup> Rather, it turns on the claim that tort law makes no *additional contribution* to product safety

<sup>35</sup> See *id.* at 1458 (speculating that products liability produces only a “small” safety benefit for widely sold products).

<sup>36</sup> John D. Graham, *Product Liability and Motor Vehicle Safety*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 120 (Peter W. Huber & Robert E. Litan eds., 1991).

<sup>37</sup> *Id.* at 180.

<sup>38</sup> *Id.* at 181.

<sup>39</sup> To his credit, Graham issued a warning about over-interpreting his data analysis. See *id.* at 183. The proxy for liability used by Graham is an apparently unpublished paper collecting “the annual number of reported crashworthiness cases obtained through a LEXIS search.” *Id.* at 186–87. One cannot tell what sort of counting the author of this study undertook. (Crashworthiness cases in which plaintiffs prevailed and which survived on appeal?) And the crashworthiness doctrine is itself a special application of products liability law: the growth in the number of crashworthiness cases during the study period may well have occurred at a faster rate than the growth in other claims for automobile-related defects. The dependent variable, meanwhile, is not car accident-related injuries, but car accident *deaths*. Are the numbers for nonfatal injury-producing accidents similar?

<sup>40</sup> *Id.* at 183.

<sup>41</sup> *Id.* at 183–84.

<sup>42</sup> Note also that *Uneasy*'s tentative reprieve for claims by bystanders and for persons injured by narrowly sold products presupposes that tort liability creates incentives for safety.

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beyond the contributions already provided by markets (which ‘sanction’ sellers of unsafe products through lower sales) and by direct government regulation. Moreover, this latter claim is further weakened by the introduction of an *evidentiary* qualification. In the end, the claim with respect to the safety benefit is this: *the handful of studies on the deterrent effect of products liability law fail to provide clear proof that it generates incentives to produce safe products beyond those incentives provided by the threat of adverse publicity and the operation of regulatory safety regimes.*<sup>43</sup>

The evidentiary standard set by *Uneasy* is stacked: it ‘blames’ tort law for the primitive state of the empirical literature on its deterrent effects. To date, only a few studies have been conducted. Because of poor information and the difficulty of controlling for the relevant variables, these studies have been forced to rely on very rough proxies. And for the most part they have generated weak conclusions. Under these circumstances, to start with an assumption that products liability law’s defenders must meet a strong evidentiary burden on its efficaciousness is to beg the question. The standards used by social scientists for proof of causal efficacy are far too demanding to serve as criteria for making practical judgments about whether to retain or displace an entire body of law.

Even leaving aside the problems posed for the no-added-deterrence argument by its use of an inapt evidentiary standard, there are at least three problems with the argument’s substance. The first is that it does not run markets or the regulatory state through the same ringer as it does products liability law. The efficacy of modern markets in enhancing product safety is said to be proved by some facts and figures concerning media coverage of products safety-related news items, coupled with mention of a handful of episodes in which products that came to be perceived as dangerous lost market share.<sup>44</sup> Possible countervailing factors are mentioned, including disputes about a product’s dangerousness<sup>45</sup> and familiar issues of cognitive psychology,<sup>46</sup> but no effort is made to weigh their significance. There is also an overlooked but obvious lag problem: the attainment of widespread awareness of product

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<sup>43</sup> See Polinsky & Shavell, *supra* note 16, at 1473 (“[W]e found no statistical evidence suggesting that product liability has in fact enhanced product safety for the three widely sold products that have been studied: general aviation aircraft, automobiles, and the DPT vaccine.”).

<sup>44</sup> *Id.* at 1443–50. One of these episodes — that of the loss of market share for Tylenol following an instance of product tampering that led to the deaths of several users — seems unusual in that it does not obviously involve public attention to an issue of product safety, as opposed to an issue of criminal misconduct. See *id.* at 1443–44.

<sup>45</sup> *Id.* at 1444–45. Most familiarly, manufacturers of tobacco products for years insisted that there was no proof that their products cause adverse health effects.

<sup>46</sup> *Id.* at 1448.

dangers occurs over time,<sup>47</sup> meaning that by the time the market corrects for the change, the defects may have already done much harm.

Likewise, as compared to products liability law, the regulatory state is treated with kid gloves. There is a passing mention of budget constraints and regulatory capture,<sup>48</sup> but again no attempt to weigh their significance.<sup>49</sup> The reader is left with the false impression that, on balance, the Consumer Product Safety Commission (CPSC) is an energetic and effective regulator and that the Food and Drug Administration (FDA) and the National Highway Traffic Safety Administration (NHTSA) operate free from political influence, budgetary constraints, dependency on regulated entities for information, and the inherent limitations of *ex ante* regulation.<sup>50</sup> Nor does *Uneasy* address the vast cost-internalization literature — oddly, given that this is a literature to which Polinsky and Shavell have made notable contributions.<sup>51</sup> A standard claim within this literature identifies as a potential weakness of regulations that, even when enforced, they tend to generate penalties that are not correlated with the losses actually caused by the violations. By contrast, tort damages, at least in principle, generate full cost internalization and hence efficient deterrence.

Second, *Uneasy* seems to treat public information, regulatory action, and the tort system as, for the most part, operating independently of one another.<sup>52</sup> There is plenty of reason to believe that these three modes of ‘regulation’ influence one another. The filing of litigation is presumably sometimes necessary for the discovery of the newsworthy story behind a product’s dangers, and litigation can itself be news that

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<sup>47</sup> To take but one prominent example, defective tires manufactured by Bridgestone/Firestone probably caused several hundred deaths and hundreds of injuries over several years before being recalled. See *Class Action Status Given to Ford and Firestone Suits*, N.Y. TIMES, Nov. 29, 2001, at C4.

<sup>48</sup> Polinsky & Shavell, *supra* note 16, at 1453.

<sup>49</sup> See *id.*

<sup>50</sup> See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 172–201 (1990) (discussing NHTSA’s vulnerability to shifts in political winds); Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1674 n.88 (2008) (noting criticisms of the FDA and CPSC for inefficacy and vulnerability to political forces); George L. Priest, *Products Liability Law and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICY* 184, 184 (Robert E. Litan & Clifford Winston eds., 1988) (“No one conscious of the dwindling budget and meager accomplishments of the [CPSC] can pretend that the United States makes a serious effort to regulate product quality directly.”); Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982); Barry Meier, *F.D.A. Seeks Better Data from Tests of Devices*, N.Y. TIMES, Dec. 30, 2009, at B1 (discussing studies of inadequacies in information provided to the FDA by manufacturers seeking approval for new medical devices).

<sup>51</sup> See generally STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

<sup>52</sup> There is a passing reference to possible interactions, rather than a meaningful weighing of their importance. Polinsky & Shavell, *supra* note 16, at 1454–55.

focuses consumer attention on alleged product dangers and attracts regulatory attention. News of alleged product-related injuries can foment litigation and regulation.<sup>53</sup> The enactment of regulation can generate news coverage and litigation. Given these probable synergies, it is almost certainly a mistake to posit that, once tort law is removed from the bundle of regulatory sticks, market and regulatory forces will have the same deterrent effect that they now have.

Finally, and most importantly, even if one were to grant that tort law offers no *incremental* deterrent effect, this concession provides no grounds for the ultimate conclusion of *Uneasy*. Rather it provides an argument against *redundant* incentivizing. This is just as much an argument for dismantling the regulatory regime governing product safety as it is an argument for getting rid of tort law: one needs a further explanation of why the existence of two redundant systems entails the elimination of one rather than the other. More to the point, one needs an explanation of why the redundancy observation (assuming it is valid) does not instead require a call for better coordination to reduce redundancies. *Uneasy* never seriously compares tort law's benefits and costs with the benefits and costs of safety regulation by other means and never contemplates the ways in which tort law already coordinates, or could coordinate, with other sources of safety incentives.<sup>54</sup>

#### B. *The State of the Deterrence Literature (Such as It Is)*

Even apart from the foregoing difficulties, *Uneasy* is fundamentally flawed because it draws firmer conclusions than can be justified given the limited number of extant studies and their quality. To begin with, two prior literature reviews — one published by Professor Mark Geistfeld in 2009,<sup>55</sup> the other by Professors Daniel Kessler and Daniel Rubinfeld in 2007<sup>56</sup> — have already addressed the same empirical studies. Both assert *agnostic* rather than negative conclusions.<sup>57</sup>

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<sup>53</sup> We do not mean to suggest that these kinds of interactions will always be socially advantageous. For example, David Bernstein has argued that media hype helped fuel unmeritorious suits alleging that silicone breast implants caused recipients to suffer systemic illnesses. See David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 467–69, 471 (1999) (book review).

<sup>54</sup> As noted above, common law doctrine and extant tort legislation provide a certain amount of coordination between products liability law, on the one hand, and consumer information and regulatory standards, on the other. See *supra* pp. 1930–31.

<sup>55</sup> Mark A. Geistfeld, *Products Liability*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 287, 301–04 (Michael Faure ed., 2d ed. 2009).

<sup>56</sup> Daniel P. Kessler & Daniel L. Rubinfeld, *Empirical Study of the Civil Justice System*, in 1 HANDBOOK OF LAW AND ECONOMICS 343, 351–67 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

<sup>57</sup> See Geistfeld, *supra* note 55, at 301–02 (“The relationship between seller liability and product risk is hard to identify empirically. The available data do not directly measure the relationship, and the injury rate is affected by a number of other factors . . . , undermining the conclusions one can draw from attempts to measure the impact that seller liability has had on product

*Uneasy* also makes some questionable choices with respect to the studies it cites and on which it focuses. Some that purport to cast doubt on the deterrent effect of tort law are included despite containing obvious flaws.<sup>58</sup> No serious attention is given to studies that claim to find evidence of a deterrent effect. For example, a 1983 study by George Eads and Professor Peter Reuter,<sup>59</sup> based on interviews with executives of large firms, finds that products liability law has greater influence on design decisions than do regulatory law or reputational concerns, though the study also finds that the signals tort law sends to manufacturers often do not point in any clear direction.<sup>60</sup>

*Uneasy* next places too much weight on studies of atypical products. Two of its central examples concern airplane and vaccine safety.<sup>61</sup> Neither of these products resembles a standard consumer product, such as an article of clothing, a food item, a home appliance, a power tool, a toy, or a passenger vehicle. Airplane manufacturing is heavily regulated, and — as Polinsky and Shavell seem to recognize<sup>62</sup> — planes are unusual in that there is a complete overlap between the technology that is required for them to perform at all and the technology that is needed to prevent the occurrence of the most significant hazard that they pose. Simply put, it would not be surprising to discover that, even without tort law, plane manufacturers would devote significant efforts to rid planes of the sorts of defects that tend to cause them to crash. Developing new vaccines requires massive up-front development costs, and the number of alternative design options available to manufacturers is limited by human biology, scientific knowledge, and FDA regulations.<sup>63</sup> Congress decided years ago that vaccines are in these and other respects so unique that they warrant the creation of a federal compensation scheme for victims of vaccine-related inju-

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safety.”); Kessler & Rubinfeld, *supra* note 56, at 363 (observing that the corpus of extant studies “is only suggestive” and pointing out that some studies have found a deterrent effect, while others have not).

<sup>58</sup> Polinsky & Shavell, *supra* note 16, at 1458 n.88 (citing Richard S. Higgins, *Producers' Liability and Product-Related Accidents*, 7 J. LEGAL STUD. 299 (1978)). Higgins sought to find a correlation between accidental fatalities in the home — no matter whether linked to products or not (!) — and the elimination by state high courts of the old privity limitation on liability. For criticism, see Geistfeld, *supra* note 55, at 302. Note that even Higgins purported to find that liability has a deterrent effect under certain conditions.

<sup>59</sup> GEORGE EADS & PETER REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* (1983).

<sup>60</sup> *Id.* at vii–viii.

<sup>61</sup> Polinsky & Shavell, *supra* note 16, at 1455–56 (airplane safety), 1457 (vaccine safety).

<sup>62</sup> *Id.* at 1456 (noting purchasers' incentives to ensure that the aircraft they purchase are capable of remaining airborne).

<sup>63</sup> See *Jones v. Lederle Labs.*, 785 F. Supp. 1123, 1127 (E.D.N.Y. 1992) (rejecting a design defect claim against a vaccine manufacturer on the ground that, at the time of manufacture, the manufacturer could not have designed a safer vaccine that would have obtained FDA approval), *aff'd per curiam*, 982 F.2d 63 (2d Cir. 1992).

ries.<sup>64</sup> And Congress did so in part out of concerns that manufacturers would have limited ability to respond to the liability signal and in part because tort law might therefore render unavailable or unduly expensive a critically important tool of public health.

Finally, and most problematically, the article makes a basic category mistake in assessing the potential payoff of the studies under review. In fact, *not one* of these studies offers anything in defense of the radical conclusion *Uneasy* aims to defend. As noted above, when Polinsky and Shavell question the case for products liability, they are referring to products liability in its *broad sense* — the availability to consumers of *any* tort cause of action by which to recover for their product-related injuries. The studies in question all address the different question of whether there is a deterrence-based case for products liability law in its *narrow sense* — that is, a case for the mid-twentieth-century doctrinal move from liability based on negligence, warranty, and fraud to liability based on defect. The Graham study of automobile safety and the studies of general aviation and childhood vaccines all seek to measure whether there is an added increment of deterrence associated with the shift from a negligence standard to a defect-based standard. They say nothing about what would happen to product safety if negligence, warranty, and fraud law were removed from the scene. To put the point bluntly, *Uneasy* does not cite a single study that even attempts to determine how safe products would be in a world without any tort law applicable to products.

The degree to which *Uneasy* overreaches can be appreciated by contrasting it with the famous deterrence study by Professors Don Dewees, David Duff, and Michael Trebilcock.<sup>65</sup> Like the surveys mentioned above,<sup>66</sup> it offers an agnostic conclusion rather than a finding of no deterrent effect.<sup>67</sup> Moreover, and directly to the present point, it is addressed only to the question of whether the marginal safety benefit *attributable to the replacement of negligence-based liability with strict products liability* outweighs, or is outweighed by, the costs associated with that move. The study has nothing to say on the question of whether *all forms* of tort liability applicable to product-related injuries have a deterrent effect as contrasted with a regime with *no* tort liability.

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<sup>64</sup> National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-10 to -34 (2006).

<sup>65</sup> DON DEWEES, DAVID DUFF & MICHAEL TREBILCOCK, *EXPLORING THE DOMAIN OF ACCIDENT LAW* (1996).

<sup>66</sup> See *supra* notes 55–56 and accompanying text.

<sup>67</sup> DEWEES, DUFF & TREBILCOCK, *supra* note 65, at 205 (noting that on the basis of studies of accident rate data “it is difficult to reach firm conclusions as to whether the tort system has reduced accidents caused by defective products,” but further observing that, if it has reduced such accidents, “these accidents must be a small fraction of the total [of all injury-causing accidents]”).

ty.<sup>68</sup> *Uneasy* is alone in making the improbable claim that widely sold products would be as safe if *all* tort liability to consumers for product-related injuries were abolished.

### III. TORT COMPENSATION AND VICTIMS' WELFARE

The other potential benefit of products liability law that *Uneasy* attends to at any length is the provision of compensation to injury victims.<sup>69</sup> Its analysis of this aspect of tort law hinges on the observation that many of the costs associated with product-related injuries are covered by first-party insurance. Thus, according to *Uneasy*, the issue is whether tort law as applied to widely sold products provides a meaningful increment of compensation beyond insurance. The article concludes that there is little or no reason to believe that products liability makes any positive contribution to compensation of accident victims.<sup>70</sup> This conclusion is defended on three grounds. First, successful tort suits by persons injured by products often deliver less to plaintiffs than the face amount of a settlement or verdict might suggest. Second, because tort compensation tends to supplement insurance benefits that already cover health care costs and lost wages, and because of the principle of diminishing marginal utility, tort dollars provide less bang for the buck than insurance dollars.<sup>71</sup> Third, because a significant portion of tort compensation is meant to remedy victims' pain and suffering, and because individuals generally do not pay to insure against this form of loss, compensation of these losses is welfare reducing.<sup>72</sup>

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<sup>68</sup> *Id.* ("We conclude that the adoption of a strict liability regime over the traditional negligence regime has not achieved significant, socially desirable safety gains.")

<sup>69</sup> See Polinsky & Shavell, *supra* note 16, at 1462–69.

<sup>70</sup> *Id.* at 1469.

<sup>71</sup> See *id.* at 1466. *Uneasy* also claims that many product liability actions seek compensation for only modest losses and hence will not provide significant welfare gains to victims. In support of this contention, it observes that many product liability claims are brought as class actions and that the class action device was designed to aggregate small claims. *Id.* at 1467. This argument ignores the fact that, historically, tort class actions have been controversial precisely because they tend to aggregate large claims, many of which would be economically viable if brought individually. In any event, it is outdated. Since the late 1990s, American courts overwhelmingly have rejected the use of class actions for products liability cases, with the narrow exception of medical monitoring class actions. Informal aggregations are still an important phenomenon, as are class action suits brought under state consumer protection laws. The former are genuine applications of products liability law but do not involve small claims. The latter involve small claims but are not part of products liability law.

<sup>72</sup> See *id.* at 1467–68. The thought is that consumers are being forced to pay a de facto insurance premium built into the price of products, which reflects the added costs for manufacturers of liability for pain and suffering damages. See *id.* Consumers' failure to insure against such losses demonstrates that they would not have chosen to pay that premium in exchange for coverage of those losses. By requiring consumers to 'buy' insurance through manufacturers' liability at a price that consumers do not want to pay, products liability law forces on consumers a welfare-reducing transaction. See MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 208



Before examining these arguments in more detail, we must again emphasize that the amount and specificity of the empirical evidence provided cannot carry the heavy burden of persuasion set by *Uneasy*'s central thesis. The key piece of evidence consists of the observation that "[a] substantial majority of Americans have some private or public insurance coverage for medical expenses, disability, loss of life, and property damage that might result from accidents, including product-related ones."<sup>73</sup> Yet this sentence and the paragraph of rough-and-ready statistics that follows it provide only the vaguest picture of the coverage actually enjoyed by the average products liability plaintiff. No doubt there are some products liability plaintiffs who benefit from generous health, disability, and property insurance plans. However, the article makes no attempt to determine how many plaintiffs fall into this group and how many belong to the ranks of the partially insured or uninsured. Even regarding the better-off plaintiffs, we are not told what sorts of losses products liability accidents are likely to inflict on them and how well their insurance will cover those losses. And no data are provided that indicate the extent to which coverage is incomplete for the remainder of potential victims and how product-related accidents would affect members of this group.

#### A. *First-Party Insurance and Real-World Compensation*

*Uneasy* rightly notes that the amount a tort plaintiff takes home after a favorable verdict or settlement is often less than what it appears to be. First-party insurers (such as automobile insurers, health insurers, home insurers, and disability insurers) enjoy certain contractual, equitable, or statutory rights of subrogation. This means that moneys paid out to or on behalf of the victim under an insurance policy are sometimes recoverable by the insurer out of the proceeds of the victim's tort award.<sup>74</sup> Also, attorneys' fees in products liability litigation

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& n.22 (2006) (citing as the fount of this argument Philip J. Cook & Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities*, 91 Q.J. ECON. 143 (1977)). For a thoughtful discussion of the ways in which tort law's being cast as insurance can introduce distortions into the analysis of tort law, see Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820 (1995).

<sup>73</sup> Polinsky & Shavell, *supra* note 16, at 1462.

<sup>74</sup> It will rarely be the case that every dollar a victim receives from a tortfeasor for costs covered by a first-party insurance plan will pass through to the insurer. Many states have rules that limit first-party insurers' ability to obtain reimbursement via subrogation for coverage related to personal injuries. See Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. REV. 237, 247-60 (1996). Moreover, in practice, first-party insurers often agree to take less than the full amount to which they might be entitled. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 304-08 (2001) (discussing first-party insurers' practices with respect to reimbursement in the workers' compensation context). That insurers typically do not obtain full reimbursement cuts against *Uneasy*'s compensation argument: the typical tort plaintiff is in fact receiving more compensation than is suggested

are typically between twenty-five and forty percent. And there is often a time lag between injury and compensation. Absent the payment of prejudgment interest, compensation will thus come at a significant discount. For example, an injury victim who is compensated by a payment of \$10,000 in 2005 for an injury that cost her \$10,000 in 2000 could well be receiving, say, seventy-five cents on the dollar.

Even bracketing the situation of the completely uninsured, the idea that insurance takes care of the important costs of injuries is vastly overblown, as a simple set of examples will demonstrate. Consider Jones, who suffers a broken shoulder when his car crashes because its brakes are defective. Jones incurs \$35,000 in medical expenses and property damage, of which insurance covers \$30,000. Let us suppose that he suffers substantial lost wages and income diminution, of which \$65,000 is not covered by any form of disability or unemployment insurance.<sup>75</sup> Notably, Jones is seeking compensation only for economic losses. Now consider three scenarios in which Jones prevails in a tort action against the car manufacturer.

Scenario 1: In an ideally fast and accurate tort system with subrogation and the standard American rule for attorneys' fees, Jones might realistically expect to receive \$77,000 in compensation based on an award of \$100,000 reflecting his pecuniary losses. (He initially obtains \$30,000 in insurance payments plus \$100,000 in tort damages, but then can expect to pay back \$20,000 to his insurer through subrogation and must also pay \$33,000 to his lawyer.)

Scenario 2: Jones obtains a verdict of \$100,000 three years after the accident. The defendant waives its right to appeal the verdict in return for an agreement that excludes Jones's recovery of prejudgment interest. Assume that Jones's insurer paid \$30,000 in benefits to Jones at the time of the accident and that the remaining \$70,000 in losses that have until now gone unpaid are today worth \$92,000. After \$20,000 goes to the insurer through subrogation, Jones is left with \$80,000 from his award. His lawyer receives \$33,000, leaving Jones with \$47,000. Even with a recovery of \$100,000 in damages for pecuniary losses, Jones thus comes out \$45,000 short of what would actually make him whole (\$92,000 worth of uninsured losses minus \$47,000 in retained tort recovery).

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by its discussion of subrogation. True, the article's diminishing marginal utility argument, discussed below, could in theory cut in the other direction by suggesting that these additional tort compensation dollars are of relatively low value. However, that argument is itself flawed. *See infra* p. 1938. In the examples we provide below, we assume less-than-full reimbursement through subrogation.

<sup>75</sup> Assume, for example, that Jones initially cannot work at all, and then when he is able to work, must take a job that pays significantly less.

Scenario 3: Jones's case quickly settles for \$60,000, which equals sixty percent of the \$100,000 in pecuniary damages he was prepared to prove at trial. His lawyer receives one-third of the settlement figure (\$20,000), and his insurer obtains \$10,000 via subrogation.<sup>76</sup> Jones is left with \$30,000, leaving him \$40,000 short of the amount that would make him whole for his uninsured losses.

Obviously the \$30,000 Jones receives in Scenario 3 or the \$47,000 he receives in Scenario 2 is far less than his true loss (even after taking into account first-party insurance benefits and excluding any nonpecuniary losses). What is harder to comprehend is why either of these figures would *not* count as a significant contribution to his welfare.<sup>77</sup> It is certainly true that if Jones had ended up with, say, \$90,000, it would be appropriate to characterize that recovery as being more significant. This larger number would also constitute a significant percentage of his total losses, whereas \$30,000 does not. But the question at hand is not whether Jones has received a large or small percentage of the total loss he suffered. Rather, it is whether the tort compensation provided to him offers a significant contribution to his well-being. Assuming that they are realistic depictions of the sort of recoveries products liability claimants tend to receive — and we think they are — Scenarios 2 and 3 suggest that the tort system's provision of less-than-face-value compensation does not support *Uneasy's* claim that welfarist considerations call for the abolition of whatever tort compensation a plaintiff such as Jones stands to receive. Quite the opposite, one might plausibly suppose that the \$30,000 provided to Jones in Scenario 3 could be very important to his welfare. More generally, there seems to be little reason to suppose that there is a positive correlation between the contribution of the plaintiff's final collectible amount of damages to his welfare, on the one hand, and the ratio of that number to the damages to which he was entitled, on the other.

To supplement its seemingly unrealistic argument that products liability adds little to compensation already provided from private or public insurance, *Uneasy* invokes the concept of diminishing marginal utility. Extra dollars received from tort compensation, the article says, are not nearly as valuable as the initial dollars received from first-party insurers.<sup>78</sup> The force of this argument hinges on the actual slope of plaintiffs' utility curves and our ability sensibly to place damage

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<sup>76</sup> The insurer's lower reimbursement in this scenario reflects the majority make-whole rule, under which a first-party insurer is formally not entitled to subrogation until the plaintiff has received damages equal to her actual loss. See Baron, *supra* note 74, at 249–52. In practice, however, insurers have negotiating leverage that usually permits them to obtain partial reimbursement.

<sup>77</sup> Cf. Polinsky & Shavell, *supra* note 16, at 1469.

<sup>78</sup> See *id.* at 1466 n.118.

awards received by plaintiffs on those curves. As to the second of these considerations, we see no reason to suppose that most persons who are injured by defective products obtain coverage from first-party insurance compensation at a level beyond which further compensation is not of 'high value.' Certainly no reason is provided in *Uneasy*.<sup>79</sup> In fact, the overwhelming likelihood is that first-party insurance tends not to make whole even those with insurance, even with respect to only their pecuniary losses. As the preceding discussion indicates, law in practice generates gaps between what many plaintiffs are entitled to demand by way of compensation from the defendant and what they recover. In these cases, the added dollars obtained by the plaintiff atop insurance coverage are likely to be anything but the 'gravy' that marginal utility analysis might disparage as being of low value.

For the foregoing reasons, we find the marginal utility argument puzzling as framed. Perhaps it instead aims to assert that products liability law does a poor job as a compensation system relative to alternatives that can provide greater compensation at a lower cost. However compelling, this is *not* an argument that tort law does not contribute to social welfare by its provision of compensation to injury victims. Rather, it is a suggestion that if a cost-benefit analysis is done on the compensation prong alone, various alternative compensation systems will come out ahead. This is a different — and familiar — point. The efficiency shortcomings of products liability law as a compensation system should indeed be counted as costs. But *Uneasy* has provided us with no reason to reject the idea that tort law generates meaningful compensation benefits. Given that products liability might well also generate safety benefits, the balance of *Uneasy*'s central equation is perhaps not so obviously skewed toward the cost side as the article supposes, even on its artificially narrow metrics.<sup>80</sup>

It may also be that Polinsky and Shavell are operating within a model according to which, absent a showing of market failure, private insurance markets are thought to demonstrate just how much value individuals assign to the availability of compensation in the event of an injury. If this contention were true, it would follow that those who are uninsured or underinsured have indicated that they do not value compensation as much as the insured, and hence should not receive reimbursements that they themselves have deemed not worth the cost of purchasing. The obvious reply to this line of argument is that people are uninsured or underinsured for lots of reasons — including,

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<sup>79</sup> At this level of abstraction, the argument that tort compensation is 'low value' would license the conclusion that, from a welfarist point of view, states should enact statutes mandating that first-party insurers pay out only the first eighty percent of the coverage promised under their policies, since the last fifth of compensation is of less value than the first four-fifths.

<sup>80</sup> See *infra* pp. 1941–47 (discussing costs and benefits not addressed by *Uneasy*).

of course, that they cannot afford to purchase more insurance — not only because compensation for accident-related injuries is not of great value to them.<sup>81</sup>

*B. Pain and Suffering Damages and the Insurance Argument*

*Uneasy*'s final point is a familiar one:<sup>82</sup> insofar as tort compensation covers noneconomic losses and insofar as people do not insure themselves against the possibility of such losses, the tort system detracts from overall welfare. *Uneasy* makes this unwanted-cost-spreading argument<sup>83</sup> through the example of a plaintiff who is deemed to have suffered a \$365.84 loss of welfare by virtue of her ability to collect pain and suffering damages.<sup>84</sup> Although a number of concerns are raised by this example, the most straightforward are evident even from within a welfarist framework.<sup>85</sup> For example, neither the passage itself nor the footnote supporting it justifies the claim that the consumer will be made worse off in an amount equal to the entire extra cost of the product attributable to the manufacturer's having to stand ready to pay for pain and suffering damages.<sup>86</sup>

Regardless, the unwanted-cost-spreading argument distracts us from a larger point about the real-world value of having a *de jure*

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<sup>81</sup> Polinsky and Shavell might in turn reply that, insofar as lack of wealth or poor information is driving the failure to purchase insurance, that is a problem within the domain of *fairness* and thus not an appropriate consideration for cost-benefit analysis. Putting to one side the question of why fairness arguments are inappropriate in this context, the main difficulty with this envisioned line of argument is that it takes us away from the topic we have been investigating: whether the compensation provided under current products liability law is valuable from within a welfarist framework and whether such value would be lost by removing tort liability for injuries caused to consumers by widely sold products. In trying to make sense of the suggestion in *Uneasy* that sums such as the \$30,000 provided to Jones in Scenario 3 by the tort system are not worth much, we have supposed that this suggestion rests on the idea that Jones's choice not to insure himself for greater losses demonstrates that he did not regard compensation for such losses as worth enough to induce him to pay to insure against them. Our point in response is simply this: if Jones had no money to obtain greater coverage, there is no reason to suppose that the \$30,000 being paid to Jones has no value for him after the accident has occurred. And this is the relevant question for the welfarist inquiry into the extent to which products liability law provides compensation, not whether it was unfair that Jones had less money to begin with.

<sup>82</sup> On the deterrence and compensation roles of pain and suffering damages in products liability litigation, see GEISTFELD, *supra* note 72, at 208–11; Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 349–55 (2006).

<sup>83</sup> See *supra* note 72.

<sup>84</sup> Polinsky & Shavell, *supra* note 16, at 1468–69.

<sup>85</sup> At least one important article has challenged this conclusion from within a law and economics framework as well. *Id.* at 1468 n.125 (citing Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995)).

<sup>86</sup> See *id.* at 1468–69 & n.124. That the consumer would decline to spend \$365.84 for pain and suffering insurance does not establish that she would pay nothing for it; rather it means that she would only pay some lower amount.

right to nonpecuniary damages. Let us return to the case of Jones, except that we will now suppose that in addition to \$100,000 in economic damages, he claims (in good faith) \$100,000 in noneconomic damages. With this fact added, consider again the two more realistic Jones scenarios — Scenarios 2 and 3. Suppose a \$200,000 verdict is returned three years after the accident and an appeal by the defendant is waived in exchange for the elimination of prejudgment interest. During this time the underlying \$70,000 in uninsured pecuniary losses has become worth \$92,000. Jones now will recover \$114,000 — an amount that exceeds his actual uninsured pecuniary losses by only \$22,000.<sup>87</sup>

Meanwhile, on a plausible variation of Scenario 3, if the plaintiff's ability to prove \$200,000 in total damages generates a quick settlement for the full value of his economic damages (\$100,000), then Jones's lawyer will take \$33,000, while his insurer is reimbursed for \$10,000, leaving Jones with \$57,000. In this hypothetical, Jones's \$100,000 settlement succeeds only in shrinking his total uninsured pecuniary loss of \$70,000 to a *loss* of \$13,000, while his claim for \$100,000 in noneconomic losses is left entirely uncompensated. Because the overwhelming majority of plaintiffs who receive any compensation in products liability lawsuits do so via settlement, and because a settlement at fifty cents on the claimed dollar strikes as, if anything, generous relative to the settlement secured by the average plaintiff, Scenario 3 is probably quite common. And in that scenario especially, there is no reason to doubt the welfare-enhancing nature of the victim's \$100,000 settlement.

The supposed consumer preference to refrain from insuring future noneconomic losses is irrelevant to deciding whether the availability of noneconomic damages is welfare-enhancing. Even conceding that it makes sense to talk about consumers paying a premium for products to cover the cost to manufacturers of pain and suffering awards, a serious welfarist assessment would have to recognize that consumers are not, for the most part, buying noneconomic damages insurance policies. Instead, they are primarily purchasing better insurance policies against pecuniary losses. Being realistic about tort law cannot stop merely at the recognition that (some) consumers harmed by widely sold products have insurance in unspecified amounts and that consumers generally do not buy insurance against pain and suffering losses. It must also include an investigation of the terms on which settlements are actually reached.<sup>88</sup>

<sup>87</sup> \$200,000 – \$20,000 (subrogation) – \$66,000 (attorneys' fees) = \$114,000 compensation for pecuniary losses stipulated to be worth \$92,000 at the time of verdict.

<sup>88</sup> Professor Geistfeld has argued that because of attorneys' fees and perhaps other undercompensated pecuniary costs, pain and suffering awards may be justifiable from a compensatory rationale, notwithstanding the insurance argument. Mark Geistfeld, *Placing a Price on Pain and*

## IV. THE COSTS OF LAW REFORM

We noted at the outset that *Uneasy* is not an advocacy document. Instead, it sets out a metric against which to measure the worth of a body of law and argues that, in all probability, that law is more trouble than it is worth, thereby offering in-principle support for law reform. Perhaps it is not the authors' responsibility to anticipate costs associated with the reform efforts guided by their analysis, but it is surely the responsibility of an advocate or lawmaker to do so. In this part, we briefly canvass some such costs, if only to highlight other important considerations that would have to figure in a complete cost-benefit accounting.

One of the virtues of *Uneasy* is its insistence that we assess tort law as but one of several institutions that address or could address product-related injuries. But this same observation also points to costs that will probably attend the elimination of most tort liability in the domain of products.<sup>89</sup> One might label these "dependency costs." For example, it is entirely plausible — as is apparently conceded<sup>90</sup> — that some market pressure for manufacturers to attend to product safety is dependent on knowledge made available by media coverage of products liability litigation. Likewise, products liability litigation not only can serve as a counterweight to regulatory capture, it may also enhance the performance of regulators. We would suppose, for example, that the risk of being exposed for lax or incompetent regulation by subsequent products liability litigation at times serves as an incentive for appropriate regulatory diligence. More broadly and elusively, the common law responsibility to avoid injuring consumers by the circulation of defective products elaborates and reinforces a norm of attentiveness to safety. The absence of such responsibility could easily lead to a deterioration of that norm, and with it, lowered consumer expectations of product safety, a greater willingness among manufacturers' employees to convince themselves that they are entitled to act in irresponsible ways, and a diminished likelihood of government intervention to ensure product safety.

Furthermore, the elimination of liability for injuries to consumers caused by widely sold products would probably require markets and

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*Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 800–02 (1995). As Geistfeld also emphasizes, a full cost-benefit analysis of non-economic damages must assess not only their compensatory benefits (if any), but also their contribution to deterrence (if any). See *id.* at 797–98, 802–03.

<sup>89</sup> Of course, if one wants to classify these actual or potential effects as benefits of products liability law, then one does not need to recount their absence as dependency costs. But one way or another, the practical decision to eliminate products liability claims cannot be reached without counting them.

<sup>90</sup> Polinsky & Shavell, *supra* note 16, at 1454–55.

regulators to pick up at least some of the slack with respect to deterrence and compensation. These ‘retooling costs’ would include the costs to businesses and individuals of new or more aggressively enforced safety regulations and expanded first-party insurance coverage. It may be that these costs would prove justified in the abstract, but there is no reason to assume that the public and private actors imposing or incurring these new costs would judge them to be worth the benefit of getting rid of products liability law. It may also be that a greater reliance on the transmission of information to consumers for product safety generates new problems, including the problem — commonly raised as a reason to limit liability for failure to warn of product dangers — of information overload.<sup>91</sup>

A related question asks whether it would, in the end, be practical to eliminate products liability law within the parameters proposed in *Uneasy*. To the extent that tort reform proposals entail reforms that are difficult to implement or facially arbitrary, they generate what might be called “systematicity costs.” How are legislators, judges, or jurors to determine what counts as a widely sold product? Who counts as a bystander? Is it credible to have a body of law that permits a cause of action for a person who suffers serious burns when his custom-made suit, made of readily flammable material, catches fire, whereas the person who suffers identical injuries from a department-store suit made of the same material recovers nothing?

Finally, any law revision in a given area inevitably emboldens a wide variety of actors to seek other reforms that superficially seem related but, in reality, are far less justified. When, so emboldened, they succeed in obtaining such changes, that, too, is a cost. These might be dubbed the “opportunistic costs” of law reform. One does not need to be paranoid to think that an abandonment of tort law for widely used consumer products would create a political slippery slope that would reach not only narrowly used products, but also medical malpractice and other domains in which tort law currently operates.

#### V. TORT LIABILITY FOR PRODUCT-RELATED INJURIES: THE EASY AND THE HARD

We have been highly critical of the central assertion of *Uneasy*: that tort liability for widely sold products fails cost-benefit analysis and therefore should be eliminated or significantly scaled back. Of course it is easier to criticize than to make a positive case, and readers may be wondering about our own affirmative judgments. Do we mean to defend products liability law against *Uneasy*’s particular critique, or do

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<sup>91</sup> See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 293–94 (1990).



we mean to claim affirmatively that products liability law is defensible more generally? The answer is both.

Construed merely as a caution against the embrace of particularly ambitious pro-liability agendas, *Uneasy* is on reasonable ground. Professors Guido Calabresi and Jon Hirschoff, for example, famously offered a deterrence argument for assigning liability simply by virtue of an actor's being in a relatively good position to prevent a certain type of injury from occurring in the future.<sup>92</sup> To the extent that liability on these terms would be so strict as to depart from common law principles and notions of responsibility, one would want to see an impressive showing that it really does add an important increment of deterrence beyond that provided by a regime that already recognizes claims for negligence, breach of warranty, and fraud. As *Uneasy* reminds us, however, the empirical evidence for *that* effect has thus far been modest, at best. On the compensation side, scholars such as Fleming James, Jr., once argued that true strict liability is preferable to even a relatively plaintiff-friendly fault-based version of products liability because of the former's greater ability to deliver compensation to the injured.<sup>93</sup> A powerful (and longstanding) reply to this claim focuses on the expenses associated with the delivery of compensation via the tort system. Others have invoked the idea of enterprise liability, according to which a profit-making enterprise that predictably generates harms to others is deemed obligated to take on those costs. Notwithstanding work by Professor Gregory Keating defending this line of argument,<sup>94</sup> we certainly understand Polinsky and Shavell's suspicion that, for cases in which there is not even a whiff of manufacturer fault, the average consumer would prefer cheaper products and first-party insurance. Such preferences, if they exist, would cut against this fairness rationale for strict liability, at least to some extent.

For these sorts of reasons, one can reasonably doubt whether there is a case to be made for recognizing a cause of action that extends manufacturers' responsibilities beyond the sort of defect-based liability that we now have. Unfortunately, to the extent that *Uneasy* is treated as arguing merely for the rejection of this incremental increase in liability, it is coming late to the party and without much by way of new supplies. In any event, to say that there is an uneasy case for *strict* products liability — in the sense of liability entirely unmoored from even an extended sense of fault — is *not* to say that the case for *tort*

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<sup>92</sup> Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060–61 (1972).

<sup>93</sup> Priest, *supra* note 2, at 474–75 (citing Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 780 (1950)).

<sup>94</sup> Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

*liability with respect to product-related injuries* is uneasy. In fact, we think that the case for allowing persons injured by defective products to obtain redress is very easy. It rests on the idea that a manufacturer bears a responsibility to avoid causing injury by sending a dangerously defective product into the stream of commerce and is supported by principles grounded in negligence and warranty, even though it extends those principles in certain ways.<sup>95</sup>

Our grounds for thinking there should be such claims are manifold and include not only the provision of incentives for safety and compensation both directly and via the indirect benefits mentioned above, but also considerations of accountability, structural constitutionalism, egalitarianism, and rule-of-law values.<sup>96</sup> In this respect, the case for the imposition of liability on manufacturers for product-related injuries more or less on the terms set by current law is no different from the case for the recognition of tort law in many other instantiations. There are many reasons to have a law that defines injurious wrongs, permits victims to respond to those who have wronged them through the courts, and deems a commercial seller that injures someone through the sale of a dangerously defective product to have committed such a wrong.

It is a truism — but by no means a vacuous observation — that products liability law allows victims who have been wrongfully injured by the seller of a defective product to invoke the legal system to hold the seller accountable. This is at some level the most basic attribute of products liability law, as some simple examples will demonstrate.

A child eating a tuna sandwich bites into a small nail, severely injuring her mouth and throat. Her grandfather purchased the tuna from a grocery store. Assuming there is nothing to suggest that the

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<sup>95</sup> Familiarly, this cause of action, unlike traditional implied warranty actions, permits claims by persons other than those in privity with the seller. Unlike negligence, it does not require proof of a failure to exercise ordinary care in the design and manufacturing process. Needless to say, there are important disputes over how best to capture the concept of a defective product, and about whether that concept in the end stands apart from ideas of carelessness and breach of warranty. These disputes need not concern us here, given the breadth of the argument to which we are responding.

<sup>96</sup> Polinsky and Shavell might be inclined to deem these grounds as irrelevant to cost-benefit analysis. As we cannot adequately engage larger questions of methodology in this forum, we will content ourselves to offer two observations to this imagined response. First, we are deliberately eschewing any appeal to fairness in the sense that Polinsky and Shavell, following Kaplow and Shavell, use the term. Polinsky and Shavell, *supra* note 16, at 1440 n.7. We are not arguing for recognition of liability for defective products on the ground that it will serve distributive justice. Second, and relatedly, we see nothing about welfarist analysis that would permit the exclusion of the sorts of considerations we offer in favor of recognizing tort liability for injuries caused by defective products: each is entitled to be taken into account from within Polinsky and Shavell's framework.

nail was introduced into the can after it left the manufacturer's possession, the manufacturer will be subject to manufacturing defect liability for the child's injuries.<sup>97</sup>

A woman purchases a lawn chair. She unfolds it and sits down, cupping her fingers around the plastic armrests that adhere to the metal frame. The folding mechanism that attaches to the bottom of the armrest is sharp. When the chair unfolds, it pinches and then cuts off the woman's right index finger. The manufacturer will be subject to liability for the injury caused by its defectively designed product.<sup>98</sup>

A man who is in his mid-50s exercises regularly but sometimes experiences serious back pain. His physician prescribes him a new pain medicine. While taking it as prescribed, the man has a debilitating heart attack. The manufacturer has been aware of studies suggesting that users of this medicine experienced a four-fold increase in the risk of heart attack but has fought the FDA's efforts to require warnings of this risk, has distorted or concealed some data in its communications with the FDA, and has instructed its marketing force to communicate to physicians that the studies are no cause for concern. In the overwhelming majority of jurisdictions, the manufacturer would be subject to liability to the man for failing to warn him, through his physician, of the risk of heart attack.<sup>99</sup>

Any serious evaluation of products liability law must count it as a benefit that victims such as these can hold the relevant manufacturers accountable for having wrongfully injured them. There are many ways of expressing this point, and judges and law professors argue amongst themselves about how best to capture the nature and value of this sort of accountability. Our position is that the law recognizes that tort plaintiffs are entitled to recourse against a wrongdoer for injuries caused by the wrongdoer's breach of a duty to refrain from injuring them in certain ways.<sup>100</sup> Others — for example, Professor Stephen Perry — have argued that tort law enforces a moral duty to repair losses associated with certain bad outcomes caused by one's faulty

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<sup>97</sup> Cf. *Coulter v. Am. Bakeries Co.*, 530 So. 2d 1009 (Fla. Dist. Ct. App. 1988) (affirming verdict for plaintiff who swallowed metal wire in doughnut but rejecting jury's comparative fault finding).

<sup>98</sup> Cf. *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956); *Boudreau v. Baughman*, 368 S.E.2d 849 (N.C. 1988) (applying Florida negligence and strict products liability law to a similar fact pattern).

<sup>99</sup> Cf. Alex Berenson, *Merck Suffers a Pair of Setbacks over Vioxx*, N.Y. TIMES, Aug. 18, 2006, at C1.

<sup>100</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364 (2005) (arguing that Calabresi's critique of negligence law fails to appreciate the values it serves as part of a broader law of wrongs and redress); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998) (arguing that the wrong of negligence consists of a breach of a duty of non-injury owed to persons such as the plaintiff).

conduct.<sup>101</sup> Judges, juries, and lawyers are typically comfortable saying that if an injury really is in some sense the defendant's fault, then the defendant should be held accountable for it. While consumers can shun producers of unsafe products, and regulators can impose fines or order recalls, neither of these processes renders manufacturers answerable to consumers injured by their unsafe products. Of course, as advocates of tort reform have tirelessly argued, the accountability-assigning features of tort law can be abused. Hence, they are hardly an unmitigated plus. One must count such misfires as a cost of this system for holding wrongdoers accountable to their victims. Also of concern are costs of an opposing sort — namely the features of extant law that defeat meritorious claims.

Distinct from accountability per se, the law's recognition of products liability serves or instantiates other values to be counted as among the 'benefits' it delivers. By empowering victims to demand a determination whether they have been victimized and, should they prove their cases, by entitling them to recourse, tort law grants to citizens an important political power. Most individuals have relatively little say over how government will look out for their basic interests, including bodily integrity and freedom of movement. To be sure, they have rights to vote, petition, speak, and assemble, and these rights are probably valuable in encouraging government to attend to the general welfare. But (for good reasons) they cannot, as individuals, demand that a legislature attend to or protect them in particular, nor can they force an agency to refrain from trading off their interests when making and enforcing regulations that bear on their well-being. By the same token, other parts of the law (again, for good reason) impose significant limits on the ability of individuals to take steps to protect themselves from others, at least where doing so might harm others. Tort law, by contrast, grants citizens rights to complain about and, upon appropriate showings, obtain redress for conduct that adversely affects them. As such, it is a part of a complex constitutional structure that aims to balance the need for law to tend to the general welfare with the need to take the interests of individuals seriously. In its absence, citizens are disempowered — they lose the ability to demand of law and government that those institutions take the protection of their interests to heart. The elimination of tort law with respect to a broad swath of product-related injuries would constitute a significant weakening of this structural feature of our government, particularly if one takes into

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<sup>101</sup> Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

account worries about opportunism costs of the sort discussed above.<sup>102</sup>

A familiar refrain of consumer-protection advocates is that products liability law is necessary to protect ordinary individuals from the predations of large corporations.<sup>103</sup> Even if the David-and-Goliath aspects of this narrative tend to be overstated, these commentators make an important point. Along with its inegalitarian, status quo-reinforcing tendencies, tort law's particular form of accountability has an important egalitarian dimension: it confers on individuals and firms an authority to hold each other accountable.<sup>104</sup> Moreover, it does so on terms that are largely indifferent to social and political status. An individual of modest means can, under the appropriate circumstances, obtain recourse against a giant corporation for having wronged her. At the same time, a person of substantial means can, on the same terms, demand from a less-well-off person compensation for interferences with those holdings. We do not mean by this observation to suggest that wealth and power have no influence on the actual operation of the tort system, nor to deny that the form of recourse typically provided by tort law — money damages — significantly limits its availability as against wrongdoers with few assets. And like every other beneficial aspect of tort law, this aspect has associated downsides, including the occasional imposition of liability as a form of 'Robin Hood' justice. Still, in both principle and practice, tort law's particular form of accountability has an egalitarian aspect that renders it distinctive and valuable, and the law of products liability is in this particular way equality reinforcing.

We observed above that any proposal to reform a particular area of tort law, such as products liability law, potentially raises issues of legitimacy. This is because our political culture is rich with notions of responsibility. As a general matter, we demand of each other behavior that is responsible in the sense of attending sufficiently to the possible deleterious effects of our actions on others. This is not to say that we expect or predict people will consistently so behave, or that we ourselves are always attentive to these responsibilities. Rather it is to say that we believe that they owe it to us, just as we owe it to them. For centuries, our law has embodied, in different ways, and to different degrees, norms of this sort. Criminal law and punishment is one such

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<sup>102</sup> The point is not that tort law cannot be reformed in defendant-friendly ways without undermining our constitutional order. Rather, it is that an appreciation of tort law's place in our constitutional structure provides a reason that counsels against such reform, as well as guidance as to why and how such reform should be undertaken.

<sup>103</sup> THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 2 (2001).

<sup>104</sup> See Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 N.W. L. REV. 1765 (2009).

embodiment. Tort law is another. The elimination of a substantial and prominent body of tort doctrine — in this case, liability for widely sold products — runs counter to these norms. It confers an exemption from responsibility that is untoward simply by virtue of being an immunity. Even when justified, immunities can plausibly be defended only as necessary departures from baseline norms of responsibility and accountability, norms embodied in the *ubi jus ibi remedium* maxim. Part of what is so worrying about the most aggressive aspects of *Uneasy* is its seeming willingness to treat what is at best a necessary evil as if it were an unalloyed good.

## VI. CONCLUSION

What shall we say, then, about the justifiability of products liability law — conceived as a modernized amalgam of negligence, misrepresentation, and warranty that, through the concept of a defective product, permits certain injury victims to hold manufacturers (and retailers) accountable? We should say that the case for products liability law, so conceived, is *easy*. It holds manufacturers accountable to persons victimized by their wrongful conduct. It empowers certain injury victims to invoke the law and the apparatus of government to vindicate important interests of theirs. It instantiates notions of equality before the law and articulates and reinforces norms of responsibility. And in doing all these things, it contributes in direct and indirect ways to deterrence and provides welfare-enhancing compensation. For all these reasons and others, it is extremely valuable that courts, at the behest of victims, have the authority to order commercial sellers of defective products that cause injury to compensate their victims.

If it is all so easy, one might ask, why are legislatures heatedly debating whether to reform products liability law? The answer is that there is a host of related questions that *are* difficult. To name only the most visible: how much defect-based liability retailers should face, how non-class aggregate litigation over product-related injuries should be structured to achieve both efficiency and due process, how evidentiary rules should be framed for causation issues, how and when regulatory law should trump tort law and who should decide this issue, and how concerns about excessive and arbitrary damage awards should be addressed and by which institution(s). The mere recitation of these familiar issues suggests that there are important aspects of products liability law about which we should be uneasy. That is why they have earned a great deal of judicial, legislative, and scholarly attention. But the case for products liability law itself is easy.