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A Consumer-Use Approach to Products Liability

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I. Introduction

In dicta, courts have had no trouble identifying unreasonable product uses. Indeed, over the years, they have compiled an extensive list of examples. That list includes the following pearls of wisdom. An automobile should not be used as a bulldozer. [FN1] A shovel should not be used as a doorstop. [FN2] A hunting and fishing knife should not be used to shave. [FN3] A knife should not be used as a toothpick. [FN4] An electric drill should not be used to clean teeth. [FN5] A power saw should not be used to clip fingernails. [FN6] A motorized hedge clipper should not be used to trim beards. [FN7] A lawn mower should not be used to cut logs or pipe. [FN8] And a radiator should not be used to open a bottled beverage. [FN9]

Curiously, however, courts have never attempted to transform these commonsense observations into clear rules of law. Instead, they have addressed the problem of product misuse in a seemingly random and inconsistent manner. Sometimes misuse eliminates the product seller’s duty of care. [FN10] Other times it negates proof of defectiveness. [FN11] In many cases it creates an issue of proximate causation. [FN12] In still others, it raises a question of comparative fault. [FN13] Too frequently, it is simply disregarded altogether. [FN14]
The results of this uncertainty are often bizarre or ridiculous. For example, a Michigan court once suggested that "glue-sniffing"--the intentional inhalation of glue fumes for the purpose of getting "high"--might be an appropriate use of glue. [FN15] In North Carolina, the court of appeals held that it was not unreasonable for the patron of an 800 to 1400 pound vending machine to deliberately tip it over in order to extract a soft drink. [FN16]

One federal court even found it foreseeable that an eleven-year-old boy would amputate his penis while taking a joy ride on a canister-type vacuum cleaner. [FN17]

In the early days of strict products liability, such decisions would have been unthinkable. Originally, strict liability was reserved exclusively for plaintiffs who were injured while putting products to their intended uses. [FN18] As time passed, however, both the role and the effect of product misuse became clouded. The Restatement (Second) of Torts [FN19] started the downward spiral. Section 402A made no mention of product use as a factor in determining strict products liability. [FN20] Although the comments to that section addressed the issue of misuse, [FN21] these comments were *758 at best ambiguous and at worst potentially inconsistent. Lacking clear guidance from the Restatement Second, courts began to improvise their own unique approaches to the problem of product misuse. [FN22] As these approaches accumulated, the law of strict products liability became more and more murky.

In 1998, the American Law Institute (ALI) had the opportunity to fix the problem. Unfortunately, it declined to do so. In the Restatement (Third) of Torts: Products Liability, [FN23] the ALI made no attempt to categorize and distinguish product uses. Instead, it adopted a broad foreseeability test for all cases. [FN24] The Restatement Third also made no effort to clarify how consumer-use issues should be handled. Rather, it allowed courts to choose their own analytical framework and let local law determine the burden of proof. [FN25] Thus, unless something changes, the current confusion in products liability law is bound to continue.

This article seeks to solve this problem by proposing a brand new “consumer-use” approach to products liability law. [FN26] Under this approach, courts would categorize products liability cases according to the type of use the plaintiff-consumer made of the product at the time he was injured. [FN27] The categorization would have both substantive and procedural effects. Criminal or intentionally destructive uses would bar recovery altogether. [FN28] Reckless or idiosyncratic uses would create a presumption of no-liability. [FN29] Common ancillary uses would require expert evidence of defectiveness. [FN30] Intended uses would create a presumption of liability, and intended uses of products violating statutes or regulations would result in absolute liability. [FN31]

My thesis will unfold in three stages. Part II will examine early approaches to consumer-use issues and will track their evolution over time. [FN33] Specifically, it will show how products liability law moved from an inchoate consumer-use approach to a consumer expectation approach to the product-focused approach we have today. [FN34] Next, Part III will examine the functional approach recently adopted by the Restatement (Third) of Torts. [FN35] It will disclose the Restatement Third’s policy objectives and demonstrate how these objectives are undermined by its own ambiguities. [FN36] Finally, Part IV will detail the consumer-use approach to products liability. [FN37] If adopted, this approach promises not just to clarify the law, but to better serve the Restatement Third’s policy objectives of efficiency and fairness.
II. Early Products Liability Approaches
Since the early 1960s, courts have used the theory of strict liability to determine when injured consumers may recover compensation from product manufacturers who sell defective products. [FN38] From its inception, strict products liability has relied on consumer-use information to allocate responsibility between the parties. [FN39] At first, consumer use was determinative. [FN40] Under this original consumer-use approach, strict liability applied only when a product failed during its normal or intended use. [FN41] With the advent of tort law's Restatement Second, the focus shifted from consumer use to consumer expectations. [FN42] Consumer use could still affect the determinations of defectiveness or contributory *760 negligence, but it was not necessarily a dispositive factor. [FN43] Unfortunately, the consumer expectation approach suffered from various analytical deficiencies. [FN44] As a result, courts changed approaches once again. [FN45] Turning away from consumer use and consumer expectations, courts increasingly looked at the condition of the product itself. [FN46] Under this product-focused approach, consumer use played a much more diversified and diluted role. [FN47] While misuse could affect various issues in a products liability case, it also could be overlooked or overridden by other considerations. [FN48]

A. The Original Consumer-Use Approach
The theory of strict products liability was the brainchild of Chief Justice Roger Traynor of the California Supreme Court. He first proposed this theory in 1944, in his now famous concurring opinion in Escola v. Coca Cola Bottling Co. [FN49] In that opinion, Traynor provided a blueprint for strict products liability and made the case for its adoption. [FN50] Nearly twenty years later, Traynor's dream became a reality. [FN51] In the seminal case of Greenman v. Yuba Power Products, Inc., [FN52] the California Supreme Court formally adopted Traynor's revolutionary new theory. [FN53] As envisioned by Traynor and adopted by the court, strict products liability was not meant to have universal application. Instead, it was created to benefit only the most disadvantaged and deserving claimants. [FN54] For Traynor, this group included consumers who sustained injuries during normal or intended product uses. [FN55]

*A761* A review of Escola and Greenman make this plain. In Escola, the plaintiff-waitress sustained an injury when a bottle of Coca Cola broke in her hand. [FN56] The plaintiff sued the bottling company for negligence. [FN57] Because the cause of the breakage was unclear, the plaintiff relied exclusively on the theory of res ipsa loquitur. [FN58] At trial, the evidence revealed that the bottle at issue was not made by Coca Cola but by an independent glass company. [FN59] In addition, Coca Cola offered substantial evidence of its extensive quality control procedures. [FN60] Nevertheless, the jury returned a verdict in the plaintiff's favor. [FN61] On appeal, a majority of the California Supreme Court noted that res ipsa loquitur ordinarily is a question of fact for the jury. [FN62] Finding sufficient evidence to support the jury's verdict, the Court upheld the judgment against Coca Cola. [FN63]

Justice Traynor concurred with this result, but not its reasoning. [FN64] Writing separately, Traynor observed that the majority stretched the concept of res ipsa beyond its logical breaking point. [FN65] The facts here did not "speak for themselves;" rather, they were ambiguous. The defect in the soda bottle could have been caused either by Coca Cola or by the bottle manufacturer. The plaintiff offered virtually no proof that Coca Cola was to blame. Coca Cola, by contrast, had produced much evidence to refute this inference. [FN66] Nevertheless, the jury found Coca Cola liable. [FN67] Traynor recognized the obvious inconsistency between the jury's verdict and the plaintiff's theory of recovery. Liability without culpability was not really negligence. It was something different. As Traynor noted, "In leaving it to the jury to decide whether the inference (of

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negligence) has been dispelled, *762 regardless of the evidence against it, the negligence rule approaches the rule of strict liability." [FN68]

To eliminate doctrinal confusion, Traynor recommended that the court openly adopt the theory of strict products liability. [FN69] Besides finding support in prior precedent, Traynor offered numerous justifications for defending strict products liability on public policy grounds. [FN70] Two points, however, seemed to underlie all the rest. [FN71] According to Traynor, consumers required both pre-accident and post-accident protection. [FN72] Pre-accident protection meant protection against hidden product risks. Unlike manufacturers, who create products and place them on the market, *763 consumers lack the means to identify and avoid product risks. [FN73] Thus, manufacturers, rather than consumers, should bear the burden of eliminating or reducing these dangers. [FN74] Post-accident protection meant protection against unfair evidentiary requirements. After accidents occur, consumers often lack the ability to determine either why a product failed or at what point during the manufacturing and distribution process it became defective. [FN75] Because the manufacturer controls the means of production and distribution, it also controls the evidence pertaining to the quality and condition of its products. [FN76] Thus, the manufacturer, rather than the consumer, should bear the burden of explaining a product failure. [FN77]

Though prodigious in scope and effect, strict products liability was not meant to be unlimited. At the very conclusion of his opinion, Traynor recognized an important precondition to its use, noting that "(t)he manufacturer's liability should . . . be defined in terms of the safety of the product in normal and proper use." [FN78] Unfortunately, Traynor did not explain the basis for this limitation. He did, however, provide grounds for defending it. Traynor saw strict products liability as the great equalizer between product manufacturers and consumers. [FN79] When manufacturers know more about product risks, strict liability expands their burden of precaution. [FN80] When manufacturers have better access to evidence, strict liability heightens their burden of proof. [FN81] However, when such imbalances are absent, there is no need for corrective action and no justification for imposing a stricter liability standard. [FN82]

Traynor silently but instinctively placed cases of product misuse into the latter category. [FN83] Because manufacturers design, construct, test, and market products for specific uses, their knowledge and control over product risk extends to these uses and *764 declines proportionately as consumer use deviates from manufacturer intent. [FN84] When a consumer puts the product to an unintended and idiosyncratic use, he creates new risks that do not inhere in the good itself and may never confront other users. [FN85] Here, the danger arises primarily from the product's application, not its design, construction, or performance. [FN86] As the master of that risk, the consumer not only possesses a superior power of avoidance, he also possesses greater information about its origin, characteristics, and consequences. [FN87]

Traynor never faltered in this view; in fact, he reinforced it. In Greenman v. Yuba Power Products, Inc., [FN88] Traynor did not just adopt the theory of strict products liability, he adopted a broader consumer-use approach to products liability law. [FN89] Greenman was injured while using a power tool. [FN90] He sued the retailer and manufacturer for negligence and breach of warranty. [FN91] The manufacturer argued that Greenman failed to give it adequate notice of breach, as required by California's version of the Uniform Sales Act. [FN92]
Traynor, writing for the majority of the court, rejected the manufacturer's argument. He observed that Greenman's warranty action arose from common law precedent, not statutory law. [FN93] Thus, the Sales Act and its notice provision did not necessarily apply. [FN94] Because this provision was intended for sophisticated commercial transactions, it was inherently unsuitable for consumer warranties. As Traynor put it, "The injured consumer is seldom steeped in the business practice which justifies the rule, and, at least until he has had legal advice, it will not occur to him to give notice to one with whom he has had no dealings." [FN95]

*765 Stripped of its commercial identity and contractual defenses, Greenman's warranty action resembled the theory of strict liability in tort. [FN96] Instead of hiding the resemblance, Traynor decided to call it what it was:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. [FN97]

As in Escola, Traynor justified the switch on public policy grounds; and once again, he hammered the theme of consumer protection. [FN98] Referencing his Escola concurrence, Traynor declined to "recanvass the reasons for imposing strict liability on the manufacturer." [FN99] He emphasized, however, that "(t)he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." [FN100]

By definition and implication, empowered consumers were excluded from this new theory. [FN101] Traynor equated empowerment with control, and control with consumer usage. [FN102] Traynor noted that, when manufacturers place a product on the market, they impliedly represent its safety. [FN103] This representation creates consumer reliance. However, manufacturers do not guarantee that *766 the product will be risk-free for all uses. [FN104] They promise only that it will "safely do the jobs for which it was built." [FN105] This guarantee, in turn, runs only to consumers who use the product for its intended purpose. [FN106] It does not extend to product misusers. Off-use consumers create risks of their own. Thus, they cannot expect absolute safety, and they cannot rely upon manufacturers for absolute protection. To earn this protection, Traynor declared, the consumer must prove "that he was injured while using the (product) in a way it was intended to be used as a result of a defect in design and manufacture of which the plaintiff was not aware that made the (product) unsafe for its intended use." [FN107] With these words, Traynor promulgated the first consumer-use approach to products liability. [FN108] This approach was marked by several distinctive characteristics. First, it was selective. It did not bestow the benefits of strict liability upon all plaintiffs; rather it reserved its beneficence exclusively for consumers who played by the manufacturer's rules. [FN109] Second, it was integrative. It recognized that product risk is not just a manufacturer's concern; rather it is the responsibility of both manufacturers and consumers. [FN110] Finally, it was determinative. It did not simply consider evidence of
consumer usage; rather it made intended use a prerequisite to imposing strict liability. [FN111]

**B. The Consumer Expectation Approach**

Just two years after Greenman, the ALI published the Restatement (Second) of Torts. [FN112] Section 402A of the Restatement adopted the theory of strict products liability. [FN113] Although identical in name to Traynor's theory, section 402A instituted a different analytical approach. Rather than focusing on consumer use, it concentrated on consumer expectations. [FN114]

The literal terms of section 402A made no mention whatsoever of consumer use. Instead, it purported to base liability solely on the condition of the product. Specifically, it provided that "(o)ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property." [FN115] Section 402A required plaintiffs to prove just four things: (1) the offending product was defective and unreasonably dangerous, [FN116] (2) the defect caused the plaintiff physical harm, [FN117] (3) the defendant was a merchant in the business of selling the product, [FN118] and (4) the product reached the plaintiff without sustaining a substantial change in its condition. [FN119]

Even during the drafting stage, the Reporter of section 402A, William Prosser, recognized that "defectiveness" and "unreasonable danger" were not self-defining concepts. As a result, Prosser used the comments to section 402A to further explain their meaning. [FN120] Comment g defined the term "defective condition." [FN121] According to comment g, "The rule stated in this (s)ection applies only where the product is . . . in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." [FN122] Comment i defined the phrase "unreasonably dangerous." [FN123] It provided that, for a product to be considered unreasonably dangerous, it must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." [FN124] Thus, although section 402A focused on the product's condition, its comments made clear that liability really turned on consumer expectations. [FN125]

In theory at least, consumer expectations may be influenced by many different factors, including a product's longevity on the market, its appearance, its marketing, word-of-mouth, and past experience. [FN126] The last factor--past experience--necessarily depends in large measure on consumer usage. [FN127] Prosser made no attempt to further define "consumer expectations" or to list the considerations that may inform them. [FN128] Nevertheless, several comments did suggest that consumer use was to play an important role in this analysis. [FN129] Unfortunately, the comments did not make clear exactly what that role should be.

In fact, the comments themselves seemed to reach contradictory conclusions. Comment I defined the term "user or consumer." [FN130] In so doing, it also defined the word "consumption." [FN131] According to comment I, "Consumption includes all ultimate uses for which the product is intended." [FN132] Thus, comment I seemed to limit section 402A to intended uses only.
Comment h cast this interpretation into doubt. [FN133] In further defining "defective condition," that comment provided:

A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. [FN134]

Unlike comment 1, comment h described consumer usage in normative terms. It extended coverage to normal uses, and excluded cases of abnormal handling, consumption, and preparation. However, it never identified its standard of normalcy. As a result, comment h permitted widely divergent interpretations. It could be interpreted broadly, referring to any use not intended by the manufacturer, or it could be construed more narrowly, extending only to those unintended uses that were not customarily practiced by most consumers.

Other portions of comment h exacerbated the confusion. [FN135] Immediately after the above-quoted passage, comment h continued: "Where, however, he (the seller) has reason to anticipate that danger may result from a particular use, . . . he may be required to give adequate warning of the danger." [FN136] This remark created two new hermeneutic problems. First, it blurred the reach of the earlier usage statements. Neither comment 1 nor the first part of comment h was limited in scope. Both seemed to apply to any and all actions brought under section 402A. However, the second part of comment h specifically addressed the manufacturer's duty to warn. It appeared to suggest that, even if a consumer used a product in an unintended or abnormal way, he still might recover for injuries caused by a marketing defect. Second, in making this suggestion, comment h further obscured the appropriate standard for distinguishing between protected and unprotected product uses. It premised its usage restriction not on manufacturer intent or consumer custom, as had the other passages, but on the foreseeability of the harm facing the consumer. Under this standard, even abnormal uses might fall within the purview of section 402A if their harmful effects could be predicted and disclosed in advance.

Comment n made a bad situation even worse. Comment n provided that a consumer's contributory negligence, presumably including product misuse, would not serve as a defense to a strict products liability action, [fn137] BUT WOULD BAR recovery only if the consumer knowingly and voluntarily assumed the risk of a product defect. [FN138] It did not, however, define the term "defense." As used in comment n, "defense" might have meant an affirmative defense, or it might have referred to any defensive argument raised by the defendant. Under the first interpretation, comment n would foreclose any consideration of consumer misuse short of an assumption of risk. Under the second interpretation, it would prohibit an affirmative defense of contributory negligence, but permit the manufacturer to argue misuse as a means of negating defectiveness or causation. Because comment n did not specify the appropriate interpretation, the Restatement Second never resolved its consumer-use conundrum.

In the end, section 402A did make one thing clear: even if consumer use was a relevant
or even a compelling factor in the determination of liability, it was not the ultimate
determinant. [FN139] Consumer expectations prevailed over everything else. [FN140]
This meant that if a product danger was open and obvious, such that an ordinary
consumer could appreciate it, then a plaintiff would be barred from recovery even if he
was injured while putting that product to its intended use. [FN141] Conversely, it also
meant that if a product was regularly misused by ordinary consumers, arguably under the
pretext that they did not fully appreciate its dangers, then a plaintiff who similarly
misused that good could seek compensation for his injuries. [FN142]

Whatever its merits, the approach adopted by section 402A was fundamentally different
from the one envisioned by Justice Traynor. Although the Restatement's consumer
expectation approach was selective, it was more lenient in its selection process. Granted,
it excluded some product misusers, but it also opened the door to others. Moreover,
unlike Traynor's consumer-use approach, the consumer expectation approach lacked an
integrative analysis. It did recognize a link between product safety and consumer use;
however, it assessed liability solely by examining *771 the mindset of the consuming
public. Finally, in contrast to its predecessor, the consumer expectation approach was far
from decisive, at least on the question of consumer misuse. In some cases misuse was an
affirmative defense. In others it impacted the issue of defectiveness. In still others its
effect was left undefined. Indeed, the only thing certain about the Restatement approach
was the disturbing depth of its own uncertainty.

C. The Product-Focused Approach
Despite its ambiguities, the consumer expectation approach was rapidly adopted by most
jurisdictions that considered it. [FN143] However, courts soon realized that this approach
presented a number of other problems. [FN144] For example, many products liability
plaintiffs were not consumers, but innocent bystanders. [FN145] Thus, they had no
product expectations. Other plaintiffs, like children, had no expectations because of their
immaturity and lack of experience. [FN146] Even average adult consumers often lacked
expectations about complicated or latent design features. [FN147] When consumers had
expectations, those expectations frequently were unrealistic. [FN148] Indeed, in a world
of rapidly improving technologies, people increasingly placed blind faith in manufacturers
that their products would never fail.

Frustrated by the consumer expectation approach, courts began to search for a suitable
replacement. Invariably, they turned their attention away from consumer expectations
and focused instead on the products that disappointed them. Unlike consumer
expectations, products had definite characteristics. They followed *772 specific design
specifications, contained certain materials, possessed definite physical properties, and
performed particular functions. Also, unlike consumer expectations, product features
were easy to discern. Consumer expectations were subjective; thus, they often were
elusive or inaccessible. Products, however, were tangible and objective. Consequently,
they could be compared, dismantled, examined, and tested for safety.

Impressed by these advantages, courts quickly adopted the product-focused approach to
products liability. In cases of manufacturing defects, an examination of the product or a
comparison of the product with other units of the same kind was usually all that was
needed to establish its defectiveness. [FN149] However, in design and marketing cases,
the product's defectiveness was not readily apparent. Thus, courts had to take a more
comprehensive look at the product and the circumstances under which it was made. To
do this, they increasingly employed some form of risk-utility analysis. [FN150]
In 1973, John Wade proposed a multi-factor risk-utility test for determining product
defectiveness. [FN151] Many jurisdictions adopted this test outright or borrowed certain
portions in framing tests of their own. [FN152] Wade's test consisted of the following
seven considerations:

(1) The usefulness and desirability of the product--its utility to the user and to the
public as a whole.
(2) The safety aspects of the product--the likelihood that it will cause injury, and
the probable seriousness of the injury.
(3) The availability of a substitute product that would meet the same need and
not be as unsafe.
(4) The manufacturer's ability to eliminate the unsafe character of the product
without *773 impairing its usefulness or making it too expensive to maintain its
utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the
product.
(6) The user's anticipated awareness of the dangers inherent in the product and
their avoidability, because of general public knowledge of the obvious condition of
the product, or of the existence of suitable warnings or instructions.
(7) The feasibility, on the part of the manufacturer, of spreading the loss by
setting the price of the product or carrying liability insurance. [FN153]

Several of Wade's factors promoted in-depth product analysis. For example, factors one
through four openly questioned the product's engineering, prodding a reexamination of
such things as social utility, desirability, safety, feasibility, usefulness, and practicality.
[FN154] However, other factors looked elsewhere. Factor six incorporated the consumer
expectation test of the Restatement Second. [FN155] Specifically, it examined "the user's
anticipated awareness of the dangers inherent in the product." [FN156] Additionally,
factor seven invoked public policy, asking whether the manufacturer could insure against,
absorb, and spread the loss caused by the product. [FN157] Most importantly for our
purposes, factor five probed for evidence of consumer use, inquiring into "the user's
ability to avoid the danger by the exercise of care in the use of the product." [FN158]
While these "nonproduct-focused" factors clearly gave the test greater flexibility, they
also undermined its efficacy. In particular, by including consumer-use information in the
analysis, the Wade test not only lost its focus, it diminished the consumer-use limitation
and clouded its relevance to the ultimate determination of liability.

The practical effect of the product-focused approach was to give jurisdictions the
discretion to handle consumer-use *774 information however they pleased. In the post-
Restatement years, courts have not been reluctant to exercise that discretion. In defining
misuse, some jurisdictions have interpreted it to mean an unforeseeable use. [FN159]
Others have defined it as an unintended use. [FN160] Still others have construed it as
either an unintended or an unforeseeable use. [FN161] Courts also have disagreed about
how to assign the burden of proof. Some courts have forced the plaintiff to negate
misuse. [FN162] In these jurisdictions, misuse may impact nearly every element of the
plaintiff's cause of action. It can (1) eliminate the manufacturer's duty; [FN163] (2)
influence the determination of defectiveness; [FN164] or (3) shape the analysis of
proximate causation. [FN165] Other courts have treated misuse as an affirmative
defense. [FN166] Here too, there is little common ground. In some jurisdictions, misuse
is an independent defense. [FN167] In others, it is simply a type of comparative fault.
[FN168] Within the former group, misuse usually serves as a complete bar to recovery.
[FN169] Within the latter, it merely serves to diminish the plaintiff's recovery. [FN170]
Because of its schizophrenic nature, the product-focused approach to products liability is the most difficult to summarize and classify. Indeed, except for its avowed commitment to product analysis, it is not really a singular approach at all. Instead, it is a diverse collection of approaches, each with its own view of consumer-use issues. Under the risk-utility test, strict products liability can be either extremely selective or virtually indiscriminate, barring recovery to some product misusers while rewarding others for their indiscretions. On its face, the product-focused approach appears unilateral in scope and one-dimensional in content. However, in practice, it may allow courts to integrate consumer-use information into the analysis of product risk. Finally, although this approach invites consideration of consumer usage, it does not make such evidence determinative of the outcome. Instead, it permits courts to overlook consumer misuse altogether, or to diminish its effect on the determination of liability.

III. The Restatement Third Approach
When the ALI set out in the mid-1990s to restate and clarify products liability law, it was faced with four options. First, it could go back to the original consumer-use approach described by Justice Traynor. Second, it could reaffirm the consumer expectation approach adopted in the Restatement Second. Third, it could continue the product-focused approach then in use by most jurisdictions. Or fourth, it could propose a new approach of its own. In the Restatement (Third) of Torts: Products Liability, the ALI adopted a middle-ground position between the third and fourth alternatives. Although it embraced a product-focused perspective for some cases, it adopted a functional approach overall. Unfortunately, the Restatement Third approach did not solve the consumer-use dilemma. Indeed, in some ways, it actually made the problem worse. Later in this part, I shall review its deficiencies. To fully understand these flaws, however, it is first necessary to examine the Restatement Third's conceptual scheme and to identify the policy objectives it was intended to serve.

A. Policy Objectives
Justice Traynor's original theory of strict products liability was created to serve a number of policy objectives. Among these objectives was the protection of powerless consumers, both by heightening the manufacturer's duty of precaution and by alleviating the consumer's burden of proof. At first, these policy goals justified the move to strict liability. As time passed, they provided a litmus test of its efficacy.

Aware of these objectives, and their importance to products liability law, the Reporters of the Restatement Third began that project with a revised policy agenda of their own. Comment a to section 2, entitled "Rationale," provides a detailed list of objectives. These objectives can be grouped into two general categories: efficiency and fairness.

The Restatement Third's main efficiency goal is to reduce the costs of product-related accidents. The best way to achieve this goal is by preventing accidents in the first place. The Restatement Third strives for two forms of accident avoidance. First, it seeks to force manufacturers to adopt optimal levels of product safety. Second, by forcing manufacturers to absorb accident costs and raise product prices, it hopes to discourage consumers from buying and consuming defective goods. When accidents do occur, the Restatement Third seeks to reduce the costs of litigating and settling the resulting claims, often by alleviating the plaintiff's burden of proof.
The fairness objectives attempt to prevent excesses and deficiencies among manufacturers and consumers. [FN179] Manufacturers owe consumers a duty of reasonable care. When a manufacturer breaches this duty, it gives less safety and takes more profit than it deserves. The manufacturer also retains exclusive control over information vital to the issue of fault. [FN180] The Restatement Third hopes to correct these deficiencies by relaxing consumers' evidentiary burdens and shifting those burdens to manufacturers. [FN181] In addition, bad products disappoint consumer expectations, giving consumers less value and safety than they deserve. [FN182] The Restatement Third hopes to restore the benefit of the consumer's bargain by requiring manufacturers to live up to their promises. [FN183] Finally, while some consumers sustain crushing product-related losses, many others escape without any loss whatsoever. [FN184] The Restatement Third seeks to remedy this imbalance. [FN185] By forcing manufacturers to pay accident costs, which in turn are added onto product prices, the Restatement requires all consumers to share both the benefits and burdens of product usage. [FN186]

Although ambitious, the Restatement Third's policy objectives are not unrealistic. As the comments make clear, both the efficiency and fairness objectives are constrained by a number of practical limitations. Regarding efficiency, the Restatement seeks only optimal product safety, not perfection. [FN187] According to comment a of section 2, "Society does not benefit from products that are excessively safe . . . any more than it benefits from products that are too risky." [FN188] Some accident costs simply cannot be eliminated without "excessively sacrificing product features that make products useful and desirable." [FN189] Such costs result primarily from consumer misuse. [FN190] As comment a acknowledges, "(A) reasonably designed product still carries with it elements of risk that must be protected against by the user or consumer." [FN191] Since these risks cannot be designed out of the product at reasonable cost, efficiency does not demand protection against them. In the Restatement Third's own words, manufacturers need not "foresee and take precautions against every conceivable mode of use and abuse to which . . . products might be put. Increasing the costs of designing and marketing products in order to avoid the consequences of unreasonable modes of use is not required." [FN192]

Consumer use also affects the search for fairness. The Restatement Third endorses loss spreading only when product accident costs result from proper product uses. [FN193] In this situation, the injured consumer is an unfortunate victim of circumstance. Although he plays by the rules of usage, he alone bears the burden of loss. Here, fairness shows him some sympathy by lifting his burden and redistributing it to those more fortunate. However, when a consumer misuses a product, fairness owes him no favors. The misuser is more of a cheater than a victim. [FN194] He puts products to uses that others forego, and he creates risks that others avoid. Thus, when his misuse results in a self-inflicted injury, he has no right to expect relief from his neighbors. As the Restatement Third observes, "requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices." [FN195] Seen in this light, the Restatement Third's objectives are not unlike those of Justice Traynor. Responsible consumers deserve the full protection of the law. Under both fairness and efficiency rationales, good consumers should be safe from unreasonable product risks, and should be aided in their fight to redress their injuries. However, bad consumers do not deserve the same treatment. By putting products to improper uses, they force manufacturers to make inefficient choices, and force fellow consumers to pay unfair costs. Thus, bad consumers should shoulder greater shares of responsibility and should bear tougher burdens of proof.
B. The Functional Approach

Apparently, the ALI did not believe that its policy agenda could be successfully carried out by any previous approach to products liability. Thus, it adopted a new, functional approach to serve its ends. Although this approach differs from its predecessors in some respects, in many others it remains quite familiar.

The biggest difference is its shift in organizing principles. Past products liability law was organized around liability concepts. To prevail, plaintiffs had to plead and prove the correct theory of liability. Negligence required proof of the manufacturer's fault. Strict liability required defectiveness. The implied warranty of merchantability required unfitness. Express warranties and misrepresentation required false assertions of fact and reliance. Under the Restatement Third, "(t)he rules are stated functionally rather than in terms of traditional doctrinal categories." So long as the requirements of the Restatement Third are met, "doctrinal tort categories such as negligence or strict liability may be utilized in bringing the claim."

The Restatement Third approach is functional in two senses. Its primary function is to make substantive distinctions in the law, depending on the type of defect alleged by the plaintiff. Under prior law, the theory of strict liability could apply to any and all defect claims. Whether the product was defective in design, manufacture or marketing, the plaintiff faced roughly the same elements of proof. However, section 2 of the Restatement Third rejects such a "one-size-fits-all" approach to liability. Instead, it creates different substantive requirements for each defect theory.

For example, in manufacturing defect cases, the plaintiff must show only that the product departs from its intended design, even though the manufacturer exercised all possible care in its preparation and marketing. By contrast, a plaintiff asserting a design or warning claim must demonstrate that the product's foreseeable risks exceed its utility.

The Restatement Third's other function is to further adapt its requirements when common sense and public policy so require. For instance, in design cases, the plaintiff generally cannot prevail unless he proves the availability of a reasonable alternative design. However, if the product's design is manifestly unreasonable, no proof of an alternative is required. Similarly, the Restatement Third recognizes that under certain circumstances--specifically, where the product fails to perform its manifestly intended function--a jury is warranted in drawing an inference of defectiveness. In such cases, the plaintiff need not identify the product's defect nor provide additional proof of its existence. Finally, the Restatement Third provides that a product's noncompliance with a safety statute or administrative regulation "renders the product defective with respect to the risks sought to be reduced by the statute or regulation." Thus, when such a violation exists, the plaintiff is freed from the strictures of section 2.

This is where the Restatement Third's functionality runs out. In most other important respects, it simply continues the product-focused approach that came before it. As noted above, the Restatement Third is organized around the concept of product defectiveness. To determine the question of defectiveness, section 2 ostensibly focuses on the product itself. In manufacturing defect cases, the fact finder must compare the product to its design specifications. In all other cases, the fact finder must weigh the product's risks against its utility.
Like past approaches, the Restatement Third's risk-utility test considers a wide array of factors. Some factors—like "the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, . . . the likely effects of the alternative design on production costs, and the effects of the alternative design on product longevity, maintenance, repair, and esthetics"—pay close attention to the product's overall production profile. [FN221] However, other factors search for additional information, like "the nature and strength of consumer expectations regarding the product (and) the range of consumer choice among products." [FN222] Thus, like its predecessor, the Restatement Third's risk-utility test is product-focused in name only. When it comes to addressing consumer-use issues, the Restatement Third is only slightly more forthcoming. It appears to select a definite test for distinguishing actionable from excluded uses. [FN223] According to section 2, comment m, liability attaches "only when the product is put to uses that it is reasonable to expect a seller or distributor to foresee." [FN224] It also opines on the nature of consumer-use evidence, stating that "misuse, modification, and alteration are not discrete legal issues." [FN225] Instead, they are merely "aspects of the concepts of defect, causation, and plaintiff's fault." [FN226]

In all other respects, the Restatement Third either perpetuates or exacerbates past uncertainties. It provides no tangible guidance for determining whether consumer use should be analyzed as a question of defectiveness, causation, or comparative fault. [FN227] It *782 simply offers the following observation: "Whether such conduct affects one or more of the issues depends on the nature of the conduct and whether the manufacturer should have adopted a reasonable alternative design or provided a reasonable warning to protect against such conduct." [FN228]

Moreover, no matter which concept is at issue, the Restatement Third offers little advice for determining how misuse evidence should affect the analysis. [FN229] At best, it explains that "(t)he post-sale conduct of the user may be so unreasonable, unusual, and costly to avoid that a seller has no duty to design or warn against them." [FN230] On the allocation of the burden of proof, it takes no position at all. [FN231] It simply observes that jurisdictions differ on the impact of consumer misuse, then leaves the entire matter to local law. [FN232]

In the few areas in which it is specific, the Restatement Third actually seems to contradict itself. As noted earlier, the Restatement Third explicitly limits consumer-use evidence to the issues of defectiveness, causation, and plaintiff fault. [FN233] However, in the explanatory reference quoted above, the Restatement Third appears to offer a fourth alternative. Where the misuse is extremely bizarre or unreasonable, the manufacturer actually owes no duty to design or warn against it. [FN234] This observation carries enormous significance. If consumer misuse is an issue of defectiveness, causation, or comparative fault, then it usually must be presented to a jury for factual determination. However, if misuse negates the manufacturer's duties, then it may be invoked by the court to dismiss the action as a matter of law.

The Restatement Third also vacillates on its consumer-use standard. As indicated above, comment m to section 2 appears to adopt a broad foreseeability standard. [FN235] Strictly construed, this standard holds manufacturers responsible for all forms of misuse, *783 so long as they are foreseeable. [FN236] It makes no distinction between reasonable and unreasonable uses, [FN237] or between intended and unintended uses. Elsewhere, however, the Restatement Third seems to be more discriminating. For
example, comment m later states that manufacturers are not required to guard against "every conceivable mode of use and abuse." [FN238] Similarly, comment p says that certain misuses may be so unreasonable or costly that they fall beyond the manufacturer's duty of care. [FN239] The Restatement Third neither acknowledges the conflict, nor provides a means of resolving it. [FN240]

In the final analysis, the Restatement Third's functional approach raises as much doubt as it removes. This is a problem in itself. If the primary goal of the Restatement Third is to clarify the law, then it leaves much to be desired. But this is not its only, or even its most serious, drawback. As will be discussed below, it also creates more fundamental problems of public policy.

C. Policy Problems
As noted earlier, the Restatement Third's chief policy goals are to make products liability law more fair and efficient. [FN241] Because the functional approach has not yet been widely adopted, it is impossible to tell whether the Restatement achieves its objectives. However, judging from its theoretical structure alone, its prospects are not encouraging. Indeed, upon close analysis, the functional approach seems destined both to increase accident and transaction costs and to distribute these burdens in an unfair manner. [FN242] If this prognosis is correct, then the functional approach is not just slightly askew, it is decidedly dysfunctional.

The Restatement Third seeks to promote efficiency by preventing product-related accidents and by expediting the claims that follow. [FN243] Unfortunately, it fails on both counts. According to the Restatement, accident avoidance is best achieved by giving *784 manufacturers incentives to invest in optimal levels of product safety. [FN244] However, the Restatement Third provides no such incentives. [FN245] In fact, it sends a mixed, and ultimately confusing, message. It says that consumer use may be reasonable or merely foreseeable; [FN246] may be part of the plaintiff's case or an affirmative defense; [FN247] may relate to defectiveness, causation, or plaintiff's fault; [FN248] and may be determinative, probative, or simply irrelevant to the question of liability. [FN249]

The Restatement does not determine, or even seek to clarify, who bears what responsibility for which consumer uses. [FN250] Without such guidance, manufacturers will not know how to build their products and juries will not know how to judge them. Verdicts will be unpredictable and inconsistent. Invariably, products reasonably suited for most consumers, but misused by a few, will be condemned as defective. These misuse costs will be passed on to manufacturers with an ominous warning: make foolproof products or be destroyed by the fools who exploit them. Faced with this prospect, manufacturers will have little choice but to overinvest in safety.

Another way to prevent product accidents is to force consumers to make better choices. The Restatement provides no incentives here either. In a perfect world, the price of every product would reflect the risks of reasonable use. Indeed, reasonable consumer use would establish a definite and definitive risk baseline. If manufacturers unreasonably increased these risks--specifically, by marketing products unfit for their intended or ordinary uses--they would be held liable. These defect costs would then be added onto the price of their products. The worse the product, the more expensive it would become. By comparing prices, consumers could identify these bad products. Presumably, they would choose to buy only cheaper, safer alternatives. As the market for dangerous products declined, their manufacturers would have to invest more in safety to avoid being put out of business. Unfortunately, the Restatement Third makes no attempt to create
By adopting a broad foreseeability test, it holds manufacturers potentially liable even for some unreasonable product uses. These fluctuating misuse costs are added onto the product's purchase price. Because the Restatement Third does not distinguish between reasonable and unreasonable uses and does not specify who should bear their consequences, such costs will be spread in a random and unpredictable manner. Thus, a price-shopping consumer would not know if a particular product really is dangerous or if it is simply subject to a lot of consumer abuse. Nor could he tell if a particular manufacturer was derelict in its duties or merely unlucky in court.

Once a consumer selects a product, the Restatement Third provides him no incentive to use it prudently. Obviously, consumers do not want to be injured. Thus, they have a built-in incentive to act safely. However, in the ebb and flow of everyday life, this instinct sometimes is ignored or repressed. The Restatement Third permits the consumer to keep his guard down. Under the foreseeability standard, no product use is ever forbidden. Because manufacturers have a duty to predict and prevent product misuses, consumers may develop a false sense of security. Comforted by this cloak of protection, they may believe that they have little or no responsibility for product safety. Even when not so deluded, consumers often have no way of knowing what their responsibilities are. Certainly, nothing in the Restatement Third makes this clear. Should a consumer sustain injury, and later file suit to redress his damage, he will enjoy the same generous burden of proof whether he intentionally misused the product or put it to an intended use. Any misuser who succeeds in his action will be rewarded for his unreasonable risk-taking behavior. Such a verdict, even if reduced in size, will carry the message that misuse is not a serious matter. As media attention towards products liability cases continues to swell, this message is sure to be broadcast loud and clear to other consumers.

Inadequate consumer incentives mean more product-related accidents. When these accidents occur, the Restatement Third proves equally inept at reducing their transaction costs. In tort cases, transaction costs take the form of litigation expenses. To be efficient, society must optimize both the number of its lawsuits and the time and expense for trying them. The Restatement Third actually subverts each of these objectives. Because no consumer is ever disqualified by his misconduct, the Restatement invites accident victims to file suit. Because consumer misuse evidence is so indeterminate, courts generally may not dismiss these actions as a matter of law, but must submit them to juries for factual analysis. In this way, the functional approach of the Restatement Third both increases the number of lawsuits and ensures that they will remain longer in the court system. Once these cases go to trial, consumer-use issues clog and complicate the litigation. Under the Restatement, consumer usage is relevant to the determinations of defectiveness, causation and comparative fault. Thus, the parties may raise this issue at various stages of the trial and may argue it in a variety of different ways. To establish consumer usage, both sides must offer a plethora of evidence, including first and third party eyewitness accounts, records of prior similar accidents, and testimony by engineers, economists, physicians, behavioral psychologists, accident reconstructionists, and human factors experts. Instead of streamlining the litigation process, the functional approach actually makes it more complex and protracted.

If this were not bad enough, the Restatement Third also delegates its litigation burdens in an inefficient manner. Misusers often put products to uses that other consumers do not. In many cases, such misuses are consciously adapted to achieve idiosyncratic objectives. As the creator of the new product use, and the sole beneficiary of its unique objective, the misuser frequently possesses the best knowledge of and control over its special risks. Thus, he is uniquely positioned to explain and justify that risk to others. To disgorge this information, the law should elevate the misuser's burden of proof. The Restatement
Third, however, does not. Instead it delegates the same burden of proof to users and misusers alike. Thus, besides encouraging frivolous lawsuits, the Restatement increases the chance that the cheapest risk-avoider will escape liability.

Many of the features that make the Restatement Third inefficient also make it unfair. Fairness is a relational concept that involves giving someone more or less than he deserves. In resolving accident disputes, products liability law must seek fairness in three types of relationships: among all manufacturers of a particular product, among all consumers of that product, and between each manufacturer and each consumer of that product. In all three of these relationships, the Restatement Third is guilty of unfair treatment.

The Restatement does not even attempt to treat all like manufacturers alike. For example, in design and marketing defect cases, a manufacturer's liability depends on the reasonableness of his choices. Under a reasonableness analysis, bad manufacturers are punished for making bad production choices. Here, the disparate treatment is deserved. However, in manufacturing defect cases, the Restatement Third treats all manufacturers the same. According to subsection a of section 2, if a product deviates from its intended design, it is considered defective no matter how much care the manufacturer used to make it. Under this "deviation" test, careful manufacturers are condemned along with the careless. The makers of grossly misused products are just as liable as those whose products fail during intended use. Although the Restatement Third's lack of differentiation attempts to correct an imbalance between manufacturers and consumers, it actually perpetuates unfair results between good and bad manufacturers.

The Restatement Third's treatment of consumers is no better. Some consumers are extremely careful and obedient. They use products only for their intended purposes. Other consumers are reasonable but not obsessed with safety. They put products to unintended but normal uses. Still other consumers are reckless and irresponsible, using products in ways that are bizarre and idiosyncratic. Finally, some consumers are just downright criminal or destructive. They put products to illegal or inherently dangerous uses. The Restatement Third ignores these differences. It lumps all consumer groups together. So long as their uses are foreseeable, each group is entitled to equal protection under the law. When consumers invoke this protection, the Restatement Third offers them all the same burden of proof. Like the model consumer, the serious misuser need only prove that a defect caused his injuries. While product usage may affect this analysis, it also may not, and it certainly is not determinative.

Once misusers prevail in their actions, the Restatement Third continues to spread its unfairness to future consumers who buy the same product. Defective products create an unreasonable risk of injury, even during normal usage. These defect risks face all consumers who use that product for its intended purpose. Because any consumer may succumb to this risk, fairness requires that all consumers pay for protection against it. Their contributions take the form of loss spreading. The manufacturer is held liable for the defect. To defray the judgment cost, it must raise the price of its product. In buying the item at the increased price, new consumers reimburse the victim for a loss that they themselves may later incur. However, in cases of consumer misuse, the justice of this scheme disappears. The misuser does not act like everyone else. By putting products to extraordinary uses, he exposes himself to dangers different both in degree and kind from others similarly situated. When he files a products liability action, he attempts not just to
mulct the manufacturer, but also to transfer his misuse costs to the consuming public. If successful, the misuser retains the benefit of unbridled discretion while escaping all of its consequences. His benefactors, by contrast, gain nothing and lose much. Besides being careful, they must pay for the carelessness of someone they do not know and cannot control. Fairness abhors this imbalance. It seeks proportionality and equality in transactions. Fairness does not favor rule-breakers, and it certainly does not require rule-abiders to subsidize the rule-breakers’ misdeeds.

Of its many fairness problems, the Restatement Third fares worst in its handling of the manufacturer-consumer relationship. In marketing products, manufacturers offer risk-benefit packages to the public. Their obligation, under the law, is to offer a package in which the benefits exceed the risks. Both the benefits and risks of this package are tied to consumer use. The manufacturer defines a product’s intended and expected uses. It then designs and prices the product so that, when the product is put to such uses, its benefits will outweigh its risks. When a consumer buys the product, he is entitled to expect such a package. If he receives something less, he is wronged. The manufacturer, by skimping on safety, enjoys a wrongful gain. The consumer, by receiving excessive risk, suffers a wrongful loss. However, such unfairness is reversed when the consumer misuses the product. Misuse increases product risk. The more unusual and outlandish the use, the greater that danger becomes. This heightened danger alters the risk-benefit package offered by the manufacturer. It can turn an otherwise valuable product into an instrument of destruction. When the risk of the misuse exceeds its benefits, such that the manufacturer would not have been justified in marketing the product for that purpose, the consumer cannot claim the manufacturer’s protection. Here, the consumer, not the manufacturer, creates the risk that makes the product package unreasonable. If the manufacturer is forced to account for this idiosyncratic risk, injustice results once again. This time, the consumer receives a wrongful gain by extorting a protection he does not deserve, and the manufacturer bears the wrongful loss of paying for that precaution.

In sum, the Restatement Third actually undermines rather than promotes its own public policy agenda. Although it adapts the law to suit different circumstances, it is hopelessly unclear. This uncertainty is especially pronounced in the area of consumer use. By leaving consumer-use issues to a case-by-case determination, the Restatement Third compromises both its fairness and its efficiency. To correct this problem, the functional approach need not lose its identity; it need only earn its title. To do this, it must recognize the difference among different product uses, and must treat different product users differently. The next Part of this article proposes an approach that can accomplish both objectives.

IV. The Consumer-Use Approach

Differentiation requires classification. Both the Restatement Third and most jurisdictions currently classify products liability cases according to the defect-type alleged by the plaintiff. But this is not the only possible basis of classification. Long before this approach emerged, courts had developed a classification system for premises liability cases. This system classifies entrants according to their status upon and use of someone else’s property. While the entrant classification system is adapted to different circumstances, it continues to serve policy objectives similar to those in products liability cases. Thus, this system supports the creation of a consumer-use approach to products liability law. Subsection A of this Part will delineate the criteria for constructing a legal classification system and explain the policy benefits that such a system has to offer. Next, Part B will examine the entrant classification system of premises liability and highlight its analogic relevance to products liability cases. Finally, Part C will detail the consumer-use...
approach to products liability law and show how it meets the demands of fairness and efficiency.

A. The Form and Function of Legal Classification
All classification systems separate, organize, and distinguish. However, legal classification systems serve a more specific and important function: they categorize persons, places, and things for the sake of assessing and assigning rights and responsibilities. To perform this function, such systems must assume a particular form. They must be selective, including and excluding subjects from each category. They must be ascriptive, assigning status to subjects depending on their inherent characteristics. They must be adaptive, changing status ascriptions from category to category. They must be integrative, coalescing various analytical considerations and synthesizing these with procedural stratagems. Finally, they must be decisive, drawing bright lines between each classification category. If a consumer-use classification system is going to work, it simply must be fit in both form and function.

Selectivity means drawing distinctions and making choices. In products liability cases, there are three groups open to selection: consumers, manufacturers, and products. Thus, liability could depend on consumer status and/or use, manufacturer status and/or conduct, or product type and/or defect. No matter which criterion is chosen, the subjects meeting that description must be grouped into separate subcategories of treatment. Although modern products liability law differentiates products by defect-type, this was not always the case. As noted earlier, Justice Traynor originally sought to differentiate consumers by their usage patterns. [FN255] Either way, the selection process itself serves two important functions: it promotes efficiency by predetermining group differences, and it promotes fairness by treating different groups differently.

*791 Selectivity, however, is not alone sufficient for either purpose. To be fair and efficient, the chosen categories must be based on dependable criteria. Ascriptiveness defines these criteria. Specifically, ascriptiveness identifies for each category some quality or characteristic that makes it unique. Current law ascribes independent status to product defects, distinguishing among manufacturing defects, design defects, and marketing defects. However, these ascriptions are flawed. Despite their disparate categorization, all three defect-types are more similar than different. Any product defect can be dangerous, and no defect-type is inherently more dangerous than any other. In addition, all actionable defects are unreasonable. Whether ill-conceived, improperly constructed or inadequately labeled, every defective product violates some social standard of acceptability. Most importantly, any defect can result from either conscious choices or inadvertent mistakes. At first this sounds anathema. Conventional wisdom says that design and marketing defects result from deliberative judgments, while manufacturing defects result from execution errors. But this is hardly the case. No doubt, many design and marketing problems derive from bad engineering concepts. However, many more derive from sloppy research, inaccurate risk calculations, or faulty testing protocols. Conversely, many manufacturing flaws surely result from production-line errors. Yet many others result from poorly designed manufacturing processes and miscalculations in quality control measures.

In contrast to these defect-based ascriptions, consumer-use ascriptions may be easier to define and defend. Usage characteristics are defined by manufacturer intent and consumer custom. As consumer use deviates from normal product function, danger increases in kind. At each stage of the continuum, the product's risk-benefit profile changes, assuming new and unique dimensions. Recognizing this fact, Justice Traynor
distinguished between intended and unintended product uses. [FN256] By further correlating product use to product risk, other ascriptions might be made. Indeed, the choices are many and varied. However, whatever ascriptions are chosen, each is bound by two imperatives: *792 it must accurately define the subjects in each category, and it must convincingly distinguish each category from all others.

If the ascriptions are right, they justify treating their subjects differently from those in other categories. Well-crafted classification systems adapt their requirements in this way. In legal contexts, the adaptability criterion permits gradations of liability, each carefully calibrated to address the unique concerns of cases in that category. The Restatement Third already embraces an adaptable approach for products liability cases. In fact, the Restatement's adaptability is what makes its functional approach functional. Under this approach, liability requirements vary depending on a product's defect-type. Plaintiffs asserting manufacturing defects may rely on the theory of strict liability. [FN257] By contrast, plaintiffs alleging design or marketing defects generally must satisfy the same risk-utility balancing test used in negligence. [FN258]

Although headed in the right direction, the Restatement Third approach ultimately veers off track. The problem is not that the Restatement employs an adaptive liability scheme. Rather, the problem is that its gradations are unfounded, fuzzy, and insufficient. There is no evidence to show that manufacturing defects occur more frequently, or cause more serious injuries, than design or marketing defects. There also is no proof that manufacturers which sell products with manufacturing defects are more derelict or deserve more punishment or deterrence than manufacturers which sell products with design or marketing flaws. Likewise, no one would contend that a consumer who misuses a poorly manufactured product is more culpable than one who misuses an item that is defectively designed or marketed, or that the first consumer deserves more protection or less deterrence than the second. If a consumer misuses a product, then he should bear some responsibility for his actions, regardless of the product's defect-type. Indeed, the more dangerous the consumer's misuse, the greater his burden should be. To be fair and efficient, a liability scheme must adapt its requirements to treat different consumers differently. Any scheme that fails to do so is either incomplete or indefensible.

*793 It is one thing to create adaptations, but quite another to implement them. Some adaptations require a unilateral approach. Criminal codes fall into this category. Because crimes are inherently antisocial, they may be punished even if they cause no actual harm. In fixing a sanction to fit the crime, the code need only focus on the offender by examining his mental state and the details of his offense. However, other adaptations, like those found in tort law, require an integrative approach. Because every tort has a victim, all torts are relational by nature. Within this broad class, some torts are also relational by circumstance. This is true of products liability cases. Here, both the manufacturer and consumer plan their transaction, and each contributes to the product risk. In these cases, the law must integrate its analysis of act and consequence, and of product condition and consumer use.

Besides these conceptual adjustments, the law also must integrate substantive and procedural requirements. Tort scholars often identify liability regimes by their theories and doctrines. However, such regimes actually operate on burdens of production and proof. In many cases, the allocation of these burdens may have a greater effect on the determination of liability than any substantive rule. To be fair and efficient, such allocations should track consumer usage. Since good and bad consumers create different
levels of product risk, they should not be treated alike. Cautious consumers should face fewer evidentiary burdens than product misusers. Indeed, modern products liability law was founded on this very premise. As Justice Traynor explained, only consumers injured during intended product use deserve preferential treatment; all others should be left to their own devices. [FN259]

In the end, none of these classification criteria matter unless the classifications themselves are clear. For a classification system to be clear, the delineations within and between categories must be decisively drawn. If decisive, these delineations serve the ends of fairness and efficiency. Drawing bright lines ensures that similar matters will be treated alike and will not be handled randomly or inconsistently from case to case. At the same time, such classifications establish fixed rules of responsibility. From these rules, people can better predict their liabilities and alter their conduct accordingly. This does not mean that all liability *794 classifications will always be determinate. In some cases, a more flexible balancing process may be required. It does mean, however, that the system will not be swayed by passion or prejudice, but will be governed by policy and principle.

B. The Entrant Classification Model

Through the years, tort law has used a variety of different classification systems. Originally, torts were classified according to the form of the defendant's action. Forceful acts were treated as trespasses; all others were considered trespasses on the case. [FN260] Today, torts are classified according to the culpability of the defendant's conduct. Deliberate wrongs are covered by intentional torts, accidental wrongs are handled by negligence, and faultless wrongs are subject to strict liability. [FN261]

Tort law also has developed a number of more specific subclassifications. Indeed, these subclassifications are especially prevalent in the field of products liability. Virtually all products liability subclassifications are based on product characteristics. Early on, courts distinguished imminently dangerous products from all others. [FN262] Later, courts differentiated products by their defects. [FN263] Still other products, like those deemed unavoidably unsafe, were singled out for special treatment. [FN264] Indeed, the Restatement Third not only retains the defect classification approach, it creates special subclassifications for prescription drugs, [FN265] medical devices, [FN266] and products with manifestly unreasonable designs. [FN267]

In 1944, Justice Traynor laid the groundwork for a different approach. He argued that strict products liability should be limited by consumer use. [FN268] Unfortunately, Traynor never explained how *795 this approach was supposed to work or why he had created it in the first place. Nevertheless, Traynor's approach had a ring of familiarity. Since its golden age, tort law had employed a restrictive classification system in premises liability cases. [FN269] This system, known as the entrant classification system, still exists today. It treats different plaintiffs differently depending on why they entered and how they used the property in question. [FN270] Although Traynor himself never cited this system as a source of inspiration, it seems to provide compelling support for his consumer-use approach.

The entrant classification system recognizes three plaintiff classifications. The first classification is for trespassers. Trespassers enter property without express or implied consent. Because they have no right to enter, they receive little protection under the law. [FN271] In most cases, their only entitlement is to be free from willful or wanton
aggression. [FN272] The second classification applies to licensees. A licensee has permission to enter the property; [FN273] however, he typically enters for his own advantage, often as a social guest. [FN274] Because licensees have a right to enter, they are owed greater protection than trespassers. [FN275] Like trespassers, licensees enjoy a freedom from willful aggression. However, unlike their uninvited counterparts, licensees also are entitled to receive warnings about known dangers. [FN276] The third classification includes invitees. Like licensees, invitees enter property with permission; however, they alone do not benefit from the visit. [FN277] Typically, they confer an economic benefit upon the occupier, who holds the premises open as a commercial establishment or public meeting place. [FN278] Because the occupier induces the entry, the invitee receives the greatest protection of all. *796 Indeed, he is owed a full duty of reasonable care. [FN279] This duty, however, changes with the circumstances. While in some cases it may require as little as a warning, in others it may require the occupier to inspect the property and eliminate its dangerous conditions. [FN280]

In form, the entrant system bears all of the hallmarks of sound legal classification. It selects property users and places them into separate conceptual categories. Each category ascribes characteristics to its members that make them unique. It adapts its treatment of each group, affording its members greater or lesser protection depending on their status. By examining both the property's condition and its usage, the system takes an integrative approach to liability. Finally, it accomplishes these objectives in decisive fashion. While the application of the classifications may not always be clear, the rules within each category create a reasonably definite scheme of responsibilities.

This system also serves the functions of efficiency and fairness. Like all classification systems, the entrant system's efficiency depends on its predictability and consistency. In this regard, it need not be perfect. Like all classification systems, the entrant system sometimes raises difficult questions of interpretation and application. Most notably, it may not be clear whether an entrant is a licensee or an invitee, or how his status might change over time. [FN281] Nevertheless, in both substance and procedure, it is more certain than the general standard of reasonable care. It tells people what to do to avoid liability. It reduces the number of lawsuits, especially those filed by trespassers. It restricts the issues and arguments that may be litigated at trial, and it gives courts greater power to dispose of such cases as a matter of law.

The fairness function in this system is less obvious. Indeed, some courts have criticized the entrant system as both unfair and *797 inhumane. [FN282] At first glance, this criticism seems well-founded. The entrant system creates an inverse pyramid of rights. Within this lopsided structure, the invitees at the top clearly receive far greater protection than the trespassers at the bottom. However, closer scrutiny reveals a different truth. The classification system actually displays proportionality and balance. Property risks are relational; they arise not just from the occupier's maintenance of the property, but also from the entrant's use of it. In some cases, the occupier possesses greater power over this risk. In others, the parties are equally equipped to avert danger. In still others, the entrant is in a superior position to protect himself from harm. The entrant system merely predicts these situations and plots the parties' liabilities along a sliding scale of responsibility. [FN283]

In each classification, the plaintiff's usage serves as the appropriate trigger. Property risks are inert. They are activated, if at all, only when someone puts the property to a particular use. Trespassers use property without permission. Thus, their use is self-
controlled, self-serving, and wrongful. Consent is a property owner's first order of control over premises risks. By withholding consent, an owner can guarantee outsiders absolute safety from the conditions on his property. Trespassers bypass this protection. By entering the property without permission, they open the gates to danger and step into its lair. In doing so, trespassers exercise exclusive control over their own well-being. Once taken, this entry benefits only the trespasser and holds no advantage for the property owner. In his eyes, the entry is both an unexpected and unwelcome intrusion. In fact, such an intrusion is more than a *798 source of inconvenience or annoyance; it is a threat to the owner's rights and a rebuke of his moral authority. Despite the trespasser's own willful action, the entrant system protects him against willful retaliation. This limited protection is all he deserves. As one treatise explains, "Intruders who come without (the owner's) permission have no right to demand that he provide them with a safe place to trespass, or that he protect them in their wrongful use of his property." [FN284]

Licensees enter on different terms. By giving consent to the licensee, the property owner exposes him to the hazards on his premises. By accepting the invitation, the licensee chooses to enter the danger zone. Often, the owner has limited control over property risks. This is particularly true of private property owners, whose residences are self-serving. They meet their own needs and desires and generally do not hold their premises open to the public. On these premises, home safety is a family chore. Homeowners do not have employees patrolling their grounds. They are not trained or experienced in the prevention, detection, and correction of property hazards. They do not receive regulatory supervision and are not advised by safety experts. As a result, private residences tend to be dangerous places. As one Kansas Supreme Court Justice has noted:

> Residences are designed to please the homeowners and meet their needs and wants. A residence reflects the homeowners' individuality and is equipped and operated by the homeowners according to how they want to live. We live in the age of the do-it-yourselfer. Few homes would meet OSHA's standards, and few individuals would desire to live in such a home. Modern businesses do not have polished hardwood floors, throw rugs, extension cords, rough flagstone paths, stairways without handrails, unsupervised small children, toys on the floor, pets, and all the clutter of living--homes do. There are good reasons behind the old adage that most accidents occur in the home. [FN285]

*799 When the homeowner admits a social guest, he often places no express restrictions on his consent. Thus, "(r)eatives and close friends wander at will, making themselves at home, as the saying goes." [FN286] Under these circumstances, "(t)he homeowner simply does not have the awareness of all guests' locations in mind at all times or even know where they might be." [FN287] The entrant, on the other hand, treks freely and willingly through unknown territory. He is there for his own pleasure, at the pleasure of his host. He expects fellowship, not security. He expects common courtesy, not professional expertise. In short, "(s)ocial guests and hosts take each other as they are, in a relaxed informal situation." [FN288] The only exception is for known risks. Because the homeowner lives in the home, he alone knows of its hidden hazards. [FN289] Thus, he is expected to impart this knowledge to his guest. [FN290] Once this is done, however, both host and guest stand on equal footing in their ability to avert further danger. [FN291]

Similar equities prevail when a licensee enters a business. Of course, the background circumstances are different. Unlike private homeowners, businesses are premises
experts. They are held open to the public. They typically control where entrants can and cannot go. However, business licensees are not like regular customers. They come without a business purpose, or their business purpose has expired. [FN292] In many cases, they seek entry into spaces usually kept off-limits to the general public. [FN293] By definition, the licensee asks much and gives nothing, by way of an economic benefit, in return. Instead, the licensee stirs up danger by venturing into areas not designed or prepared for his presence. In this way, he is not unlike a social guest. A gratuitous and privileged visitor, he takes *800 the premises as he finds them. So long as he is told of the dangers awaiting him, the licensee can navigate that minefield on his own.

True business transactions present a different case altogether. As noted above, businesses are neither self-serving nor self-executing. They exist to serve their customers. They invite public visitation, often receiving hundreds or thousands of patrons every day. They are designed, built, operated, and inspected by professionals. [FN294] They are staffed by people who are paid to keep them safe. They even control customer traffic, channeling patrons through limited and predictable pathways. The business invitee, on the other hand, is powerless and vulnerable. He does not make most of what he consumes. He relies on businesses for both necessities and luxuries. Although he is a free agent, his choices are manipulated by advertising and signage. Invariably, these inducements include promises of comfort and safety. Relying on these assurances, he foregoes opportunities to visit other stores. When he enters an establishment, he lacks the ability, authority, and inclination to secure the premises. He comes to shop for goods, not to inspect for dangers. He cannot change store policy, personnel, or conditions. Instead, he relies on the business to protect his interests. By coming to the store, he offers the owner the benefit of his dollar. All he expects in return is a reasonably safe environment in which to spend it.

Like property entrants, product consumers are not all the same. Indeed, the analogy between the two groups is strong on several levels. Consumer transactions, like property transactions, are inherently relational. The manufacturer creates the product, and the consumer puts it to use. Both the characteristics of the product and its usage determine its dangers. Like property uses, consumer uses create different levels of danger. The greatest danger arises from criminal or intentionally destructive uses. Consumers who seek to damage the product, themselves, or others are like trespassers. They harbor an illicit motive, they operate on self-interest, and they behave in ways that are unsolicited, unexpected, unwanted, and illegal. Other unintended product uses pose less, though still significant, danger. Indeed, most off-purpose users are much like licensees: they do what they like, they pursue self-serving and idiosyncratic ends, and they venture *801 forward with knowledge that their course has not been prescribed or prepared for their protection. Intended product uses pose the least danger of all. Like invitees, intended users rely upon experts, act as directed, and follow usages that are predictable, desirable, and safe.

Relational dynamics in the two areas are similar as well. Like trespassers, criminal or destructive product users create and control the dangers they face. Products, like property, can only be made so safe. Those who deliberately circumvent these safeguards do not deserve, and cannot expect, to be protected from their own mischief. Like licensees, unintended or idiosyncratic product users know that their actions take them into unknown or unsecured territory. As a result, they know, or should expect, that they tread outside the safety zone created for their benefit. Finally, intended product users, like invitees, are vulnerable to exploitation and injury. Seduced by promises of safety, intended users give over their trust, do as they are told, and place themselves in the
hands of strangers. To reduce their vulnerability, the law burdens their caretakers with strict responsibilities and affords them the fullest protection under the law.

The analogy breaks down only in practice. As a liability system, the entrant classification model sometimes falters. In certain scenarios, it cannot distinguish licensees from invitees. Indeed, under the economic-benefit test, virtually any entrant may be classified as an invitee if he confers upon the property owner some remote future benefit. \[\text{[FN295]}\]

In other cases, the entrant system yields irresolute determinations. As he moves about the premises, the entrant's status may constantly shift, changing from invitee to licensee to trespasser and back again, all in the same visit. \[\text{[FN296]}\] In its worst-case scenario, the entrant approach may even produce questionable results. \[\text{[FN297]}\] For example, door-to-door salesmen and repairmen may be classified as invitees because they bestow an economic benefit upon private homeowners who welcome them \[\text{[FN298]}\] into their homes. \[\text{[FN298]}\] Here, the entrant system would impose upon novice homeowners the same full duty of care owed by expert business operators.

By contrast, a consumer-use system promises fewer application problems. First, consumer-use standards are clearer. Unlike entrant status, consumer usage is predicated on two precise factors: the manufacturer's directions, as specified on the product and its packaging, and consumer custom. Second, consumer usage is not variable; rather, it is tied to a fixed reference point. No matter how the consumer may have used the product in the past, his classification status will always be determined by the last use which caused his injury. Finally, consumer-use categories are less susceptible to conceptual mismatches. Because product risk tracks consumer use, such categories provide reliable indicia of responsibility. Thus, if tied to a graduated duty scheme, they promise a degree of proportionality that even the entrant system cannot provide.

Despite its drawbacks, the entrant classification system continues to flourish. Although courts challenged this system in the 1960s and 1970s, \[\text{[FN299]}\] the entrant approach never lost its supremacy. \[\text{[FN300]}\] Indeed, during the last couple of decades, it has further solidified its place in premises liability law. \[\text{[FN301]}\] Thus, in rethinking products liability law, the entrant classification system provides a useful model of fairness and efficiency, and one that is worthy of emulation.

\*803 C. Consumer-Use Classifications

To implement a consumer-use approach to products liability, the law must first categorize consumers according to usage criteria that correlate well with standards of responsibility. It then must adapt its liability scheme to suit the equities and economics of each classification. And it must do so in a way that is both clear and comprehensive. I propose a five-tiered approach, although others surely are possible. \[\text{[FN302]}\] Tier One would cover criminal and intentionally destructive product uses, imposing a rule of absolute no-liability. \[\text{[FN303]}\] Tier Two would cover reckless and idiosyncratic product uses, imposing a rule of presumed no-liability. \[\text{[FN304]}\] Tier Three would cover unintended but common, ancillary uses, imposing a rule of expert-based liability. \[\text{[FN305]}\] Tier Four would cover intended uses, imposing a rule of presumed liability. \[\text{[FN306]}\] Tier Five would be somewhat unique. It also would cover intended uses, but would apply only to products that violate a safety statute or administrative regulation, imposing a rule of absolute liability. \[\text{[FN307]}\]

Before turning to these classifications, a few caveats are in order. First, because of time and space limitations, it is not possible to fully address all of the issues that such an
approach would raise. Thus, I will attempt merely to describe each classification, explain its policy basis, and provide a few illustrations. Second, the proposed approach does not disturb the conceptual basis of current products liability law. Like the Restatement Third, the consumer-use approach eschews theoretical *804 labels. It also relies on concepts of duty, defectiveness, reasonableness, and comparative fault. It merely limits their application, redefines their roles, and rearranges their burdens of proof. Third, the proposed approach treats the classification question as a question of law, not fact. Thus, in each case, it empowers the judge, not the jury, to determine what type of consumer use the plaintiff made of the product and which liability tier to apply at trial. Fourth, this approach does not apply to all products liability cases. Specifically, it does not cover inherently dangerous products, which may be unsafe even for their intended uses. [FN308] It also does not cover bystander-plaintiffs, because they do not actually "use" the products that injure them. [FN309] Finally, it may not cover children injured by children's products because their usage norms are unique, evolving, and unclear. [FN310]

*805 1. Tier One: Criminal and Intentionally Destructive Uses
The worst consumer uses are not really uses at all; they are abuses of either persons or things. Falling into this category are criminal misuses and intentionally destructive uses. A criminal misuse occurs when a product is used to commit a crime. [FN311] Intentionally destructive uses arise whenever a product is used for any of the following purposes: (1) to injure a third person; (2) to injure oneself; or (3) to destroy the product or to seriously compromise its integrity.

Under a consumer-use approach, such product abusers would be absolutely barred from recovery. There are many ways of implementing this no-liability rule. The defendant might be forced to assert it as an affirmative defense. The plaintiff might have to negate it to establish defectiveness. Or, the plaintiff might have to overcome it to prove proximate cause. However, the best approach is to make it a matter of duty. The duty element determines whether the defendant owes to the plaintiff any degree of care whatsoever. It is a question of law, not fact. It is decided by courts, not juries. It is based on public policy, not sympathy or circumstances. It creates precedents, not simply verdicts. Most importantly, it establishes bright-line rules of conduct, not ambiguous standards of evaluation.

In cases of this sort, the policy mandate is unmistakable. The deliberate product abuser requires both punishment and deterrence. Assaultive and self-destructive acts are anti-social and immoral. Acts designed to test product limits are foolhardy, dangerous, and self-indulgent. Should the costs of such behavior be passed onto others, the results will always be unfair. At first, the manufacturer will bear responsibility for risks that it did not create and could not control. After this cost is added onto the price of the product, *806 careful consumers will be forced to pay for the sins of their neighbors.

Besides being unfair, such loss spreading is inefficient. The only way to stop product abuse is to discourage and disadvantage the abusers. No product-- not even the best--can be made indestructible. Conversely, all products--even the safest--can be made into dangerous weapons. Thus, even if manufacturers could predict such abuses, which is unlikely, they could never prevent them. Here, the cheapest cost-avoider is the abuser himself. By putting the product to a criminal or destructive use, he alone determines the risk of injury. To influence this behavior, products liability law must take away its benefits. It must tell the abuser three things. If you act in the forbidden way, you will act at your own peril. If you get injured, you will have no cause of action. And if you file a
lawsuit, you will lose. A no-duty rule sends these warnings loud and clear. Emphatic, decisive, and public, it makes product abuse a no-win proposition.

Although this classification is novel, its logic is time-tested. Indeed, many courts already employ a rule that bars recovery by plaintiffs injured while committing a crime of moral turpitude. [FN312] Many others routinely dismiss actions brought by deliberate product abusers. [FN313] This first tier classification would not change these results. If anything, they would become more predictable and consistent. Under this approach, a court would still deny relief to a plaintiff who deliberately tilted a vending machine in order to steal a soft drink. [FN314] A court would still dismiss the claim of a plaintiff who intentionally smashed a beer bottle against a utility pole. [FN315] A court would still enter summary judgment against a plaintiff who deliberately put a gun to his head and pulled the trigger. [FN316] And a court would still reject the claim of a plaintiff who intentionally locked himself in a car trunk in order to commit suicide. [FN317] Only two differences seem likely. Judges would have no choice but to dismiss such cases, and the number of cases filed would quickly and dramatically decline.

*807 2. Tier Two: Reckless and Idiosyncratic Uses

Sometimes consumers do not intend to harm their products, themselves, or others. Nevertheless, they put products to such bizarre uses that they virtually invite disaster. These are the uses covered in Tier Two. They are both reckless and idiosyncratic. Specifically, they create a high amount of risk, and they serve a very peculiar purpose. Such uses violate both industry and consumer norms. They are not intended by the product manufacturer, are not recommended by other manufacturers in the same industry and do not comport with consumer custom for that item. These uses are the ones that courts seem to have had no trouble recognizing. Indeed, as the Introduction attests, all courts seem to agree that outlandish or ridiculous product uses--including the use of shovels as door stops, knives as shavers or toothpicks, electric drills as teeth cleaners, power saws as fingernail clippers, hedge clippers as beard trimmers, lawnmowers as log or pipe cutters, and radiators as bottle openers--should fall far beyond the manufacturer's responsibility.

Yet in the context of actual cases, idiosyncratic uses have received far less uniform treatment. Some courts have derided or condemned such misuses, treating them as the kiss of death to the plaintiff's cause of action. For example, in Van de Valde v. Volvo of America Corp., [FN318] the New Mexico Supreme Court dismissed the claim of a plaintiff who used a spare tire strap to load wrought-iron rods onto the luggage rack of an automobile. [FN319] Condemning the strap's misuse, the court facetiously queried, "(W)ould it not be just as conceivable that someone might attempt to use it (the strap) to lower a thousand-pound motor into a truck?" [FN320] However, other courts have overlooked idiosyncratic uses, focusing instead on the foreseeability of the plaintiff's harm. Thus, in Rivera v. Westinghouse Elevator Co., [FN321] a jury awarded damages to the estate of a decedent who used the top surface of an elevator to move a conference table from floor to floor. [FN322] In reviewing the verdict, the Supreme Court of New Jersey noted that "the *808 unintended use of a product will not, as a matter of law, constitute a defense against a strict products liability claim based upon design defect." [FN323] The manufacturer may be held liable even for "an unintended use of the product if that use is otherwise foreseeable." [FN324]

Such indeterminacy has spawned confusion not just within products liability law, but also within the phases of individual cases. The Rivera case, discussed above, is a prime example. In Rivera, the jury heard evidence concerning the decedent's unusual use of the
elevator. [FN325] Nevertheless, it found the defendant-elevator manufacturer fully responsible for his injuries. [FN326] On appeal, the New Jersey Supreme Court acknowledged that the decedent's misuse was a question of fact for the jury. [FN327] However, it completely disagreed with the jury's findings on this issue, holding that "the failure to allocate any degree of fault to the decedent is against the weight of the evidence and constitutes a miscarriage of justice." [FN328]

To avoid such confusion, the law must take a more decisive stance. The consumer-use approach would do just that. In all Tier Two cases, the law would create a presumption of no-liability. This presumption would work in the following manner. In light of the plaintiff's idiosyncratic use, the product would be presumed nondefective, and the manufacturer's conduct in developing, producing, and labeling it would be presumed reasonable. To rebut these presumptions, the plaintiff would have to show by clear and convincing evidence both that the product contained a flaw and that the flaw was the fault of the manufacturer. The first burden would require proof that the product was defective in design, manufacture, or marketing. The second would require proof of the manufacturer's negligence. To meet the latter burden, the plaintiff would have to show that the manufacturer knew or should have known about the idiosyncratic use, and that the manufacturer failed to take reasonable measures to protect the plaintiff against it. [FN329] In response to the negligence issue, the manufacturer could argue that it exercised reasonable care. To support this argument, the manufacturer could present evidence of its research efforts, engineering standards, quality control measures, and compliance with government regulations and industry custom. If the plaintiff failed to meet either burden, he would lose. If he succeeded on both issues, the jury would then consider his misuse in its allocation of comparative fault.

Tier Two's approach to consumer misuse deviates from current practice in four material ways. First, it makes consumer use, not product defect, the organizing liability principle. Second, it disadvantages, rather than assists, bad consumers by presuming the manufacturer's innocence. Third, it elevates the plaintiff's burden of persuasion from a preponderance of the evidence to clear and convincing evidence. Finally, regardless of the product's defect-type, it requires all Tier Two plaintiffs to prove both product defectiveness and manufacturer fault.

Each of these changes is warranted by public policy. Idiosyncratic product users take unfair advantage of both manufacturers and other consumers. By putting products to bizarre uses, bad consumers create unnecessary dangers. When they get injured, these consumers use the tort system to transfer their injury costs to the product's manufacturer. Under current law, they do not have to prove that the manufacturer acted unreasonably, only that the offending product was defective. This is unfair. In this situation, the consumer himself is a norm-breaker who forces unreasonable risks upon the manufacturer. Unless he can prove that the manufacturer also created unreasonable risks and violated community norms, he lacks moral standing to complain.

For similar reasons, the idiosyncratic user lacks standing to demand the benefits reserved for other consumers. Fairness does not guarantee equal treatment, only a rational basis for treating people differently. Thus, where group inequities exist, fairness removes excesses from the unjustly enriched, and repairs deficiencies of the unjustly deprived. This rule holds true for good and bad consumers. Good consumers reduce the risk of injury. As such, they should be rewarded for their prudence. However, idiosyncratic product users create extreme and abnormal risks. They should be punished for their
recklessness. The consumer-use approach strikes the appropriate balance. By adopting a heightened standard of persuasion, creating a presumption of nondefectiveness and requiring proof of fault, it achieves three fairness objectives. Specifically, it treats product misusers more harshly than cautious consumers. It reduces the chances that misusers will benefit from their misdeeds. And, it decreases the amount of unreasonable accident costs that will be borne by future consumers.

This scheme also serves the ends of efficiency. As the Restatement Third notes, the instrumental goals of products liability law are to achieve an optimal level of product safety and to reduce the costs of administering product accident claims. [FN330] The proposed approach promotes the safety goal in a number of *811 ways. It tells manufacturers that they need not overinvest in safety by eliminating every conceivable risk of misuse. At the same time, it also tells consumers that they may not underinvest in safety by ignoring instructions, flouting warnings and abdicating their common sense. Because fewer idiosyncratic product users will prevail, fewer misuse costs will be incorporated into otherwise safe products. Product prices, in turn, will more accurately reflect product risk. Thus, price-conscious shoppers will have a better ability to choose good products over bad. This approach promotes the administrative goal as well. By enhancing the plaintiff's evidentiary requirements, it promises to reduce the number of lawsuits filed by presumably undeserving consumers. It also gives courts greater opportunities to dismiss such actions. Although it increases the plaintiff's burden of proof, it avoids the confusion of basing liability solely on product characteristics. By openly allowing juries to consider fault-based concepts of reasonableness, and focusing their attention on both manufacturer and consumer conduct, this approach should simplify and expedite the ultimate determination of responsibility.

3. Tier Three: Common and Ancillary Uses
The next classification in the consumer-use continuum consists of common and ancillary uses. Like idiosyncratic uses, common and ancillary uses are not intended by manufacturers. However, they are not nearly so aberrant. Unlike idiosyncratic uses, which violate even consumer norms, ancillary uses are familiar, foreseeable, and customary. In many cases, they deviate only slightly from the product's intended purposes or usage patterns. In others, the deviation may be more significant. In any case, such uses are commonly practiced by other consumers using the same product.

Ancillary uses may be either intentional or unintentional. Intentional ancillary uses include anything from taking excessive or unnecessary medications to prying or leveraging objects with screwdrivers to positioning ladders in precarious positions. Unintentional ancillary uses are just as common. They span in range from walking around with untied shoelaces or dangling coat straps to mishandling hot cups and pans to over-wearing car parts like tires, brakes, and hoses.

Because ancillary uses comport with consumer norms, manufacturers can more readily predict and protect against them. *812 However, because they are not intended, such uses create dangers that are not inherent in the product itself. In these circumstances, both parties contribute to, and thus exercise some control over, the ultimate risk of harm. Therefore, the law must even the balance of burdens allocated between them.

This balance calls for an expert-based liability scheme similar to the one advocated by the Restatement Third. [FN331] Under the proposed consumer-use approach, the plaintiff must prove that the product is defective. He need not prove the manufacturer's fault. The
existence of the defect creates a powerful inference of fault. Because the product is not used in an intended way, its failure does not automatically indicate its defectiveness. To establish a defect, the plaintiff must present expert testimony. This testimony must explain both how and why the product should have been made to withstand the ancillary use. Should the plaintiff meet this burden, the manufacturer could argue that the product was not defective. However, the manufacturer also could raise a reasonable care defense.

Here is where the consumer-use approach and the Restatement Third part ways. In this defense, the manufacturer would be required to prove, by a preponderance of the evidence, either that reasonableness did not require taking precautions against such use or that the taken precautions were reasonable under the circumstances. If the manufacturer satisfies this defense, or if it negates the inference of defectiveness, it is relieved of all liability. However, if the manufacturer fails to meet its burden, it may still argue that the plaintiff's comparative fault should diminish his right to recovery.

Such adjustments are both fair and efficient. Here, as elsewhere, fairness is a two-way street. When manufacturers can foresee product misuses, they usually can control them. In many cases, manufacturers attempt to exercise such control by making products harder to misuse. In many others, they expressly or implicitly convey a general message of safety. Either way, consumers frequently come to expect protection from such risks. In these circumstances, it is fair to hold manufacturers to a heightened level of responsibility. On the other hand, consumers who misuse products, even in customary ways, contribute to their own endangerment. Thus, they should not expect, and do not deserve, either complete protection from harm or a free pass to compensation. The proposed approach coordinates the equities on each side. By basing liability on defectiveness, it both increases the manufacturer's duty of care and reduces the consumer's burden of proof. However, it does not go too far in either direction. The plaintiff still must support his claim with expert testimony, and the manufacturer still may escape liability with proof of reasonable care.

The proposed approach also coordinates the equities among all consumers. Because ancillary product users create less risk than criminal, intentional, or idiosyncratic users, fairness requires that they receive better treatment. The proposed approach obeys this command. It not only affords them a cause of action, it eliminates their burden of proving fault. By the same token, fairness dictates that product misusers be treated more sternly than consumers who use products only for their intended purposes. Because ancillary users are still mis-users, they do not deserve the best treatment. Thus, under the instant liability scheme, they must still prove defectiveness, present expert testimony, and rebut a defense of reasonable care. Should they prevail, fairness often supports spreading their loss. For the most cautious consumers, misuse insurance, in the form of higher product prices, is an unwanted and unneeded burden. However, for most everyone else, it is a welcome protection. If ancillary usage is a community norm, then absorbing its costs should be a community responsibility.

In efficiency terms, the proposed approach also seems to provide the appropriate mixture of accident deterrence and administrative cost reduction. Because manufacturers can prevent foreseeable accidents, the law should give them incentives to do so. The instant approach creates two types of manufacturer incentives. By lowering the plaintiff's burden of proof and heightening the threat of liability, it creates a negative incentive to make products more safe. However, this scheme offers a positive incentive as well. Manufacturers who exercise reasonable care are not punished for their effort. Rather, their effort is rewarded with a reasonable care defense. If they can prove that their
products achieve optimal safety levels, then their efficiency limits their liability. At the same time, this approach discourages consumer misuse and inefficient loss spreading. Granted, ancillary users would receive a generous liability burden. However, intended use would be rewarded further still. Thus, ancillary users would have an incentive to do better. In any event, ancillary users are not guaranteed recovery. So long as they misuse products in some way, such consumers would continue to encounter procedural obstacles like the expert requirement and the reasonableness defense. These obstacles, though formidable, would not unduly discourage deserving consumers from filing suit. Nor would they terminate or forestall the litigation of legitimate claims. They would merely separate the wheat from the chaff and pass on to future consumers the costs of customary but avoidable product misuse.

4. Tier Four: Intended Uses
Tiers One through Three all pertain to product misuses. Tier Four, the last true consumer-use classification, applies to intended uses only. These uses are the easiest to define and apply. Intended uses include any function or mode of product handling recommended by the manufacturer in its marketing. Such uses also present the least amount of consumer risk. As a result, they present an altogether different set of issues and equities.

When a product fails during its intended use, its deficiencies are obvious and inexcusable. Unless previously mishandled, overused, or altered, the product's failure bespeaks its defectiveness. Common sense and experience permit logical inferences of cause and effect. They suggest that the steering mechanism of a new car should not fail under normal driving conditions. They teach that the protective guard of a new power saw usually does not fail after cutting a few boards. And they advise that freshly-opened pop bottles will not contain rodent or insect remains.

Most jurisdictions already treat such cases differently. They simply do not classify them according to consumer usage. Under the product malfunction doctrine, a plaintiff may rely on circumstantial evidence to prove a product's defectiveness. To invoke the doctrine, he must prove that the offending product normally would not malfunction without a defect. He also must negate the existence of secondary causes, including his own negligence. The Restatement Third adopts the same approach. If the product fails to perform its "manifestly intended function," the plaintiff may recover without presenting any additional evidence.

As the Restatement Third's own language attests, cases of sudden and unexpected product failure all have one thing in common: the product's inadequacy for an essential and intended use. The proposed approach would preserve the malfunction doctrine but would treat it as a usage issue. Under this approach, the product's failure would create a presumption of manufacturer liability. To invoke this presumption, the plaintiff need not prove the manufacturer's fault. He need only prove the product's defectiveness. In proving defectiveness, he need not produce expert testimony. He need only present circumstantial evidence. Specifically, the plaintiff would have to prove two things: (1) neither he, nor anyone else of whom he was aware, altered or damaged the product after it left the manufacturer's control; and (2) at the time of the accident, he was using the product for one of its intended purposes. To satisfy the first requirement, the plaintiff need not account for the conduct of intermediaries or prior users. He need only account for parties who came in contact with the product after his purchase or acquisition. If proven, these facts would create a presumption of defectiveness. The manufacturer could rebut this presumption in only three ways. It could argue that (1) the product became defective sometime before it reached the plaintiff; (2) the defect arose
sometime following the plaintiff's purchase; or (3) the product was nondefective as manufactured. To substantiate the latter contention, the manufacturer could present quality control evidence. However, such evidence would have to prove clearly and convincingly that the offending product did not leave the factory with a manufacturing flaw. [FN342] Because all products must be fit for their intended functions, the manufacturer could not argue that the product was free of design or marketing defects. It also could not raise a reasonable care defense.

Intended use cases are precisely the ones which strict products liability was created to address. Before Greenman, most products liability actions targeted extremely bad products unfit for even their most basic functions, like the exploding soda bottle in Escola [FN343] and the contaminated foodstuffs cited by Justice Traynor in his concurring opinion. [FN344] The instant approach pursues the same agenda. Employing a plaintiff-friendly scheme of burden-shifting, it is, on many levels, even better suited to satisfy the law's original policy objectives.

First and foremost, this scheme is fair. When a manufacturer places a product on the market, it expressly or implicitly makes three representations: the product will not break down, it will do what it is supposed to do, and it will do so safely. Consumers do not buy products unless they believe that all three of these representations are true. Products unfit for intended uses breach both the manufacturer's promises of quality and safety and the consumer's expectations of value and protection. Such unfitness has two untoward effects. It denies the consumer the benefit of his bargain, and it exposes him to unexpected and unreasonable risks of harm. The instant approach reverses this unfairness. By using the product for its intended purpose, and not permitting its misuse by others, the plaintiff lives up to his end of the bargain. By demonstrating these facts in court, he establishes a prima facie right to redress. The burden then shifts to the manufacturer to explain or justify its apparent breach. If it cannot, fairness makes it pay for its incompetency, irresponsibility, and deceit. Although this approach assists intended product users more than other consumers, this favoritism is earned. By following the manufacturer's directions, intended users avoid risks that misusers do not. Thus, when intended users fall victim to a defective product, they deserve greater protection under the law. Because even bad consumers buy and use products for intended purposes, it is fair to require all consumers to absorb the inevitable costs of such use.

Efficiency, too, favors a lop-sided liability scheme. Products unfit for their intended uses do not meet optimal safety levels. In fact, they do not even meet minimum standards. At the very least, a product should be able to do the very things it was created to do, without inflicting injury upon its user. Manufacturers who cannot live up to this standard require extra deterrence. By contrast, consumers who use products as directed do all that they can to protect themselves from harm. They need no additional motivation to exercise due care. The proposed approach allocates its incentives accordingly. By premising liability on circumstantial evidence, it encourages intended product users to file suit. The threat of such actions, in turn, deters manufacturers from marketing products which are unfit for their manifestly intended functions. By limiting defenses and increasing the burden of persuasion, this approach increases the manufacturer's chances of being held liable. This threat not only discourages manufacturers from marketing more bad products, it also ensures that the costs of such products will be borne by the manufacturers who continue to create them. As these costs accumulate, the prices of dysfunctional products will rise. Eventually, their prices will become so prohibitive that they will be priced right out of the market.
5. Tier Five: Intended Uses and Statutory or Regulatory Violations

Unlike the preceding classifications, the final classification is not defined solely by consumer use. To fall into this category, the consumer must use the product for its intended purpose. In this regard, Tier Five is no different than Tier Four. However, intended use alone is not sufficient for inclusion in this category. The product must violate a government statute or administrative regulation. These circumstances---of intended use and statutory or regulatory breach---present the worst-case scenario for a manufacturer. Thus, Tier Five imposes the harshest liability regime. In this way, it completes the liability spectrum of the consumer-use approach.

Tier Five creates a form of absolute liability. Besides causation and damages, the plaintiff would have two elements of proof. First, he must show that he used the product for an intended purpose. Second, he must prove that the product, as purchased, violated a safety statute or regulation. The usage evidence establishes the plaintiff's absolute right to redress. The breach evidence establishes the manufacturer's absolute responsibility for his loss. The manufacturer would have few defenses. It could not argue that the product was free of defects. It could not argue that it exercised reasonable care. It could only show that the product was altered, damaged or deteriorated, or that other causal agents contributed to the plaintiff's injury. If the jury believes the product was not in violation when it left the factory, they may relieve the manufacturer of liability. Otherwise, they would be instructed to apportion at least some percentage of responsibility to the manufacturer. Under the theory of comparative fault, they also could apportion liability to other responsible parties.

In many ways, Tier Five follows the lead of the Restatement Third. The Restatement provides that "a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation." [FN345] Thus, such violations establish a prima facie case of liability. Comment d to section four states further that "justification or excuse of the sort anticipated in connection with negligence claims generally does not apply in connection with failure to comply with statutes or regulations governing product design or warnings." [FN346] Thus, the manufacturer is denied virtually any defense.

However, the Restatement Third makes its noncompliance rule available to all consumers, and gives each the benefit of its conclusive presumption. [FN347] The instant approach is different. In Tier Five, it confers this benefit upon the best consumers only. Because intended users fully discharge their product responsibilities, they deserve extra protection and assistance. However, the noncompliance principle might apply differently to product misusers. Criminal and intentional misusers deserve no solicitude from the law even if they use statutorily defective products to accomplish their illicit objectives. Idiosyncratic and ancillary misusers are due more deference. For them, noncompliance may create a strong, if not conclusive, presumption of defectiveness or fault. The proposed approach leaves this open. The only thing it concludes categorically is that intended users stand in a category all their own.

Ultimately, this classification, too, promotes the policy goals of products liability law. As noted above, intended users are the best consumers, and regulation breakers are the worst manufacturers. Thus, fairness favors giving such consumers the biggest breaks, and sticking such manufacturers with the biggest burdens. Because the manufacturer's rule-breaking also is unlawful, society as a whole has an interest in reproving and
punishing its behavior. Indeed, society's interest may be great enough to give even idiosyncratic and ancillary product misusers the appropriate police power. This point could be debated. However, there is no doubt that, within the community of consumers, intended users have the purest claim to such privileged status.

In cases like these, absolute liability is efficiency. Product statutes and regulations are promulgated by experts after lengthy research and investigation. Their goal is to achieve optimal, or at least minimal, levels of product safety. Products that violate these standards are per se inefficient. To avoid excess accident costs, *820 the law must provide strong incentives for statutory and regulatory compliance. Tier Five does not just create the necessary incentives, it makes them open and obvious. Absolute liability invites consumers to sue. They have little to prove and nothing to lose. Consequently, their chances for success are high. On the other hand, absolute liability coerces manufacturer compliance. Indeed, under the proposed approach, manufacturers would have little choice. They must either achieve full compliance or face a crushing onslaught of liability. In the end, the right result would prevail. Bad manufacturers would receive appropriate sanctions, bad products would be pulled from the shelves, and consumers of all stripes would enjoy greater freedom and protection in the marketplace.

V. Conclusion
The modern era of products liability law began in 1963 when the California Supreme Court adopted the theory of strict products liability. [FN348] Although this theory favored plaintiffs, it did not promise relief to all consumers. [FN349] It was reserved solely for consumers who put products to intended uses. [FN350] With the adoption of the Restatement (Second) of Torts, the law shifted its focus from consumer use to consumer expectations. [FN351] Dissatisfied with this standard, courts eventually developed a product-focused approach to products liability cases. In the Restatement (Third) of Torts, the law changed yet again. [FN352] While the Restatement Third retained a product focus, it used a functional approach to determine liability. [FN353] Throughout the law's development, the only constants have been inconsistency, unpredictability, and confusion. The greatest source of these problems is the issue of consumer misuse. Courts disagree on its definition, its relevance and its effect. Unfortunately, the Restatement Third has not corrected the *821 problem. Instead, it has exacerbated this uncertainty. By employing conflicting connotations of misuse and leaving their implementation to local law, the new Restatement merely restates an old conundrum.

A full-blown consumer-use approach may provide the solution. Borrowing insights from premises liability law, this approach classifies consumers according to their product usage. It then adapts liability burdens for each classification. Criminal and intentionally destructive users would be barred from recovery. Reckless and idiosyncratic users would have to rebut a presumption of no-liability. Common and ancillary users would have to prove defectiveness through expert testimony. Intended users would enjoy a presumption of liability and, if injured by a product in violation of a safety statute or regulation, would be guaranteed recovery against the manufacturer. Like any classification system, this approach undoubtedly will have its drawbacks. The classifications will not cover all cases, and in the cases to which they do apply, the consumer's use may be difficult to categorize. Nevertheless, the benefits of this approach far outweigh its costs. It will clarify the uncertainties created by past approaches. It will promote the law's current objectives of fairness and efficiency. And, by restoring the consumer-use approach, it will lead products liability law back onto the right path and move it forward in the right direction.

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[FN7]. Suter, 406 A.2d at 162-63 (Clifford, J., concurring).


[FN9]. See Restatement (Second) of Torts § 402A cmt. h, at 351-52 (1965).

[FN10]. See Winnett v. Winnett, 310 N.E.2d 1, 4 (Ill. 1974) ("(T)he liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used."); see also Jurado, 619 A.2d at 1318 ("When someone is injured while using a product for an unforeseeable purpose or in an unforeseeable manner, the misuse sheds no light on whether the product is defective, because a manufacturer is not under a duty to protect against unforeseeable misuses.") (citation omitted).

[FN11]. See Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 354 (Md. 1985). The Ellsworth court noted, "(I)f the product is not unreasonably dangerous when used for a purpose and in a manner that is reasonably foreseeable, it simply is not defective, and the seller will not be liable." Id. at 355.

[FN12]. See id. at 354. Again, the Ellsworth court aptly explained the connection: "Misuse of a product may also bar recovery where the misuse is the sole proximate cause of damage, or where it is the intervening or superseding cause." Id. at 355.

[FN13]. See id. at 354-55.

[FN14]. See id. at 354.

[FN15]. Crowther v. Ross Chem. & Mfg. Co., 202 N.W.2d 577, 581 (Mich. Ct. App. 1972) (in denying the glue manufacturer's motion for summary judgment, the court noted that "it would be improper, on the basis of the pleadings alone, to assume...that glue sniffing was a misuse of the defendant's product").


[FN18]. See infra text accompanying notes 78, 100-08.

[FN19]. See generally Restatement (Second) of Torts (1965).

[FN21]. See Restatement (Second) of Torts § 402A cmts. g, h, i, n, at 351-54, 356; see also Frumer & Friedman, supra note 20, § 8.04(4)(a). These comments are discussed more fully in Part II.B.

[FN22]. See generally Frumer & Friedman, supra note 20, § 8.04(4) (surveying approaches). These approaches also are addressed in Part II.C.


[FN24]. See id. § 2 cmt. m, at 33; see also discussion infra Part III and text accompanying note 224.


[FN26]. See discussion infra Part IV.

[FN27]. See discussion infra Part IV.C.

[FN28]. See discussion infra Part IV.C.1.

[FN29]. See discussion infra Part IV.C.2.

[FN30]. See discussion infra Part IV.C.3.


[FN32]. See discussion infra Part IV.C.5.

[FN33]. See infra Part II.

[FN34]. See infra Part II.

[FN35]. See infra Part III.

[FN36]. See infra Part III.

[FN37]. See infra Part IV.

[FN38]. Restatement (Second) of Torts § 402A cmt. b, at 349 (1965).

[FN39]. See infra Part II.A.

[FN40]. See infra Part II.A.

[FN41]. See infra Part II.A.

[FN42]. Restatement (Second) of Torts § 402A cmt. b, at 348 (1965).

[FN43]. See infra Part II.B.

[FN44]. See infra Part II.C.
[FN45]. See infra Part II.C.

[FN46]. See infra Part II.C.

[FN47]. See infra Part II.C.

[FN48]. See infra Part II.C.

[FN49]. 150 P.2d 436 (Cal. 1944).

[FN50]. See id. at 440-44 (Traynor, J., concurring).


[FN52]. Id.

[FN53]. See generally id.

[FN54]. See id. at 901.

[FN55]. Id.


[FN57]. Id.

[FN58]. Id. at 438.

[FN59]. Id. at 440.

[FN60]. Id.

[FN61]. Id. at 437.

[FN62]. Id. at 440.

[FN63]. Id.

[FN64]. Id. (Traynor, J., concurring).

[FN65]. Id. at 441 (Traynor, J., concurring).

[FN66]. Id. at 437-38 (Traynor, J., concurring).

[FN67]. Id. at 437 (Traynor, J., concurring).

[FN68]. Id. at 441 (Traynor, J., concurring).

[FN69]. See id. at 440 (Traynor, J., concurring). Traynor actually described this theory as absolute liability: "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." Id. (Traynor, J., concurring) (citing MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916)).

[FN70]. Id. at 440-41 (Traynor, J., concurring). Traynor outlined these policies as
follows:
It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.
Id. (Traynor, J., concurring).

[FN71] See id. at 441, 443 (Traynor, J., concurring).

[FN72] See id. at 443 (Traynor, J., concurring).

[FN73] Id. (Traynor, J., concurring).

[FN74] Id. at 440-41 (Traynor, J., concurring).

[FN75] Id. at 441 (Traynor, J., concurring).

[FN76] Id. (Traynor, J., concurring).

[FN77] Id. (Traynor, J., concurring).

[FN78] Id. at 444 (Traynor, J., concurring) (emphasis added).

[FN79] Id. at 443-44 (Traynor, J., concurring).

[FN80] See id. at 440-41 (Traynor, J., concurring).

[FN81] See id. at 443 (Traynor, J., concurring).

[FN82] See id. at 444 (Traynor, J., concurring).

[FN83] See id. (Traynor, J., concurring).

[FN84] See id. at 443-44 (Traynor, J., concurring).


[FN89] See id. at 901.

[FN90] Id. at 898.
[FN91]. Id.

[FN92]. Id. at 899.

[FN93]. Id.

[FN94]. Id. at 900.

[FN95]. Id. (citations omitted).

[FN96]. See id. at 901.

[FN97]. Id. (citations omitted).

[FN98]. Id.

[FN99]. Id.

[FN100]. Id. (emphasis added).

[FN101]. See id.

[FN102]. See id.

[FN103]. Id.

[FN104]. See id.

[FN105]. Id. (emphasis added).

[FN106]. See id.

[FN107]. Id. (emphasis added).

[FN108]. See generally id.

[FN109]. See id. at 901.

[FN110]. See id.

[FN111]. See id.

[FN112]. Restatement (Second) of Torts (1965).

[FN113]. See generally id. § 402A.

[FN114]. Id. § 402A cmt. c, at 349-50.

[FN115]. Id. § 402A(1), at 347-48 (emphasis added).

[FN116]. Id.

[FN117]. Id. § 402A(1)(a), at 348.

[FN118]. Id. § 402A(1)(a), at 348.
[FN119]. Id. § 402A(1)(b), at 348.

[FN120]. Id. § 402A cmts. g, i, at 351-53.

[FN121]. Id. § 402A cmt. g, at 351.

[FN122]. Id. (emphasis added).

[FN123]. Id. § 402A cmt. i, at 352-53.

[FN124]. Id. (emphasis added).

[FN125]. Id. § 402A cmt. c, at 349-50.

[FN126]. Id. § 402A cmt. h, at 352.

[FN127]. Id. § 402A cmt. n, at 356.

[FN128]. See id. § 402A cmt. c, at 350.

[FN129]. See id. § 402A cmts. c, h, n, at 349-52, 356.

[FN130]. Id. § 402A cmt. l, at 354.

[FN131]. Id.

[FN132]. Id. (emphasis added).

[FN133]. Id. § 402A cmt. h, at 351.

[FN134]. Id. (emphasis added).

[FN135]. See id.

[FN136]. Id.

[FN137]. Id. § 402A cmt. n, at 356.

[FN138]. Id.

[FN139]. See generally id. § 402A.

[FN140]. See id. § 402A cmt. c, at 349.

[FN141]. Id. § 402A cmt. j, at 353.

[FN142]. See id.


[FN144]. See Sperry-New Holland v. Prestage, 617 So. 2d 248, 256 (Miss. 1993) (rejecting the consumer expectation test in favor of a risk-utility test); see also Mary J. Davis, Design Defect Liability: In Search of a Standard of Responsibility, 39 Wayne L.
Rev. 1217, 1236-37 (1993) (cataloguing the problems involved with the consumer expectation test).

[FN145]. 1 Owen & Madden, supra 143, § 5:6, at 300-01.

[FN146]. Id. at 301.

[FN147]. Id. at 303.

[FN148]. Id. at 304-05.


[FN150]. See 1 Owen & Madden, supra 143, § 5:7, at 304.


[FN152]. See David G. Owen et al., Products Liability and Safety 212 n.7 (3d ed. 1996).

[FN153]. Wade, supra note 151, at 837-38.

[FN154]. Id. at 837.

[FN155]. Id.

[FN156]. Id.

[FN157]. Id. at 838.

[FN158]. Id. at 837.


[FN160]. See Jennings v. BIC Corp., 181 F.3d 1250, 1256 (11th Cir. 1999); Traylor v. Husqvarna Motor, 988 F.2d 729, 735 (7th Cir. 1993).


[FN162]. See Frumer & Friedman, supra note 20, § 8.04(4)(c).

[FN163]. See cases cited supra note 10.

[FN164]. See cases cited supra note 11.

[FN165]. See cases cited supra note 12.

[FN166]. See Frumer & Friedman, supra note 20, § 8.04(4)(d).

[FN167]. See id.

[FN168]. See id.
[FN169]. See id.

[FN170]. See id.


[FN172]. See supra notes 70-77.


[FN176]. Id.

[FN177]. Id.

[FN178]. Id.

[FN179]. Aristotle framed the concept of fairness as a relational imbalance in which one person receives more and the other less than he deserves. See Aristotle, The Nicomachean Ethics 150-61, 153, 155 (J.E.C. Welldon, trans., 1987)

[FN180]. Restatement (Third) of Torts: Products Liability § 2 cmt. a, at 15.

[FN181]. Id.

[FN182]. Id.

[FN183]. See id.

[FN184]. Id.

[FN185]. See id.

[FN186]. Id. § 2 cmt. a, at 15.

[FN187]. See id. at 16.

[FN188]. Id.

[FN189]. Id.

[FN190]. See id.

[FN191]. Id.

[FN192]. Id. § 2 cmt. m, at 33-34.

[FN193]. Id. § 2 cmt. a, at 14.

[FN194]. See id. § 2 cmt. p, at 39.
[FN195]. Id. § 2 cmt. a, at 14.

[FN196]. See id.

[FN197]. See id. § 2 cmt. n, at 35.

[FN198]. See 1 Owen & Madden, supra note 143, § 2:1, at 46-47.

[FN199]. See id. § 7:1, at 398-401.


[FN203]. Id.

[FN204]. See id.

[FN205]. See 1 Owen & Madden, supra note 143, § 7:1.


[FN207]. Id.

[FN208]. Id. § 2(a), at 14.

[FN209]. See id. § 2(b)-(c), at 14.

[FN210]. See id. § 2 cmt. a, at 14-15.

[FN211]. See id. § 2(b), at 14.

[FN212]. Id. § 2 cmt. e, at 21-22.

[FN213]. Id. § 3, at 111; see also § 2 cmt. b, at 17.

[FN214]. See id. § 2 cmt. b, at 17.

[FN215]. Id. § 4(a), at 120.

[FN216]. See id. § 2 cmt. b, at 17.

[FN217]. Id. § 2 cmt. a, at 14.

[FN218]. Id.

[FN219]. See id. § 2(a), at 14.

[FN220]. See id. § 2(b)-(c), at 14 (covering design and marketing defects).

[FN221]. Id. § 2 cmt. f, at 23.

[FN222]. Id.
[FN251]. See id.

[FN252]. See Aristotle, supra note 179, at 150-51, 153.


[FN254]. See id. § 2(a).

[FN255]. See supra notes 88-111. Specifically, Traynor meant to protect only consumers who used products for their intended functions. See Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963).

[FN256]. See Greenman, 377 P.2d at 901.

[FN257]. See 1 Owen & Madden, supra note 143, § 7:10, at 423.


[FN259]. See supra notes 54-55.


[FN261]. See id. § 1, at 2-3.

[FN262]. See Owen et al., supra note 152, at 41.

[FN263]. See 1 Owen & Madden, supra note 143, § 1.5, at 16.

[FN264]. Restatement (Second) of Torts § 402A cmt. k, at 353-54 (1965).


[FN266]. See id.

[FN267]. See id. § 2 cmt. e, at 21-22.

[FN268]. See Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963) (stating that the plaintiff could recover only if he put the product to an intended use).

[FN269]. See infra Part IV.B.

[FN270]. See infra Part IV.B.


[FN272]. See id.

[FN273]. See id. § 233, at 596.

[FN274]. Id.

[FN275]. Id. at 597.

[FN276]. See id.
[FN277]. See id. § 234, at 599.

[FN278]. See id. at 599-601.

[FN279]. Id. § 235, at 602.

[FN280]. Id.

[FN281]. See Mallet v. Pickens, 522 S.E.2d 436, 446 (W. Va. 1999) ("Complicating this confusion among property owners is the fact that an entrant can cascade chameleon-like through the various 'colors' of entrant status, from trespasser to licensee to invitee and back, in the course of a single visit.").

[FN282]. The California Supreme Court articulated this concern as follows: A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968)


[FN284]. Id. § 58, at 393.


[FN286]. Id. (Mcfarland, J., dissenting).

[FN287]. Id. (Mcfarland, J., dissenting).

[FN288]. Id. (Mcfarland, J., dissenting).

[FN289]. Id. (Mcfarland, J., dissenting).

[FN290]. See id. (Mcfarland, J., dissenting).

[FN291]. See id. (Mcfarland, J., dissenting).

[FN292]. See Restatement (Second) of Torts § 332 cmt. 1, at 181 (1965) ( "(A)n invitee ceases to be an invitee after the expiration of a reasonable time within which to accomplish the purpose for which he is invited to enter, or to remain.").

[FN293]. Id. § 332, at 181-83.

[FN294]. See Jones, 867 P.2d at 317 (Mcfarland, J., dissenting).

[FN295]. Keeton et al., supra note 283, § 61, at 420-22.

[FN297]. See Dobbs, supra note 260, § 237, at 616 (noting that the entrant classifications do not always "correlate with the rights and wrongs of the cases or with the legal principles that would normally be determinative").

[FN298]. Id. at 601.

[FN299]. During this time period, eight states abandoned the entrant classification system entirely. See Alexander v. Med. Assoc. Clinic, 646 N.W.2d 74, 77 (Iowa 2002).

[FN300]. During the same timeframe, five states retained the entrant classification system in its entirety, and six others retained classifications for trespassers and persons who enter with permission. See id.

[FN301]. Since the 1970s, only one jurisdiction, Nevada, has eliminated its entrant classification system. Id. at 78. Twenty-nine states have declined the invitation to change. Id. Two state legislatures reinstated the trespasser classification after it had been eliminated by court decision. Id.; see generally Vitauts M. Gulbis, Annotation, Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser, 22 A.L.R. 4th 294 (1983).

[FN302]. Three different approaches come immediately to mind. First, consumer uses could be classified as either intended or unintended. This approach most closely resembles the one envisioned by Justice Traynor. Under this system, intended users might be permitted to invoke some form of strict liability, while unintended users might be required to prove negligence. Second, one might classify consumer uses as either reasonable or unreasonable. Here, too, the law would customize its liability regime, giving reasonable consumers more favorable treatment than those who act unreasonably. Finally, consumer uses could be classified as intended, customary or abnormal. Once again, evidentiary burdens would vary from category to category, becoming increasingly heavier on each consumer group in the descending hierarchy.

[FN303]. See infra Part IV.C.1.

[FN304]. See infra Part IV.C.3.

[FN305]. See infra Part IV.C.3.


[FN307]. See infra Part IV.C.5.

[FN308]. The Restatement (Third) of Torts: Products Liability generally precludes liability for such products. See Restatement (Third) of Torts: Products Liability § 2 cmt. d, at 21 (1998). However, it leaves open the possibility that some products may be manifestly unreasonable in design. See id. § 2 cmt. e, at 21. Because consumer use does not substantially affect the risk profile for inherently dangerous products, they fall outside the ambit of the consumer-use approach. This is not a serious drawback. In my view, inherently dangerous products should be deemed nonactionable as a matter of law. As long as the product is properly labeled, the consumer accepts its inherent risks and releases the manufacturer from any duty of protection.

[FN309]. Although not a perfect fit, my consumer-use classification system could be extended to bystanders. Bystander injuries are a normal and, for some products, frequent occurrence. Thus, they could be classified as Tier Three "common and ancillary uses." Even if the actual user engaged in more serious misuse, the bystander's
classification would not change. However, if the user put the product to an intended use, the bystander's classification could be upgraded to Tier Four "intended uses."

[FN310]. In premises liability law, children receive special treatment. Trespassing children, in particular, are accorded greater protection. See Dobbs, supra note 260, § 236, at 608-10 (discussing the origin and basis of this special rule). In the same way, products liability law may need to create a special child product matrix, granting them more security than adult consumers. However, there are circumstances in which the "adult" consumer-use system might apply to children. In most jurisdictions, children who engage in adult activities are held to a reasonable adult standard of care. See id. § 127, at 298-302. This rule has several policy justifications. Unlike childhood activities, adult activities are not necessary for a child's development. See Robinson v. Lindsay, 598 P.2d 392, 393-94 (Wash. 1979). In addition, adult activities performed by children pose far greater societal dangers than childhood activities or adult activities performed by adults. See id. By holding children to adult standards, the law sends the message to both kids and their parents that such activities carry grave responsibilities. See id. The same reasoning applies to products liability cases. If a child is injured while using an adult product, the law would be justified in holding him to adult responsibilities. This could be done by applying the consumer-use approach described below.


[FN312]. See id. at 955.

[FN313]. See infra notes 314-17.

[FN314]. Oden, 621 So. 2d at 954-55.

[FN315]. Venezia v. Miller Brewing Co., 626 F.2d 188, 192 (1st Cir. 1980).


[FN319]. Id. at 930.

[FN320]. Id. at 932.


[FN322]. Id. at 706.

[FN323]. Id. at 707.

[FN324]. Id.

[FN325]. Id. at 706.

[FN326]. Id.

[FN327]. Id. at 707.

[FN328]. Id.
This dual burden would have the greatest impact in manufacturing defect cases. In most jurisdictions and under the Restatement Third, plaintiffs need not prove the manufacturer's negligence, and manufacturers are precluded from raising a due care defense. See 1 Owen & Madden, supra note 143, § 5:11, at 342-43. Here, liability remains strict. In design and marketing cases, courts determining product defectiveness usually employ the same balancing test used to determine negligence. See id. Thus, a finding of design or marketing defect may in many cases pre-determine a finding of negligence. Phipps v. Gen. Motors Corp., 363 A.2d 955, 963 (Md. 1976) ("Proof of a defect in the product at the time it leaves the control of the seller implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product."). However, this is not always true. Even where a product has a defect, the manufacturer may not be negligent in putting it on the market. Negligence duties are limited by the concept of foreseeability. 1 Owen & Madden, supra note 143, § 5:11, at 346-47. Foreseeable risks are within an actor's control. Thus, he is responsible for their effects. Unforeseeable risks are beyond an actor's control. These risks exceed his responsibility. Id. at 346. Defective products pose unreasonable risks for certain, foreseeable uses. For example, a lawnmower may be defective because it fails to contain adequate protective guards surrounding its blades. This defect creates the risk that someone may accidentally get a foot caught in the blade area or that objects may accidentally be thrown from it. However, it does not create the risk that someone will pick up the mower and use it to cut logs, even if the user is struck by a log fragment ejected by its blades. Here, the product might be defective for its intended use, yet the manufacturer may have no duty to protect the idiosyncratic user from this defect. One might argue that the defect simply is not the proximate cause of the injury. However, treating the issue as one of negligence and duty seems to better frame the issue of responsibility and to more clearly designate the responsible party. Id.


See id.

Permitting manufacturers to define intended use may seem unfair or unwise. They might be suspected of defining such use in a very narrow and self-serving way. However, I believe these fears are either unfounded or at least outweighed by the corresponding benefits. The more intended uses a product has, the more marketable it will be. Knowing this, manufacturers have a vested interest in defining intended use quite broadly. Since liability under the proposed scheme depends on consumer usage, manufacturers would have a greater incentive to define intended uses more precisely and communicate them more clearly to their consumers.

Moraca v. Ford Motor Co., 332 A.2d 599, 602 (N.J. 1975) ("A new Lincoln Continental properly operated and maintained should not in normal experience develop a critical malfunction in the steering mechanism in six months and after being driven about 11,000 miles.").

Agostino v. Rockwell Mfg. Co., 345 A.2d 735, 740 (Pa. Super. Ct. 1975) (stating where the guard of power saw failed to retract after ten prior uses, "(t)he jury could have properly inferred . . . that the guard did not function properly").


See 1 Owen & Madden, supra note 143, § 7:12, at 431.
[FN337]. See id.


[FN340]. Id. § 2 cmt. b, at 17.


[FN342]. To meet this burden, the manufacturer could not rely on mere evidence of general inspection or testing procedures. Rather, it would have to provide statistical, engineering, or first-hand evidence to prove that it was virtually impossible for the defect to develop prior to shipment.


[FN344]. Id. at 441-43 (Traynor, J., concurring).


[FN346]. Id. § 4 cmt. d, at 122.

[FN347]. See id.


[FN349]. See id.

[FN350]. Id.

[FN351]. See generally Restatement (Second) of Torts (1965).


[FN353]. Id. cmt. n, at 35.

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