

Products Liability and Judicial Wealth Redistributions

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Rules which redistribute wealth make some people better off at the expense of other people; they improve the welfare of particular persons' by giving them money, goods, or services. Rules which are sometimes termed general encourage the performance of duties with which all must comply; they improve the general welfare by enabling activities to be carried on efficiently, safely, and predictably. Legal rules sometimes have both distributional and general effects. Thus reducing poverty, a distributional goal, may reduce crime, which would in turn facilitate commerce.¹ And enforcing contracts, pursuant to the general rule requiring this, redistributes wealth in favor of prudent bargainers.² I will characterize a legal rule as "distributional" if (i) it produces only distributional effects or (ii) is adopted because its distributional effects are sought. A rule is then "general" if (i) it produces no distributional effects or (ii) is adopted because its general welfare effects are sought.

Courts seldom adopt distributional rules. Yet why this is so and whether it should be so are rarely discussed. This silence is no longer accompanied by an acceptance of the result: some commentators now enjoin courts to adopt distributional rules.³ Since this trend may grow, given

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¹ That distributional rules have efficiency consequences is now well known. See Polinsky, *Economic Analysis As A Potentially Defective Product: A Buyer's Guide To Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1676-79 (1974); Tobin, *On Limiting the Domain of Inequality*, 13 J. LAW & ECON. 263 (1970).

² The pursuit of optimality, that is, has distributional consequences. See Oi, *The Economics of Product Safety*, 4 BELL J. ECON. & MAN. SCI. 3 (1973); Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEG. STUD. 13 (1972).

³ The equal protection clause has often been urged as an appropriate means to redistribute wealth. For a critical survey of this literature and an argument that courts should not so use the Constitution, see Winter, *Poverty, Economic Equality, And The Equal Protection Clause*, 1972 S. CR. REV. 41. For a view less hostile to judicial intervention, see Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973). Respecting private law, the draftsmen of the Restatement of the Law Second, Property urge courts to adopt an implied warranty of habitability, whose justification can only be the desirability of redistributing wealth from landlords to tenants. For thoughtful criticism of courts so acting see Meyers, *The Covenant of Habitability and The American Law Institute*, 27 STAN. L. REV. 879 (1975). Professor

the current concern with income inequality,⁴ it seems useful to inquire again into the purpose and wisdom of the courts' refusal to act.

Part I of this paper initially shows that distributional rules are difficult to select and enforce. It then argues that these difficulties together with commonly held conceptions of institutional competence strongly imply that it is the legislature which should ordinarily adopt distributional rules. The section next suggests that it is this argument which has persuaded courts to stay their hand. Finally, Part I develops criteria for predicting when courts will and justifying when courts should adopt distributional rules.

Part II tests these criteria by an analysis of two products liability rules, that allowing consumers to sue manufacturers directly for damages caused by defective products, and that refusing to allow consumers to impose on sellers the risk of "unknowable" harms—harms which it could not be foreseen the products would cause when sold. I initially show that the rule which abolishes vertical privity is distributional in the first sense of the term: contrary to common understanding, it produces only distributional effects. A rule which would impose unknowable risks on sellers would also be distributional in this sense. Part II then explains that the disparate judicial performances—privity abolished, unknowable risks not imposed—were predictable. This is largely because the distributional nature of an unknowable risk rule is obvious: when courts are asked to adopt a rule because of its distributional effects, they generally refuse.⁵ Finally, I show that the privity rule, when its true basis is understood, is weakly justifiable, but that no legitimate case exists for judicial adoption of an unknowable risk rule.

My aim, however, is not limited to showing that the privity rule is weak and an unknowable risk rule would be wrong. Courts are better at pursuing some social goals than others. Yet discussions of torts and contracts problems often consider the desirability of the goals at issue independently of their suitability to judicial resolution. This paper thus also hopes to increase discussion, in the private law context, of the insti-

Fletcher also asserted that common law courts should not pursue distributional goals, but as he was concerned to develop a general justification for tort law, he did not pursue the point. Fletcher, *Fairness and Utility In Tort Theory*, 85 HARV. L. REV. 537, 547 n.40 (1972). For a claim that courts, in private lawsuits, should adopt distributional rules, see Birmingham, *A Second Look At The Suez Canal Cases: Excuse For Nonperformance Of Contractual Obligations In The Light Of Economic Theory*, 20 HASTINGS L.J. 1393 (1969).

⁴ An interesting argument that this concern is somewhat excessive is found in Paglin, *The Measurement and Trend of Inequality: A Basic Revision*, 65 AM. ECON. REV. 598 (1975). See also Lebergott, *Are the Rich Getting Richer? Trends in U.S. Wealth Concentration*, 36 J. ECON. HIST. 147 (1976).

⁵ The privity rule creates less uncertainty for potentially affected parties than would an unknowable risk rule, which may also explain why only the former has been adopted.

tutional issues which distributional judgments implicate. Its principal point is that these institutional considerations often prevent the conclusion that *courts* should act from following from the premise that some social action is desirable.⁶

I. DISTRIBUTIONAL RULES AND COURTS

Assume that a court has discretion to adopt a rule, unconfined by precedent or statute. It cannot act "arbitrarily," but must proceed in a "principled" or "rational" fashion. What will it do? Courts often begin with a premise, taken from analogous cases or statutes or directly from the fundamental theories of justice which underlie them. They then *derive* from the premise a rule to decide the class of cases which the case at bar represents. Although selecting a premise is not a rational exercise,⁷ deriving a rule from the premise is; and this process of deriving rules is what is largely meant when adjudication is described as a "principled" enterprise. Of course, if the premise chosen supplies no rule, the process cannot work. But it also cannot work if the premise supports a great many rules without strongly indicating any of them, because then the premise would not direct the choice. Any rule the court adopts would be "arbitrary," in terms of its underlying premise, because it would have been *chosen*, not derived. In Part I A, I shall argue that distributional rules are generally chosen, and are therefore arbitrary.

Legal rules also must direct results: a court, that is, has to say that finding for plaintiff (or defendant) will advance a rule's purpose. A related problem of distributional rules is that the results which would advance their purposes are often unknowable. Thus distributional rules would be arbitrarily applied, in that the rules could not produce the outcomes. This Part I B attempts to show.

I shall proceed by taking two premises, one in common use—utilitarianism—the other of much current interest—Professor Rawls' theory of justice—and arguing that the distributional rules of both theories would be arbitrarily adopted and applied. As these theories take up a

⁶ However, that this paper does not attempt an exhaustive treatment of the issues posed by distributional rules, that being impossible in a short article; it aims more at being an introduction. As an example, I ignore the social choice literature, which suggests that the concept of a *collective preference* for a particular outcome is without content. See Mueller, *Public Choice; A Survey*, 14 J. ECON. LIT. 395 (1976); Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, 20 AM. J. POL. SCI. 511 (1976). As distributional rules must be partly justified in terms of popular preferences for particular outcomes, any full theory respecting which legal institution should adopt them must take into account this literature.

⁷ This is not to say that *reasoning* is irrelevant to the choice. Reasoning can indicate where premises do not conflict, facilitate judgments as to the desirability of premises by clarifying their necessary implications, and so forth. See Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004 (1972).

great deal of the ground, a successful demonstration of their weaknesses, as supports for judicial distributional rules, will do much to advance my thesis. I shall then argue, in Parts I A and B and especially in I C, that because distributional rules are arbitrarily adopted and applied, courts should seldom choose them.⁸

A. Arbitrary Rules

It will be useful to begin by illustrating how a fundamental theory of justice may strongly indicate a *general* rule. The theory is utilitarianism: authoritative decisionmakers must maximize utility. Utility is now recognized to be a matter of personal preference: the same car may give more utility to X, who likes cars or travels a lot, than to Y, who is indifferent to cars or travels little; utility inheres more in people than things. It then is maximized through trades, in which people give up goods of lesser value, to them, in return for goods of greater value, to them. These bargains would be less efficacious in maximizing utility if traders could withdraw at will, because people would then be less inclined to trade. Thus utilitarianism indicates that trades should be enforceable. A legal rule which strongly follows from the utilitarian premise is that courts should enforce freely negotiated contracts. Distributional rules do not follow, in this strong sense, from the same premise.

Thus utilitarianism is commonly criticized as being indifferent to issues of distributional justice, by which is meant that it is nondirective over a wide range of distributional choices.⁹ For example, utilitarianism holds that the state should maximize average utility. Assume two states possessing \$1,000,000 of wealth and ten persons each. In State One, each person has \$10,000 except one, who has \$910,000; in State Two, each has \$98,000 except one, who has \$118,000. As the persons in both states have the same average utility, \$100,000, utilitarianism apparently has nothing to say to the question which state to prefer. Put generally,

⁸ My description of the judicial process, as courts deriving rules from premises, is plainly too skeletal. Sometimes the derivations are "felt" or "assumed" rather than explicitly made; more frequently the relationship between theories and rules is explicated through the device of analogy. See Levi, *An Introduction To Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948). These qualifications do not affect the argument that when premises cannot strongly indicate rules the nature of the judicial task changes significantly. Competing models of the judicial process of course exist. I will not discuss whether any of these or mine more accurately describes "reality." The test of a theory is not the congruence of its factual assumptions with life, but its explanatory and predictive power. See M. FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1953). Whether I am right, then, must be determined by what follows below, not by the brief description above.

⁹ An especially thoughtful criticism is Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 75, 135-50 (1973).

utilitarianism often permits a variety of distributional choices without strongly indicating any of them.

The "diminishing marginal utility of money theory" attempts to narrow these choices. It asserts that the last dollar of income to a rich person in fact yields him less satisfaction than that dollar would add to the satisfaction of a poor person, because the satisfaction a marginal dollar yields varies inversely with the number of dollars one already has.¹⁰ Thus total satisfaction can be increased by redistributing wealth from rich to poor. This "concretization" of utilitarianism is also non-directive over a wide range. For example, if the tax system is to perform a redistributive function, should the maximum rate be 70 percent or 90 percent? Should individuals pay no tax when they earn less than \$5,000 or \$2,500? Should welfare payments be \$90 a week for a family of four? or \$120? Again, a progressive estate tax may increase utility, because of its redistributive effect, but will decrease utility, because it reduces the incentive to create wealth.¹¹ What then is the appropriate progression rate? Many choices are plausible. While benefitting "the poor" at the expense of "the rich" may increase utility, a wide range of judgments thus seem equally justifiable respecting who the poor and rich are or how much should be shifted from one to the other. Any particular judgment is arbitrary.¹²

Professor Rawls develops "a conception of social justice" which provides "a standard whereby the distributive aspects of the basic structure of society are to be assessed."¹³ This standard is derived mainly from the choices made by persons in the "original position." Rawls, that is, creates an involved hypothetical, in which persons who have no specific information about their position in life, their native abilities, such as strength and intelligence, or the special features of their own

¹⁰ For a fuller explanation of the theory see G. CALABRESI, *THE COST OF ACCIDENTS* 41 (1970). It may first have been urged to justify the goal of removing a large loss from one person and spreading it over many in James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549, 550 n.1(c) (1948).

¹¹ See Tullock, *Inheritance Justified*, 14 *J. LAW & ECON.* 465 (1971).

¹² These illustrations derive from public law but the problem of theories which imply too many rules, and are therefore arbitrary, also exists in the private law context. Thus I show, at pp. 558 *supra*, that utilitarianism indicates a large number of solutions to the verticle privity question because it is a distributional question.

¹³ J. RAWLS, *A THEORY OF JUSTICE* 9 (1971) [hereinafter cited as *RAWLS*]. I am not concerned with the validity of Rawls' theory, particularly with his justification of it by reference to choices which would be made by persons in the "original position." Rather, I take the theory as established, to see what it teaches about the problem of judicial distributive rules. For interesting criticisms of the original position justification, see Barber, *Justifying Justice: Problems of Psychology, Measurement, and Politics in Rawls*, 69 *AM. POL. SCI. REV.* 663 (1975); Frankel, *Justice and Rationality*, in *PHILOSOPHY, SCIENCE, AND METHOD* 400 (S. Morgenbesser, P. Suppes, & M. White eds. 1969).

psychology, such as risk aversion and tenacity, must choose the principles of justice to govern society.¹⁴ Since these persons, when this "veil of ignorance" is lifted, might in fact take their places among society's disadvantaged, they would in the original position choose, as a principle of justice, that

All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. Injustice, then, is simply inequalities that are not to the benefit of all.

. . . .

[T]o make the principle regulating inequalities determinate, one looks at the system from the standpoint of the least advantaged representative man. Inequalities are permissible when they maximize, or at least all contribute to, the long-term expectations of the least fortunate group in society.¹⁵

This theory sometimes supplies no rules to guide concrete distributional choices, or, like utilitarianism, supplies too many. As an example of the former, the state may allow inherited wealth, but only to the point where the inequalities so created fail to benefit everyone. "Naturally, where this limit lies is a matter of political judgment guided by theory, good sense, and plain hunch, at least within a wide range. On this sort of question the theory of justice has nothing specific to say."¹⁶ Also, a proportional income tax permits greater inequalities than a progressive tax, but as to adopting one or the other, ". . . these are questions of political judgment and not part of a theory of justice."¹⁷ Respecting the problem of too many rules, Rawls' theory implies that a just state must "guarantee a reasonable social minimum." If, nevertheless, "the advantages of the better situated" do not "improve the condition of the least favored" the social minimum should be reset "at the appropriate level."¹⁸ The theory, however, does not specify what is "reasonable" or "appropriate," thereby permitting many choices. Again, in a just society the "self-respect" of the least advantaged must be increased, but as to this "a range of options rather than . . . any particular alternative" is permissible; Rawls' principles of justice "do not say where in this range the choice should fall."¹⁹ Thus the Rawls theory often fails to supply rules with which to make distributional judgements

¹⁴ RAWLS at 118-47.

¹⁵ *Id.* at 62, 151.

¹⁶ *Id.* at 278.

¹⁷ *Id.* at 279.

¹⁸ *Id.* at 87.

¹⁹ *Id.* at 362.

or supplies a number of rules without strongly indicating any of them. In either case, a judicial Rawlsian rule would be arbitrary.

Distributional rules, in sum, are not so much derived from basic premises as chosen from among the many possibilities each premise yields for resolving particular problems.²⁰ Courts cannot "rationally" adopt them. These rules thus pose, in much more acute form than do general rules, the institutional issue, whether courts or legislatures should act.

When the essence of decision is choice, not derivation, American society follows the democratic method. The rule which the majority prefers is chosen, not because it is the "right" rule but because it is the preferred rule.²¹ Majority choices are not necessarily legislative ones, for reasons of efficiency: when the popular choice is obvious, it is pointless for courts to ignore it. In Professor Wellington's phrase, courts should follow "conventional morality."²² However, legislatures have a comparative advantage over courts in ascertaining social preferences because they have, and courts lack, the requisite tools—staff, political organization, periodic campaigns, travel expenses, and so forth. Moreover, legislators who fail to respect social preferences will suffer more severe sanctions than those courts could experience. Thus when the social choice is not obvious, courts should abstain. The effect of this institutional view would be to make judicial distributional rules rare, for American society is in radical disagreement over the methods by which inequality is to be lessened and about how much inequality is tolerable. It is often exceedingly difficult to know which rule the majority would choose to resolve concrete distributional problems.

²⁰ Deriving a general rule is not a simple-minded exercise, in which the rule obviously follows from the basic premise. Seeing what premises do and do not imply is a creative and difficult task. Much of science involves thinking of this kind. The relevant difference between general and distributional rules is that fundamental theories yield fewer potentially applicable general rules than they do distributional rules. These theories thus are more capable of rational elaboration in the "general" area. I suspect this partly is because general rules are meant to resolve particular problems of interpersonal conflict while distributional rules apply to the "problem" of how individual lives should be lived. For example, no fundamental theory can yield more than a few solutions of the problem how the state should treat an induced breach of contract, but will yield many solutions of the problem how to treat an "inadequate" standard of living. The latter implicates the question what is a minimally "good" life to lead, which implicates the question what "good" means in reference to a life, and so forth. The problem of induced breaches of contract is plainly more confined. I develop this explanation more fully in the Conclusion, as it is perhaps better understood after consideration of the other difficulties which distributional rules create.

²¹ See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 103-04 (1960). Rawls agrees: "There is nothing to the view, then, that what the majority wills is right." RAWLS at 356.

²² Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 243-54 (1973).

To summarize, (i) a preference for majority rule, (ii) the nature of distributional rules—they must be chosen but society's choices are seldom easily knowable, and (iii) the commonly held view of institutional competence—legislatures are better than courts at ascertaining social preferences—combine to argue against judicial action. That distributional rules must be arbitrarily applied, which Part I B next shows, also points this way.²³

B. Arbitrary Applications

A decision under a rule is also arbitrary when the decisionmaker does not know which result will advance the rule's purpose.²⁴ Decisions under general rules are seldom arbitrary in this sense. Courts usually can assume that enforcing contracts facilitates the functioning of a market economy. Distributional judgments, by contrast, must often be made in ignorance of their contribution to the distributional goals at issue. Again this will be illustrated by brief discussions of utilitarianism and Professor Rawls' theory.

The diminishing marginal utility of money theory, which justifies utilitarian wealth redistributions, presupposes the comparability of different persons' satisfactions. In fact, no scientifically valid method of comparing the utility two persons would derive from a given amount of wealth exists.²⁵ Thus the satisfaction Jones derives from examining

²³ Although Rawls does not expressly discuss the question whether courts or legislatures should adopt the rules his theory justifies, he does recognize that the theory sometimes permits a range of solutions to particular problems, and when that recognition is made explicit it is often accompanied by the suggestion that legislative action is appropriate. See RAWLS 198-99, 201, 361-62. Finally, fundamental theories may sometimes strongly indicate more than one solution to the problems general rules address. It may be claimed that the resulting general rules were also arbitrarily chosen. The claim seems wrong. A choice between two is, in American political theory, different from a choice among many. Our society generally prefers the majoritarian method when choice is unconstrained; a choice between two or three seems as confined as choices get. Also Part I C shows that a strong argument against judicial distributional rules is that potentially affected parties could not predict particular distributional choices. This argument is telling only when the range of choice is wide. Thus a functional distinction also exists between general rules, which yield few solutions to particular problems, and distributional rules, which yield many solutions to the problem of living life. See note 20 *supra*; pp. 588-89 *infra*.

²⁴ Professor Frankel states: "[J]ustice is related to rationality in the sense that we may ask whether, as an empirical matter of fact, the rules in question are likely to achieve the purpose for which they presumably exist." Frankel *supra* note 13, at 413.

²⁵ A standard microeconomics text states:

Welfare comparisons would be simple if it were possible to aggregate the utilities of individuals into a single utility function. Unfortunately this operation cannot be performed. Interpersonal comparisons of utility are not possible. There is no obvious way to determine whether individual I or individual II derives more satisfaction from the consumption of a given bundle of goods.

J. HENDERSON & R. QUANDT, MICROECONOMIC THEORY: A MATHEMATICAL APPROACH 255 (2d ed. 1971) (footnote omitted). See also Blum & Kalven, *The Uneasy Case For Progressive Taxation*, 19 U. CHI. L. REV. 417, 472-79 (1952).

his bank statement may, or may not, be more intense or long lasting than the satisfaction Smith would get if he could purchase a used Mazda. The two persons' sensations are impossible to quantify, so that transferring marginal dollars from Jones to Smith, to enable Smith to buy the Mazda, cannot be "shown" to increase utility.²⁶

The inability to quantify does not mean that the attempt to make interpersonal utility comparisons should be abandoned; but it does imply that those comparisons must be made more precisely or more generally than adjudication permits. A "precise" interpersonal comparison entails a judgment as to the satisfaction two people would in fact derive from different units of wealth, and it can only be made between people with whom the maker is intimately familiar. Thus I can often know "just how good" a dollar would make each of my children feel, because I know my children well; but this is a comparison no outsider could draw. A "general" interpersonal comparison entails a judgment as to the satisfaction strangers feel, and while anyone can make it, it is unlikely to be especially accurate. Thus I can at best make a *very rough* comparison respecting "just how good" and "just how bad" the gain and loss of a thousand dollars would make two "typical persons" feel because all people are in some sense alike.

To illustrate that adjudication does not permit "precise" interpersonal utility comparisons consider a rule which apparently requires one: when events occurring subsequent to the formation of a contract would make performance unexpectedly difficult, performance is discharged if utility is increased. The rule would require a finding that the utility to the paying party of the extra dollars he would have to spend for the same performance after discharge is less than the utility to the performing party of the extra dollars he would have to invest in performance were enforcement decreed. Now no court—indeed no stranger—could become sufficiently familiar with the litigants' mental processes and life plans during the limited and constrained course of a trial to make such a judgment accurately. Whether particular appli-

²⁶ Interpersonal comparisons of utility thus entail assessments of different persons' mental states; they are in the realm of psychology. See I. LITTLE, A CRITIQUE OF WELFARE ECONOMICS 51-57 (1963 ed.); Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955); Markovits, *A Basic Structure for Microeconomic Policy Analysis in Our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950, 985. Thus they must be made inferentially, from ambiguous evidence, and the inferences, particularly as they relate to strangers, inevitably shade into guesses. Cf. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1061 (1975).

cations of the proposed rule would increase or reduce utility thus often could not be known.²⁷

This difficulty is not avoided by altering the rule so that it embodies a "general" comparison, because the behavioral assumptions on which such comparisons rest will be flawed by the same lack of knowledge of individual preference described above. Consider a rule requiring discharge when the performing party's net wealth is less than half of the paying party, on the ground that the utility of the dollars at issue would then be greater to performing parties. This comparison would often falsify particular pairs of litigants for the utility of a dollar is a function of much more than the possessor's current net wealth. Of obvious relevance are the number and rapacity of his dependents. Thus it could not be confidently said of particular decisions under this rule, to excuse or enforce, that they actually increase utility.²⁸

To summarize, utilitarian distributional rules require the making of interpersonal comparisons of utility. Courts cannot make precise comparisons because they cannot know enough about the litigants, nor can they make general comparisons because the factual premises on which these comparisons rest are too likely to misdescribe concrete cases. Thus judicial applications of utilitarian distributional rules would be arbitrary, for their effect on utility is unknowable.

Professor Rawls's theory eschews rules like the initial form of the contract discharge rule proposed above because of the difficulty of assessing the circumstances of particular persons.

Now the great practical advantage . . . is that it is no longer necessary in meeting the demands of justice to keep track of the endless variety of circumstances and the changing relative positions of particular persons. One avoids the problem of defining principles to cope with the enormous complexities which would arise if such details were

²⁷ The rule the text discusses resembles the contract rule of frustration of purpose, that where subsequent events render a party's performance valueless he may be excused. See 6 A. CORBIN, CORBIN ON CONTRACTS, §§ 1353-56, at 455-78 (1962 ed.). Courts rarely use the rule, see Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1 (1953), probably because its application requires something like a precise interpersonal utility comparison.

²⁸ Professor Markovits recently suggested that while individual interpersonal utility comparisons may be impossible, "one may be justified in making crude intergroup comparisons of utility." Markovits, *supra* note 26, at 988. In my terminology, authoritative decision makers may make general, not precise, interpersonal utility comparisons. Markovits goes on to say, however, that

[It] might be desirable overall to instruct some government decisionmakers to consider only the allocative efficiency of their policy decisions, given the cost of any distributional analysis and the difficulty of controlling the weighting system such decisionmakers would employ.

Id. at 990. I argue here that courts should often be among the "governmental decision-makers" instructed to eschew distributional judgments. Markovits does not identify the institutions to be limited.

relevant. It is a mistake to focus attention on the varying relative positions of individuals and to require that every change, considered as a single transaction viewed in isolation, be in itself just. It is the arrangement of the basic structure which is to be judged, and judged from a general point of view. . . .

. . . If it is asked in the abstract whether one distribution of a given stock of things to definite individuals with known desires and preferences is better than another, then there is simply no answer to this question.²⁹

Rawls is instead concerned with society's "basic structure," which is composed of its principal institutions, such as "parliaments, markets and systems of property." These institutions are constituted by "a public system of rules which defines . . . positions with their rights and duties"³⁰ The public rules must be just, which means that they must improve the expectations of a representative "least favored" person.³¹ Thus one applying a Rawlsian rule must answer three questions, as to who the least favored person is, what he wants, and what would improve his lot. Whether a rule improves the lot of a real claimant thereunder is irrelevant.

Even so, the rules are very hard to apply. To decide who represents society's least favored citizens requires general interpersonal comparisons, although of a "qualitative" kind.³² A Rawlsian comparison, that is, would be—Smith is worse off than Jones; a quantitative, utilitarian, comparison would be—Smith possesses utility *X*; Jones possesses utility *Y*. Rawlsian welfare comparisons are as difficult for courts to make as utilitarian ones.³³ Are Appalachian whites worse off than inner city blacks? Are old people on social security worse off than young people on unemployment? The answers to these questions must embody behavioral assumptions as likely to be wrong in particular cases as the utilitarian assumptions just discussed.³⁴ After finding a representative

²⁹ RAWLS at 87-88. See also *id.* at 304.

³⁰ *Id.* at 55.

³¹ *Id.* at 92.

³² *Id.*

³³ For an analysis of the deficiencies of Rawlsian and utilitarian welfare comparisons, see Sen, *Rawls versus Bentham: An Axiomatic Examination of the Pure Distribution Problem*, 4 THEORY & DECISION 301 (1974).

³⁴ Respecting the problem of ascertaining whose expectations to maximize, Rawls states:

Here it seems impossible to avoid a certain arbitrariness. . . . One possibility is to [use the] unskilled worker, and then to count as the least advantaged all those with the average income and wealth of this group, or less. The expectation of the lowest representative man is defined as the average taken over this whole class. Another alternative is a definition solely in terms of relative income and wealth with no reference to social position. Thus all persons with less than half of the median income and wealth may be taken as the least advantaged segment. . . . I suppose that either of these definitions, or some combination of them, will serve well enough.

least favored person, by the method of making qualitative comparisons, a decisionmaker using the Rawls theory must then see "which combination of primary social goods it would be rational for him to prefer. In doing this we admittedly rely upon our intuitive capacities."³⁵ The next step, in applying a rule, is to ascertain its impact on the package of primary social goods which, it was "intuitively" decided, the "least-advantaged" person prefers; for the justice of the rule is a function of how it affects that person.

To perceive the difficulty of applying this theory, consider the standard rule, that unanticipated inflation occurring subsequent to the making of a contract is not a ground for its discharge or revision. This rule requires creditors to accept payment in devalued dollars and permits debtors to obtain performances for less than they had agreed to pay; it redistributes wealth from creditors to debtors.³⁶ Is the redistribution to the benefit of the least advantaged? Some of "the poor" are debtors, and thus gain. But some of the poor are on pensions or own United States Savings Bonds, and thus lose. Some creditors are large corporations, who lose, but they may then lay off marginal employees, who are poor and also lose. Further, many large corporations are debtors, and they gain. Also, consider a lawsuit between two businesses concerning whether a lease should be terminated because of inflation. The outcome will be a precedent for other contracts. Will the parties establish the effect on the least advantaged of the decision to excuse or enforce? If they do not—and this seems likely—how is a court to ascertain the impact of its decision? And if it cannot trace the effect, on the urban poor say, of decisions to enforce contracts despite inflation, can it know that this result is just?³⁷

... [W]e are to aggregate to some degree over the expectations of the worst off, and the figure selected on which to base these computations is to a certain extent ad hoc. Yet we are entitled at some point to plead practical considerations in formulating the difference principle.

RAWLS at 98. These "practical considerations" argue against judicial solutions.

³⁵ *Id.* at 94. "[P]rimary goods . . . are things which . . . a rational man wants whatever else he wants. . . . rights and liberties, opportunities and powers, income and wealth. . . . [and] a sense of one's own worth *Id.* at 92.

³⁶ The rule nevertheless has a general justification: enforcing contracts in good times and bad increases contract stability. See Schwartz, *Sales Law and Inflation*, 50 U. So. CAL. L. REV. — (1976) [forthcoming]. I use it above only as an illustration of the difficulties of applying Rawlsian rules in private law disputes. Rawls himself is primarily concerned with public law problems. See text at p. 571 *infra*.

³⁷ A recent study found that inflation probably redistributes wealth from creditors to debtors, from profits to wages, from the very poor and very rich to the middle class and from many households to the government, but concluded:

It is important to recognize, however, that the aggregate figures cover up a mass of differential effects on individuals within and between groups.

... Clearly, simple conclusions that inflation is good for the rich and bad for the poor, or other comparable statements, need to be viewed with considerable

Applying rules so as to satisfy Rawlsian criteria thus requires the making of "qualitative" interpersonal welfare comparisons, "intuitive" judgments which are likely to differ with perceivers, and facts as to actual impact which litigation is unlikely to disclose. Whether these applications would be just, whether they would maximize the expectations of the least advantaged, would therefore often be very hard to know.³⁸

Professor Rawls apparently did not have in mind distributional rules which would govern disputes between private parties. He tacitly assumes rules specifying the relationship between persons and the state, such as tax and welfare laws; and these rules are always adopted legislatively. This focus is wise, for two reasons: First, a legislature seems better able than a court to consider a rule's impact on all affected persons. Thus its rules are more likely to achieve their objectives. Second, our society commonly allows legislatures a greater margin for error in making factual judgments. A judicial finding that parties who earn less than \$8,500 a year are unsophisticated bargainers, for whose protection courts should inquire into the adequacy of consideration, would be considered arbitrary, a judicial *ipse dixit*; yet a statute limiting deficiency judgments when the sales price of goods is less than \$1,750,³⁹ on the same ground, has not evoked this response. Drawing such distinctions is what legislatures do. As Rawlsian rules rest on general behavioral assumptions and intuitive perceptions, they would encounter less social resistance if made legislatively. So also if general interpersonal utility comparisons are acceptably made by any legal institution it is the legislature. Thus again the nature of distributional judgments and commonly held conceptions of institutional competence argue against judicial solutions. This conclusion is strengthened when the

doubt. If inflation is to be accepted . . . , government measures to rectify undesirable redistributive effects of inflation on income and wealthholders need to be focused more clearly on certain lagging-income and positive-exposure groups than has been true in the past.

Bach & Stephenson, *Inflation and the Redistribution of Wealth*, 56 REV. OF ECON. & STAT. 1, 12 (1974). That a court could make the requisite factual findings seems improbable.

³⁸ A troublesome application problem, common to utilitarianism and the Rawls theory, exists because persons who initially receive the benefits and incur the costs of redistributions often shift some of these benefits and costs to others. Therefore, before a decision-maker reaches the question of the *impact* a distributional rule produces he must first answer the difficult question of *effect*: whom does the rule actually benefit and hurt? And by how much? See Graetz, *Assessing the Distributional Effects of Income Tax Revision: Some Lessons From Incidence Analysis*, 4 J. LEG. STUD. 351 (1975). Previous commentators have remarked the difficulty of applying the Rawls theory, but did not pursue the institutional implications of the insight for private law. See Michelman, *supra* note 3, at 975-76; Scanlon, *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1064 (1973).

³⁹ UNIFORM CONSUMER CREDIT CODE § 5.103 (1974 text).

costs which distributional rules often impose are considered. To this Part I C turns.⁴⁰

C. Predictability, Efficiency, and Freedom

Distributional rules are arbitrary in two senses: they reflect a choice among several equally justifiable rules which follow from whatever basic theory of justice is being used, and which of their applications would advance that theory is often unknowable. These defects make litigation outcomes excessively difficult to predict. Initially, unless potentially affected parties know the court quite well, they could not predict the distributional choice it would make. The prediction problems stemming from applying distributional rules vary with the rule category at issue. Consider first the contract discharge rule which requires a precise interpersonal utility comparison. As the litigants' satisfactions are only measurable intuitively, almost anything may be thought relevant to assessing them. Thus the factual issues which a tribunal would later find controlling would often be hard to know in advance, and so too would be the outcome of a litigation in which those issues were at stake. Moreover, since a comparison is entailed, the outcome is governed by the circumstances, attitudes, and desires of both parties. A person might then predict it accurately if he had, and the court could obtain, an intimate knowledge of his litigation adversary. However, potential litigants rarely know their adversaries in this detailed sense, and courts never will. Predicting litigation outcomes where rules embodying rough behavioral assumptions are applied is easier, as the rules themselves are apparently invariant. However, as particular applications would so often reveal the underlying assumptions to be inaccurate, rules resting on them would be riddled with exceptions. The making of such exceptions

⁴⁰ The difficulty of deriving a rule from a theory and the difficulty of applying the rule derived seem more closely related problems than the text suggests. If, at the derivation stage, one could know how all possible rules would actually work, some rules would probably follow more strongly from the theory than others. Part I B, then, may concern a separate facet of the problem Part I A addresses, rather than a different problem. Nevertheless, the textual separation seems defensible as an expository technique and in fact. Respecting the last, it is a commonplace that some rules are "desirable in theory" but "administratively unworkable," by which is often meant that they follow strongly from the theory but require for their application facts that are unobtainable. For example, a rule resolving pollution problems by effluent taxes follows more strongly from welfare economics premises than a rule prohibiting activities altogether, but may founder over the difficulty of calculating pollution costs. Application is often a distinct problem. I suggest, in the Conclusion, a common explanation for the related difficulties Parts I A and B discuss, which focuses on the very broad question distributional rules address. See note 20, *supra*. But the relation between the difficulty of deriving and applying legal rules still seems largely unexplored.

is hard to forecast; and their effect would be to obscure the meaning of the rules themselves.⁴¹

Unpredictability of legal results creates costly uncertainties. People deciding whether to contract or breach, to make a new product or vary an old one, would risk being affected by rules subsequently adopted whose nature is unknowable, and by applications of rules already adopted which are largely unpredictable. If the risk of an adverse outcome is large people may not act; otherwise, activities become more expensive, as precautions must be taken against remotely possible as well as reasonably probable contingencies.

To these utilitarian calculations should be added the libertarian cost of unpredictability. Definite rules interfere with freedom much less than unknowable ones, because definite rules become data which persons take into account in making their plans. They are like the weather, which can limit freedom in the sense of restricting a person's options but not in the sense of restricting his ability to choose among whatever options he faces.⁴² If people may incur large costs by doing the putatively per-

⁴¹ Private law rules may apparently be devised to avoid the problem of predicting judicial outcomes. For example, manufacturers bear *all* costs of defective products. Three factors make this resolution of the prediction problem unsatisfactory. First, whether such a broad rule achieved its distributional objectives in particular cases would be impossible to know, and the net results of its application to all cases would also frequently be unknowable. Thus the rule would be intellectually untenable and, as the text indicates, vitiated by unpredictably adopted exceptions. Second, such broad rules often create collateral costs. Part II A thus shows that requiring manufacturers to bear the risk of defective products and preventing them from shifting this risk to retailers results in higher accident costs than would obtain if manufacturers could disclaim. The likelihood of such collateral costs materializing argues against adopting broad distributional rules, but more "precise" rules, the text has shown, create prediction problems. Third, making litigation outcomes predictable may be insufficient if the circumstances which trigger the rule's operation are themselves unpredictable. This sometimes happens with distributional rules. Part II B shows, for example, that making a seller liable for *all* defective product risks, known and unknown, would enable him to predict the judicial outcome when a risk materialized, but since he could not predict when this would occur, he would remain subject to the uncertainties which the text describes, and incur the costs of those uncertainties which the text next discusses.

It may also be noted that certain administrative agencies perform distributional functions, such as awarding airline and television franchises and regulating transportation rates. These agencies are notorious for failing to develop coherent, predictable policies. *E.g.*, H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962); Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 *STAN. L. REV.* 1041 (1975). Many explanations for this have been offered—an insufficiency of "competent" administrators is perhaps the most frequent—but I suggest that a major cause is the nature of distributional decisions. Being arbitrary, they are largely determined by the values of particular decisionmakers (and thus change from administration to administration); and being made in ignorance of the determinative facts, they are strongly influenced by the peculiarities of particular cases. I do not say that legislatures should never delegate distributional decisions, but offer the administrative record as evidence of my thesis that these decisions impose large costs.

⁴² Professor Hayek has explained:

The significance for the individual of the knowledge that certain rules will be universally applied is that, in consequence, the different objects and forms of action

mitted, the latter freedom is seriously limited. Many will be influenced to choose only traditional paths.

Legislative distributional rules, in the nature of the case, are less costly. They are embodied in published statutes to which courts cannot create exceptions for concrete cases. However arbitrary the choice of rule from theory, or however tenuous the rule's factual predicate, there is at least a rule, to some extent knowable in advance and largely invariant in practice. Judicial distributional rules, when contrasted with legislative ones, are simply too costly to the public's wealth and its liberties. It is probably this more than anything else which has induced courts not to adopt them.

D. Probable and Permissible Judicial Distributional Rules

The probability of a court's adopting a distributional rule is a function of three conditions. First is mistake: a court believes it is adopting a general rule when that rule has only distributional consequences. Thus courts sometimes refuse enforcement to contract clauses on the ground of unequal bargaining power, in apparent application of the utilitarian principle that only freely negotiated agreements are enforceable. Yet the "freedom" at issue often refers to access to resources; rich people can buy away many "oppressive" contract clauses while poor people can buy away few. A court which strikes a contract clause on the freedom of contract ground is thus often engaged in getting better contracts for the poor than they could get for themselves. The unequal bargaining power concept is therefore primarily distributional, achieving the object of making some contracting parties richer at the expense of businesses and other buyers.⁴³ Had courts realized this, the relative bargaining power of the parties probably would be less significant than it now is.

acquire for him new properties. He knows of man-made cause-and-effect relations which he can make use of for whatever purpose he wishes. The effects of these man-made laws on his actions are of precisely the same kind as those of the laws of nature: his knowledge of either enables him to foresee what will be the consequences of his actions, and it helps him to make plans with confidence. There is little difference between the knowledge that if he builds a bonfire on the floor of his living room his house will burn down, and the knowledge that if he sets his neighbor's house on fire he will find himself in jail. Like the laws of nature, the laws of the state provide fixed features in the environment in which he has to move; though they eliminate certain choices open to him, they do not, as a rule, limit the choice to some specific action that somebody else wants him to take.

The conception of freedom under the law . . . rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free.

Hayek, *supra* note 21, at 153.

⁴³ As such it is subject to the problems which distributional rules often create, in particular answering the questions which contracting parties to make richer, by how much

The second and third conditions under which distributional rules are likely to be adopted follow from the objections to those rules explicated above. That such rules are chosen, not derived, seems inescapable. But a distributional rule may be obviously popular, thereby enhancing the chance of a judicial choice being made. Finally, a distributional rule is occasionally capable of predictable application. The parties can plan their affairs around it, know the facts it makes relevant in litigation and predict, at least roughly, how the tribunal is likely to assess those facts. A distributional rule which satisfies the last two conditions has a good chance of being adopted.

The first condition, mistake, plainly cannot justify any rule. The third condition, predictable application, justifies a rule weakly; for while efficiency and freedom suffer little, in respect of the rule itself, its choice is not majoritarian. The second condition, obvious popularity, is a strong justification; satisfying majoritarian preferences is not an exclusively legislative task. When the second and third conditions are satisfied, then, courts are justified in adopting distributional rules. This judgment, however, must be tentatively held because these criteria are surely nonexhaustive. A fuller exploration of the nature of distributional decisions and their relation to legal institutions should produce additional guides to decision. Yet the criteria of predictability and obvious popularity will probably constitute a significant part of any full theory respecting when courts should make distributional decisions, and are thus useful in evaluating current legal doctrine.

Part II next shows that the rule abolishing vertical privity of contract fulfills the third condition (and the first), but is only weakly justifiable because it does not fulfill the second. Part II also shows that a rule which would impose the risk of unknowable harms on sellers fails to satisfy any condition, which is why it neither is nor ought to be in force.

II. ILLUSTRATIONS

A. *Vertical Privity*

(i) The Basis of the Rule

B suffers loss from a defective product sold to him by retailer *R*. The product was manufactured and sold to *R* by *M*. Neither *R* nor *M* was negligent. The common law once limited *B* to a suit against *R*, because

and in what circumstances. For a fuller development of the theme, see Schwartz, *Seller Unequal Bargaining Power and The Judicial Process*, 49 IND. L.J. 367 (1974).

he and the manufacturer were not "in privity of contract." Courts today have removed the "vertical privity barrier;" *B* may now sue *M* for breach of warranty or in strict liability in tort. Five reasons are commonly advanced to support the new rule.⁴⁴ Three are "general" justifications, in the sense used here; of them one supports removal of the privity barrier only in particular cases, and the others are wrong. The remaining reasons are distributional, but only one sustains the rule.

The ground which supports abolishing the vertical privity barrier in particular cases derives from contract law. Courts award damages in contract cases to protect parties whose expectations have been frustrated by the failure to keep promises, and to encourage promises to be kept. Generally, a promisee's expectations arise out of his dealings with the promisor; *R* promises to sell workable goods to *B*. However, expectations may also be formed by manufacturer advertising. The nature of these expectations is a function of the advertising at issue; in some sales it is thus made clear that the manufacturer alone warrants;⁴⁵ in others that only the retailer is responsible for product failures.⁴⁶ When a buyer could reasonably expect a manufacturer to be responsible for quality, the purposes of contract law are served by allowing a suit against the manufacturer. It also follows that when a buyer could expect only his retailer to be responsible for quality, despite advertising, only a suit against the retailer should be allowed. Courts originally relaxed the vertical privity barrier when a manufacturer's advertising seemed sufficiently extensive to justify a buyer inference that the manufacturer promised *him* that quality would be satisfactory.⁴⁷ Today, however, courts also allow suits against manufacturers who do not advertise⁴⁸ or whose ads apparently provide no basis for a reasonable buyer expecta-

⁴⁴ The standard reasons for abolishing vertical privity are thoughtfully explicated in Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966). See also James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

⁴⁵ See *Hunt v. Perkins Machinery Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967); *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970); *S.F.C. Acceptance Corp. v. Ferree*, 39 Pa. D. & C.2d 225 (C.P. York Co. 1966); *General Elec. Credit Corp. v. Hoey*, 7 U.C.C. Rep. Serv. 156 (N.Y. Sup. Ct. 1970).

⁴⁶ See, e.g., *Atlas Aluminum Corp. v. Borden Chem. Corp.*, 233 F. Supp. 54 (E.D. Pa. 1964).

⁴⁷ E.g., *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932).

⁴⁸ E.g., *Chairaluce v. Stanley Warner Management Corp.*, 236 F. Supp. 385 (D. Conn. 1964); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967). A recent trend exists to allow suits against intermediate wholesalers, who also do not advertise. See *Cottom v. McGuire Funeral Service*, 262 A.2d 807 (D.C. Cir. 1970); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); RESTATEMENT (SECOND) OF TORTS, § 402A, comment *f* (1965).

tion that they will be responsible for quality.⁴⁹ This total abolition of vertical privity is unrelated to the purposes contract law serves.

A general but erroneous justification for abolition is that manufacturers cause accidents. The premise is correct if cause is used in a factual sense but no particular liability rule follows from it. Admittedly, a particular accident would not have occurred but for the manufacturer selling a defective product. However, the accident also would not have occurred but for the consumer's purchase, the purchases of enough other consumers to make the business profitable, the sales of raw materials to the manufacturer, and so forth. The concept of cause in fact does not direct which among the universe of casually linked parties to hold liable. "Cause" in the legal sense must therefore be functional, not factual: a party is held liable because imposing costs on him advances some goal a court wishes to pursue.

The last general but erroneous justification for abolishing vertical privity, then, is that abolition contributes to the reduction of accident costs. If, the argument runs, the manufacturer is held liable, he will be stimulated to make safer products. Abolishing privity, however, cannot accomplish this. Initially, assume the vertical privity barrier exists, and a manufacturer wishes to avoid bearing product failure losses. He will disclaim all warranties in his contracts with retailers. Should an injured consumer prevail in his suit against a retailer, the loss will remain there, because the disclaimer prevents the retailer from shifting it. Now let privity be abolished. Our manufacturer will require of his retailers indemnification clauses compelling them to pay if the manufacturer is successfully sued. A manufacturer with the power to disclaim also has the power to obtain indemnity, because disclaimers and indemnification clauses achieve the same result. Thus abolishing vertical privity will not increase a manufacturer's incentive to make safer products.

This result may apparently be avoided by enabling consumers to sue manufacturers directly, and prohibiting manufacturers from shifting losses to retailers.⁵⁰ Such a rule, however, actually increases rather

⁴⁹ See *Corprew v. Geigy Chem. Corp.*, 271 N.C. 485, 157 S.E.2d 98 (1967).

⁵⁰ This has sometimes been done. In *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722 (1970), which by "strict construction" refused to enforce a clause requiring a business buyer to indemnify a manufacturer against liability for injuries the product might cause, the court said:

Indeed it would do violence to the doctrine of strict liability and thwart its basic purpose, if we were to interpret so general a clause as transferring the liability for a defective article from the party putting the article in the stream of commerce, to the user or consumer of the article who is within the class the doctrine was designed to protect.

Id. at 258, 85 Cal. Rptr. at 187, 466 P.2d at 731. See also *Majors v. Kalo Laboratories, Inc.*, 18 U.C.C. Rep. Serv. 592 (M.D. Ala. 1975); *Ford Motor Co. v. Tritt*, 244 Ark. 883,

than reduces accident costs. This can be demonstrated by two simple models. Assume that manufacturer and retailer deal in widgets and are free to allocate losses between themselves. A widget may be defective and cause harm. Let the average cost per defective widget be \$100, and the percent of defective widgets per widget batch be .01. Thus the "defect risk" associated with each widget is \$1 (cost times the likelihood of defects). Assume further that the manufacturer could reduce this risk to \$.25 (*i.e.*, reduce the probability of defects from .01 to .0025) by spending \$.50 per widget in safety improvements, but the retailer could not reduce the risk below \$.50, and would have to spend \$.60 per widget to do even this. The difference in ability to reduce risks is the result of the manufacturer's ability to alter the product during manufacture, while the retailer must attempt to change a finished product.

If, in this illustration, the retailer were required to compensate users for their injuries, he would not make the product safer. Were he to spend \$.60 to reduce the risk to \$.50, he would have to raise the price by a "defect charge" of \$1.10 per widget (avoidance cost of \$.60 plus reduced risk value of \$.50). Were he instead only to compensate victims, the defect charge would be \$1.00 (the old risk value). As, other things being equal, less will be sold at \$1.10 than \$1.00, the retailer will not make widgets safer. The manufacturer, however, plainly would; for by spending \$.50 to reduce the risk to \$.25, he can reduce the defect charge from \$1.00 to \$.75. As the manufacturer can sell more widgets at \$.75 than at \$1.00, he will make safer widgets. Thus imposing liability on the manufacturer is desirable. The point of the illustration, however, is that an imposition is unnecessary, for the parties will bargain to put the defect risk on the manufacturer. Both profit by a defect charge of \$.75, because both will sell more at that price; thus both will see the advantage of the manufacturer bearing the costs which defective widgets yield.

Let us now alter the model. The defect risk of \$1.00 can be reduced only to \$.75 by making the product differently, but at a cost of \$.30 per widget. However, the risk can be reduced to \$.60 per widget by a demonstration of safe use, which may be made quickly to consumer buyers after the sale at an average cost in retailer personnel time of \$.20 per widget. Imposed retailer liability now seems desirable, because retailers will spend \$.20 to reduce the risk by \$.40 while manufacturers will not spend \$.30 to reduce the risk by \$.25; retailer liability produces safer widget use. However, it is unnecessary to impose liability on re-

430 S.W.2d 778 (1968); *Sarfati v. M.A. Hittner & Sons, Inc.*, 35 App. Div. 2d 1004, 318 N.Y.S.2d 352 (1970).

tailers. If manufacturers bear the risk, they will add a defect charge of \$1.00 per widget, the defect risk, which retailers will pass on; if retailers bear the risk, they will charge each consumer an additional \$.80 (the value of the reduced defect risk plus the demonstration cost). As retailers, other things being equal, will sell more at \$.80 than at \$1.00, they will take the risk, and will then give safety demonstrations.

These models illustrate an axiom of micro-economic theory—when two informed parties bargain they will achieve the most efficient allocation of costs without the law's aid.⁵¹ It is this axiom which demonstrates the irrationality of imposing liability on manufacturers and preventing them from contracting out, with the object of reducing accident costs: when manufacturer risk bearing is efficient, the parties will themselves shift the defect risk to the manufacturer; and when retailer risk bearing is efficient, imposing risks on the manufacturer yields higher prices and less cost reduction. Put another way, a rule imposing risks on manufacturers and prohibiting them from shifting these risks to retailers cannot produce safer products than private bargains do, and will occasionally produce more dangerous products. The issue, then, is whether distributional considerations support the privity rule.

Abolishing privity is often defended on the ground that abolition facilitates loss spreading.⁵² This is false. "Spreading" is apparently achieved by the manufacturer raising his price to retailers, who then raise their prices to consumers. Consider a manufacturer who is already bearing the risk of product defects. Abolishing privity achieves no addi-

⁵¹ For a more extensive treatment of the application of this axiom to the problem of product defects, see Schwartz, *The Private Law Treatment of Defective Products In Sales Situations*, 49 IND. L.J. 8 (1974). A rigorous mathematical discussion, which reaches many of the same conclusions, is Oi, *The Economics of Product Safety*, 4 BELL J. ECON. & MAN. SCI. 3 (1973).

⁵² Professor Calabresi recently characterized loss spreading as a "compensation" goal, and putting losses on "those wealth categories able to bear them with relative ease" or "that party who, in distributive terms, is best suited to bear the burden" as a "distributional" goal. Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 73, 77 (1975). The distinction seems artificial, as the object of both goals is to redistribute wealth in favor of victims and against other classes. Moreover, both goals follow from the utilitarian diminishing marginal utility of money theory: loss spreading presupposes that the total satisfaction loss of the "average persons" who must pay slightly more for goods is smaller than the total satisfaction loss uncompensated victims would suffer; "deep pocket" loss allocation presupposes that the rich miss marginal dollars less than others do. Thus both Calabresi goals are distributional. His distinction probably rests on the assumption that the spreading goal is more popular than the deep pocket goal, and that courts feel somewhat freer to pursue spreading. This granted, it is doubtful whether the spreading goal could support *obviously* popular distributional rules. See text at 582-83 *infra*. Calabresi apparently shares these doubts. See *id.* at 107 (Vague judicial doctrine usefully facilitates the pursuit of "goals (like spreading) that we do not want to spell out or too obviously assign to judicial institutions;" rigid definitions of legal concepts would not "permit the introduction of the goals we cannot affirm too openly . . .").

tional spreading, as the manufacturer is doing what he should do. Now let retailers bear the defect risk. Abolishing privity achieves nothing, as the manufacturer will use indemnification clauses. Prohibiting these clauses is both pointless and harmful. Without them the manufacturer, who had previously shifted risks to retailers, would add a defect charge to his price. The retailers would pass this charge on; but losses would be spread no differently because retailers were previously passing on their own defect charges. True, the new charges would be higher, the least efficient risk bearer now being liable, but this only worsens the consumer's lot.⁵³

The distributional ground which actually supports the rule is that abolition shifts the risk of retailer bankruptcy from consumers to manufacturers. Understanding this requires a return to the models used above. Both presupposed that the parties could evaluate the defect risk and compute defect avoidance costs, and therefore would appreciate the advantages of bearing or shifting risks. If, for example, the retail buyer in the second illustration did not know that a demonstration would reduce the risk sufficiently to make retailer risk bearing profitable, he might shift the risk to the manufacturer for \$1.00. This would result in unnecessarily high product prices and less safe products.

Consumer buyers are frequently uninformed as to defect risk and defect avoidance costs.⁵⁴ In their bargains with retailers, they thus sometimes bear risks which they would have shifted had they known the facts, and shift risks which they would actually prefer to bear. One response to consumer ignorance is to impose defect risks on sellers. If that is done, sellers will either reduce those risks by making safer products, or charge for bearing them; the former is obviously desirable, and the latter is also, because a defect charge makes dangerous products relatively more expensive, thereby reducing the number of them which are purchased. A general justification therefore exists for courts to impose defect risks on retailers and prevent *them* from contracting out—risk impositions may conduce to optimality.⁵⁵

⁵³ Loss spreading is somewhat more complicated than the text implies, losses sometimes being spread "backward" to factors of production, and sometimes, as in monopolistic industries, spread hardly at all. See Calabresi, *Some Thoughts On Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 519-27 (1961). These complications do not affect the argument that imposing risks on manufacturers will not importantly change the way in which losses were previously spread.

⁵⁴ Schwartz, *supra* note 51, at 13-17. See also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 51-52 (1972).

⁵⁵ A theoretically preferable alternative to imposing risks on sellers is to inform buyers. Consider the second illustration above. Imposing the defect risk on the manufacture yields a defect charge of \$1.00 and no accident cost reduction; informing an ignorant retailer, so he may rationally bargain, yields a defect charge of \$.80 plus some accident cost reduction. Whether society should provide information or impose risks turns largely on whether the

A byproduct of the decision to *impose* risks on retailers is that it prevents consumers from bearing large product failure losses. If, however, a retailer goes bankrupt, this byproduct of imposing risks on him is lost; the buyer must bear losses himself. But if the buyer may also sue the manufacturer, the risk of his bearing losses is reduced; for while either business entity may go broke, the chance of both being broke at once is slight. Vertical privity barriers should therefore be abolished, because abolition materially enhances a consumer's chance of being compensated for his losses.

The rule abolishing vertical privity is thus distributional,⁵⁶ since it produces only distributional effects. A manufacturer is liable not because he raised in consumers the expectation that he would be responsible for product defects. Nor is abolition explicable as encouraging a manufacturer to comply with a duty to make safer products; abolition produces no more safety and may produce less. Abolition also cannot produce more or "better" loss spreading than would have occurred in its absence. Doing away with vertical privity instead only redistributes wealth in favor of accident victims and against business entities (and those on whom the entities shift the new costs). Assuming the desirability of this result, the issues now are whether, by the criteria Part I develop, the privity rule is (a) predictable and (b) justifiable.⁵⁷

administrative costs of information provision exceed the efficiency costs of risk impositions. No one knows whether they do, which partly explains why society pursues both methods at once. Compare Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 102, 15 U.S.C. § 2302, with § 108(a), 15 U.S.C. § 2308(a) (Supp. IV, 1974). I have discussed only the alternatives of imposing risks or allowing bargains because these are the ones courts face; courts cannot effectively regulate information disclosure. Finally, when buyers are uninformed, imposing risks on sellers would yield a more efficient allocation of accident costs than doing nothing only if sellers could price the risks which they were required to bear. I am beginning to doubt that they can, but resolution of this issue is unnecessary to the argument the text makes, that no *general* justification for abolishing vertical privity exists.

⁵⁶ An efficiency argument exists for retaining the privity barrier, *i.e.*, the barrier leads to more efficient dispute resolution systems because it generally seems more efficient to deal only with those to whom you sell. See Schwartz, *supra* note 51, at 48. Strict liability also redistributes wealth in favor of consumers who incur high accident costs and against, *inter alios*, poorer consumers who prefer riskier products at lower prices. See Oi, *supra* note 51, at 27 (1973). However, it is imposed to achieve optimal accident cost reduction and is therefore a general rule.

⁵⁷ Abolishing vertical privity is sometimes grounded on the saving of administrative cost which results if manufacturer liability is obtained in one law suit, by a consumer, rather than in two, consumer v. retailer; retailer v. manufacturer. *E.g.*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 650-51 (4th ed. 1971). However, with a privity barrier there will be two suits only if the manufacturer has not disclaimed to the retailer; without a privity barrier there will be one suit only if the manufacturer has not obtained indemnity from the retailer. Thus the argument that abolishing vertical privity reduces the number of law suits rests on the factual premise that manufacturers bear risks of non-conformity more frequently than they shift those risks to retailers. No empirical support for this premise has ever been offered. Moreover, given the ability of retailers to compel manufacturers to

(ii) Prediction and Justification

The abolition of vertical privity is perhaps principally explained as a mistake. The gains flowing from shifting the bankruptcy risk to manufacturers seem too small to justify the passion and seriousness which characterize the opinions. Judges do believe that abolishing privity reduces accident costs, puts the loss on the party which "caused" it, and so forth. Had the problem been understood, the solution might have differed.⁵⁸

This speculation seems strengthened on considering the case for the rule. A judicial distributional rule is justified if potentially affected persons can predict its application, and if the distributional choice it reflects is obviously popular. A serious prediction problem exists. Abolishing privity to shift the risk of retailer bankruptcy only justifies making manufacturers primarily liable to consumers; indemnification clauses should be permissible, so that manufacturers pay when retailers cannot. A manufacturer may then predict the rule's operation only by predicting the risk of retailer bankruptcy. That prediction cannot be made. Assume that a manufacturer sells 200 units a year to a retailer; these 200 units produce \$2,000 a year in accident costs; the manufacturer disclaims to the retailer; and the manufacturer knows, by the use of credit reports, that the retailer has a .01 chance of going bankrupt.⁵⁹ The bankruptcy risk would seem to be \$20, or \$.10 per unit (\$2,000 accident cost times .01 chance of bankruptcy). However, if

appear in the initial action, the argument is not compelling. *E.g.*, UNIFORM COMMERCIAL CODE § 2-607(5). But it is valid if manufacturers are prohibited from obtaining indemnity. Barring indemnification clauses, however, raises costs because it imposes risks inefficiently; so that the circuitry argument must be that costs should be raised to save costs. Without quantification, there is no reason to accept the position. Finally, courts occasionally justify abolishing privity on the ground that the manufacturer "put the defective article in the stream of commerce." But the consumer took it out. Thus implicit in the definition of putting an article in the stream of commerce is that one is liable to whoever takes it out, which is tautological. I doubt if this "pollution" argument is seriously meant, but thoroughness compels its mention.

⁵⁸ As evidence of this, the Oregon Supreme Court explained its refusal to impose on manufacturers the risk of consumers incurring losses from unknowable side effects of drugs partly by the argument:

[S]ocial justice might require that the price of the drugs should include an amount sufficient to create a fund to compensate those who suffer unanticipated harm from the use of a beneficial drug. But this kind of a system of compensation is beyond the power of a court to impose.

Cochran v. Brooke, 243 Ore. 89, 95-96, 409 P.2d 904, 907 (1966). Yet Oregon also abolished vertical privity for personal injury claims. And in *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968), the court cited *Cochran* with approval (at 126) while allowing a consumer to sue a manufacturer for failure to warn of a drug's dangers. The frequent judicial statements, in cases where privity was no barrier, that manufacturers are not insurers also illustrate the point.

⁵⁹ This is an heroic assumption. While manufacturers can learn much about the retailers to whom they sell, the information does not seem susceptible of such precise quantification.

the retailer went bankrupt after selling only ten units, the manufacturer's exposure is much less than if the retailer went bankrupt after selling 126 units. While the risk of bankruptcy during a period such as a year may be computed, it seems impossible for a manufacturer to know when during that period insolvency will occur, because such a calculation requires a larger statistical sample than the customers of most manufacturers would comprise. Thus the actual value of the bankruptcy risk, which is a function of the number of units *sold to consumers*, is ordinarily unknowable. Manufacturers can only attempt to shift those costs which abolishing privity unpredictably imposes on them.

This difficulty does not argue conclusively against the rule. Abolition bites only when manufacturers have shifted risks to retailers. There, the risk the rule imposes on manufacturers will seldom be sufficiently large as to affect the character of the enterprise: manufacturers will rarely close up, drop product lines, or raise prices radically because of it. Also, manufacturer exposure is to some extent limitable, by cutting off shaky retailers. Finally, when a lawsuit is brought, a manufacturer will usually know whether indemnification is obtainable; the judicial outcome can be forecast. Therefore prediction problems, while serious, seem insufficient to defeat the rule, if it follows strongly from a basic theory or is obviously popular.

The former justification seems unavailing. Consider some choices utilitarianism yields for assigning the bankruptcy risk: (i) Any victim may sue the manufacturer, since utility is increased if all buyers pay a little more but some do not bear large losses; (ii) Any uninsured victim may sue the manufacturer; (iii) "Rich" victims cannot sue manufacturers, since utility would be decreased by shifting to the poor, through higher prices, accident costs which the rich incur; (iv) Victims may shift medical expenses and earnings losses to manufacturers but must bear pain and suffering costs, these being too likely to be misvalued by manufacturers, with the result that product prices would be distorted; (v) Rule (i) obtains only against "large" manufacturers; (vi) Although rule (i) generally obtains, manufacturers should not bear the risk if more than 50 percent of their stock is owned by employee pension funds, because otherwise wealth is redistributed against the old, who often are poor; (vii) Although rule (i) generally obtains, bankruptcy risks should not be assigned to industries with high unemployment. Administrative difficulties aside, the first rule, which is now the law, does not seem indicated more strongly than the others; and the second, fourth, and sixth do seem administratively feasible. The Rawls theory yields similar results. It only indicates weakly a rule that victims of all

social classes should be compensated at the expense of persons in all social classes, because Rawlsian rules seek to maximize the expectations of society's least advantaged. Consider an alternative: victims in the least advantaged class may always sue manufacturers, as may any victim of a product made by a company whose profits exceed the national average by more than 20 percent. In sum, as neither theory of justice indicates the present rule more strongly than alternative rules, it is justifiable only if it is obviously popular.

That it is seems doubtful. Assume the public understood that only wealth redistribution were at stake; manufacturers were not evil; "cause" was irrelevant; no increase in product safety would occur; losses would be spread broadly if privity existed; but total prices would rise and earnings drop after abolition, although the affect on any one product would usually be slight. Would the public vote for a tax to be paid by buyers, employees, and shareholders, whatever their circumstances, the proceeds to comprise a "bad luck insurance fund" to compensate the victims of judgment proof retailers, whatever their circumstances? It is difficult to say. Taxes are seldom popular. Taxes which ignore ability to pay are often disliked. Welfare is these days unpopular, especially where recipients may not need the money. Yet the recent trend to compensate the victims of violent crime for certain expenses indicates a desire to redress the serious bad luck of people in all social classes.⁶⁰ However, statutes limiting medical malpractice recoveries reflect, or are consistent with, a desire to let potential victims bear large risks.⁶¹ The current rule is unlikely to be the obviously popular one.

To summarize, that courts would abolish vertical privity was predictable. Abolition resulted largely from mistake, and is possible to live with. But when the true distributional basis of the rule is understood—that it shifts the bankruptcy risk—the rule is seen to be at best weakly justifiable: serious prediction difficulties do inhere in its use and the distributional choice it reflects is not obviously popular. The high regard in which the rule is currently held seems misplaced.

B. Unknowable Risks

(i) The Basis of a Contrary Rule

Courts impose the risk of unknowable harms on sellers only when a general justification for doing so exists. To understand why, I

⁶⁰ See Comment, *Rehabilitation of The Victims of Crime: An Overview*, 21 U.C.L.A. L. REV. 317 (1973).

⁶¹ See IND. CODE § 16-9.5-1-1 to -9-10 (Burns Supp. 1975). For comment see Symp., *The 1975 Indiana Medical Malpractice Act*, 51 IND. L.J. 91 (1975).

explore the relevant justification and the basis of a contrary rule. A product is "defective" in two relevant ways: (1) It does not do what it was meant to do; (2) It does what it was meant to do but causes other harms. Unknowable risks thus are of two kinds.⁶² (1) A product malfunctions in a totally unexpected way. For example, a polio vaccine unexpectedly contains live polio virus.⁶³ (2) A product which works causes a harm no one anticipated. Thus a quinine substitute developed during the Second World War is useful in treating malaria, certain skin diseases and arthritis, but many years after its development began causing blindness in a small percentage of users.⁶⁴ May persons injured by the materialization of unknowable risks shift their losses to sellers?

Contract law directs such loss shifting in some sales of goods which unexpectedly malfunction. A seller may have agreed to bear all defect risks, having in mind the likelihood of defects and their costs. When the product fails for unanticipated reasons, that likelihood and those costs are unexpectedly higher. But a buyer of the product knows only that if it malfunctions his seller has agreed to pay; and when it does, a primary purpose of contract law—protecting a party's reasonable expectations—justifies holding the seller liable. If, however, the seller has shifted defect risks to buyers by a disclaimer, and the product malfunctions for unknowable reasons, a buyer cannot reasonably expect his seller to pay. Buyers also cannot reasonably take a seller who has agreed only to bear the risk of product malfunction to assume the risk of unanticipated harms, such as an idiosyncratic reaction to a drug which functions properly. Therefore, imposing unknowable risks on sellers is generally justifiable only when those risks cause a product to malfunction and sellers have not disclaimed.

The goal of reducing accident costs cannot justify requiring sellers to bear unknowable risks which they have not agreed to take, because imposition produces no more cost reduction than bargains. Whether a seller avoids a defect turns on the outcome of his comparison between

⁶² Courts sometimes find that a product is "defective" only because the seller failed to warn of foreseeable misuse, but exculpate sellers when the misuse cannot be foreseen. See *Casetta v. United States Rubber Co.*, 260 Cal. App. 2d 792, 67 Cal. Rptr. 645 (1968).

⁶³ *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960). See also *Tinnerholm v. Parke-Davis & Co.*, 411 F.2d 48 (2d Cir. 1969); Comment, *Cigarettes and Vaccine: Unforeseeable Risks in Manufacturers' Liability Under Implied Warranty*, 63 COLUM. L. REV. 515 (1963).

⁶⁴ *Sterling Drug, Inc. v. Yarow*, 408 F.2d 978 (8th Cir. 1969). A drug called DES (diethylstilbestrol) was administered to prevent miscarriages, between the 1940's and the late 1960's. In 1971, it was learned that DES may be associated with cancer in daughters of the recipients, and it is now considered a possible cause of sterility in their sons. Suits are now being brought. See *Wall Street Journal*, Dec. 23, 1975, at 1, col. 1; McLaughan, Newbold & Bullock, *Reproductive Tract Lesions in Male Mice Exposed Prenatally to Diethylstilbestrol*, 19 SCIENCE 991 (1975).

the cost of bearing the defect risk—compensating victims—and the cost of reducing the defect risk. That risk is a product of the likelihood of malfunction and its costs. A seller who is liable for everything can therefore do no more than predict the nature and probability of the risks “everything” includes, and compare these with the cost of altering his product; but this, of course, is what a seller who must compensate only the victims of foreseeable risks will also do.⁶⁵

However, the distributional goal of preventing buyers from bearing large losses does justify imposing unknowable risks on sellers. When a buyer of a drug developed to ease arthritis pain unexpectedly becomes blinded, there is much to be said for shifting his loss to another. But what is to be said concerns the desirability of redistributing wealth, not the protection of commercially reasonable buyer expectations or any increase in product safety. A court which holds liable the sellers of products which malfunctioned in unexpected ways or caused unanticipated harms is therefore “taxing” these sellers (and those on whom they shift part of these costs) with the object of redistributing wealth from them to buyers.

An objection to this analysis derives from the administrative difficulty of determining whether a risk was in fact unknowable. Because the foreseeability issue can be difficult, sellers may sometimes escape liability although a risk should have been foreseen. Moreover, because

⁶⁵ Professor Calabresi recently argued that holding a party liable for unforeseeable risks may reduce accident costs.

Unforeseeable risks may, as a statistical matter, cluster around certain activities. If those engaging in such activities are held liable for those unforeseeable damages, the activities will acquire a reputation for being financially risky. As such they may be undertaken to a lesser extent . . . or . . . by . . . those who are willing to gamble on their knack for avoiding even unforeseeable risks more successfully than most people.

Calabresi, *supra* note 52, at 93. This argument is nondirective as applied to products. The activity of prescription drugs includes making them, taking them and prescribing them. Neither evidence nor theory so far indicates which of these constituent “activities” is the cheapest cost avoider of unknowable risks. Thus if Calabresi is right, he is not yet instructive on the question the cases pose. His theory seems otherwise unsuitable for judicial use. Consider the first materialization of an unknowable risk in an industry. A court has no way of knowing whether these risks “may, as a statistical matter, cluster around” this industry. Should it deny liability? If so, how many more unknowable risks would it take to produce a different result? If the court holds the manufacturer liable for the first injury, how is it to know whether future cost avoidance will result? Thus the Calabresi rule seems either unworkable—a court could not know how many unknowable risks are statistically significant—or an act of faith—a court could not know whether cost avoidance would follow the initial risk imposition. Finally, Calabresi justifies “business” liability when business cannot foresee the risk but victims can because were victims liable they might “shift the loss to another category, such as a social insurance fund,” thereby eliminating all cost avoidance incentives. *Id.* But this presupposes that victim and injurer do not bargain; if they did, the one who could foresee the risk would notify the other. Calabresi, however, was not talking specifically about products liability and probably did not have its peculiar problems in mind.

sellers may win on the foreseeability issue, their incentive to investigate for *all* potential defects may be reduced. Thus holding sellers liable only for foreseeable risks may produce less accident cost reduction than would be obtained by holding them for every risk. This objection, however, presupposes an inaccurate fact finding system whose tendency is to err on the side of no compensation. Whatever the limitations on jury fact finding, the tendency to err will most frequently be the other way. Juries seem more likely to vote for plaintiffs than defendants. This preference should stimulate sellers to find all foreseeable risks.

The judicial treatment of unknowable risks varies with the risk category involved. When the product unexpectedly malfunctions courts seem to impose risks on sellers. Goods that do not do what they are meant to do breach implied warranties of merchantability,⁶⁶ but this contract law justifies. When the product causes unexpected harms, the majority of cases hold that sellers are not liable.⁶⁷ For those harms whose possibility has become known, sellers are responsible only for failure to warn.⁶⁸ Thus the courts, rejecting the importuning of the commentators,⁶⁹ have refused to adopt a distributional rule imposing unknowable risks on sellers.

(ii) Prediction and Justification

The courts' refusal to impose unknowable risks on sellers, except as contract law directs, is not surprising. First, since the risks are not known, the general goals of accident cost reduction and protecting reasonable expectations plainly cannot sustain the rule. Judicial mistakes are unlikely. Second, unknowable risks materialize unpredictably and cannot be avoided. Although litigation outcomes would be predictable—when unknowable risks materialize sellers lose—the parties could not take the rule into account when planning their affairs. The costs of this unpredictability seem large: the cases primarily involved drugs and

⁶⁶ That a product failed for unexpected reasons seems never to have been a defense to a warranty action. See *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 602, 6 Cal. Rptr. 320 (1960).

⁶⁷ E.g., *Singer v. Sterling Drug, Inc.*, 461 F.2d 288 (7th Cir.), cert. denied, 409 U.S. 878 (1972); *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968); *Cochran v. Brooke*, 243 Ore. 89, 409 P.2d 904 (1966).

⁶⁸ See authorities *supra* note 67. Other cases are collected in Annot., 53 A.L.R.3d 239 (1973).

⁶⁹ See, e.g., Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398 (1970); Keeton, *Some Observations About the Strict Liability of the Maker of Prescription Drugs: The Aftermath of MER/29*, 56 CALIF. L. REV. 149 (1968); James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550 (1966); Note, *Strict Liability in Tort: Its Applicability to Manufacturers of Prescription Drugs*, 7 U.C.D. L. REV. 487 (1974). But see Note, *Strict Liability For Drug Manufacturers: Public Policy Misconceived*, 13 STAN. L. REV. 645 (1961).

the results were influenced by the fear that imposing all risks on sellers could deter research, thereby causing greater harm to the many who would benefit from new drugs than the harm suffered by the few who may be unexpectedly injured.⁷⁰ Third, a majoritarian preference for a tax benefiting victims is not obvious. As none of the conditions which lead courts to adopt distributional rules is met by a rule which would impose unknowable risks on sellers, the courts' failure to adopt it is not surprising. It also cannot be characterized as unjust, until criteria are developed to justify distributional rules which are without obvious popular support and impose liability unpredictably.

CONCLUSION

Theories of justice often yield many distributional rules for given situations but do not strongly indicate which of them should govern. The adoption of a particular rule is thus more a matter of choice among the permitted possibilities than derivation from the basic theory being followed. I describe this process as arbitrary. Applications of distributional rules are also arbitrary, in the more conventional sense of the word, because whether they actually advance the basic theory—*i.e.*, are just—is often unknowable. The consequence of arbitrariness is unpredictability: potentially affected parties often could not know which distributional rule would be adopted or how it would be applied; and would incur resultant uncertainty costs, of wealth lost and liberty foregone. Courts therefore do not adopt distributional rules unless either the first two or the last two of three conditions obtain: (i) a rule is mistakenly believed to be general; (ii) the rule would operate predictably; (iii) the distributional choice the rule reflects is obviously popular. A rule which satisfies the first two conditions has a good chance of being adopted, but would only be weakly justifiable, for its distributional choice is insufficiently majoritarian. A rule satisfying the last two conditions also is likely to be adopted, and would be strongly justifiable because it neither imposes unpredictability costs nor offends majoritarian norms. That the three conditions, and especially the last two, are so difficult to satisfy explains why judicial distributional rules are rare. Of the rules discussed here, the one abolishing vertical privity barriers is explicable as a mistake, and as satisfying the predictability condition. The other, which would impose unknowable risks on sellers, satisfies none of the conditions, which explains and justifies the courts' refusal to adopt it.

⁷⁰ See *Christofferson v. Kaiser Foundation Hospitals*, 15 Cal. App. 3d 75, 92 Cal. Rptr. 825 (1971).

A significant area for further inquiry is why distributional rules are so troublesome. I suspect it is because of the question these rules are meant to answer. General rules usually reflect the answers to relatively precise questions, such as how the state should allocate risks of nonconformity in sales situations; in consequence, they conveniently assume relatively precise forms. Distributional rules are meant to reflect the answer to the question of what means people need to lead "good" lives. Unfortunately, the standard answers seem unhelpful or excessively general, no matter the theory of the "good" the questioner accepts. Thus if a good life is the life a person, with full information, would *choose* to lead, a person's "good" is defined as what he wants. As no two people want the same things, "preference" or "wanting" theories of the good thus strongly indicate only that the state should enforce mutually acceptable trades, wherein people exchange goods of lesser value, to them, for goods of higher value, to them, thereby realizing their own good, in the material sense. Preference theories—utilitarianism is a good example—thus unsurprisingly offer little guidance when the issue is what the state should provide to enable people to realize their own good; by definition this is a question only those in need can answer.

A preference theory nevertheless is tenable if the assumption made above, that everyone wants different things, is false. If all want some "basic" things "most," the state should supply them: people can realize their good, in at least an acceptably minimal sense, if their "basic wants" are satisfied.⁷¹ If true, this argument may indicate redistributions in kind; but courts deciding cases between private parties can do little of this. More seriously, one redistributing, in kind or cash, to satisfy basic wants must know the relevant preference orderings, and the knowledge is lacking. Thus what things "the poor" would buy first with additional

⁷¹ Rawls seems to make a preference argument of this kind, as he urges the State to maximize the expectations of the poor only in respect of "primary goods," but these are so broadly defined—wealth, self respect, opportunity—that the argument is not greatly advanced. See note 35, *supra*. Professor Grey recently made "a very tentative and impressionistic sketch of a set of arguments," that the state should satisfy people's "basic needs." Grey, *Property and Need: The Welfare State and Theories of Distributional Justice*, 28 STAN. L. REV. 877 (1976). He is no more specific than Rawls respecting what these needs are, describing them as enough "food, clothing, shelter, and medical care" to enable children to "have a fair start," or those things which are "degrading to have to do without," and arguing that "it seems essential to guarantee that material needs will be met up to the point at which the ordinary person will not be induced to enter a [market] transaction that he along with the rest of society sees as inconsistent with basic fairness or decency." *Id.* at 892, 898, 894. However, Grey apparently assigns the redistributive task to legislatures, not for the reasons set out above but because "our tradition" prohibits courts from enforcing "rights that by their very nature require large expenditures of public money raised by taxation. . . ." *Id.* at 400-01.

dollars is not known. This ignorance precludes the adoption of workable judicial distributional rules directed to satisfying basic wants.

The alternative is to reject preference theories of the good for a particular moral code. The code indicates what people "should" have, and this the state ought to provide. The initial difficulty with deontological theories is that the premises must largely be taken on faith. The Ten Commandments are a good illustration. People are converted to deontological theories more than they are persuaded of their validity. Thus the judicial choice of theory would appear obviously arbitrary. Also, the injunctions again seem excessively general; that people should be honest, charitable, fair, just, and unselfish does not tell us how much money Smith should have or what he ought to want.

Some hard knowledge of what group living requires has accumulated: coherent theories of political and economic organization do exist and have empirical support. General rules draw on this wisdom. But what material things are necessary to enable each person to realize his own good is still obscure.⁷² Distributional rules trip over this ignorance. The problem, then, may be intractable. But it is perhaps too soon to say.

⁷² Professor Arrow recently suggested that this question may remain unanswered. In discussing the attempt to find "objective criteria" to guide distributional decisions he said:

[T]he search can be surely said to have been inconclusive for reasons that I think are intrinsic to the logic of the subject. The root facts here are the incommensurability and incomplete communicability of human wants and values. . . . Social good, as in the determination of a just income distribution, is an abstraction of some kind from the individual values of the members of the society. But this abstraction can only be based on interpersonally observed behavior, as in market purchases or voting, not on the full range of an individual's feelings.

K. ARROW, *THE LIMITS OF ORGANIZATION* 24 (1974).