

Toward a Trinitarian Theory of Products Liability

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Introduction

It may come as a surprise to theologians and philosophers who are experts in Catholic Social Thought that for many of the lawyers and legal scholars participating in the Villanova *Symposium on Catholic Social Thought and the Law*, the conference was absolutely path-breaking. At a time when law school curriculums are heavily sprinkled with "Law &" seminars that explore the rich connections between legal theory and the most varied social sciences and arts, and given that the texts of Catholic Social Thought are pregnant with a profound and multi-layered social critique, it would seem that its robust integration with jurisprudence is long overdue.¹

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¹ Exploration of this delay could be the topic of a lengthy essay. One reason could be that few legal scholars would consider themselves "expert" enough in the theology, philosophy and history of Catholic Social Thought to produce serious scholarship on how it might intersect with their field of legal expertise. For example, I realize it is superficial to refer broadly and generally to "Catholic Social Thought"; the nuance of the more-than-hundred-year tradition cannot be summarized in these few excerpts from the most recent encyclicals. I ask the experts' forgiveness for the short-hand form, happily admit that the reflections in this essay barely scratch the surface of how the full expanse of the tradition could illuminate the field of products liability and many other areas of current legal theory, and eagerly look forward to the continued interdisciplinary dialogue.

Among legal specializations, several obvious candidates for integration leap to mind. The Church's extraordinarily deep and extended reflections on human labor could do much to enrich theories of labor law. The principle of subsidiarity, and reflections on the dignity of the human person and on role of religion in public life readily go hand in hand with the theoretical underpinnings of many aspects of Constitutional law. The preferential option for the poor could easily inform many areas of governmental regulation, from immigration to health care policy and tax law, just to name a few.

In the list of obvious candidates, however, many might not include products liability. How would such seemingly technical and scientific standards for the production of material goods intersect with Catholic Social Thought? Similarly, no one would be surprised that legal theorists have not yet identified the deeply mysterious theological doctrine of the Trinity as a lens for products liability analysis. Indeed, when the title of this paper flashed across the Power Point presentation screen, the audible gasps of curious shock spoke volumes. Yet spurred on by the conviction that Catholic Social Thought can offer profound solutions to the knottiest dilemmas in products theory, and encouraged by recent challenges to move beyond the "ordinary" and "conventional" in order to probe the depths of the unique resources that Christian theology may offer to legal theory,² this essay sets out a few initial ideas as a first step toward a "Trinitarian" theory of products liability.

It begins with a brief outline of some of the overarching themes in products liability, and a story that illustrates what could be considered

² See, e.g., William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1721 (2003) (reviewing *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* (M. McConnell, R. Cochrane, A. Carmella eds., 2001)) (critiquing a recent collection of essays on Christianity's contribution to legal theory, and well worth an extensive quotation:

Why the ordinariness? Why, when the topic is legal theory, is Christianity so conventional? Christianity is a theory of everything, and 'everything' includes law, so Christianity ought to have something to say about law. And Christianity is different from other theories of everything, particularly the non-theistic theories that dominate in universities today. Among other things, Christianity holds that 'good' and 'bad' find their definition not in men's and women's choices but in God's character. One might think that would have a fairly powerful impact on how Christians see the law of contracts, or securities regulation, or criminal procedure, or anything else in the wide world of legal study. Yet the differences revealed in *Christian Perspectives* are mild, sometimes nonexistent. Non-Christians might be excused for wondering why the transcendent God seems to think like a typical American law professor. What gives?).

See generally GEORGE M. MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* (1997), especially chapter four, *What Difference Could It Possibly Make?*, and chapter five, *The Positive Contributions of Theological Context*.

one of the principal tensions: the profound disconnect between how economic analysts and the ordinary citizens who make up civil juries define the standard for a "reasonably designed" product. The second section pursues the somewhat modest goal of showing that the philosophical and analytical framework of Catholic Social Thought can do much to help flesh out the critique of predominating products liability theories, which are largely influenced by economic analysis. The more ambitious final sections move beyond critique, zeroing in on a relatively new current of thought in Catholic theology that sets out the Trinity as a model for social life, and then considering two hotly debated areas in products theory, they test whether Catholic Social Thought viewed through a "Trinitarian" lens might promise creative solutions.

I. An Overview of the Law of Products Liability

A. General Background

Products liability is the area of tort law that deals with the liability of the supplier of a product to the person who is injured by the product. Although key elements of its doctrine date back to the early twentieth century,³ products liability theory is a relatively contemporary development. Following World War II, as mass markets for products were rapidly expanding, courts increasingly resonated with strong policy arguments that consumers should be assured of greater protection against dangerous products than was afforded by the contract law of warranty. Thus they began to flesh out a more flexible framework for the analysis of liability for injuries from defective products.

For example, in a seminal 1963 case, *Greenman v. Yuba Power Products*,⁴ the plaintiff was injured while using a power tool that had been given to him by his wife. The plaintiff himself could not show that he had read and relied on the warranty. The California Supreme Court found the law of warranty entirely too cramped. In a world of mass production, why should it make any difference, the court reasoned, whether the plaintiff had actually purchased the product or whether he

³ See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389 (1916) (Cardozo, J.) ("If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."). See also *Thomas v. Winchester*, 6 N.Y. 397, 397 (1852) (allowing action sounding in negligence against drug dealer where plaintiff was injured by mislabeled poison).

⁴ 59 Cal. 2d 57 (1963) (Traynor, J.).

had actually read the warranty? Thus the court held that under a theory of “strict” products liability, the plaintiff need only show: 1) that he was injured by the power tool while using it a way it was intended to be used; and 2) that his injury was caused by a defect in the product.⁵ As the doctrine developed, courts emphasized that as a matter of policy a plaintiff should not have to jump through the hoops of showing exactly what went wrong in the manufacturing process. It was enough to show that the product was marketed in a “defective condition unreasonably dangerous to the user or consumer,” and that such defect caused the plaintiff’s injury.⁶

Two principal theories began to take shape: manufacturing defect and design defect.⁷ When the product injury is due to an alleged manufacturing defect, the analysis is relatively simple because the standard of safety is that of the manufacturer’s own design. A product is defective when a flaw in the manufacturing process causes it to emerge defective as compared to the intended design.⁸

When the injury is due to an alleged defect in the product design itself, the analysis is much more complex. In evaluating a manufacturer’s conscious judgments about product design, how safe is “reasonably” safe? Compared to what? According to whose perspective? Some aspects of the balance are intuitively obvious. For example, the risk of paper

⁵ *Id.* at 62, 64.

⁶ A synthesis of one widely-accepted definition of an “unreasonably dangerous” product can be found in the RESTATEMENT (SECOND) OF TORTS [hereinafter SECOND RESTATEMENT] § 402A at 347-48: “(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”

⁷ Some analysts include defect due to inadequate warning as a part of the design defect theory. *See, e.g.*, 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d § 28:10 at 28-18 (1987); John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 747 (1983). While recognizing the similarities in design and warnings defect theories, the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY [hereinafter THIRD RESTATEMENT] § 2 at 14 delineates three distinct categories of analysis: manufacturing defect, defect in design, and defect because of inadequate warnings or instructions.

⁸ *See generally* THIRD RESTATEMENT, *supra* note 7, § 2(a) at 14. *See also* David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851 (2002).

cuts does not prevent the marketing of paper. While automobiles could be designed as crash-proof tanks, that would also make them prohibitively expensive, slow, awkward and inefficient in fuel consumption, with consequent damage to the environment. Injury from accidents might even be augmented if these tank-type models were to crash into less sturdy models designed earlier. Some products are so dangerous that no "balance" ever seems appropriate.

But beyond the obvious, where and how to draw the line defining a product design as "unreasonably dangerous" is one of the most difficult conundrums in American tort law. Whose perspective and whose values should determine the correct balance for a "reasonably safe" design? Manufacturers and consumers may differently value the risks and benefits at stake. Manufacturers and victims of product accidents may have even more divergent views.

B. The Ford Pinto Case

The 1978 case of the exploding Ford Pinto illustrates the tension. In *Grimshaw v. Ford Motor Company*,⁹ a stalled Ford Pinto was struck from behind by a car that had braked to a relatively slow speed of about thirty miles per hour. The impact resulted in a rear-end fire in the Pinto that killed the driver and left thirteen-year-old plaintiff Richard Grimshaw with serious injuries.

In the course of discovery, the Ford Motor Company produced a document which indicated that it was aware of certain risks, but because of a "cost-benefit" calculus, the company had determined it would be cheaper to compensate for resulting injuries and death rather than alert the public and recall the Pinto for repair. The jury awarded Grimshaw over \$2.5 million in compensatory damages and \$125 million in punitive damages as well. The punitive damages award was later reduced by the court to \$3.5 million, but the case took on somewhat mythical dimensions, and remains an important symbol.¹⁰

⁹ 119 Cal. App. 3d 757 (1981) (affirming 1978 jury decision).

¹⁰ See generally Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991). As Professor Schwartz's careful analysis explains, the plaintiff attempted to introduce the infamous "cost-benefit" study not on the issue of defective design, but as evidence of a corporate mentality which merited punitive damages. *Id.* at 1020-1021. After winding through the complexities of Ford's contemplated alternative improvements, Professor Schwartz concluded that the factual core of the narrative did indicate that the company may have decided not to improve the Pinto's design knowing that its decision would increase the chances of loss to consumer life. He then went on to consider the symbolic importance of the case. *Id.* at 1034-35.

Was it “unreasonable” for Ford to make such a calculation? According to some theories, of course not. As Professor Gregory Keating describes, a “powerful and influential tradition of thought asserts that reasonable care in the law of negligence is, and ought to be, economically efficient care.”¹¹ Extrapolating from Judge Learned Hand’s famous “formula” for determining the amount of care due, Professor (now Judge) Richard Posner described the “economic meaning of negligence” as asking the judge or jury “to measure three things: the magnitude of the loss if an accident occurs; the probability of the accident’s occurring; and the burden of taking precautions that would avert it.”¹² According to Posner, “[i]f the costs of safety measures or of curtailment—whichever is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention.”¹³ In such cases, a “rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.”¹⁴

But as the Ford Pinto case illustrates, more often than not this line of analysis just does not sit well with a civil jury. As Professor Michael Green graphically explains, the market for “a broken arm, shattered brain, or a life” is “quite thin”—not only because it is problematic to compare items that do not align on a common scale or measure, but also because on an even more basic level, “the stark balancing of lives and limbs with money strikes many as jarring, inappropriate, even absurd.”¹⁵

Might this tension and confusion be simply a blip on the screen of the development of a relatively new legal theory? Probably not. The Ford

¹¹ Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653, 655 (2003).

¹² Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (extrapolating from *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) and *Conway v. O’Brien*, 111 F.2d 611 (2d Cir. 1940)).

¹³ *Id.* at 32.

¹⁴ *Id.* at 33.

¹⁵ Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609, 617 (1995). See also Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1643 (1997) (“[E]conomics is not nearly as intuitive as Landes and Posner think it is . . . Understanding the economic version of risk-benefit analysis is not always easy, is sometimes contrary to common sense, and requires comparisons that can be quite jarring to lay sensibilities.”). Or as economist Amartya Sen puts it bluntly, the “economic man is indeed close to being a social moron.” Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 J. PHIL. & PUB. AFFAIRS 317, 336 (1977).

Pinto narrative continues to repeat itself, with exponential increases in punitive damages.¹⁶ For example, in a 1999 trial against General Motors for an accident involving the Chevy Malibu, where the evidence included an internal cost-benefit analysis noting it would be cheaper to pay \$2.40 per car to settle lawsuits than \$8.59 per car to make the fuel system safer, the jury awarded five billion dollars in punitive damages.¹⁷ In an interview following the verdict, one juror proclaimed: "We wanted to let them know that no matter how large the company may be, we as jurors, we as people all over the world, will not stand for companies having disregard for human life."¹⁸

What is going on here? Professor Schwartz saw how the patterns of the debate over the standard of reasonable safety in product design reflect a clash between two radically different cultures: on the one hand, policy analysts who see cost-benefit analysis as obviously acceptable, and on the other, the general public, which finds such analysis deeply disturbing.¹⁹

How can two such radically different views of "reasonable" be reconciled? According to the number crunchers, the ordinary folks who serve

¹⁶ For a recent in-depth analysis, see generally CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002). Note also that recently the US Supreme Court seems to have pulled in the reins quite a bit. See *State Farm v. Campbell*, 538 U.S. 408 (2003) (\$145 million punitive damages award for an automobile insurer's bad faith refusal to settle within policy limits struck down as excessive under the Due Process Clause of the US Constitution), *rev'g and remanding* 65 P.3d 1134 (Utah 2001). For a complex analysis of the role of punitive damages, see generally Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347 (2003).

¹⁷ Jeffrey Ball & Milo Geyelin, *GM Ordered by Jury to Pay \$4.9 Billion: Auto Maker Plan to Appeal Huge California Verdict in Fuel-Tank-Fire Case*, WALL ST. J., Jul. 12, 1999, at A3; *Risk in Big Jury Awards*, L.A. TIMES, Jul. 14, 1999, at B6; *Jury Awards 4.9 Billion Against General Motors for Burn Injuries in Post-Crash Fire*, 126 PROD. LIAB. ADVISORY 1 (Aug. 1999); Anne W. O'Neill, *GM Urges Judge to Void Injury Award*, L.A. TIMES, July 30, 1999, at B1.

¹⁸ Janan Hanna, *Paying the Price for Profits Jurors in Liability Cases are Sending Corporate America the Message that Covering Up Product Risks Will Cost Big Money*, CHI. TRIB., Jul. 17, 1999, Business, at 1 (interview with juror Billy Lowe, Jr.).

¹⁹ Schwartz, *The Myth of the Ford Pinto Case*, *supra* note 10, at 1041. Professor Schwartz credits Professor Bruce Ackerman for his depiction of two "ideal types" which represent divergent understandings of the nature of legal language and the objectives of legal analysis. See generally BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 15 (1977) (The "Scientific Policymaker. . . (a) manipulates technical legal concepts so as to illuminate (b) the relationship between disputed legal rules and the Comprehensive View he understands to govern the legal system. In contrast, the Ordinary Observer. . . (a) elaborates the concepts of nonlegal conversation so as to illuminate (b) the relationship between disputed legal rules and the structure of social expectations he understands to prevail in dominant institutional practice.").

on civil juries are simply incapable of understanding the technical complexities of product design decisions. Because jurors wreak havoc on any hope for an objective analysis, the whole tort system should be reformed, either to excommunicate them, or at the very least to greatly curtail their discretion.²⁰ According to the ordinary folks on civil juries, companies who crudely and cruelly exchange dollars for safety should be severely punished with multi-billion dollar punitive damages awards, even though this response may effectively lead to bankruptcy.²¹

While most manufacturers and consumers would agree that lines must be drawn somewhere—it cannot possibly be the case that “reasonable design” means that manufacturers have to spend an infinite amount on safety to avoid liability and punitive damages—the debate on where and how to draw the line reveals a profound and seemingly irreconcilable cultural rift.

II. Catholic Social Thought and Products Liability Theory

With this background in mind, the goal of this section is to show how Catholic Social Thought might help to describe the tensions and flesh out a critique of an economic analysis of products liability theory. The analysis that follows is by no means the only way to explain the tension or dig into the layers of the debate. Complex critiques of legal theorists²² and scholars in other disciplines, such as sociology, psychology

²⁰ See, e.g., Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49 (1997) (advocating requiring a minimum number of college-educated individuals on juries trying complex cases); William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981) (advocating specially qualified juries for complex cases); Elizabeth A. Faulkner, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 ARIZ. ST. L. J. 297 (1989) (advocating use of the special verdict to improve the jury's ability to decide complex legal and factual issues); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981) (advocating use of the special verdict to improve the jury's ability to decide complex legal and factual issues).

²¹ See, e.g., Schwartz, *The Myth of the Ford Pinto Case*, *supra* note 10, at 1029 (discussing press and public reactions to the Ford Pinto case, including the 60 Minutes segment in which “Mike Wallace expressed the view that he found it ‘difficult to believe that top management of the Ford Motor Company is going to sit there and say, “Oh, we’ll buy 2,000 deaths, 10,000 injuries, because we want to make some money or we want to bring in a cheaper car””).

²² For two seminal critiques, see Duncan Kennedy, *Cost/Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Mark Kelman, *Consumption*

and analytic philosophy have already enriched the dialogue in important ways.²³

However, in contrast to critiques based on other disciplines, most legal scholars may not have considered Catholic Social Thought as a resource for reflection on products liability theories. Even from an initial reading of the most recent social encyclicals,²⁴ it is astounding to see the number of passages that not only reflect the Church as an "expert in humanity"²⁵ looking broadly at human work and economic

Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. CAL. L. REV. 669 (1979).

²³ For an excellent application to products liability of cultural studies theorists' analyses of consumers as "socially situated," see Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1757-1761 (2003). As my analysis based on theological texts and models tracks in significant respects Professor Kysar's argument, richly interwoven with support from various social science disciplines, extensive citations to his essay follow. For other summaries of critiques of law-and-economics according to various disciplines, see, e.g., *Symposium: Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075 (2003) (combining insights from psychology, sociology, cognitive science and empirical research, questioning "whether people truly fit the profile offered by law and economics scholars"); Joseph Sanders, *Road Signs and the Goals of Justice*, 85 MICH. L. REV. 1297 (1987) (reviewing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM), (summarizing psychological, sociological and philosophical critiques of cost-benefit analysis); Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?* 29 J. LEGAL STUDIES 913 (2000) (summarizing theoretical objections to cost-benefit analysis). Compare Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUDIES 1059 (2000) (defense of cost-benefit analysis not from the stand-point of conventional economics, but on grounds associated with cognitive psychology and behavioral economics).

²⁴ An "encyclical" is literally a "circular letter" (from the Greek *egkyklios, kyklos*, meaning a circle). It refers to a pastoral letter written by the Pope to the entire Church, generally concerning matters of doctrine, morals or discipline, or significant commemorations. The formal title is taken from the first few words of its official text, usually in Latin. See *Encyclical*, in THE MODERN CATHOLIC ENCYCLOPEDIA 279-80 (Michael Glazier & Monika K. Hellwig eds., 1994). Throughout this article's reference to the encyclicals, numerical notations refer to paragraph numbers. The full texts of all of the encyclicals cited here are available online through the Vatican website, <http://www.vatican.va>.

²⁵ POPE JOHN PAUL II, SOLLICITUDO REI SOCIALIS ¶ 41 (1987) (quoting POPE PAUL VI, POPULORUM PROGRESSIO ¶ 13 (1967)). It is also interesting to note that the social encyclicals are addressed to all people of good will, not just Catholics or Christians. See, e.g., SOLLICITUDO REI SOCIALIS, *supra*, ¶ 38:

One would hope that also men and women without an explicit faith would be convinced that the obstacles to integral development are not only economic but rest on more profound attitudes which human beings can make into absolute values. Thus one would hope that all those who, to some degree or other, are responsible for ensuring a "more human life" for their fellow human beings, whether or not they are inspired by a religious faith, will become fully aware

systems, but also contain specific and in-depth discussion of criteria for the production of material goods.

The analysis that follows is neither a complete and exhaustive compilation of all the relevant documents of Catholic Social Thought—it focuses on two of the more recent encyclicals, *Sollicitudo Rei Socialis* and *Centesimus Annus*²⁶—nor an in-depth survey of all the nuances of design defect theory. It does, however, hope to offer a few initial ideas about the intersection between Catholic Social Thought and products theory so as to spark further research, discussion and analysis.

A. A Broader Cultural Framework for Product Design Decisions

What the jury was reaching for in the Ford Pinto case, and what Catholic Social Thought could offer to the field of products liability theory, could be described in a nutshell, as a broader cultural framework for evaluating decisions about the production of material goods. In classic “both/and” style—or perhaps here best described as “yes, but”—Catholic Social Thought recognizes the positive aspects of economic development and production, but insists that such must be placed within a broader ethical and cultural context. Embedded within this insistence on a broader cultural context is a profoundly substantive critique of the current framework.

1. “Yes”: Appreciation for the Commercial Endeavor

To start with the “yes,” Catholic Social Thought includes a deep appreciation for the advantages and benefits of the modern business economy and for technological and scientific development. Economic initiative is “important not only for the individual but also for the common good.”²⁷ The production of material goods is not only practical and

of the urgent need to change the spiritual attitudes which define each individual's relationship with self, with neighbor, with even the remotest human communities, and with nature itself; and all of this in view of higher values such as the common good or, to quote the felicitous expression of the Encyclical *Populorum Progressio*, the full development “of the whole individual and of all people”.

²⁶ *Centesimus Annus* was promulgated in 1991, on the hundredth anniversary of the first social encyclical, *Rerum Novarum*. See POPE JOHN PAUL II, *CENTESIMUS ANNUS* (1991).

²⁷ *SOLLICITUDO REI SOCIALIS*, *supra* note 25, ¶ 15. See also *CENTESIMUS ANNUS*, *supra* note 26, ¶ 32 (“The modern *business economy* has positive aspects. Its basis is human freedom exercised in the economic field, just as it is exercised in many other fields.”).

necessary,²⁸ but also reveals something affirmative and favorable regarding the truth about the human person. "Indeed, besides the earth, man's principal resource is *man himself*."²⁹ *Centesimus* highlights how the commercial endeavor can lead to human growth and fulfillment: "disciplined work in close collaboration with others" gives rise to the development of "[i]mportant virtues . . . such as diligence, industriousness, prudence in undertaking reasonable risks, reliability and fidelity in interpersonal relationships, as well as courage in carrying out decisions which are difficult and painful but necessary, both for the overall working of a business and in meeting possible set-backs."³⁰

Although the analysis is complex, in the most recent documents one finds nothing of a yearning for a simpler, less industrialized past. As *Sollicitudo* highlights, "the ever greater availability of material goods not only meets needs but also opens new horizons."³¹ Even though this same encyclical includes a cutting social critique, it also notes that "[t]he danger of the misuse of material goods and the appearance of artificial needs should in no way hinder the regard we have for the new goods and resources placed at our disposal and the use we make of them. On the contrary, we must see them as a gift from God and as a response to the human vocation, which is fully realized in Christ."³²

2. "But": Elements of a Broader Cultural Context

While Catholic Social Thought appreciates the positive potential of the commercial endeavor, it also highlights the fact that production and economic development must be analyzed within the context of a broader

²⁸ SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 29 ("There is no doubt that [human beings need] created goods and the products of industry, which is constantly being enriched by scientific and technological progress."). *See also* CENTESIMUS ANNUS, *supra* note 26, ¶ 32:

A person who produces something other than for his own use generally does so in order that others may use it after they have paid a just price, mutually agreed upon through free bargaining. It is precisely the ability to foresee both the needs of others and the combinations of productive factors most adapted to satisfying those needs that constitutes another important source of wealth in modern society. Besides, many goods cannot be adequately produced through the work of an isolated individual; they require the cooperation of many people in working towards a common goal. Organizing such a productive effort, planning its duration in time, making sure that it corresponds in a positive way to the demands which it must satisfy, and taking the necessary risks—all this too is a source of wealth in today's society.

²⁹ *Id.*

³⁰ *Id.*

³¹ SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 29.

³² *Id.*

cultural framework. Analogously, the Church has long affirmed the validity of private property³³ while highlighting the limits of this right. As the Second Vatican Council framed it in *Gaudium et Spes*, "Private property or some ownership of external goods affords each person the scope needed for personal and family autonomy, and should be regarded as an extension of human freedom . . . Of its nature private property also has a social function which is based on the law of the *common purpose of goods*."³⁴ Profit serves a legitimate role as an indication that a business is functioning well.³⁵ But it is not the only indicator of a firm's condition: "*other human and moral factors* must also be considered which, in the long term, are at least equally important for the life of a business."³⁶

On a macro level, to strive for economic development and an expansion of product markets is legitimate, and can in some sense contribute to a life that is "qualitatively more satisfying."³⁷ But the process of "singling out new needs" must be "guided by a comprehensive picture of man which respects all the dimensions of his being and which subordinates his material and instinctive dimensions to his interior and spiritual ones."³⁸ For example, "an excessive promotion of purely utilitarian values, with an appeal to the appetites and inclinations towards immediate gratification, [makes] it difficult to recognize and respect the hierarchy of the true values of human existence."³⁹

Catholic Social Thought's global embrace also brings to the fore the claim that criteria for economic development and expansion of markets

³³ CENTESIMUS ANNUS, *supra* note 26, ¶ 30 ("In *Rerum novarum*, Leo XIII strongly affirmed the natural character of the right to private property, using various arguments against the socialism of his time. This right, which is fundamental for the autonomy and development of the person, has always been defended by the Church up to our own day.").

³⁴ *Id.* (quoting SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (1965) ¶ 71 [hereinafter GAUDIUM ET SPES]). See also GAUDIUM ET SPES, *supra*, ¶ 69 ("In making use of the exterior things we lawfully possess, we ought to regard them not just as our own but also as common, in the sense that they can profit not only the owners but others too.").

³⁵ CENTESIMUS ANNUS, *supra* note 26, ¶ 35. ("When a firm makes a profit, this means that productive factors have been properly employed and corresponding human needs have been duly satisfied.").

³⁶ *Id.*

³⁷ *Id.* ¶ 36.

³⁸ *Id.*

³⁹ *Id.* ¶ 29b.

must include an awareness of their impact on "all and each person."⁴⁰ As *Sollicitudo* warns, "True development cannot consist in the simple accumulation of wealth and in the greater availability of goods and services, if this is gained at the expense of the development of the masses, and without due consideration for the social, cultural and spiritual dimensions of the human being."⁴¹

For the theoretical analysis of the process of production, the tools of economics are useful. But the documents consistently emphasize that economics is only one element of culture. As *Centesimus* observes, "Of itself, an economic system does not possess criteria for correctly distinguishing new and higher forms of satisfying human needs from artificial new needs which hinder the formation of a mature personality."⁴² A broader cultural context is "urgently needed" to educate consumers in the responsible use of their power of choice, and to form "a strong sense of responsibility" among all those involved in the commercial endeavor.⁴³

Yes, the Church has a profound appreciation for the commercial endeavor. *But*, to the extent that analyses of economic development and production lose their grounding in a broader moral, cultural, and spiritual framework, Catholic Social Thought offers a vigorous critique.⁴⁴ *Centesimus* warns of the consequences when economic freedom loses its anchor in the truth about the human person:

[E]conomic freedom is only one element of human freedom. When it becomes autonomous, when man is seen more as a producer or consumer of goods than as a subject who produces and consumes in order to live, then economic freedom loses its necessary relationship to the human person and ends up by alienating and oppressing him.⁴⁵

⁴⁰ SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 33 (True development implies "a lively awareness of the value of the rights of all and of each person. It likewise implies a lively awareness of the need to respect the right of every individual to the full use of the benefits offered by science and technology.").

⁴¹ *Id.* ¶ 9.

⁴² CENTESIMUS ANNUS, *supra* note 26, ¶ 36.

⁴³ *Id.*

⁴⁴ For a summary of the critique, see *id.* ¶ 43 (recognizing the positive value of the market and of enterprise, but at the same time pointing out that these need to be oriented towards the common good).

⁴⁵ *Id.* ¶ 39. See also *id.* ¶ 24 ("To this must be added the cultural and national dimension: it is not possible to understand man on the basis of economics alone, nor to define him simply on the basis of class membership.").

Perhaps the need for a broader cultural framework is best summed up in *Sollicitudo*'s citation of this passage from the Gospel of Matthew: "For what will it profit a man, if he gains the whole world and forfeits his life?"⁴⁶

B. A Critique of Current Products Liability Theory Through the Lens of Catholic Social Thought

The next section explores some implications for products liability of Catholic Social Thought's insistence on a broader cultural framework for economic development.

1. Products Liability Analysis is a Moral Endeavor

When the principles of Catholic Social Thought are brought to bear on current products liability theory, what immediately emerges is the moral character of any business endeavor and of the choices that underlie the process of product design. Since its inception, products analysis has tended to obfuscate this characteristic. As the theory was developing, it seemed to be in some sense a leap ahead in consumer protection to move beyond the evidentiary obstacle course required to prove negligence, toward a more technical policy analysis. Since product accidents are simply the cost of doing business, manufacturers should simply pay; the plaintiff should not be required to jump through the additional hoops of determining fault.⁴⁷

Recent scholarship, however, has probed the theoretical line between negligence and strict products liability. Especially in design defect analysis, what emerges is that whether it is termed "strict" liability or negligence, the manufacturer has, at some point, made a conscious decision about how much money to spend (or not to spend) on safety.⁴⁸ Whatever the determined dollar amount may be, this decision is at bottom not a technical or scientific calculation but a moral decision: at the end of the day, the jury, charged with determining whether that decision was "reasonable," is asked to make a moral judgment. In the

⁴⁶ SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 33 (citing Matthew 16:26).

⁴⁷ For a concise history of the development of products liability theory, see Kysar, *supra* note 23, at 1718-1724.

⁴⁸ See, e.g., Sheila Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980). Cf. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990).

words of torts scholar David Owen, product accidents are always moral events.⁴⁹

Catholic Social Thought provides a broad framework for emphasizing the moral dimension of production decisions. It highlights that true development can never be measured merely in terms of the greater availability of material goods. As *Sollicitudo* explains, "True development cannot consist in the simple accumulation of wealth and in the greater availability of goods and services, if this is gained at the expense of the development of the masses, and without due consideration for the social, cultural and spiritual dimensions of the human being."⁵⁰ Similarly, "the mere accumulation of goods and services, even for the benefit of the majority, is not enough for the realization of human happiness."⁵¹ It further warns: "... unless all the considerable body of resources and potential at man's disposal is guided by a moral understanding and by an orientation towards the true good of the human race, it easily turns against man to oppress him."⁵²

Instead, as *Centesimus* defines it, "the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole of society."⁵³

Against the backdrop of a Catholic Social Thought's broader cultural framework, what comes into relief is that however the test is articulated, balancing the costs and benefits of safety expenditures is essentially a moral endeavor that implicates moral values. Of course techni-

⁴⁹ David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 430 (1993). See also SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 41 ("[W]hatever affects the dignity of individuals and peoples, such as authentic development, cannot be reduced to a 'technical' problem.").

⁵⁰ *Id.* ¶ 9.

⁵¹ *Id.* ¶ 28.

⁵² *Id.* See also *id.* ¶ 33 ("When individuals and communities do not see a rigorous respect for the moral, cultural and spiritual requirements, based on the dignity of the person and on the proper identity of each community, beginning with the family and religious societies, then all the rest—availability of goods, abundance of technical resources applied to daily life, a certain level of material well-being will prove unsatisfying and in the end contemptible.").

⁵³ CENTESIMUS ANNUS, *supra* note 26, ¶ 35. See also *id.* ¶ 41 (condemning as alienating a single-minded pursuit of maximum returns and profits without regard to whether workers grow or diminish as persons, and where workers are considered only as means and not as ends).

cal and scientific knowledge about risks to safety contribute to the analysis in important ways. But that should in no way mask the moral nature of the underlying decisions about production.

2. A More Complex Analysis of Whether "Society Would Be Better Off"

According to Richard Posner's economics analysis, "[i]f the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention."⁵⁴ The rational profit-maximizing manufacturer would take only those precautions whose benefits, measured by the losses averted and discounted by the probability those accidents would occur in the absence of a precaution, outweigh their costs.⁵⁵ To be fair, Posner's formula could embrace more complex and relational human dimensions, such as emotional costs, and enhancement to relationships of trust, and many economic theories of legal analysis do so.⁵⁶ Neither does Posner's description "in economic terms" necessarily preclude the contributions of other disciplines. As applied, however, the analysis often stops with "economic terms" in part because other elements are not easily quantifiable.

In contrast, Catholic Social Thought offers a profound critique of the extent to which "economic terms" can ever fully measure the health of a society. For example, in a sharp critique of both Communism and the free market society, *Centesimus* notes that although the free-market society may achieve a greater satisfaction of material human needs than Communism, "insofar as it denies an autonomous existence and value to morality, law, culture and religion, it agrees with Marxism, in the sense that it totally reduces man to the sphere of economics and the satisfaction of material needs."⁵⁷

In fact, it places "side-by-side" with the miseries of underdevelopment an equally inadmissible "super-development" which, like the former, "is

⁵⁴ Posner, *supra* note 12, at 32, and accompanying text.

⁵⁵ See *id.* at 32-33.

⁵⁶ The work of Guido Calabresi is an excellent example of how morally rich economic analysis can be. See, e.g., GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* 32 (1978) (discussing the "costs of costing" moralisms and the affront to values); GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES & THE LAW* 69-86 (1985) (chapter discussion whether "moralisms and emotions" should count in measuring costs).

⁵⁷ *CENTESIMUS ANNUS*, *supra* note 26, ¶ 19.

contrary to what is good and to true happiness.”⁵⁸ As a cutting critique in *Sollicitudo* summarizes: “[a]n excessive availability of every kind of material goods for the benefit of certain social groups easily makes people slaves of ‘possession’ and of immediate gratification, with no other horizon than the multiplication or continual replacement of the things already owned with others still better.”⁵⁹ Thus one could question the extent to which society is “better off” where a “blind submission to pure consumerism” leads to “crass materialism” and “radical dissatisfaction”—“the more one possesses the more one wants, while deeper aspirations remain unsatisfied and perhaps even stifled.”⁶⁰

3. Insight into What “Cost-Benefit” Analysis Fails to Capture

Perhaps one of the strongest attractions of economics-based legal analysis is its promise to articulate a quantifiably measurable, and thus seemingly more objective standard. Here, too, Catholic Social Thought does not negate the utility of economic analysis and does not hesitate to affirm the “secure” advantages of the mechanisms of the market: “they help to utilize resources better; they promote the exchange of products; above all they give central place to the person’s desires and preferences, which, in a contract, meet the desires and preferences of another person.”⁶¹

However, as *Centesimus* also highlights, the numbers cannot hope to capture the full picture. A more complete cultural analysis must recognize the limits of the market: “there are collective and qualitative needs which cannot be satisfied by market mechanisms. There are important human needs which escape its logic. There are goods which by their very nature cannot and must not be bought or sold.”⁶² Further, it warns against an “idolatry” of the market “which ignores the existence of goods which by their nature are not and cannot be mere commodities.”⁶³

⁵⁸ SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 28.

⁵⁹ *Id.*

⁶⁰ *Id.* See also CENTESIMUS ANNUS, *supra* note 26, ¶ 29b (“... in the developed countries there is sometimes an excessive promotion of purely utilitarian values, with an appeal to the appetites and inclinations towards immediate gratification, making it difficult to recognize and respect the hierarchy of the true values of human existence.”).

⁶¹ *Id.* ¶ 40.

⁶² *Id.*

⁶³ *Id.* See also *id.* ¶ 35 (“But profitability is not the only indicator of a firm’s condition. It is possible for the financial accounts to be in order, and yet for the people—who make up the firm’s most valuable asset—to be humiliated and their dignity offended. Besides

Catholic Social Thought's insistence on a broader cultural framework to analyze the process for producing material goods reveals the Achilles heel of many forms of law-and-economics analysis as applied to products liability design defect cases: since there are goods which, by their very nature, cannot be bought or sold, and perhaps, to some extent, not even measured, economic analysis alone can never produce an "objective balance."⁶⁴ Every step of the process—from assigning dollar amounts, to lining up various values, to weighing and balancing those values—takes place within the context of a very specific philosophical framework and anthropology; every step applies specific moral criteria to make value judgments.

III. Beyond Critique: Catholic Social Thought Through a Trinitarian Lens

To articulate a critique is much easier than to propose a positive contribution. This next section presents a few initial ideas on how Catholic Social Thought might offer positive and constructive solutions to some of the most difficult theoretical problems in design defect analysis. As its focal lens it zeroes in on the Trinity, the very life of God, and the fundamental pattern from which Catholic Social Teaching emerged. As the United States Bishop's Conference's Introduction to *Sharing Catholic Social Teaching* describes:

Catholic Social Teaching emerges from the truth of what God has revealed to us about himself. We believe in the triune God whose very nature is communal and social. God the Father sends his only Son Jesus Christ and shares the Holy Spirit as a gift of his love. God reveals himself to us as one who is not alone, but rather as one who is relational, who is Trinity. Therefore, we who are made in God's image

being morally inadmissible, this will eventually have negative repercussions on the firm's economic efficiency."). For a thoughtful critique of the failure of cost-benefit analysis to distinguish between substantively different kinds of risks, and discussion of the extent to which the risk of devastating physical injury should be treated differently than other risks, see Keating, *supra* note 11, at 656 ("Cost-benefit analysis treats all human interests—urgent ones like adequate nutrition and physical integrity and luxuries like the consumption of fine wines—as fungible at some ratio of exchange and insists that the cost-justified level of precaution is the only level of precaution that is ever justified.").

⁶⁴ See Kysar, *supra* note 23, at 1766 ("[R]isk is in large part a constructed concept that depends critically on the observer's prior selection of relevant variables."); *id.* at 1779 ("Once one begins to define thoroughly the concept of 'objective risk,' one encounters value judgments at nearly every stage of the analysis.").

share this communal, social nature. We are called to reach out to build relationships of love and justice.⁶⁵

What might this mean, concretely? And in particular, what might this mean for products liability?

A. *The Trinity as a Social Model*

It is more than a slight understatement to describe as “undeveloped” the scholarship on the Trinity as a social model. As theologian Enrique Cambón describes, generally in the culture of Christian churches, when one must speak about the Trinity, there has been a tendency either toward abstract and incomprehensible discourse, or to take refuge in eloquent silence.⁶⁶ Over the centuries, much of the Catholic theological reflection on the Trinity has emphasized its pattern found in the individual soul rather than in inter-personal relationships.⁶⁷

More recently, however, scholars of various disciplines have begun to probe how the dynamic of the relationship between the Father, Son and Holy Spirit might serve as a fascinating and profound model

⁶⁵ UNITED STATES CATHOLIC BISHOP'S CONF., SHARING CATHOLIC SOCIAL TEACHING: CHALLENGES AND DIRECTIONS 1 (1998) [hereinafter SHARING CATHOLIC SOCIAL TEACHING].

⁶⁶ ENRIQUE CAMBÓN, TRINITÀ MODELLO SOCIALE [The Trinity as a Social Model] 16 (1999) (paraphrasing Hans Kung; translations from the Italian here, and throughout, are my own). See also KARL RAHNER, THE TRINITY 10-11 (1970) (“We must be willing to admit that, should the doctrine of the Trinity have to be dropped as false, the major part of religious literature could well remain virtually unchanged.”). Such is a pretty shocking assessment, given the centrality of Trinity in Christian faith and life. See CATECHISM OF THE CATHOLIC CHURCH ¶ 234, at 68-70 (1995) (“The mystery of the Most Holy Trinity is the central mystery of Christian faith and life. It is the mystery of God in himself. It is therefore the source of all the other mysteries of faith, the light that enlightens them. It is the most fundamental and essential teaching in the ‘hierarchy of the truths of faith.’ The whole history of salvation is identical with the history of the way and the means by which the one true God, Father, Son, and Holy Spirit, reveals himself to men ‘and reconciles and unites with himself those who turn away from sin.’”).

⁶⁷ This is certainly not to downplay the momentous insights and contributions of great theologians such as Augustine. It is only to highlight that the “social” dimension of the theological model has emerged after—and building on—centuries of reflection. See, e.g., Piero Coda, *Il De Trinitate di Agostino e la sua promessa* [Augustine's *De Trinitate* and Its Promise], 24 NUOVA UMANITÀ 219 (2002) (discussing Augustine's *De Trinitate* focus on the pattern of the Trinity within the individual soul); Gianni Caso, *Lex Aeterna e diritto* [Lex Aeterna and Law], 25 NUOVA UMANITÀ 69 (2003) (discussing Thomas Aquinas's description of the “eternal law” as the law of the life of God's own being, noting that it does not explicate its Trinitarian character).

not only for theology and philosophy, but for every discipline.⁶⁸ Some of the cutting-edge work in this field is gestated by the Interdisciplinary Study Center of the Focolare Movement headquartered in Rome, Italy.⁶⁹ Because the analyses have emerged from decades of practical experience in living what Pope John Paul II now terms the *spirituality of communion*,⁷⁰ the resulting descriptions of the Trinity as a social model are accessible even to those without theological or philosophical

⁶⁸ See e.g., JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 57-59 (1966) (John Fitzgerald trans., 1947) (noting the unity of the three persons of the divine Trinity is the supreme example of the essential relationality of personhood); *Id.* at 58-59 (In the "divine society," "[e]ach one is in the other through an infinite communion, the common good of which is strictly and absolutely the proper good of each, since it is that which each person is and their very act of existing."). See also DAVID HOLLENBACH, S.J., *THE COMMON GOOD & CHRISTIAN ETHICS* 129-132 (2002) (discussing Trinitarian models for common life in civil society).

⁶⁹ The Focolare Movement is one of the relatively new ecclesial movements in the Roman Catholic Church. Founded in Italy in 1943, it is now known especially for its work in inter-religious dialogue, and more generally as an effective instrument to build unity between people of different cultures, races and social backgrounds. See generally <http://www.focolare.org>. For the most comprehensive history in Italian, see ENZO FONDI & MICHELE ZANZUCCHI, *UN POPOLO NATO DAL VANGELO: CHIARA LUBICH E I FOCOLARI* (2003). The most comprehensive biography in English thus far is JIM GALLAGHER, *A WOMAN'S WORK: CHIARA LUBICH* (1997). The Interdisciplinary Study Center's bi-monthly journal, *NUOVA UMANITÀ* often includes essays and analyses on the application of the Trinity as a social model. See, e.g., Symposium: *La Trinità—Esperienza di Dio* [The Trinity: Experience of God], 24 *NUOVA UMANITÀ*, *supra* note 67, 127-390, which includes an analysis of a seminal text by the founder of the Focolare Movement, Chiara Lubich, *Vita Trinitaria*, 24 *NUOVA UMANITÀ*, *supra* note 67, 135. Among the books published by the Focolare's publishing house, Città Nuova, Enrique Cambón's *TRINITÀ MODELLO SOCIALE* is an excellent and quite accessible overview. In the same series, KLAUS HEMMERLE, *PARTIRE DALL'UNITÀ: LA TRINITÀ COME STILE DI VITA E FORMA DI PENSIERO* [Starting From Unity: The Trinity as a Lifestyle and Form of Thought] (1998) is a seminal and profound analysis. To date, the North American publishing house New City Press has translated into English only a small morsel of this scholarship, but it is a good start. See, e.g., *AN INTRODUCTION TO THE ABBA SCHOOL: CONVERSATIONS FROM THE FOCOLARE'S INTERDISCIPLINARY STUDY CENTER* (2002); *THE ECONOMY OF COMMUNION: TOWARD A MULTI-DIMENSIONAL ECONOMIC CULTURE* (Luigino Bruni ed., Lorna Gold trans., 2002) [hereinafter *ECONOMY OF COMMUNION*].

⁷⁰ See John Paul II's Apostolic Letter *Novo Millennio Ineunte* ¶ 43 (Jan. 6, 2001) ("A spirituality of communion indicates above all the heart's contemplation of the mystery of the Trinity dwelling in us, and whose light we must also be able to see shining on the face of the brothers and sisters around us. A spirituality of communion also means an ability to think of our brothers and sister in faith within the profound unity of the Mystical Body, and therefore as 'those who are a part of me.'"). See also Address of John Paul II to a Group of Bishops, Friends of the Focolare Movement 2 (Feb. 13, 2003) ("The 'spirituality of communion' is articulated into different elements that are rooted in the Gospel and enriched by the contribution made to the entire Christian community by the Focolare Movement, committed to witnessing to the 'spirituality of unity.'").

training, and one can intuit how they might be applied to the most varied disciplines.

As Focolare founder Chiara Lubich describes, “the heart of Christian anthropology” can be found in a life based on Jesus’ new commandment, “with which it is possible to live the Trinitarian life on earth: ‘As I have loved you, so you also should love one another.’”⁷¹ Further,

When we live the new commandment, seeking to receive the gift of unity in Jesus that comes to us from the Father, the life of the Trinity is no longer lived only in the interior life of the individual person, but it flows freely among the members of the Mystical Body of Christ.⁷²

Specifically, an anthropology based on the model of a triune God whose very nature is communal and social offers a rich description how to get from one person to another—in theological terms, *pericoresis*, or “mutual indwelling”—a union of persons without loss of individual identity.⁷³ How is this possible? Specifically, the commandment of love is “lived out and measured against Jesus’ love for us, to the point of abandonment . . .”⁷⁴ He who was God “emptied himself”—*kenosis*.⁷⁵ Mutual indwelling is possible through an essential attitude of openness to the other, of “making room” for the other, even to the point of “emptying” oneself for the other.⁷⁶

In the life of the Trinity, this openness or emptiness is not a negative encroachment on one’s personhood, but actually the positive key to self-fulfillment: “whoever loses his life for my sake will find it.”⁷⁷ Reflecting on the mysterious cry that Jesus addressed to the Father before dying, “My God, my God, why have you forsaken me?”⁷⁸ Lubich probes the paradox:

⁷¹ Chiara Lubich, *Toward a Theology and Philosophy of Unity*, in AN INTRODUCTION TO THE ABBA SCHOOL: CONVERSATIONS FROM THE FOCOLARE’S INTERDISCIPLINARY STUDY CENTER 19, 25 (2002) (citing John 12:34, 15:12).

⁷² *Id.* at 25.

⁷³ CAMBÓN, *supra* note 66, at 30.

⁷⁴ Lubich, *Toward a Theology and Philosophy of Unity*, *supra* note 71, at 25.

⁷⁵ See *Philippians* 2:6-7.

⁷⁶ See *Novo Millennio Ineunte*, *supra* note 70, ¶ 43 (“A spirituality of communion means . . . knowing how to ‘make room’ for our brothers and sisters, bearing ‘each other’s burdens.’”) (citing *Galatians* 6:2).

⁷⁷ *Matthew* 10:39, 16:25.

⁷⁸ *Matthew* 27:46.

There may be those who think that to affirm self is to struggle against all that is not self, because what is not self is perceived as limit and, what is more, as a threat to the integrity of the self. But Jesus forsaken, in that terrible moment of his passion, tells us that while the awareness of his subjectivity appears to be diminishing because it seems he is being annulled, in that very moment it *is* in all its fullness.⁷⁹

Based on this example, she draws out striking implications for the philosophy of being:

[Jesus forsaken] shows us, by his being reduced to nothing, accepted out of love for the Father to whom he re-abandons himself (“Into your hands I commend my spirit,” *Lk.* 23:46), that I am myself not when I close myself off from the other, but when I give myself, when out of love I am lost in the other.⁸⁰

This, according to Lubich, is the inter-personal dynamic at the heart of the Trinity: “In the relationship of the three divine Persons, each one, being Love, *is* completely by *not being*, each one mutually indwelling in an eternal self-giving.”⁸¹ And as the “heart of Christian anthropology,” this is the dynamic that can inform all human relationships and social structures. Like a “divine immigrant” who retained the language and customs of his homeland, Jesus brought to humanity the pattern of life at the heart of the Trinity so that human relationships and human community could be “on earth as it is in heaven.”⁸²

B. Trinitarian Patterns in Catholic Social Thought

Against the backdrop of this description of “the heart of Christian anthropology,” the Trinitarian dimensions of Catholic Social Thought

⁷⁹ Lubich, *Toward a Theology and Philosophy of Unity*, *supra* note 71, at 33.

⁸⁰ *Id.* See also Luigino Bruni, *Etica ed economia politica: oltre l'individualismo* [Ethics and Political Economics: Beyond Individualism], 19 NUOVA UMANITÀ 113, 132 (1994) (“The individual is oneself in oneself; the person is oneself in the other. Metaphysically, the individual, in order to be oneself needs only oneself; the other is an external, functional help. The person, in order to be oneself needs (not in a functional sense, but in an existential sense) the other, who opens up one’s individuality, and brings it beyond itself, in order to complete itself in the person.”) (quoting philosopher Giuseppe Maria Zanghì); Mario Gecchele, *L’“altro” indispensabile* [The Indispensable “Other”], 18 NUOVA UMANITÀ 577, 580 (1996) (“[T]o refer to the other is not a limit, but a possibility to escape from the vicious circle of the self (individualism) in order to enter into the richness of the dimension of the *we*.”).

⁸¹ Lubich, *Toward a Theology and Philosophy of Unity*, *supra* note 71, at 34. See also David Schindler, *Introduction*, in AN INTRODUCTION TO THE ABBA SCHOOL: CONVERSATIONS FROM THE FOCOLARE’S INTERDISCIPLINARY STUDY CENTER 1, 8 (2002) (summarizing Lubich’s analysis: “The fullness of each person [in the Trinity] coincides with the ‘self-emptying’ entailed in being *wholly* for the other.”).

⁸² See Chiara Lubich, *Spiritualità dell’unità e vita trinitaria* [The Spirituality of Unity and Trinitarian Life], 26 NUOVA UMANITÀ 11, 12-13 (2004); CHIARA LUBICH, LA DOTTRINA SPIRITUALE [The Spiritual Doctrine] 142 (2001).

come into relief. The Second Vatican Council highlights the powerful analogy between the life of the Trinity and life in human community, and as a consequence human fulfillment in relationships of self-giving:

[T]he Lord Jesus, when He prayed to the Father "that all may be one . . . even as we are one" (*Jn.* 17:21-22), opened up vistas closed to human reason, for He implied a certain likeness between the union of the divine Persons and the union of God's sons in truth and charity. This likeness reveals that man, who is the only creature on earth which God willed for itself, cannot fully find himself except through a sincere gift of himself.⁸³

If "I am myself when I give myself," to make room for the other is neither a sad concession to the realities of the social contract, nor a simple nod to respect for the principle of equality. Rather, it is one's door to authentic freedom and human fulfillment. As *Centesimus* highlights:

When man does not recognize in himself and in others the value and grandeur of the human person, he effectively deprives himself of the possibility of benefiting from his humanity and of entering into that relationship of solidarity and communion with others for which God created him. Indeed, it is through the free gift of self that man truly finds himself.⁸⁴

Similarly, at the core of its definition of an "alienated" society is the incapacity to offer the "gift of self": "its forms of social organization, production and consumption make it more difficult to offer this gift of self and to establish this solidarity between people."⁸⁵

A close analysis of a text from *Sollicitudo* reveals the profoundly Trinitarian dimension of the definition of solidarity. Pope John Paul II describes solidarity as an invitation beyond equality, beyond equal respect for the rights of others, to a more profound recognition of the fundamental unity of the human race:

In the light of faith, solidarity seeks to go beyond itself, to take on the specifically Christian dimension of total gratuity, forgiveness and reconciliation. One's neighbor is then not only a human being with his or her own rights and a fundamental equality with everyone else, but becomes the living image of God the Father, redeemed by the blood of Jesus Christ and placed under the permanent action of the Holy Spirit.⁸⁶

⁸³ GAUDIUM ET SPES, *supra* note 34, ¶ 24.

⁸⁴ CENTESIMUS ANNUS, *supra* note 26, ¶ 41.

⁸⁵ *Id.*

⁸⁶ SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 40.

The consequence of this vision is clear: “[o]ne’s neighbor must therefore be loved, even if an enemy, with the same love with which the Lord loves him or her; and for that person’s sake one must be ready for sacrifice, even the ultimate one: to lay down one’s life for the brethren (cf. *1 John*. 3:16).”⁸⁷

What is the result of this love? A new awareness or “new criterion” for interpreting reality. *Sollicitudo* goes on to explain, “[a]t that point, awareness of the common fatherhood of God, of the brotherhood of all in Christ—‘children in the Son’—and of the presence and life-giving action of the Holy Spirit will bring to our vision of the world a new criterion for interpreting it.”⁸⁸ This Trinitarian vision, then, is the ultimate source of inspiration for solidarity:

Beyond human and natural bonds, already so close and strong, there is discerned in the light of faith a new model of the unity of the human race, which must ultimately inspire our solidarity. This supreme model of unity, which is a reflection of the intimate life of God, one God in three Persons, is what we Christians mean by the word “communion.”⁸⁹

As distinguished from philanthropy, solidarity “is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all.”⁹⁰

Through a Trinitarian lens, Catholic Social Thought presents so much more than a tool to manage fairly what would otherwise be clashes between varying interests in the market, and much more than a grudging acknowledgment of another’s rights. Because a life of communion is the essence of the structure of reality, making room for the other, acting in a way which acknowledges the other as the living image of God, is a true positive good, and more characteristic of an authentically human life.

IV. Trinitarian Products Theory

What might the Trinity as a social model offer to products liability theory? The next sections explore its potential contribution by consid-

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *SOLLICITUDO REI SOCIALIS*, *supra* note 25, ¶ 38.

ering two hotly debated issues in the field. First, it returns to the Ford Pinto case to discuss the tension between policy-makers and ordinary citizens concerning the role of cost-benefit analysis. Second, it explores the debate as played out in the Third Restatement's recent formulation of the definition of a defective product.

The analysis posits not that the Trinity would take sides in the debate, but that the Trinitarian lens can function as a "new criterion for interpretation," or as Thomas Kuhn described, a paradigm shift to help products theorists see "new and different things when looking with familiar instruments in places they have looked before."⁹¹

As anthropologist Clifford Geertz poetically described, the heart of religious perspective, "of this way of looking at the world," is not so much to posit the theory of an invisible world beyond the visible; nor the doctrine of a divine presence; nor that there are "things in heaven and earth undreamt of in our philosophies."⁹² Rather, according to Geertz, the heart of religious perspective is:

[T]he conviction that the values one holds are grounded in the inherent structure of reality, that between the way one ought to live and the way things really are there is an unbreakable inner connection. What sacred symbols do for those to whom they are sacred is to formulate an image of the world's construction and a program for human conduct that are mere reflexes of one another.⁹³

To pose the Trinity as a social model applicable to products liability theory is not a recipe for tweaking economic analysis towards more generous and safety-concerned results. The distinction between law-and-economics and the cultural framework of Catholic Social Thought is best described not as a direct clash between the greedy industrialists obsessed with profit-maximization, and the magnanimous producers who triple check every safety concern. The novelty, rather, is a completely different framework and process for decision-making—or better,

⁹¹ See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 111 (2d ed. 1970) ("Led by a new paradigm, scientists adopt new instruments and look in new places. Even more important, during revolutions scientists see new and different things when looking with familiar instruments in places they have looked before. It is rather as if the professional community had been suddenly transported to another planet where familiar objects are seen in a different light and are joined by unfamiliar ones as well.").

⁹² See Clifford Geertz, *The Struggle for the Real in ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA* 97 (1968).

⁹³ *Id.*

a completely different description of reality which then informs one's conduct.

With the “intimate life of God” as a model for human communion, there is, to paraphrase Geertz, an “unbreakable inner connection” between the life of communion at the heart of the Trinity and the “the way one ought to live.” Or as *Sollicitudo* might frame it, “in the light of faith,” judgments about product design and safety are to be based on “a new model of the unity of the human race, which must ultimately inspire our solidarity.”⁹⁴ What emerges is not so much a list of criteria, or an extra weight on one side of the balance, but a conviction about the “inherent structure of reality” which then informs the decision-making process.

As Professor William Stuntz describes, the “core” of Christianity’s distinctive contribution to legal theory is about “attitudes and relationships, not rules and standards.”⁹⁵ He gives a wonderfully concrete example by discussing of two ways to think about Jesus’ occupation for most of his adult life: making tables. “Were the tables he made distinctive? Did he use different wood or a different manufacturing process than other carpenters used? The likely answer is no—at least, the gospel accounts offer no reason to think otherwise.”⁹⁶ He then invites the reader to “change the question—focus less on the noun and more on the verb.”⁹⁷ “Instead of asking whether Jesus’ tables were different, ask whether he made the tables differently—whether his motivations and attitudes toward his work, the ways he treated his customers and his coworker, differed from the practices of other carpenters. The answer to that question is surely yes.”⁹⁸

In a sense, the following sections focus “more on the verb,” highlighting how Catholic Social Thought through a Trinitarian lens brings to the fore *how* a broader cultural framework for the commercial endeavor might influence the decision-making process for the production of material goods. Through this lens, the production of material goods is “naturally interrelated with the work of others,” *with others, for others*: “it is a matter of doing something for someone else.”⁹⁹

⁹⁴ See *SOLLICITUDO REI SOCIALIS*, *supra* note 25, ¶ 40.

⁹⁵ See Stuntz, *supra* note 2, at 1721.

⁹⁶ See *id.* at 1721-22.

⁹⁷ See *id.* at 1722.

⁹⁸ *Id.*

⁹⁹ See *CENTESIMUS ANNUS*, *supra* note 26, ¶ 31.

A. *The Ford Pinto Case Through a Trinitarian Lens*

Turning back to the opening discussion of the exploding Ford Pinto, here we might ask, would Catholic Social Thought through a Trinitarian analysis have made any difference? Or better, through this lens might we see "new and different things" which might provide additional guidance to define the design defect standard?

In the defense bar, at this point it is clear that cost-benefit arguments generally do not go over well with juries.¹⁰⁰ As Professor Schwartz described the tension, "What seems obvious enough is that there exists a basic belief held by many (indeed most) of the public that it is wrong for a corporation to make decisions that sacrifice the lives of its customers in order to reduce the corporation's costs, to increase its profits."¹⁰¹ More generally, as Professor Michael Wells summarized, "[t]here is a growing body of evidence that laymen (who, after all, make up juries) do not evaluate risks in the way that economists and other policymakers do."¹⁰²

But even if one is not enamored of number crunching as the key to social policy, one must admit that the development of useful products

¹⁰⁰ See, e.g., Schwartz, *The Myth of the Ford Pinto Case*, *supra* note 10, at 1038 (stating composite advice of lawyers who defend manufacturers in design defect cases: "[O]ne argument that you should almost never make is that the manufacturer deliberately included a dangerous feature in the product's design because of the high monetary cost that the manufacturer would have incurred in choosing another design. If you do argue this, you're almost certain to lose on liability, and you can expose yourself to punitive damages as well"). See also Hanna, *supra* note 18, at 1 (quoting jury consultant Sara Parikh: "The worst thing that companies can do from a juror's perspective is to trade human lives for profit. . . . If jurors get evidence of that, they will slam the company.").

¹⁰¹ Schwartz, *The Myth of the Ford Pinto Case*, *supra* note 10, at 1041 (stating outcome of the Ford Pinto case raises serious questions about the operational viability of the risk-benefit standard itself: "the public subscribes to the idea of the pricelessness of life, and therefore is firmly opposed to processes of risk-benefit balancing"). See also Green, *supra* note 15, at 626; Charles Fried, *The Value of Life*, 82 HARV. L. REV. 1415, 1415 (1969); Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1046 (1994) ("Others suggest that aversion to cost-benefit analysis is widespread among lay people and even law students."); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 152 (1982) (discussing American public's "deep-seated belief—nurtured, no doubt, by our Judeo-Christian ethic—that life is of infinite or near infinite value"); CALABRESI, *TRAGIC CHOICES*, *supra* note 56, 32 (discussing the "external costs," including the "affront to values" of claiming that the value of a life is reducible to a money figure).

¹⁰² See Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 GA. L. REV. 725, 736 (1992).

that can vastly improve human life will always entail some risk of injury. Practically, expenditures on safety cannot be placed at infinity; manufacturers must, at some point, draw a line. It would be irresponsible for them not to measure scientifically the probability and gravity of likely risks, and bring these measurements to bear on the development of their products. But in their efforts to articulate predictable standards and measure risks objectively, they run head on into one of the most intractable problems in tort theory: because it is impossible to measure certain values, they cannot be compared in numeric terms.¹⁰³ To appreciate further the conundrum of hard-to-measure values, it is enough to flip around the problem: in evaluating the consequences of products accidents, at some point juries do have to come up with a dollar amount for damages.

In addition to the rather general critique that economics is not all there is, might Catholic Social Thought through a Trinitarian lens have a specific contribution to offer to this complex problem?

1. Defining the "Reasonable Person"

Catholic Social Thought through a Trinitarian lens offers not only insight into what cost-benefit analysis fails to capture, but also an alternative framework for defining what it means to be "reasonable." As Professor Posner sets out the "economic meaning of negligence," the "rational profit-maximizing enterprise" "should attempt to measure three things: the magnitude of the loss if an accident occurs; the probability of the accident's occurring; and the burden of taking precautions that would avert it."¹⁰⁴ If the cost of safety measures or of curtailment exceeds the benefit in accident avoidance to be gained by incurring that cost, it would be more "rational" to pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.¹⁰⁵

As discussed above, within a cultural framework informed by Catholic Social Thought, one is under no illusion that the algebraic formula can fully capture all that should be taken into consideration. The dilemma of incommensurable values remains, but because Catholic Social Thought's cultural framework does not hinge on assigning numeric

¹⁰³ See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994); Green, *supra* note 15, at 609 (1995). See also CENTESIMUS ANNUS, *supra* note 26, ¶ 40 and discussion *supra*, notes 61-63.

¹⁰⁴ Posner, *supra* note 12, at 32.

¹⁰⁵ See *id.* at 33.

values to all the factors in the balance, it is less problematic. Catholic Social Thought would highlight the limitations of a Posnerian "rational profit-maximizer's" approach not so much because it applies the economic tools of cost-benefit analysis, but because the criteria are too impoverished to fully capture the decision-making process of a "reasonable" person.

Through a Trinitarian lens, something "new and different" comes into relief—an alternative definition of what it means to be "reasonable." Through this lens, the "inherent structure of reality" consists of the relationships of mutual love and gift that provide "a new model of the unity of the human race, which must ultimately inspire our solidarity."¹⁰⁶ To paraphrase Geertz, this is the model of "the way things really are" that informs "the way one ought to live"—the moral standard of due care.

Such an approach would not only explode models of consumers as primarily atomistic economic beings¹⁰⁷ but would also provide a thick description of alternative forms of rationality.¹⁰⁸ For one whose "inherent structure of reality" is the depth of one's connection to other human beings, it is evident that the Posnerian "rational profit-maximizers" might be missing out on the greatest richness of all. Through a Trinitarian lens, the heart of what it means to be a "reasonable person" is to open oneself to relationships of respect, service and attentive care to all that solidarity calls for in the production process. Through this lens, it is "reasonable" that the production of material goods should express concern for others: "I am myself not when I close myself off from the other, but when I give myself, when out of love I am lost in the other."¹⁰⁹

¹⁰⁶ See *SOLLICITUDO REI SOCIALIS*, *supra* note 25, ¶ 40.

¹⁰⁷ See Luigino Bruni, *Toward an Economic Rationality "Capable of Communion,"* in *ECONOMY OF COMMUNION*, *supra* note 69, at 41-67 *et seq.* (tracing the history of the current definition of "rationality" and drawing out the elements for rethinking rational action in light of non-individualistic behaviors). Such would also accord with recent analyses of cultural studies theorists, who describe consumers as "permanently engaged in a dialectical conversation with product manufacturers, marketers, regulators, and others regarding the social significance of consuming activities." Kysar, *supra* note 23, at 1758. See also *id.* at 1757 ("Those who view consumer goods merely as vehicles for satisfying individual, unspecified desires ignore the many ways in which consumer product markets are culturally inflected.").

¹⁰⁸ See *id.* at 1774-1782 (discussing whether lay (non-expert) judgments constitute a "rival rationality").

¹⁰⁹ Lubich, *Toward a Theology and Philosophy of Unity*, *supra* note 71, at 33. See also *CENTESIMUS ANNUS*, *supra* note 26, ¶ 41 (stating through the free gift of self one truly finds oneself); *id.* ¶ 58 (describing the preferential option for the poor as an opportu-

Through a Trinitarian lens, it is *more* reasonable to let solidarity with those with whom one is called to live in relationships of “gift” and communion permeate the decision-making process than to be guided by “rational profit-maximizing” formulas.

2. The Jury’s Perspective as Normative Guide

The alternative definition of the “reasonable person” described above would probably not satisfy those in search of an objective anchor for product design decisions. The driving force behind much of the law-and-economics analysis is to provide a set of predictable standards that lend themselves to even and neutral application. What is often left out of the equation, however, is that those who evaluate the actual cases—civil juries—often reject these seemingly neutral and objective descriptions of the law. Or if this fact is recognized, it is often followed by the assumption that the reason ordinary citizens reject such standards is because they are incapable of the technical and complex analysis required to appreciate and accurately apply them.

Through a Trinitarian lens, one can not only appreciate alternative definitions of what it means to be reasonable, but also why the jury may already be intuitively operating according to this dynamic.¹¹⁰ As Professor Stephen Gilles put it: “No one has suggested that jurors are deeply conflicted over whether the average person ought to take as much care for the average other person as for himself or herself.”¹¹¹ Through this lens, Catholic Social Thought actually does a better job than economic analysis of capturing the operating definitions of “reasonableness” as applied by jurors within the context of the dynamic of a civil trial.

Studies indicate that when projected deaths are anonymous and statistical, the public seems more willing to balance risks and benefits;

nity: “Justice will never be fully attained unless people see in the poor person, who is asking for help in order to survive, not an annoyance or a burden, but an opportunity for showing kindness and a chance for greater enrichment. Only such an awareness can give the courage needed to face the risk and the change involved in every authentic attempt to come to the aid of another.”).

¹¹⁰ See Kysar, *supra* note 23, at 1737-38 (“[A] growing body of empirical evidence suggests that juries are simply unable or unwilling to approach the final step of the risk-utility analysis in the tidy, algebraic manner required by economic theory. Rather, law jury members seem to exhibit behavior that is consistent with a deontological moral outlook in which human life is not viewed as properly subject to instrumentalist trading against inferior competing interests.”).

¹¹¹ Gilles, *supra* note 101, at 1048.

when victims are specific and identifiable, however, it is more likely to call for open-ended expenditures.¹¹² A tort suit, by nature, focuses on and dramatizes the individual victim with all his or her personal attributes: the victim's injury or death is the ultimate focus of the trial.¹¹³ When jurors are brought face-to-face with accident victims and with managers who made decisions about safety, the context cannot help but put into relief the personal dimension of responsibility for decisions about safety and the personal consequences of product accidents. There are no "statistical people"—only flesh-and-blood human beings.¹¹⁴

As Professor Charles Fried explains, in certain contexts a stranger may be seen as a "potential friend": "A person is a potential friend if we encounter him in some degree of particularity, as a person with concrete, individual attributes. Thus every stranger we encounter in a situation where personal interaction of some sort is possible—every person who appears to us as a particular person—is a potential friend."¹¹⁵ Even if the jurors and parties are strangers at the start of the trial, the process of the trial brings them into a context in which the jurors are more likely to view these parties as "potential friends"—engaged in a personal interaction—rather than as "statistical lives."¹¹⁶

¹¹² See generally Fried, *supra* note 101, at 1415 (discussing whether the immediacy of a person's peril of death creates any special claims on us to relieve that peril).

¹¹³ See, e.g., Schwartz, *The Myth of the Ford Pinto Case*, *supra* note 10, at 1043 (stating that punitive damages award served to "teach Ford the lesson that the American people would not permit [Ford] to treat the face of a teenage boy or the life of a 52-year old mother as 'cost-benefit statistics'").

¹¹⁴ The climactic scene from the 1965 film *MIRAGE* illustrates this point well. Scientist David Stillwell (Gregory Peck) heatedly argues with his mentor, Charles Crawford (Walter Abel), about the use of a newly-discovered scientific formula which could threaten human life. *Stillwell*: "We're being turned into statistics, case histories and percentage points, all in the name of progress. What ever happened to human beings?" *Crawford*: "Is that what you want to see, David? Human beings?" Crawford opens the window and looks down to the street, twenty-seven floors below. *Crawford*: "Come here, David. Look at them. Do they look like human beings or ants? You're quite right, David, they are statistics. But I didn't do it to them. I'm not responsible. *Stillwell*: "Maybe you are, Charles. You're one of the leaders. You have the power to control progress and protect human dignity!" In a final rage of anger against the business tycoon conniving for access to the formula, Stillwell ignites it: "Those people down there, they aren't even ants to him, they're articles of commerce. That man computes human lives in terms of dollars and cents. He's made you his prize salesman and I'm the cost accountant trying to cut down his overhead with what you and he call progress. I won't let you have this, Charles."

¹¹⁵ Fried, *supra* note 101, at 1429.

¹¹⁶ See *id.* at 1430 (discussing the "personalist" justification for expenditures: "in many of our dealings—as taxpayers, as voters, as public servants, as entrepreneurs—we

Through a Trinitarian lens, the preferred point of reference for a safety design decision would be the personal face-to-face dynamic of a civil trial which highlights the impact that product accidents have on individual people. Because juries are the ultimate evaluators of product design decisions, the face-to-face encounter with the consequences of product accidents should actually carry more weight than a distanced statistical analysis. Observing the dynamic of a trial through a Trinitarian lens, one may intuit that jurors' enraged response to cost-benefit analysis is not so much a negative reaction to the process of assigning numeric values to probable risks, but rather an indication that this kind of distanced and seemingly "objective" analysis does not fully capture the regard due to fellow human beings.

Considering the Ford Pinto dilemma, reading the design defect standard through a Trinitarian lens, the cost-benefit studies relevant to the design of the Pinto would have been placed within a much broader framework of attentive care to all that solidarity would require. With the Trinity as a model of the "unity of the human race," it is clear that solidarity requires more than a "feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far."¹¹⁷ Rather, it inspires "a firm and persevering determination to commit oneself to the common good"—and a consequent concern for each person individually potentially affected by product accidents—"that is to say to the good of all and of each individual, because we are all really responsible for all."¹¹⁸

If the Ford Pinto manufacturers had looked at the design problem through a Trinitarian lens, they would have felt solidarity's pull towards responsibility for "the good of all and of each individual"—and would have been cautious not to let the seemingly anonymous and distant quality of the mass statistics distort the fact that their safety considerations could have drastic and fatal consequences in the lives of actual individual human beings. Through a Trinitarian lens, the universal bonds of human solidarity would inform design decisions to the point that the manufacturers might ask themselves, "Given realistic budget constraints on the amount one could spend on an automobile, would I want my child, my sister or my father to drive this car?"

can look at our fellow men only as abstractions, as statistical persons. But often too we encounter people as actual persons, and there it seems we have the occasion, the opportunity to show our deeper humanity.").

¹¹⁷ See *SOLLICITUDO REI SOCIALIS*, *supra* note 25, ¶ 38.

¹¹⁸ See *id.*

While manufacturers who do not open themselves to a broader cultural analysis run the risk of being blindsided by juries, the instrumental point should not be overemphasized. The power of Catholic Social Thought's analysis lies in its own philosophical structure and its deep appreciation for humanity's relational nature, not in its predictive capacity. However, the disconnect between current products theory standards and actual jury decisions does indicate that to highlight the need for a broader cultural analysis such as that offered by Catholic Social Thought is not a plea for manufacturers to magnanimously open the corporate coffers beyond the call of duty. Rather, it is a thick description of the legal standards to which they will be held, according to jurors' evaluations of "reasonableness." Thus even the law's theoretical "bad man" who is interested only in a description of the edges of legal duty so as to predict potential liability may find something helpful in Catholic Social Thought's description of the cultural criteria.¹¹⁹

B. The "Risk-Utility"—"Consumer Expectation" Debate Through a Trinitarian Lens

A second hotly debated area of design defect theory revolves around the effort to define the test for a defectively designed product. As courts and scholars worked to articulate the test, two main contenders emerged: the consumer expectation test¹²⁰ and the risk-utility balance.¹²¹ As the California Supreme Court, long recognized as a leader

¹¹⁹ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459, 461 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . . [W]hat does [a legal duty] mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.").

¹²⁰ The consumer expectation test emerged from two comments to the SECOND RESTATEMENT, *supra* note 6, § 402A. In judging whether one had sold a product in an "unreasonably dangerous" defective condition, Comment *g* defined "defect" as occurring "where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id.* at 351. Comment *i* further described the consumer's perspective as according to the "ordinary knowledge common to the community as to [the product's] characteristics." *Id.* at 352. Some courts and commentators refer to the test as the "consumer contemplation" standard, based on the language in Comment *g*. See, e.g., W. Page Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 300 (1979).

¹²¹ The risk-utility balance emerged from early scholarship commenting on Section 402A, a second test emerged in the effort to describe "reasonable" judgments about product design. In a seminal article, Dean Wade outlined a seven factor balancing test

in the development of products liability theory, explained in the relatively early case of *Barker*:

[A] product may be found to be defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First a product may be found to be defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.¹²²

Attempting to glean a "consensus" of the courts and leading torts theorists, the recently formulated Third Restatement indicates that the risk-utility balancing test seems to have won the day. Section 2(b) states the test for design defect: a product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."¹²³ Comment d defines "reasonable" according to the

which defined a product "defective as designed" only where the magnitude of the hazards outweighs the individual utility and broader societal benefits of the product. John W. Wade, *On the Nature of Strict Tort Liability for Products* 44 Miss. L. J. 825, 837 (1973) [hereinafter *On the Nature*]. These factors included: (1) the usefulness and desirability of the product to the user and to the public as a whole; 2) the safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury; 3) the availability of a substitute product which would meet the same need and not be as unsafe; 4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; 5) the user's ability to avoid danger by the exercise of care in the use of the product; 6) the user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and 7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. For one of the clearest early explanations of the risk-utility test, see *Cepada v. Cumberland Engineering Co.*, 386 A.2d 816 (N.J. 1978).

¹²² *Barker v. Lull Engineering Co.*, 575 P.2d 443, 455-56 (1978).

¹²³ THIRD RESTATEMENT, *supra* note 7, § 2(b) at 14. The full text is: "A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe."

risk-utility balance, and in comparison to an alternative design. Comment d states:

Answering [the question of whether design specifications create unreasonable risks] requires reference to a standard outside the specifications. Subsection (b) adopts a reasonableness ('risk-utility' balancing) test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design rendered the product not reasonably safe.¹²⁴

Consumer expectations are tucked into a broad range of factors for evaluating not the product itself, but whether the alternative design was reasonable. Comment g explains: "Under Subsection (b) consumer expectations do not constitute an independent standard for judging the defectiveness of product design."¹²⁵ While consumer expectations may be relevant to proof of a reasonable alternative design, "since reasonable consumers have a right to expect product designs that conform to the reasonableness standard," such expectations are not determinative.¹²⁶

What would Catholic Social Thought through a Trinitarian lens bring to the debate? The following sub-sections note a few insights on various angles of the discussion.

1. A Critique of the Alternative Design Requirement as an Expression of a Culture of Consumerism

One of the most controversial aspects of the Third Restatement's design defect standard was its articulation of reasonable alternative design as an element of the plaintiff's *prima facie* case.¹²⁷ As section 2(b) defines, the risk-utility balance is evaluated in comparison to the extent

¹²⁴ *Id.* § 2, cmt. d at 19.

¹²⁵ The comments explicitly distinguish the use of the consumer expectation test for manufacturing defects, proof of which turns on the failure of a product "to function as a reasonable person would expect it to function." *Id.* § 2 cmt. g at 27-28 and Reporters' Note at 44-90. See also David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 760-61 (stating consumer expectations relegated to mere factor status in the risk-utility calculus).

¹²⁶ See THIRD RESTATEMENT, *supra* note 7, § 2 cmt. g at 27.

¹²⁷ See *id.* § 2(b) (stating a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design"; *id.* § 2(b) cmt. d at 20 (noting that subsection 2(b) set out a "requirement . . . that the plaintiff show a reasonable alternative design").

to which harm could have been reduced or avoided by the adoption of a reasonable alternative design. The Third Restatement's alternative design requirement has been criticized on several grounds, including its failure to accurately reflect the dominant trends in case law, and the extent to which the requirement may dramatically increase the cost of proving a products liability case.¹²⁸

Catholic Social Thought through a Trinitarian lens would push the inquiry back a number of steps to ask an even more fundamental cultural question: to what extent does the alternative design requirement presume the inherent goodness of an unending variety of material products, and perhaps even express a certain "blind submission" to "pure consumerism"?¹²⁹ As *Sollicitudo* warns: "an excessive availability of every kind of material goods for the benefit of certain social groups, easily makes people slaves of 'possession' and of immediate gratification, with no other horizon than the multiplication or continual replacement of the things already owned with others still better."¹³⁰

The critique should not be overstated, especially in light of Catholic Social Thought's evaluation of economic initiative as "important not only for the individual, but also for the common good,"¹³¹ and how an "ever greater availability of material goods not only meets needs but also opens new horizons . . ." ¹³² But on balance it can shed light on the extent to which unarticulated cultural presumptions are often tucked into products liability theories such as the requirement of showing an alternative design.

Here too, Catholic Social Thought through a Trinitarian lens can not only point out the cultural drawbacks of "super-development"¹³³ and

¹²⁸ See e.g., Frank J. Vandall & Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. MEMPHIS L. REV. 909, 923 (2003). See also Kysar, *supra* note 23, at 1720, n.84 (summarizing literature critiquing the alternative design requirement).

¹²⁹ See SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 28.

¹³⁰ *Id.* See also CENTESIMUS ANNUS, *supra* note 26, ¶ 29b (" . . . in the developed countries there is sometimes an excessive promotion of purely utilitarian values, with an appeal to the appetites and inclinations towards immediate gratification, making it difficult to recognize and respect the hierarchy of the true values of human existence.").

¹³¹ See SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 15. See also CENTESIMUS ANNUS, *supra* note 26, ¶ 32 ("The modern *business economy* has positive aspects. Its basis is human freedom exercised in the economic field, just as it is exercised in many other fields.").

¹³² SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 29.

¹³³ *Id.* ¶¶ 28 & 31.

the "crass materialism" and "radical dissatisfaction" which result,¹³⁴ but can also highlight the "new and different things"¹³⁵ which can form the basis of a positive alternative. In light of an "unbreakable inner connection" between the life of communion at the heart of the Trinity and the "the way one ought to live," one can begin to see the ways in which the production of material goods could be evaluated—and ordered—against the backdrop of a broader cultural framework.

Drawing an important distinction between "having" and "being," *Sollicitudo* explains: "To 'have' objects and goods does not in itself perfect the human subject, unless it contributes to the maturing and enrichment of that subject's 'being,' that is to say unless it contributes to the realization of the human vocation as such."¹³⁶ *Centesimus* draws out the moral consequences: "It is not wrong to want to live better; what is wrong is a style of life which is presumed to be better when it is directed towards 'having' rather than 'being', and which wants to have more, not in order to be more but in order to spend life in enjoyment as an end in itself."¹³⁷ The challenge then becomes, *Centesimus* continues, "to create life-styles in which the quest for truth, beauty, goodness and communion with others for the sake of common growth are the factors which determine consumer choices, savings and investments."¹³⁸

Decisions about the development of a variety of products should be evaluated against the backdrop of this imbalance: "there are some people—the few who possess much—who do not really succeed in 'being' because, through a reversal of the hierarchy of values, they are hindered by the cult of 'having'; and there are others—the many who have little or nothing—who do not succeed in realizing their basic human vocation because they are deprived of essential goods."¹³⁹

Through a Trinitarian lens, one would see in the cultural shift an opportunity to further solidarity and human communion. The Trinitar-

¹³⁴ *Id.* ¶ 28. See also *CENTESIMUS ANNUS*, *supra* note 26, ¶ 29b.

¹³⁵ KUHN, *supra* note 91, at 111.

¹³⁶ *SOLLICITUDO REI SOCIALIS*, *supra* note 25, ¶ 28. See also *GAUDIUM ET SPES*, *supra* note 34, ¶ 35 ("A man is more precious for what he is than for what he has.").

¹³⁷ *CENTESIMUS ANNUS*, *supra* note 26, ¶ 36.

¹³⁸ *Id.*

¹³⁹ *SOLLICITUDO REI SOCIALIS*, *supra* note 25, ¶ 28. See also *CENTESIMUS ANNUS*, *supra* note 26, ¶ 36 ("The evil does not consist in 'having' as such, but in possessing without regard for the quality and the ordered hierarchy of the goods one has. Quality and hierarchy arise from the subordination of goods and their availability to man's 'being' and his true vocation.").

ian lens would highlight the ways in which broader questions about the production of material goods could constitute “a great opportunity for the moral, cultural, and even economic growth of all humanity.”¹⁴⁰ In light of Trinitarian relationships of communion, this framework also offers to those hindered by the cult of “having” the possibility of “entering into that relationship of solidarity and communion with others for which God created them.”¹⁴¹

Through this lens, one might also see new advantages to the roads less travelled in products theory. For example, in the influential article which set out the initial proposal for risk-utility factors, Dean John Wade included not only an inquiry into the manufacturer’s ability to eliminate the unsafe character of the product, but also the availability of a substitute *product* “which would meet the same need and not be as unsafe.”¹⁴²

2. Beyond “Technical” Expectations to Highlight Relationships of Solidarity and Communion

A second area of debate which was especially heated in the formulation of the Third Restatement’s design defect standard was the extent to which the “risk-utility” test is preferable to the “consumer expectation” test. One of the most pronounced criticisms of the consumer expectation test is that beyond the limited category of products that fail in their “manifestly intended” function, consumers may not be able to form any specific expectations, particularly regarding complex product design. As the manufacturer argued in another California case in which the plaintiff alleged injuries resulting from defective automobile design, *Soule v. General Motors*, the consumer expectation test is deficient and unfair because, among other reasons, it focuses “not on the objective condition of products, but on the subjective, unstable, and often unreasonable opinion of consumers” and because “it ignores the reality that ordinary consumers know little about how safe the complex products they use can or should be made.”¹⁴³

¹⁴⁰ See *id.* ¶ 28 (noting the necessity of abandoning “a mentality in which the poor—as individuals and as peoples—are considered a burden, as irksome intruders trying to consume what others have produced”).

¹⁴¹ See *id.* ¶ 41.

¹⁴² Wade, *On the Nature*, *supra* note 121, at 837-38.

¹⁴³ See *Soule v. General Motors*, 882 P.2d 298, 309 (Cal. 1994).

The Reporters for the Third Restatement agree that the consumer expectation test seems to pose a "totally unstructured standard of reasonableness."¹⁴⁴ Because the consumer expectation test relies heavily on intuition, they conclude, "it is so vague as to be lawless."¹⁴⁵ In contrast, it is argued, the more focused risk-utility test "relies less on intuition and more on a balancing of articulated considerations regarding the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed."¹⁴⁶

¹⁴⁴ See Aaron D. Twerski, *From Risk-Utility to Consumer Expectation: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861, 864 (1983) [hereinafter *Judicial Screening*]; James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) [hereinafter *Limits of Adjudication*].

¹⁴⁵ See James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 882 (1998) [hereinafter *Consensus*]; Henderson, *Limits of Adjudication*, *supra* note 144, at 1531. See also PROSSER & KEETON ON TORTS (5th ed. 198) ¶ 99(3) at 699 (stating the consumer expectations test "is very difficult of application to discrete problems. . . . The test can be utilized to explain most any result that a court or jury chooses to reach. The application of such a vague concept in many situations does not provide much guidance for a jury"); Twerski, *Judicial Screening*, *supra* note 144, at 900-901 ("The most pronounced criticism of the consumer expectation test is that it is difficult to pinpoint just what those expectations are with regard to any given product.").

¹⁴⁶ Henderson & Twerski, *Consensus*, *supra* note 145, at 878-879. See also *id.* at 883 ("Unlike the consumer expectations test that is almost wholly based on intuition and thus not subject to judicial limitation, the risk-utility test is relatively focused."). Note also that one of the justifications for adopting the risk-utility balance over the consumer expectation test is that the risk-utility balance better clarifies how analysis of design defect should hinge on the application of negligence rather than strict liability principles. See, e.g., Owen, *Defectiveness Restated*, *supra* note 125, at 761 ("The consumer expectations test derives from the law of contracts, and, like the great bulk of contract law principles, it operates in a manner that is truly 'strict.' Thus, this test often operates poorly in the design context where reasonableness, optimality, and balance are the proper benchmarks of responsibility. By banishing consumer expectations as a formal test of product defect, the Reporters exploded the final obstacle to the complete and final victory of negligence principles in the defect concept in design and warning cases."); David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 286 (1998) (stating that in relegating consumer expectations to a consideration in the risk-utility balancing calculus, "by shifting from 'strict' liability to negligence principles, the Products Liability Restatement 'restates' what most courts have long been doing if rarely saying"). It would be interesting to explore the extent to which it is the other way around—risk-utility balancing is stuck with a myopic "focus on the product," while the consumer expectation test bites the bullet of recognizing that what is really at issue are the negligence inquiries of the manufacturer's judgment, in particular whether the perspective and values which drove that judgment were that of the "reasonable person." Cf. Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 463 (1979) ("Since design decisions are made deliberately by manufacturers' design

Further, the critique continues, even if the standard could be measured, it would be too fraught with individual preferences. "The concept of consumer expectations carries with it inescapable psychological connotations that frustrate attempts to objectify the appropriate standard. It is unrealistic to believe that one can surgically separate ordinary consumer expectations from the value preferences of flesh-and-blood human beings. . . . Even though risk utility confronts the same problem of objectifying a normative standard, it does a better job."¹⁴⁷

In response to this analysis, Catholic Social Thought through a Trinitarian lens would offer both a critique and an alternative explanation. First, in response to its confidence that the complete set of risks and benefits can be "objectively" balanced, Catholic Social Thought would highlight the extent to which important human needs escape the logic of the market, and that "[t]here are goods which by their very nature cannot and must not be bought or sold."¹⁴⁸ It might even identify as "idolatrous" the extent to which a risk-utility balance tends to ignore "goods which by their nature are not and cannot be mere commodities."¹⁴⁹ To the extent that the risk-utility balance rests on the supposition that all the goods at stake could be objectively measured, Catholic Social Thought would unmask the illusion.

Catholic Social Thought would also highlight the ways in which this analysis tends to focus exclusively on the technical and mechanical aspects of consumer expectations. While this dimension is certainly relevant to product development, it nonetheless captures only one aspect of the inquiry and neglects an important set of "expectations"

officials, an unreasonable decision almost necessarily leads to an unreasonable design, and conversely an unreasonable design is almost always the consequence of an unreasonable design decision. Perceiving this, courts in some jurisdictions have found it meaningless to apply strict liability in design cases.").

¹⁴⁷ Henderson & Twerski, *Consensus*, *supra* note 145, at 881-82. The push to formulate "objective" standards distinct from the value preferences of "flesh-and-blood human beings" makes sense in light of theoretical economics' aspiration to be an "exact science." See, e.g., FRANK HYNEMAN KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 3 (1964) ("[E]conomics, or more properly theoretical economics, is the only one of the social sciences which has aspired to the distinction of an exact science."). On the other hand, it is interesting to note that the author of the initial list of risk-utility factors recommended that the jury *not* be instructed on the seven-factor list. Wade, *On the Nature* *supra* note 121, at 840 ("Should the jury be told about the list of seven factors which were set forth above? The answer should normally be no. The problem here is similar to that in negligence.").

¹⁴⁸ See CENTESIMUS ANNUS, *supra* note 26, ¶ 40.

¹⁴⁹ See *id.*

which embrace a universe beyond the technical concerns about a product's mechanical function.

While consumers may not be able to give a mechanically detailed explanation of how a product should have functioned, they can and do articulate their expectations about the care owed to relationships of respect, and about the kind of judgments manufacturers should make when they know about certain risks to safety. As a juror in the Chevy Malibu case commented, "GM has no regard for the people in their cars, and they should be held responsible for it . . . We're telling [GM] that when they know that something . . . is going to injure people, then it's more important that they pay the money to make the car safe than to come to court and have a trial all the time."¹⁵⁰

This is not to say that a general expectation about the "regard for people in their cars" will always be sufficient to fully analyze whether a product is defective in design. In *Soule*, for example, the plaintiff's own theory of design defect called for a technical and mechanical examination of "the precise behavior of several obscure components of her car under the complex circumstances of a particular accident."¹⁵¹ In these cases, as the *Soule* court concluded, ordinary consumer expectations may not do much to advance the technical analysis of defect.¹⁵²

But even in cases such as these the value judgments underlying technical design decisions should not be glossed over. Here Catholic Social Thought through a Trinitarian lens could highlight the ways consumer expectations about, for example, the regard due to "people in their cars" are neither unreasonable, nor "so vague as to be lawless,"—but actually in many ways capture the heart of the "law" as juries understand it.

Within a Trinitarian framework and process for decision-making, appreciating the "unbreakable inner connection" between the life of communion at the heart of the Trinity and the "the way one ought to live," moral decisions about product design and safety can ultimately reflect "a new model of the unity of the human race, which must ultimately inspire our solidarity."¹⁵³ Even though ordinary consumer expectations

¹⁵⁰ Anne W. O'Neill, Henry Weinstein, Eric Malnic, *GM Ordered to Pay \$4.9 Billion in Crash Verdict Liability*, L.A. TIMES, Jul. 10, 1999, at A1 (quoting jury foreman Coleman Thornton and juror Sheila Nash).

¹⁵¹ See *Soule v. General Motors*, 882 P.2d 298, 309 (Cal. 1994).

¹⁵² *Id.*

¹⁵³ See SOLLICITUDO REI SOCIALIS, *supra* note 25, ¶ 40.

may not be expressed in mathematical equations or formulas, they may nonetheless serve to form a robust and "reasonable" cultural framework that emphasizes the moral dimensions of decisions about product testing and development.

Finally, a Trinitarian lens would provide not only a cultural framework but a process for defining reasonable product design.¹⁵⁴ Of course, as the Reporters for the Third Restatement have observed, "one can never surgically separate ordinary consumer expectations from the value preferences of flesh-and-blood human beings." But neither is the seemingly "objective" risk-utility balance any less an expression of human value preferences.

Through a Trinitarian lens, the potential tug-of-war between values can become an occasion to further solidarity. By opening up the process to allow room (*kenosis*) for consumer expectations, in all their manifold dimensions—technical, mechanical, aesthetic and moral—to permeate decisions about product design, the resulting "mutual indwelling" (*pericorensis*) could not only become a much more complete cultural foundation for economic development, and not only further and express the bonds of human solidarity and communion, but also serve as a substantive guide for the standards for product development.

¹⁵⁴ See Kysar, *supra* note 23, at 1772 ("[C]onsumers appear to care a great deal about the process that results in a particular design, in addition to the end form that the design itself takes. . . . consumer expectations regarding product safety may be driven heavily by the extent to which consumers trust the manufacturer of the product, including such important variables as whether the manufacturer incorporates and responds to safety decision-making input from lay citizens, whether consumers perceive meaningful choices in the relevant market, and whether the manufacturer's internal cost-benefit calculations too severely depart from public values concerning life and safety."). An analysis on this level would also fit neatly with recent economic analyses challenging that "goods are goods." See, e.g., Stefano Zamagni, *On the Foundation and Meaning of the "Economy of Communion" Experience*, in *ECONOMY OF COMMUNION*, *supra* note 69, at 135 (challenging the notion that "the preferences which economic agents seek to maximize on the market have as their exclusive object the goods which enter their choice sets." Instead, "[t]he way in which objects are chosen is also relevant, since people attribute values to the possibility of acting—and hence of choosing—on the basis of their moral and religious convictions. . . . it is not irrelevant for the consumer to know where the goods and services he or she is consuming came from. Neither is it irrelevant for him or her to know the ways in which they were made."); Kysar, *supra* note 23, at 1757 (discussing theories which indicate "consumption should be viewed as a messy communicative act that combines pleasure seeking with elements of self-definition and social expression").

Conclusion

A few years after the Third Restatement was published, the Reporters, Professors Henderson and Twerski, pondered the continued vitality of the consumer expectation test in some courts and among some commentators. They lamented that its influence could continue to wreak havoc in products litigation, allowing recovery “notwithstanding evidence that no feasible alternative design could have reduced or avoided the plaintiff’s harm,”¹⁵⁵ and that it threatened to “abandon[] technology as the cornerstone of rational products litigation.”¹⁵⁶ What is the great attraction? “Perhaps,” they suggest, “the lure of such a doctrine is that it awakens in all of us a nostalgia for a world in which technology was not dominant.”¹⁵⁷

Catholic Social Thought through a Trinitarian lens would offer an alternative explanation. It would see in the recognition of the extent to which consumer expectations should inform design decisions, and more generally in a resistance to domination of economic analyses of the law, the expression of “an inherent structure of reality” in which technology *is not* dominant—because the human person is placed at the center of every aspect of productive activity. It would describe a world in which the cornerstone of products litigation is not technology, but the human person, morally responsible to other human beings for the consequences of product design decisions. If there is nostalgia for anything, it is for authentic relationships of solidarity and communion—because we are made in the image of God who is not alone, who is relational, who is Trinity, “[w]e are called to reach out to build relationships of love and justice.”¹⁵⁸ On earth as it is in heaven.

¹⁵⁵ James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 GEO. L.J. 659, 689 (2000).

¹⁵⁶ *Id.* at 688-89.

¹⁵⁷ *Id.* at 689.

¹⁵⁸ See SHARING CATHOLIC SOCIAL TEACHING, *supra* note 65, at 1 (1998).

