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.

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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

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[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. Cochran, 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

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[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

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[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]

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[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

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[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

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[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 theorists[22] and scholars in other disciplines, such as sociology, psychology

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[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

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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

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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

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[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 property[33] 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

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[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]

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[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

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[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-

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[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

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[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]

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[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