Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort

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COMPENSATION FOR SMOKING-RELATED INJURIES: AN ALTERNATIVE TO STRICT LIABILITY IN TORT

RICHARD C. AUSNESS†

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I. INTRODUCTION

The Surgeon General has described cigarette smoking as the "single most important preventable environmental factor contributing to illness, disability and death in the United States." Each year, smoking-related diseases claim more than 350,000 lives.


2. See Blasi & Monaghan, The First Amendment and Cigarette Advertising, 256 J. A.M.A. 502 (1986) (each year approximately 350,000 Americans, and one million persons worldwide, die from cigarette related illnesses).
Smoking-related illnesses also impose a huge economic burden on society. Estimates of health care costs range from $12 billion to $22 billion per year, and productivity losses due to illness and death are even greater.

Arguably, cigarette companies and their customers ought to bear the health costs of smoking. At the present time, however, the tobacco industry has largely escaped responsibility for these costs. Instead, smoking-related health costs either fall on the individual victims, or are shifted to private health insurance plans and government entitlement programs.

In theory, strict liability in tort can provide a mechanism for compensating injured parties and ensuring that the social costs of smoking are borne by those who benefit from the presence of cigarettes in the market. This Article evaluates strict liability as a mechanism for compensating the victims of smoking-related injuries and also assesses the merits of an administrative compensation system.

Part I of this Article examines the basic principles of products liability and discusses the effect of federal preemption on claims


4. See Comment, supra note 3, at 269 ($27 billion); Note, supra note 3, at 1072 n.319 ($25 billion); Blasi & Monaghan, supra note 2, at 505 ($43 billion).

A recent study by the Rand Corporation, however, contended that the pecuniary costs of smoking (health care, lost productivity, and fire damage) are almost balanced by cigarette taxes and the saving from Social Security, pension benefits, and nursing home care that accrue to society because smokers die prematurely. See Manning, Keeler, Newhouse, Sloss & Wasserman, The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?, 261 J. A.M.A. 1604 (1989).

5. See Comment, Strict Products Liability on the Move: Cigarette Manufacturers May Soon Feel the Heat, 23 SAN DIEGO L. REV. 1137, 1155 (1986). Cigarette companies can be affected by the health costs of smoking. For example, they could lose potential sales due to consumers concerns about smoking-related health risks. In addition, the cigarette industry has to spend money for legal services to defend against lawsuits by injured consumers.


against cigarette manufacturers based on the alleged inadequacy of health warnings. Part II evaluates the case for tort liability in terms of corrective justice, allocative efficiency, risk distribution, and cost of administration. I conclude that the imposition of strict liability on cigarette manufacturers is consistent with principles of corrective justice. However, I am not persuaded that the imposition of strict liability on cigarette companies necessarily promotes either allocative efficiency or risk distribution goals. Furthermore, I find that the high cost of administering a strict liability regime is likely to seriously impair its compensatory function.

In Part III, I propose a social insurance scheme to provide compensation for smoking-related injuries. Its primary goal would be to process claims for smoking-related injuries quickly and at minimal administrative cost. Compensation would be limited to economic losses and the program would be financed by an excise tax on cigarette manufacturing. I conclude that, for the most part, this approach compares favorably to strict liability in terms of corrective justice, allocative efficiency, risk distribution, and cost of administration.

II. PREEMPTION OF TORT CLAIMS AGAINST CIGARETTE COMPANIES

Injured consumers have sought recovery against cigarette companies for more than three decades. Negligence and breach of warranty theories were popular in the 1960's. However, tobacco companies generally have avoided liability in such cases by claiming to have been unaware that smoking was dangerous.

Strict liability has now largely replaced negligence and implied warranty as the preferred theory of recovery for injuries caused

9. See Garner, supra note 6, at 1425.


11. E.g., Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), question cert. on reh'g, 154 So. 2d 169 (Fla. 1963), rev'd & remanded, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964), rev'd & remanded on reh'g, 391 F.2d 97 (5th Cir. 1968), aff'd per curiam, 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970); Ross v. Philip Morris, Inc., 328 F.2d 3 (8th Cir. 1964).

12. E.g., Pritchard, 350 F.2d at 482 (negligence); Lartigue, 317 F.2d at 12-13 (implied warranty); Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541, 542 (5th Cir. 1970).
by defective products. Product defects may arise from flaws in the manufacturing process, defective design, or from an inadequate warning. Cigarette companies have always been liable for manufacturing defects, such as foreign objects in tobacco products. However, defects of this sort are relatively uncommon. Some injured parties have also tried to recover by alleging that cigarettes were defectively designed because their inherent risks outweighed their utility. To date, no plaintiff has recovered

13. The basic principles of strict products liability are set forth in the Restatement (Second) of Torts § 402A (1965). Section 402A provides:

(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 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.


16. Strict liability may also be imposed on a manufacturer who fails to provide an adequate warning about a product's inherent dangers, even though the product is not otherwise defective. See Wade, On Product "Design Defects" and Their Actionability, 33 Vand. L. Rev. 551, 551-52 (1980).

17. E.g., Liggett & Meyers Tobacco Co. v. DeLape, 109 F.2d 598 (9th Cir. 1940) (explosive material in cigarette); Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1930) (firecracker in cigar); Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918) (human toe in chewing tobacco).

against a cigarette manufacturer under a theory of defective design. 19

Finally, litigants have contended that cigarettes are defective because the warnings placed on cigarette packages were not sufficient to inform consumers about the health risks of smoking. 20 At first blush, this appears to be a promising theory. Until 1966, 21 tobacco companies gave no health warnings at all, and even now these required warnings provide very little information about many of the health risks of smoking. 22 Nevertheless, plaintiffs have almost never prevailed against cigarette companies when they raised a failure to warn claim 23 because the courts have found such claims to be preempted by federal cigarette labeling legislation. 24

The preemption doctrine, which is based on the supremacy clause of the Constitution, 25 provides that federal legislation may


22. See Note, supra note 3, at 1064.


25. U.S. Const. art. VI, § 2. For a more detailed discussion of the preemption doctrine and its effect on cigarette warning cases, see Ausness, supra note 8, at 913-24.
over-ride inconsistent state statutes\textsuperscript{26} and common law rules.\textsuperscript{27} Congress may preempt state law expressly or by implication. Express preemption occurs when federal law specifically and unequivocably excludes the states from regulating in a particular area.\textsuperscript{28} State law may be impliedly preempted when Congress completely occupies a regulatory field\textsuperscript{29} or when there is a conflict between state and federal law.\textsuperscript{30}

\begin{footnotesize}
\begin{enumerate}
\item Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824).
\item State regulation may also be excluded on federal occupation grounds when a dominant federal interest is asserted in a particular regulatory area. E.g., Kolovrat v. Oregon, 366 U.S. 187, 198 (1961) (states preempted from disinherting citizens of foreign countries); Pennsylvania v. Nelson, 350 U.S. 497, 504-05 (1956) (state sedition law interferes with federal government’s powers over national security); Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (dominant federal interest in conduct of foreign affairs preempts state alien registration laws).
\end{enumerate}
\end{footnotesize}
The Federal Cigarette Labeling and Advertising Act,31 which became effective in 1966, was a response to public alarm over the 1964 Surgeon General's Report revealing smoking-related health risks.32 However, Congress was also concerned about the disruptive effect of state regulation of cigarette labeling.33 Consequently, several of the Act's provisions contain preemptive language.

Section 1334(a) of that Act declares that no statement relating to health risks from smoking shall be required on cigarette packages except the statement required under section 1333 of the Act.34 Furthermore, section 1334(b) states that no additional requirements or prohibitions relating to smoking and health may be imposed under state law with respect to advertising or promotional activities.35 This language expressly prohibits state and local governments from enacting statutes or ordinances that impose health-related labeling requirements or otherwise regulate the promotional activities of cigarettes companies.36

provisions of state labeling act). Another form of direct conflict may arise when state law diminishes or interferes with the exercise of a federally created right. E.g., McCarty v. McCarty, 453 U.S. 210, 235 (1981) (military retirement benefits not subject to state law claims of divorced spouse); Wissner v. Wissner, 338 U.S. 659, 655-56 (1949) (right to designate beneficiary under military life insurance policy not subject to rights of surviving spouse under state community property law); reh'g denied, 339 U.S. 926 (1950). In addition, state law may be displaced when it significantly undermines federal regulatory policies even when there is no direct conflict. E.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973) (municipal airport curfew preempted because it interferes with Federal Aviation Authority's power to regulate air traffic).


33. See H. REP. No. 449, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2350, 2352 (“such a requirement as to labeling should be uniform; otherwise, a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions and consumer confusion”).

34. 15 U.S.C. § 1334(a) (1982) declares: “No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.”

35. 15 U.S.C. § 1334(b) (1982) declares: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”

Cigarette companies contend that this language also precludes implicit challenges by injured smokers as to the adequacy of the statutory warnings. Most courts have accepted this argument and, have accordingly denied recovery against cigarette companies on the basis of an inadequate warning claim.

III. Strict Liability for Smoking-Related Injuries

If the preemption doctrine continues to be applied to cigarette warning cases, tobacco companies will avoid much of the responsibility for smoking-related injuries. Instead, smoking costs will be borne by individual victims and, to some extent, by first-party insurers and government entitlement programs. This result can be criticized from a number of perspectives: (1) The wrongful infliction of injury on another calls for rectification under principles of corrective justice; (2) allowing cigarette companies to avoid liability for smoking-related injuries seems inconsistent with the concept of allocative efficiency; and (3) a rule which imposes the health costs of smoking on victims and, to some extent, on nonsmokers, appears to conflict with accepted norms of distributive justice and loss-spreading.

Holding cigarette companies responsible for smoking-related injuries, however, seems consistent with corrective justice, allocative efficiency, and modern notions of risk distribution. Therefore, the doctrine of strict liability in tort, which is applicable to product sellers generally, should also apply to cigarette companies. This would further the goals of justice, efficiency, and risk distribution.

A. Corrective Justice

Principles of corrective justice support the notion that victims of smoking-related illnesses should be compensated for their injuries. To the extent that a strict liability regime will provide for such compensation, it is superior to a rule that limits the liability of cigarette companies without providing any alternative source of compensation.

Corrective justice is concerned with rectifying wrongful gains and losses. The principle of corrective justice simply provides that those who are wrongfully injured should obtain redress and those

38. See Palmer, 825 F.2d at 626; Stephen, 825 F.2d at 313; Cipollone, 789 F.2d at 187; Roysdon, 623 F. Supp. at 1191; Forster, 437 N.W.2d. at 660.
who profit from the infliction of such injuries should be forced to disgorge their wrongful gains.39

1. *Aristotle's Theory of Corrective Justice*

The traditional theory of corrective justice derives from Aristotle's discussion of the nature of justice in his *Nicomachean Ethics*.40 According to Aristotle, every wrongful act confers an unwarranted gain on the wrongdoer and a corresponding loss to the victim. The judge returns the parties to equilibrium by transferring the wrongful gain from the wrongdoer to the victim.41 Thus, in Aristotle's view, corrective justice is essentially procedural in nature:42 wrongful conduct is rectified by returning the parties to the status quo ante.43

Aristotle's theory of corrective justice is particularly applicable to cases of unjust enrichment, such as theft; where one party has directly benefitted at another's expense. Rectification is especially compelling in such cases because the injustice involves a wrongful

41. Aristotle provides the following illustration:
The judge restores equality, as though a line [AB] had been cut into unequal parts [AC and CB], and he removed from the larger part [AC] the amount [DC] by which it exceeds the half [AD] of the line [AB], and added this amount [DC] to smaller part [CB]. And when the whole [AB] has been halved [into AD and DB], then they say that each person has what is properly his own, when he has got an equal share.
*Id.* at book 5, chapter 4, at 127.
42. See Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 190-91 (1981). Of course, social considerations are relevant to a determination of what acts are wrongful. *Id.* at 191.
43. See Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 350 (1990). According to Aristotle, the overall moral worth of the parties does not affect their right to impartial treatment by the judge under principles of corrective justice:
For here it does not matter if a decent person has taken from a base person, or a base person from a decent person, or if a decent or a base person has committed adultery. Rather, the law looks only at differences in the harm [inflicted], and treats the people involved as equals, when one does injustice while the other suffers it, and one has done the harm while the other has suffered it. Hence the judge tries to restore this unjust situation to equality, since it is unequal.
gain to one party and an undeserved loss to the other. Restitution corrects both of these conditions by restoring the parties to their former position. Aristotle would also apply the principle of corrective justice where the wrongdoer received no direct gain from the victim's injury.

Aristotle made it clear that the victim cannot create a corrective justice claim unless the injurer has engaged in wrongdoing. Elsewhere in *Nicomachean Ethics*, Aristotle appeared to confine his notion of wrongdoing to deliberate or intentional misbehavior. However, to Aristotle, the core principle of corrective justice is the rectification of wrongful injuries; a concept entirely independent of any particular definition of wrongdoing.

44. See J. Dawson, Unjust Enrichment 5 (1951) (loss alone is a grievance, but victim's anguish is twice as great if his loss is identified as another's wrongful gain); Fuller & Purdey, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 56 (1936) (if wrongdoer not only causes victim to lose one unit, but appropriates that unit to himself, the resulting discrepancy between them is not one unit but two); Sherwin, Constructive Trusts in Bankruptcy, 1989 U. Ill. L. Rev. 297 (loss to victim and corresponding gain to wrongdoer gives restitutionary claim strong appeal in fairness and corrective justice).

45. Aristotle expressed the point in terms of profit and loss:
For [not only when one steals from another but also] when one is wounded and the other wounds him, or one kills and the other is killed, the action and the suffering are unequally divided [with profit for the offender and loss for the victim]; and the judge tries to restore the [profit and] loss to a position of equality, by subtraction from [the offender's] profit. For in such cases, stating it without qualification, we speak of profit for, e.g., the attacker who wounded his victim, even if that is not the proper word for some cases, and of loss for the victim who suffers the wound. At any rate, when what was suffered has been measured, one part is called the [victim's] loss, and the other the [offender's] profit.


46. See Posner, supra note 42, at 190.

47. Aristotle explains justice and injustice in terms of voluntary and involuntary acts:

Given this account of just and unjust actions, someone does injustice or does justice whenever he does them willingly, and does neither justice nor injustice whenever he does them unwillingly, except coincidentally, since the actions he does are coincidentally just or unjust.

Further, an act of injustice and a just act are defined by what is voluntary and what is involuntary. For when the action is voluntary, the agent is blamed, and thereby also it is an act of injustice. Hence something will be unjust without thereby being an act of injustice, if it is not also voluntary.

ARISTOTLE, supra note 40, at book 5, chapter 8, at 136.

The conduct of cigarette manufacturers would be wrongful under contemporary standards of rectitude. Thus, injured consumers can base compensation claims on corrective justice principles because cigarette companies place a product on the market that is responsible for 350,000 deaths a year in this country,49 and is linked to a large number of serious diseases.50 Moreover, cigarette companies have consistently failed to provide adequate warnings about the health risks of smoking.51 Despite growing scientific evidence that links smoking to lung cancer and other diseases,52 cigarette companies failed to issue warnings until required to do so by statute.53 Even now, cigarette companies fail to inform consumers about some health risks of smoking, and have resisted governmental efforts to require warnings about the addictive qualities of tobacco.54

Furthermore, the tobacco industry has deliberately undermined statutorily mandated warnings in various ways. Cigarette companies overpower and neutralize the effect of warnings by positive advertising strategies.55 The tobacco industry also questions whether smoking poses a health risk to society, implicitly suggesting that health warnings should not be taken seriously.56 Finally, cigarette companies use their economic power to discourage negative media coverage of smoking-related health issues.57

These actions constitute an industry-wide policy of discouraging the dissemination of information that could prevent death or serious injury. The industry is motivated solely by a desire to

49. See supra note 2.
50. See supra note 1.
51. See Note, supra note 3, at 1057.
52. Medical experts detected a relationship between smoking and lung cancer as early as the 1930's. See e.g., Hoffman, Cancer and Smoking Habits, 93 Annals of Surgery 50, 56 (1931) (lung cancer increase directly connected to increase cigarette smoking); DeBakey & Oschner, Primary Pulmonary Malignancy, 68 Surgery, GYNECOLOGY & OBSTETRICS 435 (1939) (smoking probably a factor in the development of lung cancer.) See also 1964 Surgeon General Report, supra note 1, at 14.
53. See Garner, supra note 6, at 1430.
55. See Comment, Liability of Cigarette Manufacturers for Smoking Induced Illnesses and Deaths, 18 Rutgers L.J. 165, 183 (1986).
56. See Note, supra note 3, at 1067.
57. Id. at 1068.
protect the profits that flow from the marketing of a highly dangerous product. If such conduct is wrongful, injured parties could make a strong case for compensation based on the requirements of corrective justice.

However, one might argue that smokers should not be compensated for their injuries because they voluntarily assumed those risks. According to Aristotle, injustice involves harm inflicted against the victim's wishes. Thus, in Aristotle's view, an act is not unjust if the victim consents, even though the act would normally be regarded as wrongful by society.\(^{58}\) Strictly speaking, however, consent is not an aspect of Aristotle's core theory of corrective justice, but instead he focuses on the question of whether an injurer's act is wrongful or not. The assumption of risk issue must be decided by some principle other than corrective justice.

Our society places a high value on personal autonomy and free choice.\(^{59}\) Consequently, an injurer should not be held morally responsible if the victim consents to an act or accepts a risk that results in harm. However, the consenter must be fully informed of the consequences of his consent for it to have legal or moral effect. Arguably, most smokers did not make an informed decision to smoke. The general public was not aware of the health risks of smoking until the Surgeon General's Report was published in 1964. Even now, the vast majority of consumers do not know

\(^{58}\) Aristotle illustrated the point as follows: Perhaps, however, our definition [of doing injustice] was incorrect, and we should add to "harming with knowledge of the victim, the instrument and the way," the condition "against the wish of the victim." If so, then someone is harmed and suffers something unjust unwillingly, but no one suffers injustice willingly. For no one wishes it, not even the incontinent, but he acts against his wish; for no one wishes for what he does not think is excellent, and what the incontinent does is not what he thinks it is right [and hence excellent] thing to do.

And if someone gives away what is his own, as Homer says Glauces gave Diomede "gold for bronze, a hundred cows' worth for nine cows' worth," he does not suffer injustice. For it is up to him to give them, whereas suffering injustice is not up to him, but requires someone to do him injustice. Clearly, then suffering injustice is not voluntary.

Aristotle, supra note 40, at book 5, chapter 9, at 141.

about many specific health risks of smoking.\textsuperscript{60} Warning labels do little to inform consumers about such risks because cigarette advertising dilutes their effectiveness.\textsuperscript{61}

In addition, consent must be voluntary to be effective, and it is doubtful that smoking can be regarded as entirely voluntary. Smoking is a matter of personal choice. However, even if the initial decision to smoke is voluntary, the addictive nature of tobacco causes many smokers to continue smoking when they would rather stop.\textsuperscript{62} Moreover, most smokers become dependent on tobacco shortly after beginning to smoke.\textsuperscript{63} Since the health effects of smoking result from long-term exposure to tobacco, one may argue that smokers, once they are “hooked” on cigarettes are no longer acting voluntarily when they continue to smoke.\textsuperscript{64}

Because smokers typically do not knowingly and voluntarily submit to the health risks posed by smoking, the theory of consent should not affect my characterization of cigarette company behavior. Therefore, if the marketing practices of cigarette companies are considered wrongful, compensation claims against cigarette companies based on principles of corrective justice are not defeated by the argument that smokers consented to the health risks of smoking.

2. Other Theories of Corrective Justice

Not all scholars view corrective justice purely as a procedural principle. Some writers, such as Richard Epstein and George

\textsuperscript{60} See Note, Plaintiff’s Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. 809, 813-14 (1986); Sigmon, Cigarette Smoking Injuries: A Theory for Recovery Against the Federal Government, Trial 64, 66 (April 1983) (most consumers unaware smoking may cause other cancers besides lung cancer). A Gallup Poll showed that 24% of heavy smokers are unaware or do not believe that smoking is hazardous. Levin, supra note 21, at 226. Another study revealed that 30% of those polled were unaware of the relationship between smoking and heart disease. See FTC Staff Report on the Cigarette Advertising Investigation 1-7 (May, 1981).

\textsuperscript{61} See Comment, supra note 55, at 183.

\textsuperscript{62} Three out of four smokers have tried to quit and have failed. See Levin, supra note 21, at 226 n.247.

\textsuperscript{63} See Garner, supra note 6, at 1433-34.

\textsuperscript{64} See White, The Intentional Exploitation of Man’s Known Weaknesses, 9 Houston L. Rev. 889, 915-16 (1972); “Given the habit-forming nature of cigarettes, it is questionable how voluntarily many consumers are continuing to smoke.” Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 371 (1965).
Fletcher, have developed theories of corrective justice that not only require rectification for wrongful injuries, but also provide a substantive standard for determining when such an injury is wrongful.

Professor Richard Epstein believes that corrective justice should play a major role in the analysis of tort law. Epstein's theory of corrective justice proceeds from his "libertarian" view of human relationships: a person may act without having to account for his actions to another as long as his actions do not harm another. Prior to the incidence of harm, individuals are in a state of "equilibrium" or "balance." The infliction of harm upsets this balance. The imposition of tort liability corrects the imbalance thereby restoring equilibrium.

According to Epstein, causation rather than fault is the moral basis of tort liability. Epstein believes that the traditional "but for" test of causation is too broad to provide a moral basis for liability. Therefore, he imposes restrictions on the right to recover against one who causes an injury. Epstein would limit liability to four causal paradigms: (1) the volitional application of force by the actor against another; (2) conduct by the actor that creates fright or shock; (3) force directed against someone that compels him to harm a third party; and (4) creation of dangerous conditions that result in harm to another.

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65. The theories of another important scholar, Jules Coleman, are discussed infra in Part IV B.


67. See Epstein, supra note 66, at 479.


69. See Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 160 (1973). Unlike a theory of torts that relies on fault, a theory based on causal connection can theoretically ground all tort law under a comprehensive moral principle, since causation, unlike fault, is a necessary element of both negligence and strict liability. Epstein, Intentional Harms, 4 J. LEGAL STUD. 391, 398 (1975) [hereinafter Epstein, Intentional Harms].

70. See Epstein, supra note 69, at 166-84. This last paradigm encompasses three classes of dangerous conditions. The first includes items such as explosives, that are inherently dangerous. "The second kind of dangerous condition is created
Epstein further limits liability by requiring that the injurer’s actions constitute an invasion of a legally recognized right on the part of the victim.\textsuperscript{71} Finally, even if these conditions are met, Epstein would permit the injurer to invoke a variety of defenses to avoid liability for the harm inflicted.\textsuperscript{72}

The imposition of tort liability on cigarette companies for smoking-related diseases seems consistent with Epstein’s theory of corrective justice. Cigarette companies have knowingly placed a dangerous product on the market, failed to warn about its carcinogenic properties and, through advertising and other means, have induced consumers to believe that cigarettes are not harmful. Thus, cigarette companies have created a dangerous condition that causes harm to another.\textsuperscript{73} Specifically, their conduct has exposed smokers and others to carcinogenic substances.\textsuperscript{74} According to Epstein’s concept of corrective justice, those who incur smoking-related injuries would have a claim for compensation against cigarette companies.

Like Epstein, Professor George Fletcher also believes that corrective justice should be the guiding principle of tort liability.\textsuperscript{75} According to Fletcher, the courts have resorted to two different

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\textsuperscript{72} The defendant may allege good reasons to prove not only that he is blameless, but also that he should prevail over the plaintiff, who may also be blameless, in any contest between them. See Epstein, \textit{Intentional Harms, supra} note 69, at 400. These include causal defenses, assumption of risk, and trespass by the plaintiff on the land of the defendant. See Epstein, \textit{supra} note 68, at 174-213.

\textsuperscript{73} See Epstein, \textit{supra} note 69, at 178.

\textsuperscript{74} Epstein would no doubt agree that this exposure constitutes an unwarranted invasion of the personal integrity and the physical well-being of those who are injured by tobacco products. See Epstein, \textit{supra} note 71, at 50 (every personal injury action rests on unspoken assumption that every person owns his own body). On the other hand, cigarette companies would not be liable under Epstein’s theory of corrective justice, if smokers voluntarily assumed the inherent risks of smoking. See Epstein, \textit{supra} note 68, at 185-201.

approaches to resolve personal injury cases: the paradigm of reasonableness and the paradigm of reciprocity.\textsuperscript{76}

Reasonableness involves a balancing of costs and benefits. If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator. If the risk yields a net social disutility (cost), the victim is entitled to recover.\textsuperscript{77} Thus, the paradigm of reasonableness is utilitarian in nature. It assumes that reasonableness can decide what activities society ought to encourage and that tort liability is an appropriate mechanism for achieving these goals.\textsuperscript{78}

The paradigm of reciprocity, on the other hand, is grounded in notions of corrective justice.\textsuperscript{79} Under the paradigm of reciprocity, "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant."\textsuperscript{80} Therefore, strict liability is an appropriate liability standard for activities, like blasting, that do not by nature involve participants imposing similar risks on one another. However, a fault criterion is more suitable to activities of mutual involvement, like driving, in which there exists a shared level of background or reciprocal risk taking.\textsuperscript{81}

In Fletcher's view, the creation of a nonreciprocal risk is a more appropriate basis for tort liability.\textsuperscript{82} Fletcher contends that each individual is entitled to the maximum degree of security compatible with a like level of security for all.\textsuperscript{83} This means that

\textsuperscript{76} The paradigm of reciprocity dominated the law of personal injury until the mid-nineteenth century. See Fletcher, supra note 75, at 556. The courts' primary focus was on the propriety rationality of singling out the party immediately causing harm as the bearer of liability. Id. at 551. Later the paradigm of reasonableness emerged. Under this approach, the inquiry focused on the context and reasonableness of the defendant's risk-creating conduct. Id. at 556-57.

\textsuperscript{77} Id. at 542.

\textsuperscript{78} Id. at 542-43.

\textsuperscript{79} Id. at 538.

\textsuperscript{80} Id. at 542.

\textsuperscript{81} Id. at 549. Because Fletcher believes that tort law should be grounded on principles of corrective justice, he would relegate distributive aims to other branches of law. Id. at 547 n.40. According to Fletcher, the paradigm of reciprocity requires the judge to look solely to the claims and interests of the parties before the court without looking beyond the case at hand. Social costs and utility of risk are irrelevant. Id. at 540-41. In contrast, the paradigm of reasonableness allows judges to resolve seemingly private disputes in a way that serves the interests of the community as a whole. Id. at 540.

\textsuperscript{82} Id. at 543.

\textsuperscript{83} The analogy is to Rawls' principle that each individual participating in
individuals "are subject to harm, without compensation from background risks, [generated by mutual activity] but that no one may suffer harm from additional risks without recourse for damages against the risk-creator. Compensation is a surrogate for the individual's right to the same security as enjoyed by others."84

Fletcher excludes products liability from his analysis because the principles of products liability are inherently instrumentalist in character.85 Additionally, products liability may not fit Fletcher's paradigm of reciprocity because buyers and sellers often voluntarily allocate product-related risks by contract. These product-related risks would fall outside the boundaries of the reciprocity paradigm. Nevertheless, Fletcher's paradigm of reciprocity may support the imposition of liability on product manufacturers in cases where they withhold information about a known product risk. Subjecting others to such a risk involves involuntary and nonreciprocal conduct. Arguably, cigarette sales subject consumers to a nonreciprocal risk of harm. Moreover, nothing in the conduct of cigarette companies meets Fletcher's definition of excuse. Therefore, imposing strict liability on cigarette companies is not inconsistent with Fletcher's theory of reciprocity.

In conclusion, Aristotle's concept of corrective justice supports a liability rule that would award compensation to injured consumers, if the conduct of cigarette companies is considered to be wrongful. Such a rule is also compatible with the views of modern theorists, like Epstein and Fletcher.

B. Allocative Efficiency

This section discusses the allocative effect of making cigarette manufacturers strictly liable for the health costs of smoking.

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84. See Fletcher, supra note 75, at 550. However, one who subjects another to a nonreciprocal risk is not automatically liable to the injured party. In certain cases, the injurer may be excused. Id. at 554. Conduct may be excused when some peculiar set of circumstances takes the case out of the general situation contemplated by the legal norm. Excuse is to be distinguished from justification. Conduct that is justified is not considered wrongful at all. For example, duress is an excuse; self-defense is a justification. Id. at 558-59.

At the same time, Fletcher suggests that in cases of excuse, principles of corrective justice may support the plaintiff's right to compensation even though the defendant is not obligated to pay. Id. at 553. Those who have been deprived of their equal share of security from risk might have a claim of priority in a social insurance scheme. Id. at 554.

85. See Fletcher, supra note 75, at 544 n.24 (arguing products liability law inherently instrumentalist in character).
Although strict liability is often justified on the basis that it encourages allocative efficiency, I believe that this argument is less persuasive than in other cases. Allocative efficiency attempts to distribute economic resources within a society to maximize social welfare. In a free market economy, market forces play an important role in directing resources to their most productive uses. However, governmental


87. See R. Posner, Economic Analysis of Law 9 (1972). Economists distinguish between productive efficiency and allocative efficiency. The goal of productive efficiency is to achieve a particular level of production or output at the least cost (i.e., with the lowest level of inputs) or to obtain the highest level of output from a given level of input. Allocative efficiency, on the other hand, is concerned with how resources are allocated among various productive uses. See Kornhauser, A Guide to the Perplexed Claims of Efficiency in the Law, 8 HOFSTRA L. REV. 391, 592 (1980).

88. Because people value goods differently, they can often benefit from voluntary exchanges. A mutually beneficial exchange can occur by means of barter. In a more sophisticated economic environment, a party would purchase the goods he desired instead of exchanging other goods for them. See Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103, 120 (1979).

Competitive markets, thereby, promote allocative efficiency by allowing members of society to engage in mutually beneficial exchanges. Thus, consumers create a demand for various goods and services based on individual preferences. Producers, in turn, determine levels of output that maximize their profits. See Polinsky, Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law, 87 HARV. L. REV. 1655, 1666 (1974). In this fashion, resources are allocated to their highest-valued uses, as measured by willingness to pay. See E. BROWNING & J. BROWNING, PUBLIC FINANCE AND THE PRICE SYSTEM 7-10 (1979); R. Posner, supra note 87, at 10-12.
institutions also make allocative decisions. Expenditures of public funds on public works or welfare programs have obvious allocative effects. Safety and environmental regulations also affect resource allocation because they affect the allocation of economic resources in the private sector. In addition, judicial decisions influence resource allocation particularly in the area of products liability.

According to the conventional wisdom, strict liability in tort promotes allocative efficiency in two ways: (1) It encourages manufacturers to make appropriate investments in product safety; and (2) it ensures that the price of a product reflects the true cost of production by including the cost of product injuries. When strict liability is applied to cigarette manufacturers, however, this doctrine may not achieve either of these goals.

1. Product Safety

Commentators generally support the imposition of strict liability on product manufacturers. They maintain that the resources society devotes to treating product injuries ought to be regarded as a cost of production because these resources could otherwise be allocated to some other productive use. In other words, the economic cost of product injuries should be considered part of the product's social cost. If the cost of product injuries are viewed in this manner, then a reallocation of economic resources that reduces such injuries may be efficient. For example, assume that a product manufacturer can reduce personal injury costs by $500,000 if it spends an additional $200,000 on product safety. Assuming that no other economic consequences result from this decision, the expenditure on product safety would produce a net social gain of $300,000.

If the cost of product injuries were borne by others, however, a manufacturer would have little incentive to spend money on

89. Manufacturers are usually in the best position to implement measures that will increase product safety because of their control over the processes of production. See Prosser, supra note 86, at 1119; Note, Strict Liability in Hybrid Cases, 32 Stan. L. Rev. 391, 394 (1980).

90. Social costs are not limited to pecuniary consequences, but also include the monetary equivalent of such intangible injuries as pain and suffering. For purposes of simplification, however, the reader may assume that the $500,000 figure used above refers to direct economic losses, such as medical expenses and loss of income.
product safety. A strict liability rule, in this instance, would force manufacturers to choose between paying damages for resulting product injuries or spending money to prevent their occurrence in the first place. If a manufacturer is subject to liability, it will spend money to prevent harm when it is cost-effective to do so. Conversely, if the cost of preventing harm is greater than the cost of liability, a rational manufacturer will elect to pay damage claims instead of spending money to prevent the harm from occurring.

Another advantage of imposing strict liability on manufacturers is that it encourages them to acquire information about the costs and benefits of product safety alternatives. Strict liability is sometimes justified on the theory that manufacturers can obtain this

91. Externalities arise when the private costs of an activity are not equivalent to its social costs. See Coleman, supra note 87, at 231-32. In the above example, the social cost of product injuries is $500,000, but the private cost to the manufacturer is zero.

In theory, the affected parties could achieve an efficient result through the process of bargaining, regardless of who was initially responsible for product injuries. See generally, Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960). Thus, if a manufacturer was not liable for product injuries, potential victims (consumers) could bribe the manufacturer to produce safer products. In my example, the price paid to the manufacturer would lie somewhere between $200,000 and $500,000. If transaction costs, however, were too high (that is, if they exceeded $300,000), the parties would fail to reach an agreement. See Demsetz, When Does the Rule of Liability Matter?, 1 J. LEGAL STUD. 13, 25-27 (1972); Coleman, supra note 87, at 238. Transaction costs include the costs of getting large numbers of people together to negotiate an agreement, as well as the costs of excluding "free riders" from the benefits of the agreement. See Calabresi, Transaction Costs, Resource Allocation and Liability Rules—A Comment, 11 J. L. & Econ. 67, 68 n.5 (1968).

92. It should be noted that a liability rule that forces an enterprise to internalize external costs would not be Pareto efficient even though an overall economic gain was achieved. Such a rule would make the enterprise worse off even though society as a whole would be better off. The Kaldor-Hicks possibility of compensation theory, however, provides a way to evaluate allocative decisions that have mixed effects. Under this approach, a redistribution of resources is considered efficient if, and only if, under redistribution, the winners win enough so that they could theoretically compensate the losers. See Posner, supra note 87, at 491. The notion of Kaldor-Hicks efficiency, however, does not require that winners actually compensate losers. In effect, a reallocation is efficient under the Kaldor-Hicks criterion if it is a possible Pareto superior allocation when compared with the existing distribution. See Coleman, supra note 87, at 239-40.

information less expensively than others. In a sense, manufacturers are the "cheapest cost avoiders." 94

Some commentators contend that these arguments are applicable to cigarette companies. 95 However, there are significant differences between cigarette manufacturers and other product manufacturers. For this reason, the imposition of strict liability may not have the same effect on cigarette manufacturers.

Arguably, cigarettes are inherently dangerous and cannot be made appreciably safer by improved quality control measures or safer design. 96 Therefore, imposing strict liability on tobacco companies will not necessarily induce them to produce safer cigarettes. However, it could be argued that even if safer cigarettes are not technologically feasible at the present time, strict liability may encourage tobacco companies to invest in safety research to develop one. 97

However, this incentive to engage in research argument is weakened by the fact that smoking-related injuries manifest themselves only after many years. Research success is by no means certain and cigarette company managers, therefore, may reasonably conclude that the present value of a safer cigarette may not outweigh its costs. In addition, corporate managers tend to excessively discount long-term risks 98 and are often more concerned with near term profits than long-term savings. 99 Thus, corporate managers are unlikely to invest large sums of money on safety research when this research will not net short-term economic benefits.

This tendency to discount or ignore long-term consequences is compounded by the fact that liability costs are likely to be shared

94. See Calabresi & Hirschoff, supra note 86, at 1060.
95. See Garner, supra note 7, at 277.
96. The health risks of smoking are directly connected to the inherently dangerous nature of tobacco. Although tobacco companies may be able to achieve modest improvements in product safety, it is doubtful that any amount of research will discover a "technical fix" that significantly reduces the health risks of smoking. But see Garner, supra note 7, at 276 (tar, nicotine and carbon monoxide levels reduced by more efficient filters, developing new types of tobacco leaf, and using improved processing methods).
97. See Note, supra note 60, at 826.
98. This phenomenon is sometimes referred to as the "Faust effect." See Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 VAND. L. REV. 1281, 1301 (1980).
99. See Sugarman, Doing Away with Tort Law, 73 CALIF. L. REV. 555, 569 (1985) (managers may be gone from firm before decisions affecting tort liability have any effect).
by more than one manufacturer. Smokers often switch brands many times. Consequently, a plaintiff consumer will probably join several cigarette companies as defendants. Arguably, joint and several liability acts as a risk-pooling device, in much the same fashion as liability insurance. Like liability insurance, the prospect of shared liability may discourage individual cigarette companies from spending money to reduce group liability.

A final argument in favor of strict liability is that it will encourage cigarette companies to provide better warnings about the health risks of smoking. Once again, however, cigarette companies are likely to be more responsive to present costs than future savings. Although warnings benefit consumers, they also discourage people from smoking. If cigarette companies are forced to choose between a present drop in revenue from lost sales and the cost of future tort liability based on inadequate warnings, they are likely to regard the latter as the lesser of the two evils.

Strict liability will not necessarily cause tobacco companies to produce safer cigarettes or to provide more effective warnings. Because of the time lag problem, the incentive effect of strict liability will likely be too attenuated to affect product safety.

2. Market Deterrence

Economists maintain that the prices of goods should reflect their true social costs, including the costs of product injuries. If these costs are not placed on the manufacturer, the price of dangerous products will be artificially low and demand for them will be higher than market forces would ordinarily support. On the other hand, if a manufacturer is forced to raise prices to reflect the cost of product injuries, demand for dangerous products

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100. See Garner, supra note 6, at 1455.
102. If more informative health warnings are desirable, perhaps it is better to require them by statute or administrative regulation, rather than indirectly through the results of increased products liability exposure.
will fall accordingly.\textsuperscript{105} If fewer products are produced, product injuries will also decline.\textsuperscript{106} This phenomenon, known as the theory of market deterrence, provides a rationale for strict liability even in cases where product safety cannot be improved by some sort of "technical fix."

The theory of market deterrence supports the idea of forcing cigarette companies to internalize the health costs of smoking. At the present time, smokers do not bear the full health costs of smoking,\textsuperscript{107} instead, a substantial portion of these costs are shifted to nonsmokers.\textsuperscript{108} Consequently, smokers "overconsume" tobacco products, causing society to expend more of its resources on smoking-related health care than can be justified by the economic benefits of smoking.\textsuperscript{109}

Strict liability would shift the health costs of smoking back to cigarette manufacturers, who would pass them on to smokers in the form of higher prices. Presumably, smokers would then restrict their consumption of tobacco products, with a consequent reduction in smoking-related health costs.\textsuperscript{110} Unfortunately, market deterrence might not operate in this manner within the cigarette industry. To understand why strict liability might not reduce smoking related injuries, a brief discussion of price theory, and the influence of market structure on firm behavior is necessary.

Generally speaking, manufacturers are interested in maximizing profit. "Profit" is the excess of total revenue over total cost.

\textsuperscript{105} The relationship between the price of a product and the demand is called elasticity of demand. Demand is elastic when the percentage change in the quantity demanded is greater than the percentage change in price. Thus, demand for a product is elastic if a ten percent increase in price results in a fifteen percent drop in sales. On the other hand, demand is said to be inelastic when the percentage change in the quantity demanded is less than the percentage increase in price. Of course, demand for a product may be elastic within one price range and inelastic within another. See A. Alchian \& W. Allen, University Economics 61 (3d ed. 1972).


\textsuperscript{107} See Comment supra note 5, at 1155; Office of Technology Assessment, Smoking Related Deaths and Financial Costs 56 (1985) (62% smoking's costs borne by nonsmokers).

\textsuperscript{108} See Garner, supra note 6, at 1462.

\textsuperscript{109} See Note supra note 60, at 824.

\textsuperscript{110} Id. Smokers vary in their response to price increases. Demand appears to be more elastic among teenagers and young adults than among older smokers. See Warner, Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax, 255 J. A.M.A. 1028, 1029-31 (1986).
Profit maximization theory predicts that producers will increase output so long as an additional unit sold adds more to total revenue than to total costs, or where marginal revenue is greater than marginal costs. Conversely, producers will cease further production at the point where the sale of an additional unit would increase total costs more than total revenue, i.e., where marginal cost is greater than marginal revenue.\(^{111}\) Consequently, the profit-maximizing output is the quantity at which marginal revenue equals marginal cost.\(^{112}\) (See Figure 1) This principle applies to industry behavior as well as individual sellers' behavior.\(^{113}\)

![Diagram of Price vs. Output with demand and marginal curves](image1)

![Diagram of Price vs. Output with demand and marginal curves](image2)

**Figure 1**

**Figure 2**

If liability for product injuries is imposed on manufacturers, their costs of production will increase accordingly. A manufacturer,

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111. This model of pricing is the traditional or "marginal" theory. Another model, which is not discussed in the text, is the "cost plus" theory of pricing. According to this theory, manufacturers calculate the average cost of producing a product, add a fixed or percentage markup to the selling price, and then produce as many units as they think they can sell at that price. *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 510 (1961).

112. *See* R. Posner, *supra* note 87, at 197. Marginal revenue is the contribution to total revenue from the sale of one additional unit of output. When marginal revenue is positive, total revenue will increase as production increases. Once marginal revenue falls to zero, however, additional output will not increase the producer's total revenue. *Id.* at 195.

In Figure 1: q is the quantity of output at which marginal revenue and marginal cost are equated; and p is the price at which output q will realize.

however, cannot simply raise prices when production costs rise, and expect sales to remain the same. Instead, if demand for the product is elastic, at some point lost profits from declining sales will exceed the revenue from increased prices.

Since the cost of compensating the victims of product injuries will increase the marginal cost of production, the point at which marginal cost equals marginal revenue will change. As Figure 2 indicates, the intersection between the marginal cost and marginal revenue curves shifts to the left when production costs rise. The new intersection indicates that price will increase and quantity produced will decline, if all other factors remain constant.\(^{114}\) Thus, according to this model, subjecting product manufacturers to liability for product injuries in theory will cause product prices to rise and the quantity produced to decline.\(^{115}\)

The principles discussed above operate under many different market conditions. Nevertheless, market structure does play a role in determining how manufacturers within an industry respond to an increase in production costs. In particular, monopolistic or oligopolistic firms may pass fewer cost increases on to consumers than firms in more competitive industries.

A pure monopoly exists when there is only one firm that produces and sells a particular commodity.\(^{116}\) The basic principle that profit is maximized by producing and selling the output at which marginal cost equals marginal revenue is the same for a monopoly as it is for a more competitive seller. Monopoly manufacturers, usually set their prices at a point where any further price increase will cause a substantial loss of sales.\(^{117}\) Consequently, when costs go up, a monopoly firm may be forced to absorb these costs and accept lower profits from the sale of its product.\(^{118}\)

\(^{114}\) In Figure 2: q' is the quantity of output at which marginal revenue and the new marginal cost are equated; p' is the price at which output q' will realize. By comparing Figure 1 and Figure 2 one can see that q' is lower than q and p' is higher than p.

\(^{115}\) A similar result would be predicted under the "cost plus" theory of pricing. The manufacturer would treat liability costs as cost of production and try to raise the price of the product accordingly. See Calabresi, supra note 111, at 510.


\(^{117}\) Id. at 330.

\(^{118}\) The monopoly would absorb a production cost increase if it concluded this action would cause its total profit to decrease less than if it raised prices and suffered a significant loss in sales revenue.
Oligopolistic firms may also be unable to pass along all production cost increases to consumers. An oligopoly exists when only a few firms compete in the sale of a commodity. Oligopolistic firms, like monopolies, often obtain higher than normal prices for their products. Consequently, like monopolies, oligopolistic firms will not necessarily raise prices when production costs increase.

The market structure of oligopolistic industries also contributes to price rigidity. In an oligopoly, if one firm reduces the price of its product to increase its market share, other firms will also lower their prices. As a result, all of the firms will retain their original market share, but profits will decline because the new price for their product will now be lower. Likewise, if one firm raises its prices and the other firms do not, the firm will lose most of its market. Therefore, unless one firm is a price leader in the industry, oligopolistic firms tend to be cautious about raising prices even when faced with an increase in production costs.

The tobacco industry has a number of oligopolistic characteristics. The industry is highly concentrated; there are only six major cigarette manufacturers in the United States and four of these companies control eighty-eight percent of the American market. Although profit margins are high, no new firms have entered the American market in many years.

Because of its oligopolistic character, the tobacco industry may not respond to increased production costs caused by tort liability in the same manner as more competitive industries. In particular, if these costs are relatively modest, cigarette companies may choose to absorb them instead of passing them on to consumers. If this occurred, cigarette prices would remain stable and so would cig-

119. See C. Ferguson & C. Maurice, supra note 116, at 388.
120. See Calabresi, supra note 111, at 524-26.
124. Market entry is probably made more difficult because cigarette companies cannot advertise on television. This gives established brands an advantage over new products.
arette consumption.\footnote{125} In other words, strict liability would not result in market deterrence.

Alternatively, a more likely prospect is that strict liability would cause a massive increase in production costs for cigarette manufacturers. Under this scenario, cigarette companies would have no choice but to pass these costs on to consumers. If this strategy succeeded, cigarettes would become expensive luxury items. Consumption would fall drastically and, presumably, smoking-related injuries would begin to decline. Assuming that the administrative costs of litigating claims did not cause significant economic distortion, the imposition of strict liability on cigarette manufacturers would indeed achieve market deterrence.

On the other hand, it is also possible that the cost of strict liability would be so great that cigarette companies would lose their markets entirely. Of course, under the principle of market deterrence, such a result would be perfectly justified; a product does not belong in the marketplace if consumers are unwilling to pay for the costs the product imposes upon society.

However, before concluding that cigarettes should be classified as socially useless and forced from the marketplace, it is appropriate to consider a few arguments for partially “subsidizing” the social costs of cigarettes. First, significant spillover costs will be incurred if cigarette companies suddenly went out of business. These adverse effects would not be limited to tobacco company shareholders, but will also affect farmers, employees, creditors and governmental entities that depend on excise and sales taxes from cigarettes.\footnote{126} Arguably, it would be unfair to make “innocent” third parties bear these losses entirely.

Loss spreading provides another argument for allowing tobacco companies to stay in business, even if their products cannot “pay their own way” when manufacturers are subjected to the full health costs of smoking. As discussed below, there are good reasons to shift the burden of compensating injured consumers from

\footnote{125} Some market deterrence may exist when the tobacco industry charges monopoly prices. When aggregate health costs of smoking equal the aggregate excess profits cigarette companies make because of their monopoly power over prices. consumer demand for cigarettes would be the same as if the health costs of smoking were explicitly reflected in cigarette prices. In other words, one misallocation of resources would cancel out the other. See Calabresi, supra note 111, at 510-11. However, it would be entirely fortuitous if these two figures were even roughly equivalent.

\footnote{126} For a discussion of the impact of the tobacco industry on the American economy, see Ausness, supra note 8, at 955-57.
existing sources to cigarette companies and their customers.\footnote{127 See infra notes 148-164 and accompanying text.} However, cigarette manufacturers will not be able to perform this function if their market drastically erodes.\footnote{128 See Comment, Beshada v. Johns-Manville Products Corp.: Adding Uncertainty to Injury, 35 Rutgers L. Rev. 982, 1012 (1983) (product manufacturer cannot pay tort claims if bankrupt).}

The final argument for insulating cigarette prices against the full effects of a market deterrence strategy is based on the rationale of “consumer choice.” According to this proposition, it would be unfair to deprive the public of a basic consumer product either by putting producers out of business or by pricing the product beyond the means of ordinary buyers.\footnote{129 For a more detailed discussion of this argument, see Ausness, supra note 8, at 951-53.} While this argument is unlikely to persuade nonsmokers, it cannot be dismissed as entirely frivolous.

To summarize, an argument for strict liability against cigarette manufacturers can be made on the basis of market deterrence. Under an ideal scenario, the cost of tort liability would be significant enough to affect cigarette prices, but would not put cigarette companies out of business. Prices would rise while consumption and smoking related injuries would fall in response. However, other scenarios are also possible. Under one such scenario, cigarette companies might accept reduced profits in order to retain their market. Existing levels of consumption would be maintained and the goal of market deterrence, at least in the short run, would be defeated.

At the opposite extreme is what might be called, at least by the tobacco companies, a “doomsday” scenario. Market deterrence would succeed only too well and cigarette companies would be threatened with extinction. While this result is perfectly consistent with market deterrence goals, it may be politically unacceptable.

It is difficult to say which of these three scenarios is most likely to occur, but since all three are possible, the market deterrence rationale for strict liability must be qualified to some degree.

C. Risk Distribution

Risk distribution is concerned with how losses are allocated in society. Personal injury losses initially fall on the individual victim. When the victim is compensated, the loss shifts to the person who is required to provide the compensation. First-party
insurance, such as health, accident, or disability insurance, is a contractual mechanism for shifting losses; tort law shifts losses on a nonconsensual basis.

In smoking-related injuries, some loss-shifting occurs whether or not cigarette companies are held liable for the health costs of smoking. These costs are borne by different groups depending on the liability rule applied. For example, when claims against cigarette companies are effectively barred by the preemption doctrine, the individual victims are forced to bear the loss. Often these costs will then be shifted to health insurance organizations or governmental agencies. Thus, insurance policyholders and taxpayers are ultimately held responsible for many smoking health costs when cigarette companies successfully escape liability for smoking-related injuries.¹³⁰

Loss shifting also occurs when cigarette manufacturers are subjected to strict liability. Under strict liability, responsibility for compensation initially falls on cigarette companies; they in turn attempt to shift the cost of liability to their customers by charging higher prices for tobacco products. Cigarette companies which are unable to pass these costs on to consumers may either try to shift them back to suppliers or employees or accept lower profits. If the latter occurs, the loss falls on shareholders.

Thus, the choice of a liability rule has distributive consequences. If cigarette companies are not held liable, such as when the preemption doctrine is applied to failure to warn claims, the health costs of smoking are ultimately borne by victims, insurance policyholders, and taxpayers. If cigarette companies are held strictly liable then consumers of tobacco products, suppliers, employees, and shareholders will bear most of the burden for smoking-related injuries.

In determining which of these distributional effects is better, two normative principles will be discussed. The first, "distributive justice," is concerned with achieving a fair distribution of benefits (and burdens) in society. The second principle, more utilitarian in nature, is concerned with minimizing social dislocation and favors shifting losses to those who can spread them most efficiently.

1. Distributive Justice

As discussed earlier, corrective justice concerns rectifying wrongful gains and losses and determines the responsibility of

¹³⁰ See Garner, supra note 6 at 1462.
cigarette companies to injured consumers.\textsuperscript{131} Principles of distributive justice, on the other hand, are relevant when personal injury costs are shifted to someone other than a victim or wrongdoer.

Distributive justice deals with the allocation of benefits and burdens among a group of people.\textsuperscript{132} Over the years, philosophers have proposed various criteria for the distribution of the benefits and, to a lesser extent, burdens by society.\textsuperscript{133} For example, egalitarians maintain that economic resources should be distributed equally.\textsuperscript{134} This is often interpreted to mean that equals should be treated equally and unequals may be treated unequally.\textsuperscript{135} An alternative egalitarian position is based on the notion of equal rights. According to this theory, everyone has a right to certain values such as liberty, dignity, and economic opportunity. Thus, distribution of societal benefits should be ordered so that these rights are attainable by all.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{131} See generally notes 39-85 and accompanying text.
  \item \textsuperscript{132} See Heidt, supra note 43, at 351. Aristotle described distributive justice as: "[o]nly species of justice . . . found in the distribution of honors or wealth or anything else that can be divided among members of a community who share in a political system." ARISTOTLE, supra note 40, book 5, chapter 3, at 122.
  \item \textsuperscript{133} See, e.g., N. BOWIE, TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE 77-99 (1971) (socialist theory of distributive justice); R. NOZICK, ANARCHY, STATE, AND UTOPIA 149-231 (1974) (libertarian theory of distributive justice).
  \item \textsuperscript{134} See Grey, Property and Need: The Welfare State and Theories of Distributive Justice, 28 STAN. L. REV. 877, 877 (1976).
  \item \textsuperscript{135} Aristotle declared that while justice required equality of distribution, equality was to be determined in relation to ability, merit, or some other characteristic. Thus, if two persons were equal with respect to M, their shares of a particular benefit related to possession of M should be equal. If, however, they were unequal with respect to M, their shares of the particular benefit should be in proportion to M. If this occurred, the ratio of their shares to their possession of M would be equal and a just distribution of the particular benefit would be achieved. ARISTOTLE, supra note 40, book 5, chapter 3, at 123-24. See N. BOWIE, supra note 134, at 102.
  \item \textsuperscript{136} See N. BOWIE, supra note 134, at 102. John Rawls is perhaps the best known advocate of this position. See J. RAWLS, A THEORY OF JUSTICE (1971). Rawls's theory is grounded in the social contract tradition. Rawls formulates a set of hypothetical conditions and procedures that govern the way an agreement should be reached. These conditions define the original position from which the participants bargain. In the original position, no one knows or may consider whether he is rich or poor, black or white, male or female, strong or weak, sick or well. Id. at 136-38.

  Rawls assumes that the parties in the original position would agree on two basic principles for the ordering of society. The first principle is that "each person is to have an equal right to the most extensive basic liberties compatible with a similar system of liberty for all." Id. at 250. According to the second
Another view of distributive justice is based on the concept of utilitarianism. Utilitarians believe that the sole criterion for judging the morality of an action is whether it satisfies human desires or preferences.\footnote{See Grey, supra note 137.} Thus, distributive justice from the utilitarian perspective, requires a distribution of goods resulting in the maximum happiness for society as a whole.\footnote{See Justice and Economic Distribution 100-01 (J. Arthur & W. Shaw eds. 1978). For a critique of the utilitarian position, see N. Bowie, supra note 134, at 15-24.}

Others subscribe to a desert theory of distributive justice under which societal goods are allocated according to the amount deserved.\footnote{See Rachels, What People Deserve, in Justice and Economic Distribution 150-63 (J. Arthur & W. Shaw eds. 1978).} According to the desert theory, distribution ought to be based on considerations such as ability, effort, or contribution to economic output.\footnote{See Justice and Economic Distribution, supra note 139, at 136.}

Principles of distributive justice are relevant to the assessment of liability rules that shift losses from one group of people to another. Egalitarians, for example, might argue that liability rules should shift losses to ensure that personal injuries are not allowed to increase existing inequalities in wealth.\footnote{See Note, supra note 60, at 820-21.} However, this theory does not appear to support any particular liability rule concerning cigarette manufacturers. If the choice is between taxpayers (when cigarette companies are not held liable) and consumers of tobacco products (when cigarette companies are held liable), it is difficult to determine which class is wealthier. Even assuming that shareholders would bear some of the health costs of smoking under a rule that imposed liability on cigarette companies, it is not self-evident that individual shareholders are necessarily wealthier than individual taxpayers.

Utilitarians, on the other hand, contend that losses should be shifted from victims to those who are better able to bear them. This loss-shifting is justified by the declining marginal principle. According to this theory, each dollar that a person acquires
provides less utility than the previous dollar. Likewise, each dollar a person loses causes more disutility than the previous dollar lost. Accordingly, aggregate utility is increased when the costs of personal injuries are shifted from the relatively poor to those who are better off.142 Once again, this theory does not justify shifting losses from one class of individuals, such as taxpayers, to shareholders or consumers of tobacco products when there is no evidence that one class is wealthier than the other.143

However, desert theory may provide justification for the imposition of liability on cigarette manufacturers. This theory provides that those who enjoy the benefits of a harm-producing activity should also bear the accompanying burdens.144 Thus, manufacturers (and their shareholders) who profit from the sale of dangerous products, should compensate those who are injured by these products.145 Likewise, product consumers who benefit from the product’s presence on the market should expect to pay a higher price in order to provide compensation for injured parties.

This theory is applicable to cigarette company liability. Corporate shareholders benefit from cigarette sales, thus, it is equitable to compensate injured consumers out of corporate profits. Consumers of tobacco products also benefit from cigarettes and, therefore, ought to contribute to the compensation of injured parties. However, taxpayers as a class do not benefit from the presence of cigarettes on the market. Consequently, it is unjust to require taxpayers to compensate injured parties.146

Under a strict liability rule, smokers, corporate shareholders, and others who benefit from cigarette sales will bear most of the health costs of smoking. A nonliability rule, on the other hand, would shift a large portion of these costs to nonsmokers. Therefore, strict liability seems more consistent with a desert theory of distributive justice than a nonliability rule.

143. Wealth may not be the only basis for allocating losses under this theory. Among persons of equal wealth, one may be better able to spread losses through insurance or other means. If the loss is shifted to that person, the disutility to him or her is relatively less than the disutility to one who cannot spread loss.
146. Distributive justice principles are not relevant when personal injury costs are shifted from individual victims to first-party insurers since this results from voluntary choices by the parties.
2. Loss-Spreading

Another theory of risk distribution would distribute losses to minimize their harmful effects on society. According to this essentially utilitarian theory, it is appropriate to shift losses to a party who is best able to spread the losses among a large group.\(^{147}\) The underlying assumption is that a loss will cause less social and economic disruption if many people share it.\(^{148}\) Although individual victims may have some loss-spreading capacity,\(^{149}\) defendants, particularly those engaged in profit-making activities, are usually considered better loss-spreaders.\(^{150}\)

This loss-spreading rationale is particularly applicable to product manufacturers.\(^{151}\) Manufacturers can purchase liability insurance\(^{152}\) or self-insure\(^{153}\) against the costs of compensating injured consumers. In either case, manufacturers are able to treat the expense of compensation as a cost of production and can normally pass it on to consumers in the form of higher prices.\(^{154}\)

\(^{147}\) It is necessary to distinguish between loss-shifting and loss-spreading. Loss-shifting involves shifting the burden of an injury from the victim to another party. Loss-spreading involves sharing the burden of personal injury costs with those other than the individual victim.


\(^{149}\) For example, they can often purchase medical, life, or disability insurance on an individual or group basis. It is rare, however, for potential victims as a class to be able to loss-spread more cheaply than injurers. The cost of insuring against personal injuries on a first-party basis often varies according to the age, general health or occupation of the insured. Furthermore, the injured parties cannot obtain compensation for such noneconomic losses as pain and suffering or loss of consortium.

\(^{150}\) "It is both just and expedient that the enterprise which causes losses should lift them from the individual victims and distribute them widely among those who benefit from the activities of the enterprise." James, General Products—Should Manufacturers Be Liable Without Negligence?, 24 TENN. L. REV. 923, 923-24 (1957).


\(^{152}\) See Calabresi & Hirschoff, supra note 86, at 1056; Wade, supra note 15, at 828.


\(^{154}\) See Keeton, Products Liability—Liability Without Fault and the Re-
At first blush, the loss-spreading theory seems to support strict liability that would shift the health costs of smoking from individual victims to cigarette companies. The market for tobacco products is quite large: At least 50 million Americans smoke and tobacco companies sell more than 600 billion cigarettes a year. Moreover, despite public concern about the health consequences of smoking, the tobacco industry is profitable.

Cigarette companies, however, differ from other product manufacturers as far as loss-spreading capacity is concerned. For most manufacturers, only a small proportion of the products sold are defective; therefore the liability costs that must be spread constitute only a small part of the cost of production. On the other hand, the health risks of smoking are generic in character and a large proportion of smokers eventually develop smoking-related health problems. Consequently, the liability costs that would have to be spread by cigarette manufacturers, especially when coupled with high litigation expenses, are likely to be enormous.

Even if cigarette companies pay only a fraction of these claims, the aggregate cost of tort liability may be too great to be completely

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quirement of a Defect, 41 Tex. L. Rev. 855, 856 (1963). The manufacturer may also pass some of these costs back to production factors such as labor and raw material suppliers. See Calabresi, supra note 111, at 519-27.

155. See Note, supra note 60, at 809 n.5.

156. See Note, supra note 55, at 167 n.12.

157. See Comment, supra note 3, at 270 n.26 (profits from combined sale of tobacco and alcohol products are $3.1 billion per year).


159. According to one commentator, twenty-five percent of all smokers will die prematurely. See Levin, supra note 21, at 199.

160. The annual costs of smoking have been estimated to be as high as $65 billion. Blasi & Monaghan, supra note 2, at 502 (annual cost of smoking in U.S. $22 billion in health costs, $43 billion in lost productivity). In addition, cigarette companies would have to spend substantial amounts of money defending product liability suits. See infra text accompanying notes 167-71.

161. In many cases, cigarette companies may be able to escape or reduce liability by denying causation or by raising affirmative defenses. See Note, supra note 3, at 1047-49 (causation issues in cigarette litigation); Garner, supra note 6, at 1448-52 (affirmative defenses potentially available to cigarette manufacturers). In addition, some victims may not choose to sue, but may accept minimal settlements for their injuries. See Sugarman, supra note 99, at 593-94 (many plaintiffs settle for less than their actual injuries because of delay, lack of proof or financial need); Robinson & Kane, Punitive Damages in Product Liability Cases, 6 Pepperdine L. Rev. 139, 142 (1978) (some victims unable to undergo the financial and emotional stress of a lawsuit).
passed on through higher prices. Loss spreading would be even harder to achieve if consumers responded to higher prices by reducing consumption. Any liability costs that could not be passed on to consumers, would be absorbed by the enterprise and its shareholders.\textsuperscript{162} Furthermore, if the demand for cigarettes ceased completely forcing tobacco companies out of business, there would be no enterprise left to spread losses.

At this point it is necessary to point out a potential conflict between resource allocation and distributive goals. As mentioned earlier, it is consistent with the principle of market deterrence for cigarette companies to go out of business if the social costs of smoking exceed its social benefits, as measured by consumer willingness to pay. However, if the tobacco industry experienced severe economic decline, or went out of business altogether, it would no longer be able to spread losses. Injured consumers would then have to look to some other source for compensation.\textsuperscript{163}

This problem is particularly acute for smoking related injuries because it takes a long time for many of these injuries to appear. Thus, even if cigarette companies were to go out of business today, claims for smoking related injuries would continue to arise for another twenty years.

One solution to this problem is to choose allocative efficiency instead of loss-spreading and allow cigarette companies to go out of business if they cannot survive under strict liability. If this option was chosen, future smoking related injuries could be compensated from other sources. However, if loss-spreading is preferred to allocative efficiency, one must be cautious about imposing strict liability on cigarette manufacturers because it may lead to consequences inconsistent with the goal of loss-spreading.

\textsuperscript{162} Loss spreading may occur even if cigarette manufacturers cannot shift all of their liability costs on to consumers. For example, tobacco companies may be able to reduce their production costs by paying lower wages to employees. Finally, as mentioned earlier, some of the increased liability burden may be shifted to shareholders in the form of lower dividends.

\textsuperscript{163} Since most tobacco companies are highly diversified, they would probably remain in business even if they discontinued the production of cigarettes. An interesting issue is whether such companies could shed future tort liability by reorganizing their corporate structure. The experience of Johns Manville and other asbestos manufacturers suggests that courts would not allow tobacco companies to avoid their responsibilities to injured consumers quite so easily. Moreover, there are problems from the perspective of loss spreading theory in raising the price of one class of products to pay for injuries to users of another unrelated class of products.
The loss-spreading rationale must be viewed with caution as a justification for the imposition of strict liability on cigarette manufacturers. If cigarette manufacturers can spread losses effectively, strict liability may be appropriate. However, if the health costs of smoking are too great for cigarette companies to manage, a strict liability rule may not serve distributional goals.

D. Cost of Administration

Administrative costs are the costs associated with the operation of a particular compensation system. These costs affect the efficiency of a compensation system. As they increase, the victims receive a smaller portion of the money allocated to compensation.

Litigation could be very expensive for all litigants if cigarette companies are subjected to strict liability. First, there are a great number of potential claimants. More than 350,000 Americans die each year of smoking-related illnesses and thousands more require treatment for similar illnesses. Increased litigation will ultimately force cigarette companies to defend each new case more stubbornly than the last because concessions in one case will harden the negotiating position of litigants in other cases.

Second, cigarette litigation will often involve multiple parties. Brand loyalty is not strong among smokers. When a plaintiff

164. Dean Calabresi refers to administrative costs as “tertiary costs.” See Calabresi, supra note 104, at 28.


166. Although procedural reforms could reduce these expenses somewhat, a strict liability system will always be costly to operate. See Ausness, supra note 8, at 964-68 (use of consolidation, class actions and offensive collateral estoppel suggested to reduce administrative costs in mass tort cases).

167. See Blasi & Monaghan, supra note 2, at 502.

168. For example, a manufacturer who loses a case to one claimant will find that other claimants have hardened their positions in the expectation that they will win too. Even settlement with one party is likely to set a floor for negotiations with other claimants if the settlement terms become known. Ausness, supra note 8, at 961.

169. See Garner, supra note 6, at 1455.
has smoked more than one brand, it may become necessary to sue several cigarette companies. Multiple defendants will undoubtedly complicate settlement negotiations and increase the cost of litigation.\textsuperscript{170}

Finally, disputes over causation will also increase the cost of cigarette litigation. The connection between smoking and disease, though generally accepted by the medical profession, is largely based on statistical correlations derived from epidemiological data. Consequently, in most jurisdictions, the plaintiffs will have to offer individualized proof of causation and the defendants will attempt to discredit the plaintiffs' evidence with expert testimony of their own. Thus, each party will be required to spend large amounts of money on medical tests and expert witnesses to present its side of the causation issue.

It is hard to predict the impact of administrative costs on the operation of a strict liability approach. However, the present experience with products liability suggests that high administrative costs distort the allocative effects of strict liability and also impair manufacturers' ability to spread liability costs through the pricing mechanism.\textsuperscript{171} For this reason, other compensation systems may be preferable to a tort system based on strict liability.

\textit{E. Strict Liability Reconsidered}

Prior to 1966, cigarette companies completely failed to warn consumers about the health risks of smoking. Even after warnings were provided, they were inadequate. Ordinarily, conduct of this sort would result in liability to injured consumers under state products liability law. However, cigarette companies have generally avoided liability by maintaining that failure-to-warn claims are preempted by the Federal Cigarette Labeling and Advertising Act.\textsuperscript{172}

A number of commentators have criticized judicial application of the preemption doctrine in cigarette warning cases and have called for the imposition of strict liability on cigarette manufac-

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turers. The prima facie case for strict liability is impressive. Principles of corrective justice support injured smokers' claims. At least in theory, strict liability encourages manufacturers to invest resources in product safety and forces them to include the cost of smoking-related injuries in the price of cigarettes. Finally, subjecting cigarette manufacturers to strict liability facilitates loss-spreading and will ensure that those who benefit from smoking also bear its costs.

Upon close examination, however, some of these arguments lose their force. The argument for strict liability based on allocative efficiency, for example, is less compelling for cigarettes than it is for other products. Arguably, strict liability will not encourage cigarette manufacturers to make their products safer because money spent on safety will not result in any immediate reduction in liability. In addition, strict liability may not cause cigarette prices to reflect the true social cost of smoking, due to the ologopolistic nature of the tobacco industry.

The risk distribution argument is also suspect when applied to cigarette companies. Due to the market structure of the tobacco industry, cigarette companies may be unable to pass liability costs on to customers in the form of higher prices for cigarettes. No company can spread losses effectively if liability costs become astronomical.

Finally, the scale and complexity of cigarette litigation is likely to result in very high administrative costs. Because these costs cause economic distortions and impair loss-spreading capacity, they undermine two of the most important rationales for strict liability.

These problems suggest that strict liability may not be the most effective mechanism for shifting the health costs of smoking to cigarette companies and smokers. At the very least, other options should be carefully examined before accepting the strict liability approach. One such alternative is a program of social insurance aimed specifically at compensating those with smoking-related health problems. This alternative compensation plan is described in Part IV.

IV. A Social Insurance Alternative to Strict Liability

Part III of this Article concluded that denying compensation to consumers for smoking-related injuries was unfair. However, the

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173. See, e.g., Ausness, supra note 8, at 924-39; Edell, Cigarette Litigation: The Second Wave, 22 Tort & Ins. L.J. 90, 98-102 (1986); Comment, supra note 32, at 918-19; Comment, supra note 23, at 661-62.
section also identified several problems with the use of strict liability as a compensation mechanism. This section proposes an alternative approach to strict liability.

A. A Proposed Compensation Scheme

The proposed system to compensate certain smoking-related injuries is loosely modeled after social insurance programs such as worker's compensation and the federal Black Lung Act. Since an effective compensation program should be uniform throughout the country, this proposal would require implementation at the federal level. Congress would create an administrative


175. For a brief description of worker's compensation acts, see Note, Compensating Victims of Occupational Disease, 93 HARV. L. REV. 916, 920-25 (1980).


177. A legislative scheme that compels parties to adjudicate state common-law claims before an administrative tribunal might be inconsistent with the Supreme Court's decision in Northern Pipeline Construction Company v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In Northern Pipeline, the Court held that the 1978 Bankruptcy Act, which gave federal bankruptcy courts extensive jurisdiction over debtors and creditors in bankruptcy proceedings, unconstitutionally conferred Article III judicial power upon judges who lacked life tenure and protection against salary diminution. Id. at 87.

However, it is generally accepted that Congress, pursuant to its Article I powers, may establish legislative (non-Article III) courts in "specialized areas having particularized needs and warranting distinctive treatment." See Palmore v. United States, 411 U.S. 389, 408 (1973). Arguably, the compensation scheme
agency (hereinafter referred to as the Board), which would be
given rulemaking and adjudicative powers authorizing it to hear
victims’ claims of specified smoking-related injuries. Board-ap-
proved claims would be paid from a compensation fund financed
by an excise tax on cigarette production.178

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proposed in this Article deals with a specialized problem. Furthermore, the rights
created under this proposed compensation scheme are entirely federal in character
and do not parallel comparable rights under state common law. Consequently,
Congress should be able to create an administrative tribunal to adjudicate claims
brought under this proposed compensation scheme without violating the spirit of
Northern Pipeline. See also Commodity Futures Trading Comm’n v. Schor, 478
U.S. 833, 852-53 (1986) (Commodity Futures Trading Commission can validly
adjudicate state law counterclaims brought against parties who bring reparations
proceedings before it).

178. The compensation plan described in this Article differs somewhat from
two proposals suggested by Professor Donald Garner. See generally Garner, supra
note 7, at 314-333.

Professor Garner called his first proposal a “civil adjudication” plan. Under
this approach, welfare agencies could bring claims against individual cigarette
manufacturers for direct medical costs and transfer payments attributable to
smoking-related injuries. Id. at 314. An administrative tribunal would adjudicate
the claim.

A rebuttable presumption of causation based on the victim’s smoking history
could be established in order to reduce the cost of proving causation. Furthermore,
in appropriate cases, the welfare agency could pursue its claim against several
cigarette companies, rather than against just one company, and the administrative
tribunal could apportion liability accordingly. Id. at 316-17.

Some of the features in this Article’s proposed compensation scheme are
similar those of Professor Garner’s “civil adjudication” proposal, specifically
the use of an administrative procedure and evidentiary presumptions to simplify
the adjudicatory process. However, the two proposals are somewhat different in
scope and purpose. Professor Garner’s “civil adjudication” model is primarily
concerned with allowing the government to recoup welfare costs incurred because
of smoking. Consequently, injured smokers are not allowed to bring claims
against cigarette companies under this procedure. Moreover, liability is imposed
on individual companies, not on the industry as a whole. Finally, liability is
limited to economic costs sustained by the agency.

In contrast, this Article’s proposal is concerned with compensating injured
smokers, not the government. Thus, the class of potential claimants is much
larger. In order to contain administrative expenses, liability would be calculated
for the entire industry on a market share basis, and no attempt would be made
to assign liability to particular cigarette companies.

The purpose of these two proposals also differ somewhat. Although both
proposals seek to encourage safety by forcing tobacco companies to internalize
some of the social costs of smoking, Professor Garner’s proposal focuses on
reducing welfare costs, while the present proposal promotes compensating injured
parties for reasons of corrective justice. In addition, Professor Garner’s proposal
provides for determinations of liability on an individualized basis in order to
1. Eligibility Criteria

Since the compensation system is intended to serve as a substitute for tort liability, ideally it should allow anyone to file a claim who could otherwise sue a cigarette company under state law. However, administrative costs must be kept within reasonable limits, with Congress or the board taking administrative convenience into account when establishing eligibility requirements.

The greatest difficulty in formulating eligibility standards is deciding which diseases are smoking-related and which are not. Epidemiological studies have shown a statistical correlation between smoking and a variety of diseases. In some cases, the evidence is so strong that it has been completely accepted by the scientific community.179 In other cases, medical studies may suggest a con-

encourage each cigarette company to produce a safer product. In contrast, the present proposal assesses industry-wide liability in order to avoid the administrative cost of making specific determinations of liability.

Professor Garner's second proposal is referred to as a "safety tax" approach. Under this plan, an excise tax would be levied upon cigarette companies based on production. The federal agency responsible for administering the program, however, could reduce the tax rate on a sliding scale where the manufacturer demonstrates that its brand of cigarette was safer than others. In theory, a perfectly safe cigarette would not be subject to any tax. Id. at 327.

The purpose of Professor Gardner's scheme is to promote safety competition within the tobacco industry. Id. at 327. It would also raise revenue to offset some of the social costs of smoking currently borne by taxpayers and would impose an adjustable excise tax on cigarette companies. The plan proposed in this Article is primarily concerned with compensation rather than safety. Unlike Professor Garner's approach, the tax rate would be determined on an industry-wide basis. The federal government would use the proceeds of the excise tax to fund a compensation program rather than being earmarked for the federal treasury as in the case of the Garner proposal.

In addition, this proposal employs a uniform tax rate rather than adjusting it for individual cigarette brands. The rationale for this approach is to avoid the administrative cost of making determinations about the relative safety of various brands of cigarettes. Another reason for choosing an industry-wide tax rate is an assumption that cigarettes cannot be made appreciably safer and that attempts to stimulate competition among cigarette companies in this area is not likely to be worth the effort.

179. For example, the incidence of coronary heart disease is at least twice as high for smokers as for nonsmokers. See 1983 Surgeon General Report, supra note 1, at 128. Likewise, the mortality rate from cancer of the oral cavity is at least three times higher for smokers than for nonsmokers, while the mortality rate for cancer of the larynx is at least six times greater. See 1979 Surgeon General Report, supra note 1, at 116-17. Finally, smokers are at least ten times more susceptible to lung cancer than nonsmokers. See FTC, Staff Rep. on the Cigarette Advertising Investigation ch.1, at 11-31 (May 1981).
nection between smoking and disease, but do not establish causation beyond a reasonable doubt. 180 Finally, situations exist where factors other than smoking significantly contribute to a particular disease. 181

The fairest approach may be to permit assertion of any claim and then to decide each claim individually. Under this procedure, claimants who could prove that smoking caused his injury could recover, while claimants failing to prove causation would be denied compensation. However, resolving medical causation issues individually is a very expensive process. Each claimant's circumstances, such as occupation, heredity, general health, and lifestyle, are unique and all have a bearing on causation.

Consequently, it may be necessary to make some threshold eligibility determinations on a categorical basis. For example, Congress or the Board might allow smokers who contract certain diseases to file claims for compensation without having to prove that smoking caused their particular injury. 182

Such a rule is especially appropriate where the claimant seeks compensation for lung cancer. Some researchers estimate that smoking causes as much as ninety-five percent of all lung cancers. 183 Thus, while other factors may cause or contribute to the overall incidence of lung cancer, 184 the correlation between smoking and lung cancer is so high that it is makes it reasonable to assume that, whenever a smoker contracts lung cancer smoking significantly contributed to the disease.

Smoking is also closely linked to chronic obstructive lung diseases such as emphysema and chronic bronchitis. According to the

180. For example, some evidence suggests that smoking contributes to cancer of the stomach, cervix, esophagus, bladder, pancreas and kidney. See 1979 SURGEON GENERAL REPORT, supra note 1, ch. 5 at 31, 36, 42, 44, 49, 53. In addition, smoking by pregnant women is thought to increase the risk of miscarriage and premature birth. See Note, supra note 5, at 141.


182. As an alternative, Congress or the Board could create a strong presumption in favor of such claimants.

183. See Levin, supra note 21, at 199. See, e.g., AMERICAN CANCER SOCIETY, CANCER FACTS AND FIGURES 17 (1985) (smoking estimated to be responsible for eighty-three percent of all lung cancer cases).

184. For example, apparently asbestos, when combined with smoking, greatly increases the risk of lung cancer. Thus, smokers who are exposed to asbestos are ninety times more likely to develop lung cancer than nonsmokers who have not been so exposed. When both smokers and nonsmokers are exposed to asbestos, smokers are thirty times more likely to develop lung cancer than nonsmokers. See Haskins, The Tobacco Industry—A Contributor to Asbestos Disabilities, 34 Fed'n Ins. Couns. Q. 271, 280-85 (1984).
Surgeon General, smoking may cause as much as ninety percent of the chronic obstructive pulmonary disease in the country.\textsuperscript{185} Again, the high statistical correlation between smoking and chronic obstructive lung disease strongly suggests the existence of a causal relationship.

However, a categorical rule may not work so well with other diseases. Heart disease is a good example. While smoking clearly increases the risk of heart disease,\textsuperscript{186} diet, lifestyle and heredity are also significant causal factors.\textsuperscript{187} These causal elements could be taken into account by the Board in one of four ways. First, allow victims to seek compensation, but authorize the Board to deny or reduce compensation if it concludes that factors other than smoking were responsible for the injury. Second, allow the Board to impose threshold requirements that automatically exclude certain claims.\textsuperscript{188} Third, permit injured parties to seek compensation, but require individualized proof of causation. Finally, authorize the Board to reject certain types of claims altogether, particularly where the link between smoking and the particular disease is inconclusive. The latter approach may seem unduly harsh, however, there are several reasons why it may be justified in some circumstances. First, this rule reduces the chances that smokers will be forced to pay for injuries not caused by smoking. Second, it avoids creating a situation where smokers are compensated, but nonsmokers are not compensated, for the same illness.\textsuperscript{189}

2. \textit{Compensation Formulas}

This Article has suggested that cigarette companies might not be able to fully absorb the social costs of smoking or spread them to consumers. Arguably, the present proposal would be cheaper to

\begin{itemize}
\item \textsuperscript{185} See 1984 \textbf{Surgeon General Report}, \textit{supra} note 1.
\item \textsuperscript{186} See 1983 \textbf{Surgeon General Report}, \textit{supra} note 1, at 127-28; 1979 \textbf{Surgeon General Report}, \textit{supra} note 1, ch. 4 at 34-35 (smoking doubles the risk of coronary heart disease).
\item \textsuperscript{187} See 1979 \textbf{Surgeon General Report}, \textit{supra} note 1, ch. 1 at 17.
\item \textsuperscript{188} For example, the Board could require that the claimant prove she smoked for a certain number of years. This approach is used in some worker's compensation statutes. These statutes require that a worker be exposed to a health hazard for a specified length of time in order to qualify for compensation. See \textit{Note}, \textit{supra} note 174, at 923.
\item \textsuperscript{189} Injured parties whose claims are rejected on a categorical basis should still be allowed to seek recovery against cigarette manufacturers in court. The judicial process is better suited to decide highly individualized causation issues. Furthermore, the high cost of litigation will screen out frivolous claims.
\end{itemize}
implement than a strict liability regime because the costs of administration would be lower. Even so, the cost of fully compensating injured parties might still be too great to be financed solely through an excise tax on cigarettes. In this case, Congress would either have to make up the difference from general revenues or reduce the level of compensation to injured parties. I would reduce compensation in some manner because the compensation program should be self-sufficient.

There are various ways to limit compensation. One possibility is to include a "deductibility" provision as private health insurance policies often do.190 Another option is to reduce all compensation awards on a pro rata basis.191 However, the best solution is to limit compensation solely to economic losses.192

There are a number of reasons for discriminating against noneconomic losses. Arguably, economic losses cause more social dislocation than noneconomic losses if they are allowed to fall entirely on individual victims.193 Also, noneconomic losses are highly idiosyncratic and are, therefore, difficult to measure in dollar terms.194 Finally, perhaps disallowing noneconomic losses could be justified as a reflection of the view that smokers also bear some responsibility for their injuries. For these reasons, it is best to limit compensation to direct economic losses such as out-of-pocket medical expenses and lost earnings.

Furthermore, survivor's benefits and compensation for long-term disability should be based on uniform schedules rather than on past or prospective earnings.195 In addition, the collateral source rule196 should not be applied when it would result in a windfall to the victim.197

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190. A deductibility requirement could be imposed to discourage trivial claims. See Franklin, supra note 176, at 800.
191. Many health insurance programs do not pay the entire claim, but limit payment to some percentage, such as eighty percent.
192. Other commentators have also suggested that noneconomic losses be excluded from compensation. See, e.g., J. O'Connell, supra note 175; Franklin, supra note 175; Pierce, supra note 98; O'Connell, A Proposal, supra note 175; O'Connell, supra note 175.
193. See Franklin, supra note 175, at 798 (studies suggest major concerns in personal injury cases are economic consequences such as medical expenses and lost income).
194. See O'Connell, A Proposal, supra note 175, at 341.
195. The primary purpose of this approach is to avoid the administrative expense of determining past and prospective earnings. This approach also benefits many claimants who are either retired, near retirement, or who have never worked.
196. The collateral source rule provides that no reduction in a damage award
3. Compensation Sources

As mentioned earlier, those who benefit from an activity should bear the costs it imposes on others. Consequently, responsibility for smoking-related injuries should be placed on cigarette companies and smokers rather than on the general public. This means that general tax revenues should not be used to finance the proposed compensation plan. Of course, there are many ways to finance the program without relying on public funds. For example, cigarette companies could establish a private fund to pay claims to injured consumers. Each year the fund could levy assessments on cigarette companies on a market-share basis. Tobacco companies would then pass this cost on to consumers by raising cigarette prices.

This approach is preferable to a government sponsored compensation plan in a number of respects. One potential advantage of a privately administered compensation program is economic: arguably, a private program could process claims more efficiently than a government sponsored program. In addition, private programs tend to operate more informally than government programs. This environment may be more conducive to the mediation, compromise or settlement of contested claims than the more formal and adversarial procedures often associated with government entitlement programs.

Nevertheless, one may anticipate considerable political resistance to the implementation of any privately-administered, industry-wide compensation program. This opposition may eminate from both cigarette companies and potential claimants. Thus, Tobacco companies, having defeated the claims of injured consumers in the courts, may be reluctant to participate in a program that tacitly acknowledges their responsibility for the health effects of smoking.198

However, claimants might also resist a privately administered compensation program if they suspect that it will not adjudicate

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against a tortfeasor is allowed because of benefits received by the victim from other sources even though they may have partly or entirely mitigated his loss. See Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Calif. L. Rev. 1478 (1966); O'Connell, A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers, 73 Calif. L. Rev. 898, 900 (1985).

197. On the other hand, it seems appropriate to recognize the subrogation rights of first-party insurers and governmental health care providers. Subrogation allows a party, such as an insurance company, that has compensated a victim, to pursue a tort claim against the insurer in the victim's name. See Fleming, supra note 196, at 1498.

198. However, such a program will be much more attractive to cigarette companies if courts begin to hold them liable for such injuries.
their claims fairly or that awards would be larger with conventional litigation. If participation in the private program is mandatory, as is the case with most worker’s compensation plans, legislation would be necessary to put the program in place. Those who opposed such a proposal would try to defeat this enabling legislation. If they failed to prevent passage of such legislation, the issue of the program’s acceptability would be resolved. However, if individual claimants were allowed to choose between participating in the private program or pursuing their claims in court, the problem of public acceptability could arise at any time. That is, claimants would choose litigation over participation in the private compensation program whenever they felt that the program was not being operated fairly. This potential for a failure of public confidence in the program would make it less attractive to tobacco companies as well since they would gain nothing if most victims pursued their claims in court anyway. For this reason, participation in the private plan must be made mandatory. 199

An alternative to the privately funded compensation program is one financed by an excise tax levied on the manufacture of cigarettes (and possibly other tobacco products). 200 While recognizing the merits of a private plan, this Article will focus primarily on the governmental scheme. However, many of the issues discussed are relevant to private as well as governmentally administered plans.

Excise taxes are already levied on tobacco products by federal and state governments. 201 However, these taxes are primarily for general revenue and are not earmarked for compensatory purposes. 202 The present excise tax would be increased to cover the cost of administration and compensation. The excise tax rate could be

199. A possible hybrid approach is that employed by the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to 300aa-33 (Supp. IV 1986). The Vaccine Act requires victims to first seek compensation through the U.S. Claims Court. If a claimant is dissatisfied with the award, he or she may then bring suit against the vaccine manufacturer. Id. at §§ 300aa-21, 300aa-22. See also Dark, Is the National Childhood Vaccine Injury Act of 1986 the Solution for the DTP Controversy?, 19 U. Tol. L. REV. 799, 803 (1988).


201. See Ausness, supra note 8, at 948.

202. See Comment, supra note 54, at 328.
revised periodically (upward or downward) to meet the changing financial needs of the program.

For example, assume that 30 billion packs of cigarettes are sold each year, which is roughly the current rate of production. If the Board paid $10 billion in direct health care costs and another $10 billion in disability and survivor's benefits, an excise tax of 67 cents a pack would be needed to produce enough revenue to cover these claims.

The excise tax approach has a number of advantages over other revenue raising options. First, since an excise tax is already in operation, the costs of collection should be minimal. In addition, an excise tax might be more acceptable than other financing mechanisms because it is already familiar to the tobacco industry and consumers. Finally, since the excise tax is specifically targeted at cigarettes, tobacco companies that are part of larger diversified firms would be less likely to shift the cost of the tax to other products.

4. Claim Processing Procedures

The board should implement a claims processing procedure that will compensate eligible parties inexpensively and expeditiously. The claims processing procedures of such agencies as the Social Security Administration, or the Veterans Administration might provide

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203. See Comment, supra note 55, at 167 n.12. Of course, cigarette consumption will decline somewhat if prices were substantially increased due to the excise tax.

204. I have omitted the cost of administration in my calculations. If the excise tax were increased by one cent a pack, it would produce another $300 million, which should be enough to cover the cost of administration.

205. The major tobacco companies have diversified into a number of other industries. See Comment, supra note 54, at 332-83. Therefore, it possible that cigarette manufacturers might attempt to shift some of their liability costs onto other products. Arguably, it would be easier for the manufacturer to shift tort liability costs, which would not be known by the public and which would vary from manufacturer to manufacturer, than to shift the cost of a uniform excise tax whose rate was public knowledge.


a rough model for the Board’s hearing procedure. In any event, the Board should attempt to resolve as many claims as possible on a routine, nonadversarial basis. When factual disputes exist, the Board should use presumptions and other evidentiary techniques, where appropriate to reduce the cost of adjudication.\footnote{Cf. 30 U.S.C. § 921(c)(1) (1982) (Black Lung Act provides ten years’ exposure to coal dust establishes a rebuttable presumption that pneumoconoiosis resulted from employment).}

B. Corrective Justice

Earlier, this Article concluded that Aristotle’s theory of corrective justice was compatible with a liability rule that provided compensation to those who are injured as a result of smoking. This section, considers whether it violates any principle of corrective justice to shift the primary responsibility for compensation for cigarette injuries from cigarette companies to consumers.

Two aspects of the proposed compensation scheme raise corrective justice concerns: (1) guilty parties (cigarette companies) theoretically escape responsibility for compensating the victims of their wrongdoing; and (2) the burden of compensation is shifted to “innocent” parties (smokers).\footnote{In a formal sense, cigarette companies are still liable to injured consumers since companies must pay the excise tax levied on cigarette manufacturing. However, one result of the excise tax approach is to shift most of the compensation cost from cigarette companies to smokers.}

Aristotle’s theory of corrective justice is based on the concept of distributional equilibrium between parties. Thus, one who wrongfully inflicts an injury upon another disturbs the equilibrium, which calls for rectification. However, Aristotle assumed that the injurer reaped a gain that corresponded to the victim’s loss. Therefore, rectification was achieved by taking the unjust gain away from the injurer and transferring it to the victim.\footnote{Aristotle stated: In this way, we will recognize what we must subtract from the one who has more and add to the one who has less [to restore equality]; for to the one who has less we must add the amount by which the intermediate exceeds what he has, and from the greatest amount [which the one who has more has] we must subtract the amount by which it exceeds the intermediate.}

However, as Professor Jules Coleman points out, not every wrongful injury confers a corresponding gain on the wrongdoer.\footnote{See Coleman, supra note 39, at 425.}
According to Coleman, when the injurer derives no gain from the injury itself, corrective justice does not necessarily compel the injurer to compensate the injured party, even though his wrongdoing caused the injury.\textsuperscript{212} In Coleman’s view, principles of corrective justice merely dictate that wrongful gains be annulled. However, corrective justice does not give rise to a claim for compensation by the victim against the injurer unless the injurer directly profits from the victim’s injury.\textsuperscript{213}

Professor Coleman gives the example of a negligent motorist to illustrate his thesis. A motorist who speeds derives some benefit, such as a time saving, by his negligent conduct. But the negligent motorist gains from his wrongful conduct regardless of whether an accident occurs, and he secures no \textit{additional} wrongful gain as a result of the harm he has caused to his victim. In that sense, his gain is not a reflection of the victim’s loss. In Coleman’s view, the existence of such a loss cannot serve as the moral basis for annulling a gain,\textsuperscript{214} because the gain the negligent motorist secures is logically distinct from the loss he causes another.

As Coleman points out, the injurer may be required to compensate the victim for reasons other than corrective justice. For example, blameworthy conduct may deserve punishment even though the wrongdoer does not gain from his wrongful actions.\textsuperscript{215} In addition, one might argue that an injured party has a claim right to compensation and the existence of this right imposes a correlative duty on the injurer to compensate or repair the harm.\textsuperscript{216} Finally, instrumental goals, such as deterrence, also provide a basis for imposing liability on the injurer.\textsuperscript{217}

According to Coleman’s theory, the right to compensation is distinct from the duty to compensate: The right to compensation may be based on corrective justice principles, while the duty to compensate may be grounded in other considerations. Consequently, as long as the injurer does not benefit by his wrongdoing at the victim’s expense, it does not violate any notion of corrective justice.

\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at 423.
\textsuperscript{214} \textit{Id.} at 425.
\textsuperscript{216} \textit{See} Coleman, \textit{supra} note 39, at 426-27.
\textsuperscript{217} This, of course, does not require that the injurer be guilty of actual wrongdoing. \textit{See} Coleman, \textit{supra} note 215, at 262-63.
to shift the responsibility for compensation from the wrongdoer to someone else.\textsuperscript{218}

As mentioned earlier, corrective justice appears to support the smokers' claim for compensation. However, if Coleman's view is correct, this corrective justice claim does not include the right to receive compensation from tobacco companies. Although tobacco companies profit from the sale of cigarettes, they gain no benefit from smoking-related injuries. Therefore, even though their conduct may be wrongful, principles of corrective justice would not necessarily require cigarette companies to bear the cost of compensation as long as compensation was provided from some other source.

Therefore, an excise tax levied on cigarette manufacturing would satisfy corrective justice claims for compensation on the part of injured consumers. Furthermore, the principles of corrective justice do not preclude a compensation scheme such as the proposed scheme, merely because consumers, rather than tobacco companies, provide most of the funding.

\textbf{C. Allocative Efficiency}

As discussed earlier, imposing strict liability on cigarette manufacturers may not promote a more efficient allocation of resources. The same criticism can be made of excise taxes that are imposed on the basis of production without any relation to safety. Of course, it is possible to design an excise tax scheme that also would encourage cigarette companies to produce safer products. For example, the excise tax rate could be tied to tar or nicotine levels in particular brands of cigarettes.\textsuperscript{219}

Another approach, suggested by Professor Garner, would be to impose a uniform rate on all cigarette companies but allow an administrative agency to lower the rate for any manufacturer who demonstrates that its cigarettes are safer than other brands.\textsuperscript{220} However, the purpose of the excise tax, under Garner's proposal, is to

\textsuperscript{218} \textit{Id.} at 263-65. According to Coleman: "In short, although principles of corrective justice may justify penalizing wrongdoers and principles of compensatory justice require elimination of wrongfully inflicted losses, neither standard of justice requires that the costs of individual accidents be borne by those at fault in causing them." \textit{Id.} at 263-64.


\textsuperscript{220} See Garner, \textit{supra} note 7, at 326-33. If a particular brand was found to be entirely safe, the tax on that brand would be eliminated. \textit{Id.} at 327.
encourage safety, not to compensate injured consumers. In contrast, the primary goal of the present proposal is to compensate; safety (or resource allocation) goals are secondary. Any attempt to vary the excise tax rate according to safety characteristics of individual brands would complicate the program and possibly impair its compensatory functions. Therefore, it is best to retain a uniform taxation rate for all producers.

Even though the present proposal is more concerned with compensation, than with allocative efficiency, resource allocation remains an important consideration. Therefore, this section will evaluate the allocative effects of the proposal and compare them with the allocative effects of strict liability.

1. Product Safety

Any program that compensates injured consumers from an excise tax seems to provide little incentive to produce a safer product. When each manufacturer is forced to bear its own liability costs, manufacturers who produce safer products incur lower liability costs and, therefore, can sell their products more cheaply than other producers. Consequently, there is incentive to develop safer products. In contrast, an excise tax that is based on the number of cigarettes produced, without regard to their relative safety, gives no competitive advantage to the manufacturer who produces a less dangerous product. Consequently, an excise tax ostensibly provides no incentive to develop safer products.

To illustrate, assume that manufacturers, by placing more efficient filters on cigarettes can potentially reduce smoking-related injuries. Also assume the existence of a cost-benefit ratio of 1:2; every dollar spent on filters would reduce health costs by two dollars. However, a cigarette manufacturer would not necessarily

221. Under Garner's proposal, the amount of money collected by the excise tax would not be directly tied to the compensation of smoking-related injuries. Id. at 326-33.

222. This same criticism has been made about the excise tax that is levied on coal production to finance the Black Lung Program. See Viscusi, Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety, 6 Yale J. on Reg. 65, 86 (1989).

223. For example, assume that a total excise tax of $10 billion is imposed on the tobacco industry, representing the health costs of smoking for which the industry is held responsible. Assume that the maximum reduction in health costs from the use of better filters is $2 billion. In other words, if every producer used the better filters, it would cost the industry $1 billion. However, the excise tax would be lowered by $2 billion, thereby, saving the industry $1 billion.
spend the money to introduce the new filters if subjected to an excise tax. The problem is that an expenditure by one producer may not be cost-effective, because other producers will receive most of the benefit should an excise tax reduction result.

Assume Manufacturer A, who controls twenty percent of the market is prepared to use the better filters at a total cost of $200 million. If the cost-benefit ratio is 1:2, this expenditure would reduce total health costs by $400 million. The excise tax levied on the industry will also fall by $400 million. However, because Manufacturer A only controls twenty percent of the market, its share of the excise tax reduction would only be $80 million. Consequently, if Manufacturer A spent $200 million to improve product safety, but would only reduce its excise tax liability by $80 million. Manufacturer A would lose $120 million by changing to the better filters even though it resulted in an overall societal gain. (See Table 1 below.)

<table>
<thead>
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<th>Table 1</th>
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<tr>
<td>1:2 Cost-Benefit Ratio</td>
</tr>
<tr>
<td>market share</td>
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<tr>
<td>$ spent on safety ($ hundred million)</td>
</tr>
<tr>
<td>excise tax reduction for industry ($ hundred million)</td>
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<tr>
<td>excise tax reduction for Manufacturer A ($ million)</td>
</tr>
<tr>
<td>net profit or loss ($ million)</td>
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<tr>
<td>% return on safety expenditure</td>
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224. The example assumes that the per unit cost of production remains the same regardless of the number of cigarette filters produced. The example also ignores development costs. A more sophisticated example would have to take these factors into consideration.

225. To keep the example simple, let us assume that the filters cause an immediate reduction in smoking-related injuries and, thereby causes an immediate reduction in the excise tax rate.

226. To some extent, this may be offset by an improvement in sales if Manufacturer A can convince consumers to pay more for safer cigarettes.
Note that a number of other variables also affect the degree to which an excise tax discourages manufacturers from spending money to produce safer products. One variable is market share. As Figure 3 illustrates, if Manufacturer A controlled forty percent of the market instead of twenty percent, it would spend $400 million on better filters and reduce its excise tax liability by $320 million. Its loss would only be $80 million instead of $120 million. By the same token, Manufacturer A would break even if it controlled fifty percent of the market. However, if Manufacturer A controlled sixty percent of the market, its expenditure of $600 million on better filters would reduce its excise tax burden by $720 million, resulting in a net gain of $120 million.

Figure 3
(1:2 Cost-Benefit Ratio as a Function of Market Share & Profit/Loss)

The break-even point between a manufacturer's safety-related expenditures and its excise tax savings is not just a function of its market share but, as Figure 4 below indicates, it is also related to the cost-benefit ratio of the safety measure involved. In the previous example, a fifty percent market share was the break-even point for a safety measure whose cost-benefit ratio was 1:2. However, a manufacturer would need a two-thirds market share to break even if the safety measure's cost-benefit ratio was only 1:1.5. At the same time, a manufacturer would only have to control one-third of the market to break even if the cost-benefit ratio was 1:3. Thus, the higher the cost-benefit ratio between safety expenditures and health cost reduction, the smaller a market share is necessary for a manufacturer to break even.
Figure 4
(Break Even Point as a Function of Market Share & Cost-Benefit Ratio)

All of this suggests that an excise tax approach will inevitably discourage investment in safety. However, this hypothetical has only considered what happens when a single producer initiates a safety measure and other producers do nothing. What happens if a second manufacturer adopts the same safety measure? Assume Manufacturers A and B each produce cigarettes with improved filters. Assume, as in the first example, the existence of a 1:2 cost-benefit ratio. If Manufacturers A and B each control ten percent of the market, each will spend $100 million on filters and enjoy an excise tax reduction of $40 million. Although each producer will lose money, their total loss is equivalent to that suffered by a single producer who controls twenty percent of the market. This means that the market share needed to reach a break-even point can be determined on aggregate basis.

The ability to aggregate also means that it is easier to make a profit if firms cooperate on product safety. For example, suppose Manufacturers A, B, and C control 10, 20 and 40 percent of the market, respectively. If they cooperate, Manufacturer A will spend $100 million on better filters and receive a tax reduction of $140 million, thereby saving $40 million for a net gain of $40 million; Manufacturer B will spend $200 million on safety and receive a tax reduction of $280 million for a net gain of $80 million; and Manufacturer C will spend $400 million on safety and receive a tax saving of $560 million for a net gain of $160 million.

This raises a number of other issues. First, as Table 1 shows, the “profit,” or return on investment, of each manufacturer increases as aggregate market share increases. Thus, if manufacturers who represent an eighty percent market share adopt a particular safety measure, the net return to each manufacturer will be higher
than if only seventy percent of the market share is represented. The reason for this is that as more parties adopt the safety measure, the percentage of "free riders" who also benefit from lower excise taxes is reduced.

It is also significant that while return on investment is affected by the aggregate market share of all participants, it is not affected by relative market share of any one party. In the example discussed above, Manufacturers A, B, and C each received a forty percent return, regardless of their respective market share. Thus, overall return on safety increases as more producers adopt a particular safety measure, and small producers benefit as much as larger ones.

Not only is a cooperative response to product safety rational in an economic sense, but industry-wide cooperation is especially likely to occur among cigarette companies because the tobacco industry has a history of dealing with common problems on a collective basis. Therefore, the incentive to invest in product safety under a strict liability regime, if it exists at all, will not be appreciably reduced under an excise tax scheme. 227

2. Market Deterrence

An efficient allocation of resources is more likely if product prices reflect their actual social costs, including the cost of product injuries that are economically or technologically unavoidable. 228 Obviously, this goal cannot be fully realized through the present proposal, since it expressly excludes some loss categories from compensation. Nevertheless, the proposal can achieve a certain degree of market deterrence, perhaps even more than if strict liability was imposed on cigarette manufacturers.

As mentioned earlier, no market deterrence will be achieved if cigarette companies are not held responsible for the health costs of smoking. For this reason, the goal of market deterrence is largely frustrated by the preemption doctrine because it effectively bars tort claims against cigarette companies. Strict liability, on the other hand, will promote market deterrence if cigarette manufacturers are able to pass their liability costs on to consumers. As

227. Cooperative efforts in this area might cause anti-trust problems for the tobacco industry. Therefore, any legislation enacted to implement this proposed compensation scheme might have to exempt cooperative agreements with respect to product safety from federal antitrust laws.

228. See McKean, supra note 103, at 41-42.
suggested earlier, this will occur under some, but not all market conditions.

How much market deterrence would an excise tax system achieve? Two factors must be considered: (1) The percentage of smoking-related health costs that will be reflected in the excise tax levied on cigarette companies; and (2) the extent to which cigarette companies actually pass the cost of the excise tax on to consumers.

Under the proposed compensation scheme, the size of the excise tax will depend on the amount of compensation to injured consumers. The present proposal would exclude noneconomic losses and some types of injuries on a categorical basis. It is difficult to estimate the precise figure, either in dollar terms or as a percentage of total smoking health costs, that would be paid to injured consumers under the proposal. However, since pain and suffering and similar noneconomic losses constitute a major portion of the typical personal injury award, the cigarette companies' potential liability is significantly less under this proposal than under strict liability. At the same time, this lower potential liability is offset somewhat by the fact that a greater percentage of eligible claimants will receive compensation. 229

A second requirement for market deterrence is that product sellers actually pass increased costs on to consumers via higher prices. Earlier, it was suggested that under some circumstances cigarette companies might decline to pass costs caused by increased liability on to consumers. Of course, cigarette companies might also refuse to pass on to consumers increased costs due to an excise tax. If this occurred, there would be no market deterrence.

However, there is reason to believe that cigarette companies might be more inclined to shift the cost of an excise tax on to consumers than to raise prices to cover the cost of increased tort liability. First, consumers are more likely to accept higher prices that are clearly attributable to a government imposed tax, than higher prices that appear to be solely within the producer's control and, thus, more suspect. Furthermore, the price increase due to an excise tax would be the same for all producers. Consequently, producers could uniformly raise prices.

Of course, even though consumers may be more receptive psychologically to higher cigarette prices that are attributable to

229. Thus, if potential liability was $60 billion, but cigarette companies defeated many claims and paid only $30 billion, the effect would be the same if, under an administrative compensation system, potential liability was limited to $30 billion, but every claim was paid in full.
action beyond the manufacturer’s control, this does not mean that consumption rates will not be affected by such price increases. Therefore, one would expect the excise tax proposal to achieve lower cigarette consumption rates; although it is impossible to predict whether consumption would be lowest under strict liability or an excise tax.

D. Risk Distribution

Part III of this Article stated that a rule of strict liability for cigarette manufacturers produces a different distributive effect than a rule of nonliability. Some loss-spreading will occur under either rule. In the former case, losses are spread to corporate shareholders and smokers. In the latter case, losses that are not borne by victims are spread to taxpayers and medical insurance policyholders. These latter groups include a large proportion of nonsmokers.

Principles of distributive justice suggest that the costs associated with a product should shift to those who benefit from the product. On the other hand, utilitarian principles support shifting these costs to parties who can spread them most effectively. Applying these principles to smoking-related injuries, it was concluded that strict liability was superior to nonliability because it shifted the costs of smoking-related injuries to shareholders and smokers—parties who benefited from cigarette sales and who could participate in loss-spreading.

The most important distributive consequence of the present proposal is that the burden of compensating injured consumers falls on smokers and those who benefit economically from smoking. None of the compensation costs are shifted to nonsmokers. This is a just result.

At the same time, there are other distributive effects associated with the proposal that may be controversial. One such effect is the distributive effect of an excise tax as compared with strict liability. A second involves the propriety of selective compensation. Finally, there is the problem of intergenerational loss-shifting. These three issues will be discussed in the following sections.

1. Distributional Effect of an Excise Tax

The burden of an excise tax should fall on the same parties who would bear the cost of liability under a strict liability regime. Excise tax liability, like damage awards in product liability cases, would initially fall on cigarette manufacturers. Cigarette companies would treat their excise tax liability as a cost of production and
would shift as much of it as possible to consumers. If cigarette companies were not able to increase prices enough to recoup their excise tax liability, the shortfall would probably be apportioned among corporate shareholders, suppliers and employees. In any event, the same parties would bear the costs of compensating injured consumers regardless of whether strict liability or an excise tax approach was adopted.230

This result seems desirable in terms of both loss-spreading and distributive justice. As mentioned earlier, distributive justice supports the imposition of liability on those who benefit from smoking. Shareholders, suppliers and employees all benefit economically from cigarette sales. Smokers also benefit in the sense that they derive satisfaction from smoking. The excise tax approach ensures that these groups, rather than nonsmokers, will bear most of the cost of compensating the victims of smoking-related injuries.

The excise tax can also be justified in terms of loss-spreading goals. Strict liability promotes loss-spreading, at least in theory. However, as discussed earlier, cigarette manufacturers, under some circumstances, might not be able to spread all of the health costs of smoking. On the other hand, overall cost burden under my compensation scheme, will probably be less than under strict liability because some claims will be excluded and administrative costs will be minimized. Since overall liability will be lower under the present proposal, it should be easier for cigarette manufacturers to spread the cost of this liability by charging higher prices for their products. Even if some of this cost is shifted back to shareholders or suppliers, the burden on them will be much less than under strict liability.

2. Selective Compensation

The costs of compensation can be spread more easily under the present proposal than under strict liability because compensation rules are more restrictive under the former. For example, under the proposal, noneconomic losses would not be compensated, although they are recoverable in tort actions. However, there are several reasons for the exclusion of noneconomic losses. First, to some extent, allowance of noneconomic losses in damage awards

230. As mentioned earlier, there might be less consumer resistance to a price increase that was related to a tax increase. If this assumption is correct, a cigarette company might be able to shift a greater share of its liability to consumers if the excise tax approach was used instead of strict liability.
in strict liability cases is not intended to compensate the victim, but rather to pay for attorney's fees and other litigation expenses. Since claimants normally will not incur these costs under the present proposal, there is no need to take them into account in determining compensation.

Another reason for excluding noneconomic losses relates to the conduct of victims. Arguably, smokers are partly responsible for their injuries and, therefore, are not entitled to full compensation. Denying compensation for noneconomic losses is a humane (though arbitrary) way to vindicate this principle.

However, the most persuasive reason for limiting compensation to economic losses is that it reduces the overall cost of the compensation plan and, thus, makes it workable. In other words, it represents a necessary tradeoff between distributional values and practical considerations.

A second example of restrictive compensation rules, under the present proposal, is the restrictive eligibility criteria. Earlier, it was suggested that Congress or the Board might impose greater proof requirements for certain injuries or even exclude them from consideration altogether. As a result, some meritorious cases will not be heard, and some worthy claimants will be denied a recovery. Once again, it is important to note that the compensation system cannot work properly unless administrative costs are kept as low as possible. Unfortunately, this means that a small number of worthy claims may be excluded.

3. Intergenerational Loss-Spreading Problems

Another criticism of an excise tax approach is that some individuals who benefit will have paid nothing into the program. Most smoking-related illnesses take many years to develop, and smokers who are presently paying the excise tax (assuming that it is passed on to consumers) will not file claims against the compensation fund for many years. On the other hand, those who benefit most, at least initially, are persons who have smoked for the past twenty or thirty years, but who have paid little or no excise tax. Arguably, the proposed compensation scheme is unfair because of this retroactive effect.

The problem of intergenerational equity potentially exists whenever a decision is made to compensate pre-existing injuries by post hoc assessments against an industry or a group of persons. It is

231. See O'Connell, A Proposal, supra note 175, at 351.
especially pervasive in the products liability area where product risks might not become known until long after the product has left the market. Consequently, any criticism of the proposed compensation plan due to intergenerational inequity is weak, at least when balanced against the proposition that nonsmokers should not be forced to pay for smoking-related injuries. To the extent that a tradeoff must be made between these two objectives, an approach that shifts the costs of smoking as much as possible to smokers as a class is preferable, even if older smokers benefit at the expense of younger smokers.

E. Political Considerations

The compensation scheme set forth in this Article would undoubtedly be difficult to enact. As long as tobacco companies have no duty to compensate injured smokers, they can be expected to oppose any legislation that would impose such liability. Cigarette companies are likely to resist a compensation plan even if they could pass all or most of the excise tax on to consumers. This is because, as suggested earlier, higher prices resulting from the imposition of such a tax might adversely affect cigarette sales and thereby reduce profits.

This scenario assumes that cigarette companies can continue to avoid tort liability, either because of the preemption doctrine or because plaintiffs are unable to prove causation or overcome affirmative defenses. However, the present legal environment could change. In particular, the preemption doctrine could be overturned by judicial or legislative action. If this were to occur, the tobacco

232. DES is a classic example of this problem. Between 500,000 and two million women used DES from the early 1950’s until 1971 to prevent miscarriages. It was later discovered that the drug caused many of their female offspring to develop vaginal and cervical cancer. See Note, Proof of Causation in Multiparty Drug Litigation, 56 Tex. L. Rev. 125, 125 (1977). However, the first successful lawsuit was not brought against the makers of DES until 1980. See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). Obviously, any liability claims DES manufacturers pay will not be shifted to DES users since the drug is no longer on the market.

233. See Note, supra note 60, at 825-27 (cigarette companies have little incentive to participate in compensation plan for smokers as long as they are winning in court).

234. Although five federal appellate courts have ruled that the Federal Cigarette Labeling and Advertising Act preempts claims under state tort law that allege cigarette warnings are inadequate, the New Jersey Supreme Court has recently reached a different conclusion. See Dewey v. R.J. Reynolds Tobacco
industry might view a limited compensation scheme, such as the one proposed in this Article, as a welcome alternative to conventional tort liability.\footnote{235}

Even though smokers would benefit from this proposal, many might oppose it because the excise tax provision would cause cigarette prices to rise. All smokers would have to pay more for cigarettes, but only those who were actually injured would be entitled to compensation. Thus, from the smokers' point of view, the proposal functions like insurance. Smokers who expect to receive compensation from such collateral sources as medical insurance, disability insurance, social security or other government entitlement programs, may feel that they will get nothing in return for the higher cigarette prices that they would be forced to pay under the proposal.

In addition, since only a fraction of the smoking population actually develops smoking related illnesses, many smokers, especially younger ones, may feel that they will be lucky enough to avoid serious illness. For them, the costs of my proposed compensation plan are obvious, but the benefits are more speculative.

It is difficult to say how widespread, or how politically effective, such consumer opposition would be. Conventional wisdom holds consumers are usually too diffuse and too disorganized to make much of an impact on Congress. Moreover, it is doubtful that existing consumer groups, such as Common Cause, would take a pro-smoking position. Therefore, to be effective, grass roots consumer opposition to this proposal would probably have to be organized and supported by the tobacco industry. Conversely, if cigarette companies decline to actively oppose the proposed compensation plan, consumer opposition will probably be insignificant.

A third group that might oppose this proposal consists of tobacco farmers and others whose economic welfare is linked to the tobacco industry. These parties would be harmed by any decline in the market for tobacco products. Unlike consumers, members of this group have lobbying organizations of their own and are

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\footnote{235} This phenomenon has occurred before. For example, employer opposition to worker's compensation legislation diminished significantly when injured workers began to prevail against them in court.
less dependent on the tobacco industry for organizational support.

Even if the proposal does not generate strong opposition, its chances of being enacted are not promising unless it gains support from a powerful political constituency. To determine where such support may be found, it is necessary to review the proposal’s purpose and effects. Presumably those who agree with the proposal’s goals or who benefit from its provisions will support its enactment.

In essence, the proposal accomplishes two things: it provides some compensation for injured smokers (thus arguably furthering corrective justice and distributive goals); and it reduces smoking related injuries either through market deterrence or by encouraging cigarette companies to produce safer products. Therefore, its natural constituency would be groups who sympathize or benefit from compensation or product safety.

The primary beneficiary of the proposal’s compensatory features would be those who presently pay the cost of smoking-related injuries. This group includes employers, insurance companies, taxpayers and the governmental entities. These are powerful interest groups. They would provide strong political support for the proposed compensation scheme if they thought that it would shift significant costs from themselves to smokers.

Although there are some doubts about the amount of "product safety" the proposed compensation scheme would achieve, either through direct pressure on producers or through market deterrence, the safety rationale remains a powerful one. If the proposed plan would significantly reduce smoking-related injuries, it would draw support from insurance companies, unions, the medical profession, employers, consumer groups and government health and welfare agencies.

Most of these groups already have effective lobbying organizations in Washington. Consequently, they could mobilize significant economic and political resources in support of the proposal if they believed that it would substantially reduce smoking-related health problems.

In summary, the compensation plan described in this Article, though controversial, should appeal to a broad spectrum of political constituencies. Therefore, it should not be characterized as simply an academic exercise, but rather should be regarded as a practical and realistic solution to a serious social and economic problem.

V. Conclusion

At the present time, most courts have applied the preemption doctrine in cigarette litigation. As a practical matter, this policy
prevents most consumers from recovering against cigarette companies for smoking-related injuries. This Article has considered whether the existing rule of nonliability for cigarette companies should be replaced by a rule that would make cigarette companies strictly liable to consumers for smoking-related injuries.

It then evaluated strict liability from the perspective of corrective justice, allocative efficiency, risk distribution and administrative cost. It suggested that injured consumers were entitled to compensation under principles of corrective justice. However, the Article concluded that strict liability might not promote an efficient allocation of resources or distribute losses in a socially desirable way. In addition, strict liability would give rise to excessive administrative costs. For these reasons, an alternative to strict liability was proposed.

A compensation plan funded by an excise tax is superior to strict liability. Not only would such a proposal satisfy the corrective justice claims of injured consumers, but it would facilitate loss-spreading and would ensure that most of the health costs of smoking are borne by smokers. Finally, such a system could provide compensation at far less cost than a litigation-oriented approach like strict liability.