

11-2003

Consumer Expectations' Last Hope: A Response to Professor Kysar

James A. Henderson Jr.

Cornell Law School, james-henderson@lawschool.cornell.edu

Aaron Twerski

Brooklyn Law School

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Consumer Protection Law Commons](#), [Marketing Law Commons](#), [Products Liability Commons](#), and the [Torts Commons](#)

Recommended Citation

Henderson, James A. Jr. and Twerski, Aaron, "Consumer Expectations' Last Hope: A Response to Professor Kysar" (2003). *Cornell Law Faculty Publications*. Paper 802.

<http://scholarship.law.cornell.edu/facpub/802>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CONSUMER EXPECTATIONS' LAST HOPE: A RESPONSE TO PROFESSOR KY SAR

James A. Henderson, Jr.* & Aaron D. Twerski**

The authors agree with Professor Kysar that the current version of the consumer expectations test for design defectiveness is an amorphous, unprincipled misreading of section 402A of the Restatement (Second) of Torts. And they agree that most courts apply risk-utility balancing in determining design defectiveness. But they disagree with Kysar's proposal to supplement risk-utility balancing with a reinvigorated consumer expectations test based on expert testimony regarding what consumers actually expect in the way of design safety. Judicial reliance on such testimony would be susceptible to result-oriented manipulation by litigants, would not guide manufacturers in making sensible design choices, would pressure courts to exceed the limits of their institutional competence, and would undermine the new Restatement's commitment to making products safer. In the final analysis, Professor Kysar's suggested approach to design liability rests on an unworkable premise, implicit in his article, that the authors reject—that enterprise liability is a worthy, attainable goal toward which courts should strive.

INTRODUCTION

Having served as Reporters for the *Products Liability Restatement*,¹ we offer a brief response to Professor Kysar's proposal to supplement its design liability provisions with a "reinvigorated" consumer expectations test. His article is beautifully written and forcefully argued. Unquestionably, he makes the best case possible for reformulating the consumer expectations test in product design litigation. Indeed, he has forced us to consider our positions carefully and, in several respects, provide clarification. Nevertheless, we have serious reservations regarding Professor Kysar's proposal. We believe that he overstates the need for a revitalized consumer expectations test and understates the serious problems that his proposal would generate.

I. WHERE WE AGREE

Certainly we agree with Professor Kysar's assessment of the current version of the consumer expectations test. He refers to the version currently advocated by plaintiffs' lawyers as "a gross misreading of [sec-

* Frank B. Ingersoll Professor of Law, Cornell University. A.B., 1959, Princeton University; LL.B., 1962, LL.M., 1964, Harvard University.

** Newell DeValpine Professor of Law, Brooklyn Law School. A.B., 1962, Beth Medrach Elyon Research Institute; B.S., 1970, University of Wisconsin-Milwaukee; J.D., 1965, Marquette University.

1. Restatement (Third) of Torts: Prods. Liab. (1998) [hereinafter Third Restatement].

tion 402A],” “amorphous,” “unprincipled,” and “decidedly inferior.”² Coming from a scholar who believes that the *Third Restatement’s* risk-utility test is inadequate and who offers his own version of consumer expectations as a necessary supplement, these are strong criticisms. Any open-minded observer who finds Kysar’s analysis persuasive can reach but one conclusion: The consumer expectations test as it is currently advocated by a handful of academics and most of the plaintiffs’ bar is an unprincipled, intellectually bankrupt approach to design-based liability that only a proponent of unrestricted liability could knowingly embrace. We also agree with Kysar’s reading of the relevant case law. In this respect, quite apart from the fact that his reading coincides with our own, his treatment of decisional developments up to the present is the most lucid, coherent account to date. He concludes that a clear majority of American courts apply risk-utility analysis in determining whether product designs are defective, and that many American courts that appear to recognize an independent consumer expectations test are, upon closer examination, applying risk-utility principles. Finally, we agree that a few jurisdictions do seem firmly committed to consumer expectations as the primary test for judging product designs.

II. WHERE WE DISAGREE

Beyond these significant areas of agreement, it should come as no surprise that we disagree with Professor Kysar’s proposal on several grounds. In essence, Kysar objects to the *Restatement’s* exclusive reliance on risk-utility analysis in determining design defectiveness. Risk-utility analysis is incomplete, he argues, because it ignores the rich, contextual ways in which lay persons perceive and evaluate risks. By this process of “spare instrumentalist balancing,”³ the *Restatement* allows technological expertise to triumph over populist values and perceptions. Product designs that would clearly be rejected by the moral intuitions of a majority of American consumers are deemed acceptable under risk-utility analysis. Kysar’s solution to these shortcomings takes the form of judicial reliance on empirical work by experts in cognitive psychology who he claims can measure the actual perceptions and beliefs of American consumers about product-related risks. In his view, when these experts are able to testify credibly, courts should allow juries to accept their testimony as setting the legal standards for judging product designs. Kysar would continue to apply risk-utility analysis to support liability when consumers expect less safety than risk-utility requires; but when consumers are shown to expect more safety, he would allow liability to follow even if the manufacturer had no technologically feasible way to make the product safer. (He refers to this double whammy in his proposal by the more dignified term, “twin

2. Douglas A. Kysar, *The Expectations of Consumers*, 103 *Colum. L. Rev.* 1700, 1701, 1705, 1707, 1746 (2003).

3. *Id.* at 1774; see also *id.* at 1736–39.

test."⁴) Approaching design liability in this expanded manner, he asserts, will allow the populist values of the American public to find expression in court and, ultimately, prevail over the domination of technology.

Our first disagreement with Professor Kysar's proposal concerns its reliance on the expertise of cognitive psychologists in setting design standards different from those set by risk-utility analysis. We doubt that the "concrete, robust findings from psychologists"⁵ that he envisions will actually be sufficiently forthcoming to support consistent application of his reinvigorated consumer expectations test. In an article published more than a decade ago describing the inherently lawless nature of failure-to-warn litigation, we suggested greater reliance on the expertise of behavioral experts as one possible way to help solve the difficulties of indeterminacy presented by an essentially vacuous, rhetorical tort.⁶ Courts do not appear to have followed our suggestion, however, and in the design defect scenario, we would urge them *not* to follow it. In our previous article, we contrasted failure-to-warn with design defect litigation. Design defect litigation, we argued, is an arena in which technological rigor makes consistency possible. Requiring proof of specific alternatives, supported by relatively hard, physical science, saves design defect litigation from slipping into rhetorical lawlessness.⁷ In our view, Kysar's proposal to substitute soft, behavioral science for hard, physical science as a solution to what he sees as technological dominance under the *Restatement* would seriously undermine the integrity of design litigation and would send that branch of products liability law in the same lawless direction that the failure-to-warn branch seems destined to travel.

Responding to one legal scholar's published criticisms of a leading cognitive psychologist's portrayal of consumers' "rival rationality," Professor Kysar suggests that it is premature to reject such a rationality at this point.⁸ Perhaps that is true in the Platonic world of psychological paradigms, but we strongly caution courts against adopting a liability standard based on actual consumer expectations in the hope that the psychological expertise necessary to support such an approach will be forthcoming. We doubt that it will. Moreover, even if such a rival rationality were discernible as a general proposition, we have difficulty envisioning how it could ever be made to work fairly and consistently in design litigation. Would the necessary empirical research be conducted in a manner aimed specifically at the design issue before the court? How could judges ever hope to distinguish solid research from expert-for-hire rubbish? And how could manufacturers, when they make design decisions, anticipate

4. *Id.* at 1705.

5. *Id.* at 1790.

6. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 323–25 (1990).

7. See *id.* at 292–93, 298 (noting that design cases draw upon body of hard sciences to run consistent risk-utility analyses).

8. Kysar, *supra* note 2, at 1776–79.

what psychological survey analysis might reveal years later, when those design decisions are attacked in court?

For the sake of argument, let us assume that something like the rigorous psychological expertise that Professor Kysar anticipates does materialize. What then? We believe that he has overstated the extent to which technology dominates human values in the *Restatement's* risk-utility approach, and that he has failed to demonstrate the need for his suggested legal reform. To be sure, the first part of the *Restatement's* test—that a reasonable alternative design be shown to have been available that would have reduced the product's foreseeable risks—involves a risk-utility analysis in which the manufacturer's exposure to liability is confined within the realm of the practically feasible. In that connection, the relevant variables are relatively "hard" and the judge's role as screener of evidentiary sufficiency dominates. The modifier "reasonable" in the phrase "reasonable alternative design" is intended to allow softer variables to be taken into account, but the judgment called for in the first part of the test is admittedly more technical than normative.

By contrast, the second part of the *Restatement's* risk-utility test—whether omission of the safer alternative renders the defendant's design not reasonably safe—is clearly more normative than the first part; the variables are "softer," and juries are given considerable leeway to reach nuanced decisions. Indeed, once the plaintiff has produced sufficient evidence of a reasonable, safer alternative, the *Restatement* is largely indifferent to exactly how the jury in a design case should be instructed. Moreover, while the *Restatement* approach rejects consumer expectations as an independent test for defective design, evidence regarding consumer expectations is relevant on both the "reasonable alternative" and the "not reasonably safe" issues, and may even be controlling in the plaintiff's favor.⁹ Given the open-textured nature of jury decisionmaking under the *Restatement*, we are puzzled by Professor Kysar's assertion that the *Restatement* approach confines the jury within a world of technology-based uniformity. His proposal, as much if not more than ours, confines juries in that manner. To be sure, Kysar's preferred technology—derived from cognitive psychology—concerns what consumers expect in the way of design safety, and thus appears to be more consumer-oriented. But the jurors' task under Kysar's approach is largely to determine as a matter of fact what consumers desire, not to decide what they, the jurors, desire. In most cases, the jury's task will be simply to decide whether or not to accept the expert's opinion. Kysar's approach never does explicitly give jury members the freedom to incorporate their own values into decision-making the way the *Restatement* does. Thus, at least from the jury's perspective, Kysar's proposal is as susceptible as ours to the criticism that the approach allows technology to dominate over populism.

9. See Third Restatement, *supra* note 1, § 2 cmt. g.

Another way that Professor Kysar arguably misinterprets the *Restatement's* approach to design defects concerns his support for what we refer to as "product-category liability."¹⁰ When he says that his new version of consumer expectations would support liability even when no reasonable alternative design is available to the manufacturer, by definition he is proposing the imposition of liability on whole categories of products. He implies that the *Restatement* approach, by not allowing the true attitudes of consumers to set the standard for such liability, condones as socially acceptable products that consumers actually regard as loathsomely unacceptable. But as comments d and e to its design section make clear, the *Restatement* denies category liability in such cases not because it deems such products socially acceptable—clearly they are unacceptable—but because courts are believed to be inappropriate institutions to be making such categorical judgments regarding social acceptability.¹¹ It follows that when psychologists under his proposal tell juries that consumers perceive certain categories of products to be contemptibly unacceptable, they are not telling juries anything they do not, intuitively, already know.

Thus, we object to Professor Kysar's willingness to embrace category liability, not because it introduces new substantive grounds on which to condemn product categories as unacceptable, but because it violates the norm against courts overstepping their proper institutional limits. Comment e recognizes that such outlier judicial responses are possible, and suggests they should occur, if at all, in rare instances when the loathsomeness of certain product categories is particularly egregious rather than when a psychologist tells the jury something they already know full well.¹² In response to our position regarding institutional limits, Kysar might argue that juries are not reaching normative judgments but merely making findings of fact about what consumers actually expect. But that would belie his insistence that juries reach nuanced decisions, and ignores the reality that "factfinding" under his proposal would unavoidably be affected to some extent by normative elements. And certainly, when courts incorporate jury decisions into their categorical tort judgments, they are imposing norms on product sellers.

Two further aspects of Kysar's promotion of category liability deserve brief mention. First, his willingness to allow courts to reach decisions about the social undesirability of entire categories of products reflects a certain degree of elitism. He claims to be siding with populist values in a struggle against powerful industrial technology, but he relies on the least populist branch of government—the courts—to reject entire product cat-

10. James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263, 1297 (1991).

11. See Third Restatement, *supra* note 1, § 2 cmt. d.

12. See *id.* § 2 cmt. e ("[T]he designs of some products are so manifestly unreasonable . . . that liability should attach even absent proof of a reasonable alternative design.").

egories. And he does this in a way that constrains juries to follow a different sort of technology in exercising their factfinding responsibilities. By contrast, the *Restatement* defers the policy issue of categorical acceptability to the more populist-oriented branches of government—the legislative and executive branches.¹³ In the cases of marginal (rather than categorical) defectiveness that belong in court, the *Restatement* gives jurors the freedom to incorporate a variety of factors in determining liability.¹⁴ In the end, by emphasizing the negative qualities of risk-utility analysis, Professor Kysar leaves design defect liability to the whims of a few academically-oriented experts who, through the medium of relatively soft technology, will be only too happy to tell jurors what Americans really want.

The second aspect of Kysar's endorsement of categorical liability that deserves mention is his twin-test approach, in which what consumers actually expect trumps technology when elevated expectations support liability, but is itself trumped by technology when lower expectations would negate liability. In his plan, expectations serve as a sword, but not as a shield. This strikes us as self-contradictory. Once Professor Kysar convinces the reader that the actual, concrete values and expectations of consumers deserve to trump technology and control liability outcomes, why should those values and expectations not hold sway whichever way they cut from a liability standpoint? We suspect that part of his agenda in advocating this twin-test approach is to move the design liability system closer to what he refers to at the outset of his article as "enterprise liability"—strict liability, or "absolute manufacturer liability" without a requirement of defect.¹⁵ His apparent fondness for that doctrine, implicit in this article and explicit in his previous work,¹⁶ may explain his willingness for courts to impose category liability. Enterprise liability is certainly part of his explanation of how manufacturers will respond rationally to the mixed signals sent by his twin-test approach. According to Kysar, manufacturers will not necessarily withdraw products from the market that expose them to the double whammy of being liable no matter which design alternative they choose; they may simply pay the no-fault liability tax and get on with their business.¹⁷ Finally, the enterprise liability principle may explain Kysar's willingness to impose liability based on assessments of consumer perceptions at the time of trial—assessments to which manufacturers could not have had access when making their design deci-

13. See *supra* note 9 and accompanying text.

14. See Third Restatement, *supra* note 1, § 2 cmt. f.

15. Kysar, *supra* note 2, at 1708.

16. See Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420, 1554–55 (1999) (arguing that system of enterprise liability would best combat market manipulation of consumers and increase product safety).

17. See Kysar, *supra* note 2, at 1785; see also Hanson & Kysar, *supra* note 16, at 1557 (arguing that under enterprise liability, manufacturers of relatively dangerous products will simply charge more to bear increased liability costs).

sions. On his view, liability is aimed not at explicitly guiding corporate conduct, but at internalizing the social costs of that conduct.

III. KYSAR'S CONCRETE EXAMPLES: AIR BAGS, BLACK TALONS, AND TOBACCO

Perhaps the best way to illustrate our objections to Professor Kysar's proposal is to examine briefly the three concrete examples that he uses to show how his approach would reach more desirable outcomes than would be reached under the *Restatement*. As will be made clear, we have some difficulty seeing how these examples support his thesis. Of the three, the one involving competing air bag designs is the most novel and the only one that involves judicial application of the *Restatement's* concept of reasonable alternative designs.¹⁸ Professor Kysar posits two competing air bag designs, A and B, each of which saves the lives of 3,000 automobile occupants over a given period of use. Over the same period, design A unfortunately kills 100 adult occupants who would have survived without the device, and design B kills 90 occupants. Kysar correctly observes that, from a risk-utility standpoint, design B is preferable to design A because it provides the same benefits as A and kills fewer people. Moreover, the availability of design B to the manufacturer of design A would presumably render design A defective under the new *Restatement*. Kysar then introduces the wrinkle that the 100 lives lost under design A are divided equally among adult men and women, but that the 90 lives lost under design B are mostly women. He implies that the *Restatement's* risk-utility test is committed to the earlier conclusion that design B is preferable and design A is defective—under risk-utility, after all, lives are lives—but that under his new approach, design A might not be defective if an expert testified that consumers actually prefer design A, although riskier overall, because of its gender neutrality. Thus, Kysar seems to be implying that the reinvigorated consumer expectations test would approve a product design (design A) that the *Restatement* test would automatically condemn.

This is interesting, but it does not accurately reflect the *Restatement's* likely treatment of the competing air bags situation. Consider the case of an action against the manufacturer of design A by a plaintiff who represents a male occupant killed by that design. Under the *Restatement*, the plaintiff would point to design B as a reasonable alternative and would reach the jury with the claim. However, contrary to Professor Kysar's apparent assumption, liability does not automatically follow under the *Restatement*. In answering the further question of whether the defendant's omission of design B rendered design A not reasonably safe, the jury would presumably hear the same expert testimony about the reasons for consumers' preferences for design A and would be allowed to reach the

18. See Kysar, *supra* note 2, at 1768–69.

same nuanced outcome of nondefectiveness that Kysar appears to prefer.¹⁹

Now let us consider a different variation of the air bag example, one that bears out Kysar's conclusion that the consumer expectations test and the *Restatement* test would reach opposite results. Suppose that the plaintiff represents a female occupant killed by design B, the one that kills mostly women. Can the plaintiff rely on design A as a reasonable alternative design and use it to condemn design B as "not reasonably safe"? At first blush, having just considered the mirror-opposite version involving a male occupant, one might answer in the affirmative. Given that the *Restatement* would allow a jury in the first variation to consider gender neutrality to justify the adoption of design A, one might assume that it would allow the same consideration in the second variation to condemn design B as defective. Closer examination of the relevant *Restatement* language, however, reveals this is probably not the case. In this second variation of the air bag example, we believe that the plaintiff would suffer judgment for the defendant as a matter of law. This outcome is not a result of the reasonableness concept upon which the outcome rested in the first variation. Rather, it is a result of the requirement in section 2(b) that adoption of the plaintiff's proposed alternative design *must reduce or avoid the foreseeable risks posed by the product*.²⁰ Because design A is not safer than design B from an overall safety standpoint, the plaintiff in the second variation arguably should lose as a matter of law. By contrast, the plaintiff in the first variation reaches the jury because his alternative, design B, is safer overall.

Of course, one might argue that the risk reduction language of section 2(b) should be read to refer to the risks to the particular victim class—in our second variation, women—of which the plaintiff's decedent was a member. For women, air bag A is a safer design. But comment f to section 2(b) contains language emphasizing that "safety" means "overall safety," making such an argument more difficult.²¹ Admittedly, comment f's "overall safety" language could be construed to allow the female victim's claim to reach the jury—that portion of comment f could be read to refer to the types of risks to any given victim class, not to comparisons across classes. On balance, however, we do not believe that courts should read the *Restatement* in this manner. The requirement that the plaintiff's reasonable alternative design be safer than the defendant's design, all risks considered, is a bedrock principle in the *Restatement's* treatment of

19. Ironically, of course, Kysar's twin-test rule, coupled with his sterner vision of risk-utility, would probably deny the manufacturer of design A this expectations-based shield, and thus would condemn air bag A as defective, even though the consumer expectations part of his analysis would favor the contrary outcome. This is the self-contradictory aspect we puzzled over earlier.

20. See Third *Restatement*, *supra* note 1, § 2(b).

21. See *id.* § 2 cmt. f ("When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered.").

design defectiveness. To allow juries to deem designs defective that are actually safer than the alternative designs upon which plaintiffs rely, based on considerations such as gender neutrality, would seriously undermine the *Restatement's* objective of promoting greater product safety rather than promoting other, albeit important, social interests at the cost of safety.

Along with its endorsement of category liability, this is the aspect of Professor Kysar's proposal that we find most troubling. Our concern is that, under his plan, as long as an expert psychologist can convince a jury that consumers are willing to accept less overall automobile safety in exchange, say, for better gas mileage (an environmental consideration), a plaintiff injured by a safer but less fuel-efficient automobile might be allowed to recover damages based on proof that consumers disapprove of the manufacturer's decision to adopt a safer but less fuel-efficient alternative—assuming, of course, that the plaintiff can satisfy Professor Kysar's proximate cause requirements. We anticipate that Professor Kysar would argue that the air bag example pits safety-to-women against safety-to-men in the context of treating men and women equally and, unlike increased fuel efficiency, raises a "safety" issue. But regardless of how one frames the issue, the simple fact is this: Relying on what expert psychologists say about actual consumer expectations, Kysar would condone harming one victim class in order to help another victim class, even when overall safety is thereby reduced, all in the name of social interests such as gender neutrality or environmentally-motivated fuel efficiency.

It is not the notion of tradeoffs among classes of consumers, as such, that bothers us—that is what risk-utility is all about, and we would allow the jury in the first air bag variation to deny plaintiff's recovery on that ground. Rather, it is the proposition that such tradeoffs may condemn a design as defective even when the alternative design proposed by the plaintiff would diminish the aggregate safety of all accident victims. We reject the idea of trying to accommodate a more sensitive, politically acceptable outcome in that admittedly unusual case²² by allowing courts in the run of cases to redefine "safety" in ways that actually increase overall product risks. Kysar's proposal strikes us as highly susceptible to manipulation across the run of cases, and would open every product design to attack on what are, from a safety standpoint, tangential policy grounds. We believe that the "overall safety" approach in the *Restatement* will lead to a better mix of outcomes in the long run, even if it seems to sacrifice some worthwhile interests in the short run. As we have indicated, the relevant language in the *Restatement* could be construed to allow for Kysar's preferred outcome in the second variation of the air bag example, but we urge that it not be so construed.

22. Although Professor Kysar insists the example is "not entirely implausible," he admits it is "purely hypothetical." See Kysar, *supra* note 2, at 1768 n.282.

Professor Kysar's second example, based on Black Talon bullets, moves us away from considerations of safer alternative designs.²³ The victim of a shooting incident sues the manufacturer of the type of bullet used in the shooting, a Black Talon, that is deliberately (and viciously) designed to maximize the destruction of human tissue upon impact with the victim's person. The plaintiff cannot establish a reasonable alternative design because ordinary bullets lacking the unique destructive feature are not, by definition, acceptably close substitutes for the superdestructive Black Talons. Thus, under the *Restatement*, the plaintiff would be seeking to impose category liability and would be denied as a matter of law. A court might give effect to comment e to section 2(b) and allow liability under a "manifestly unreasonable design" exception, but that is admittedly an unlikely response. Kysar suggests that under his new approach, expert testimony would be available to show that most Americans, in fact, abhor the Black Talon design, and the plaintiff's claim would be allowed on that basis. The clear implication of Kysar's analysis is that, under the *Restatement's* risk-utility analysis, all deaths are alike and the hollow-point bullets are no more objectionable than any other life-threatening ammunition. Only under Kysar's approach would the defendant's bullets receive the legal treatment they deserve.

Our problem with this analysis is that, as explained earlier, the reason the *Restatement* would reject category liability on these facts is not that hollow-point bullets are socially acceptable. Clearly they are not, and courts do not need expert psychologists to tell them that. Instead, the *Restatement* rejects category liability because it is believed to be beyond the proper bounds of judicial competence to make such categorical risk-utility decisions. On the widely accepted view reflected in the *Restatement*, questions of social acceptability of that sort are broad policy questions that do not lend themselves to being adjudicated and should be left to more politically accountable branches of government that are institutionally competent to make such decisions. Once again, Kysar might argue that juries under his approach are not making policy decisions but merely determining what consumers expect as a matter of fact. Notwithstanding Kysar's efforts to constrain juries to a factfinding role, however, their "findings" will inevitably involve some measure of normative decisionmaking. Indeed, Kysar explicitly refuses to require juries to base their findings of what consumers expect on expert testimony, or even to require plaintiffs to introduce expert testimony, leaving juries, implicitly at least, to reach their findings of fact based in part on their own intuitions.²⁴

23. See *id.* at 1767.

24. See *id.* at 1774 n.309 (concluding that the issue whether to require plaintiff to introduce expert testimony "is better left to the courts"). As mentioned earlier, we believe that the *Restatement's* reasonable alternative design approach gives jurors more leeway to rely upon their own values than does Kysar's plan. See *supra* text accompanying note 14. However, the *Restatement's* requirement that plaintiffs first prove the existence of a feasible alternative design carefully restricts the scope of jurors' normative decisionmaking, and

Moreover, regardless of how jurors reach decisions under Kysar's approach, judges will exercise legislative power when they give effect to those decisions in their categorical judgments, and neither judges nor jurors are politically accountable for the broad policies they are thereby implementing.

Professor Kysar's third example, based on tobacco products, involves another highly controversial product category that is much on the minds of regulators these days.²⁵ He correctly observes that reasonable alternative designs are not available to plaintiffs in these tobacco cases and correctly concludes that design-based liability under the *Restatement* is available, if at all, only under comment e's "manifestly unreasonable" exception. After describing a litany of reprehensible marketing behavior by tobacco companies that the *Restatement* would presumably refuse to take into account in assessing the manifestly unreasonable nature of tobacco products under comment e, he concludes that, since such behavior manipulates consumer perceptions of the relative safety of tobacco products, it should be subject to design-based liability. Under his version of the consumer expectations test, it would be.

Once again, as Professor Kysar appreciates, he is urging courts to impose category liability on controversial products. We will not repeat here our objections to category liability based on the inappropriateness of courts making such policy decisions. What interests us most about Kysar's tobacco products example is that it reveals an analytical trap that often arises in discussions of design defect liability: the assumption that all manner of manufacturers' bad conduct must somehow be addressed under the heading "design defectiveness." Even assuming that the marketing behavior Kysar describes should bring tort liability, such liability is no less significant when imposed under the headings "failure to warn," "misrepresentation," or "consumer fraud." The *Restatement* would prefer to deal with errant corporations under those more straightforward auspices than to stretch design defectiveness, via the new consumer expectations rubric, to include inappropriate marketing practices. Of course, these other branches of products liability law impose their own requirements that plaintiffs must meet, and allowing tobacco claims under an expanded version of category liability better serves the implicit objective of enterprise liability. Thus, bringing a suit under one of these other claims may not be as attractive to proponents of expanded liability. Still, recent case law suggests that courts are indeed imposing liability for the marketing behavior Kysar describes, on doctrinal bases other than defective design.²⁶

therefore prevents juries from deciding broad policy questions. Kysar's approach provides no such ex ante constraint.

25. See *id.* at 1769–71.

26. See, e.g., *Williams v. Philip Morris Inc.*, 48 P.3d 824 (Or. Ct. App. 2002) (allowing widow to recover from cigarette manufacturer on theory of fraud for husband's smoking-related death), adhered to on reconsideration, 51 P.3d 670 (refusing to reduce punitive

CONCLUSION

At bottom, the difference between our view of product design liability and Professor Kysar's view is that we insist that the plaintiff introduce proof of a safer reasonable alternative design in every case not falling within one of several important exceptions, and he does not. Unlike the current consumer expectations test, which he rejects as hopelessly vague and unprincipled, he suggests a version based on cognitive psychology that, at least by comparison, offers some hope of methodological rigor. While we have grave misgivings on the question of whether the psychological expertise would be able to deliver what he asks of it, we are ready to assume for argument's sake that it might. Even so, we fail to see the need for a new version of consumer expectations. Kysar has overstated the narrow-mindedness of the *Restatement* approach, and he has understated the problems that his version of what we view as category liability would bring. Not only would his version of category liability encourage courts to exceed their institutional capabilities, but also it would lead to unacceptable levels of indeterminacy. As we have explained, much of our concern relates to comparative institutional competence. Perhaps our five-year stint as Reporters to the *Restatement* project has caused us to be overly concerned with the formal aspects of products liability law. But if ex-Reporters do not worry about the formal structures of that subject, who will?

damages), review denied, 61 P.3d 938 (Or. 2002), vacated, 2003 WL 21020159, at *1 (U.S. Oct. 6, 2003) (remanding in light of holding on excessive punitive damages in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003)).