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DESIGN DEFECT. LITIGATION REVISITED

James A. Henderson, Jr. †

For more than a year I have followed the work of the four co-authors¹ of the preceding Article,² and with growing interest have become aware of the implications of their work to mine. Thus, when Professor Twerski sent me a copy of their latest manuscript, I was delighted. Since the publication of my own Article in the *Columbia Law Review*,³ I have come to feel somewhat like a passenger on a ship at sea who discovers (or thinks he has discovered) a growing leak below the waterline which threatens the ship with destruction.⁴ Telling others of my discovery, I have frequently encountered two types of reactions: either, "What leak? What water?" or "Yes, aren't we fortunate! Now we will be able to swim below decks!" The reaction of these four authors, however, has been different. As I read their published work, including this latest article, these authors have also seen the rising water in the ship's hold and recognize the threat it poses to all on board.⁵ Listening to their proposed remedy of the situation, however, I am still fearful for my life. Having recognized the rising water level and its threat to the ship, the authors deny that it is caused by anything so basic as a leak in the hull. Instead, they indulge in their own version of the "swimming pool" reaction, with the difference that they feel the water has been allowed to get too deep. "Let's man the bilge pumps," they advise, "and get the below-decks swimming pool into more manageable proportions." Such advice, if taken, may buy us a little more time, but in the end the ship is doomed. Grateful as I may be to them for recognizing that we must do something about the rising water in the hold, the substance of their proposal has me frantically looking for a life preserver.

In responding to my earlier analysis, the authors reach four

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¹ E.g., Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEXAS L. REV. 1303 (1974); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974).

² Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976) [hereinafter cited as Twerski].

³ Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) [hereinafter cited as Henderson].

⁴ *Id.* at 1539, 1578.

⁵ Twerski 535-36.

basic conclusions. They are, in the sequence in which they appear: (1) that the failure-to-warn issue is as complex and polycentric as the issue of defective design;⁶ (2) that design defect questions are not very polycentric and can be answered by the courts employing proper litigation techniques;⁷ (3) that design defect cases present a "litany of litigation problems;"⁸ and (4) that these problems can be solved by replacing our "Model T litigation process" with more sophisticated trial methods.⁹ The only one of their conclusions with which I am in substantial agreement is the third—the litigation problems which the authors recognize are as threatening to the survival of our common-law products liability system as rising water in the hold would be to the survival of a ship at sea.

However, as for the other conclusions reached by the authors, I could not disagree more. As I shall try to demonstrate in the remarks that follow, the authors apparently fail to understand the concept of polycentricity as I advanced it in my earlier Article. As a consequence, they have erred in assessing the relative feasibility of the theories of failure to warn and design defect, and they have erred in their conclusions regarding what should be done to reduce what they properly recognize to be threats to our common-law process of products liability litigation. The four co-authors have seriously misdiagnosed the source and nature of the problem. Their suggested solution, if accepted and relied upon, would almost certainly doom to destruction the common-law products liability system which all five of us respect and admire.

I

JUDICIAL IMPLEMENTATION OF THE DUTY TO WARN

Nowhere in their Article do the authors reveal more clearly their misapprehension of my thesis than in their treatment of failure to warn. Essentially, what I said in my Article was that adjudication has discernible limits and that courts cannot solve every kind of problem in our society, including the problem of design safety. Products liability commentators have focused almost entirely upon the substantive objectives of the liability system, and have overlooked this important truth regarding the appropriateness of the means of achieving those objectives. As desirable as it might be from the

⁶ *Id.* at 500-01.

⁷ *Id.* at 525.

⁸ *Id.* at 534.

⁹ *Id.* at 536.

perspective of social welfare to implement governmental review of manufacturers' conscious design choices, courts are not suited to perform that review independently. What courts can do (besides applying specific standards established extrajudicially) is to implement a failure-to-warn approach which, though admittedly inadequate in some instances to achieve necessary levels of product safety, at least does not threaten the procedural integrity of our judicial system. If failure to warn proves insufficient, as it will in some situations,¹⁰ then other governmental responses will be necessary.¹¹ But to ask courts to deliver more than they are capable of delivering is to send them on a suicide mission.¹² In effect, I argued that in the area of design we ought not let our traditional obsession with the objective of product safety blind us to the reality that adjudication is not a suitable means of achieving that end.

What, then, is the perspective that the authors adopt from the outset in attempting to answer my thesis? They focus upon the end-objective of achieving socially acceptable levels of product safety. And what is the first point of substance which the authors advance by way of "rebuttal" of my thesis? They insist that failure to warn is not "the panacea for all ills,"¹³ and that "it will not be possible for the courts to rely on warnings alone to ensure product safety."¹⁴ With all respect, this sort of talk begs the very question I raised. I asked whether, assuming that the failure-to-warn approach is not a "panacea," we can responsibly ask more of the courts. By assuming that the mission of the courts is "to ensure product safety," the authors have assumed away my thesis that such a mission would be suicidal. In fairness, I should recognize that they also advance the thesis that courts are suited to doing more—*i.e.*, to reviewing the reasonableness of product designs—and I shall turn to their thesis in this regard shortly. However, the reader should be fully aware of this "failure-to-warn-is-not-a-panacea" technique, oft-repeated throughout their analysis,¹⁵ by which the authors shift attention from the limits of adjudication-as-a-means to the desirability of product-safety-as-an-end. If my thesis is correct, then all of their talk about the social desirability of courts "ensuring product safety" completely misses the point.

The main thrust of the authors' treatment of failure to warn at

¹⁰ Henderson 1560 n.122 and accompanying text.

¹¹ *Id.* at 1574-77.

¹² *Id.* at 1578.

¹³ Twerski 500.

¹⁴ *Id.* at 517.

¹⁵ *Id.* at 500, 503, 509-10, 514, 517, 537, 539-40.

least appears to meet my thesis directly. They argue that failure to warn is just as complex, and involves the same levels of polycentricity, as design defect.¹⁶ Their argument consists of two points. First, they insist that in deciding whether a manufacturer should warn of a hidden risk, the court must consider, among other factors, whether the warning will have an adverse effect upon the marketability of the product in question.¹⁷ In response, I am willing to concede that consideration of such a factor by a court would render the failure-to-warn issue exceedingly polycentric. However, it is nonsensical in the first place for the authors to suggest that such a factor should or would be considered by a court in connection with the failure-to-warn issue. That is, the entire thrust of the failure-to-warn concept is a "let the chips fall where they may" commitment to disclosure, regardless of the impact of disclosure upon the party making it. In fact, I would insist that the duty to warn is imposed precisely because it is anticipated that it may have an adverse impact upon the product's marketability. This has clearly been a matter of first principle both in products liability¹⁸ and in other areas of our law dealing on a

¹⁶ *Id.* at 500-24.

¹⁷ [I]f to impose the kind of warning that will truly reduce the risk will lead to nonmarketability, then the court must consider what alternatives consumers will seek in order to replace the dangerous product. If, as a result of an adequate warning, consumers will be faced with alternatives that are even more dangerous than the questioned product without a warning, then perhaps the warnings should not be imposed or if imposed should be couched in less frightening language.

Id. at 503.

¹⁸ In one of the classic design defect decisions in our law, *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the court stated the failure-to-warn principle in these words:

If, because of the alleged undisclosed defect in design of the 1963 Corvair steering assembly, an extra hazard is created over and above the normal hazard, General Motors should be liable for this unreasonable hazard. Admittedly, it would not sell many cars of this particular model if its sales "pitch" included the cautionary statement that the user is subjected to an extra hazard or unreasonable risk in the event of a head-on collision. But the duty of reasonable care should command a warning of this latent defect that could under certain circumstances accentuate the possibility of severe injury. . . .

391 F.2d at 505-06.

Of course, unique cases can arise in which courts are tempted to countenance nondisclosure on the ground that the overall good of society will be furthered by keeping consumers ignorant of risks associated with product use. One such unique case may arise in the context of a mass immunization of the public against dangerous, communicable disease. In an action brought against the drug company by one injured by inoculation, if the court became convinced that immunization was clearly in the public interest it might be tempted to countenance nondisclosure of the risks to the public as a means of facilitating the immunization process. Although several courts have hinted in this direction (*see Reyes v. Wyeth Labs., Inc.*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121 (9th Cir. 1968)), the decisions thus far are fully supportive of the traditional "let the chips fall where they may" approach. *See generally* Kidwell, *The Duty to Warn: A Description of the Model of Decision*, 53 TEXAS L. REV. 1375 (1975). In any event, it should be obvious that the

regular basis with duties to disclose,¹⁹ and I expressly made it a part of my own analysis of the subject.²⁰ It is simply incomprehensible to me why the authors would suggest otherwise in their Article.²¹

Their second basic point in connection with failure to warn is also erroneous, although less astoundingly so. The authors appear to insist that, even assuming a commitment to full disclosure, the question, "When do warnings become so trivial, or numerous, as to be counterproductive?" is itself sufficiently polycentric to be beyond the ability of courts to answer. They posit the specter of requiring "laundry lists" of warnings,²² to which users and consumers will inevitably become inured to the point that attempts to warn will

issues presented by cases arising from the mass immunization of the public against deadly disease are completely atypical and unique. (Cf. the discussion in the following footnote of the disclosure under federal securities laws of bribes to foreign officials.)

¹⁹ Perhaps the clearest example in our law of this traditional commitment to the "let the chips fall where they may" principle of disclosure is in connection with the sale of securities governed by the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh (1970). Two recent developments have tested this principle in the strongest manner. The first concerns the disclosure requirements in connection with real estate investments that are credit extensions to Real Estate Investment Trusts (REITs) when those Trusts are in default. Although a strong argument can be made that full disclosure will in some cases hurt a large number of the very class of persons meant to be protected by the securities laws, disclosure is nonetheless required. See 5 SEC Docket 772 (1974-75). An even stronger argument for nondisclosure is advanced in connection with the overseas dealings of some large American corporations, when bribes are occasionally given to foreign government officials. Should the companies be required to disclose such unsavory dealings, even if disclosure would probably hurt those same corporations in future transactions abroad? Although the final resolution of this problem is yet to come, it appears likely that the Securities and Exchange Commission will require disclosure. For the view of one member of the SEC that exceptions to the rule of full disclosure, if they are to be made at all, should be established by Congress, see Sommer, *The Limits of Disclosure*, FINANCIAL EXECUTIVE, Oct. 1975, at 46, 50-51.

For a discussion of the physician's duty to inform his patients of the risks incident to medical treatment, see Henderson 1559 n.121. To the extent that courts have allowed physicians to weigh the patient's health in deciding whether to inform, they have not submitted to review the custom of the medical profession in this regard. In contrast, the authors here call for a "disclose only when in the best interests of society" rule, with case-by-case judicial review of the reasonableness of manufacturers' decisions.

²⁰ Henderson 1559 n.121.

²¹ Quite frankly, I find much of what the authors say about the relationship between warning and design incomprehensible. On page 505 of their Article, for example, they state: "[T]o impose the kind of warning that might make the product reasonably safe constitutes ipso facto an instruction to the manufacturer to redesign it in a manner that will sharply reduce its danger level." Can they be unaware of the significance of the phrase "ipso facto" in their statement just quoted? The point of my analysis is that, by the very process they describe, courts can influence manufacturers' product design decisions without being required to decide how, even at a minimum (see note 47 *infra*), those products should be redesigned. Their sentence just quoted is an apt statement of the basic point I am trying to make. Why should I argue my position when they argue it so eloquently?

²² Twerski 516.

become futile, and self-defeating. My response here is simply to recognize that "full disclosure" is not the same as "disclosure of every detail," and that it may become necessary for courts to decide in some cases²³ whether what at first glance appears to be full disclosure has, in reality, become concealment. However, I insist that in any event these kinds of questions are not sufficiently polycentric to render them unadjudicable.

That these questions are not polycentric deserves further elaboration. Once we dismiss the authors' first suggestion (that the commitment to disclosure should be mitigated by considerations such as the short-run interests of the manufacturer or the long-run good of society), and we properly adopt the traditional "let the chips fall where they may" principle of disclosure, the further question of what constitutes disclosure in a particular case is not so open-ended as to be unadjudicable. The questions, "How much warning is enough?" and "How much warning is too much?" are fundamentally different from the "How much product safety is enough?" question involved in a design defect case. The former questions are decided along a single value axis (*i.e.*, maximum information to the user or consumer), whereas the latter question is decided by balancing the various competing values recognized in the society.²⁴ The inquiry in a duty-to-warn or duty-to-disclose case is essentially factual—*i.e.*, "What are the limits of the recipients' understanding and ability to understand, and how may the objective of informing the recipients best be accomplished in light of those limits?" The inquiry in a design defect case, on the other hand, is substantially normative—*i.e.*, "What is a reasonable mix of the competing values at stake in setting the minimally acceptable level of design safety?"

As I recognized in my Article,²⁵ if the design defect inquiry were to be rendered unidimensional—if the only value recognized in such cases were the safety of the consumer—the inquiry into defectiveness in design cases would become as manageable as the inquiry in connection with failure to warn. But, unlike the issue of failure to warn, the issue of unreasonable design is most certainly *not* unidimensional, and courts *are* required to balance competing values.²⁶

²³ The cases will be rare because the manufacturers' self-interest will curb any tendency to overdo warnings. The authors apparently agree with me here, at least in a different section of their Article. On page 504, they speak of the judicial "sensitivity to the harshness of an edict that would require a manufacturer to place on a product a warning which would destroy its marketability." If they are correct in perceiving that courts are sensitive to the impact of warnings, then I must be correct here in attributing even greater sensitivity to manufacturers.

²⁴ See text accompanying notes 32-47 *infra*. See also Henderson 1540.

²⁵ Henderson 1554.

²⁶ *Id.*

The point here is not that failure-to-warn cases are never complex; it is rather that they are not polycentric in the way that design defect cases are.²⁷

In fairness to the authors' treatment of the failure-to-warn issue, I should acknowledge several contributions which they have made to my understanding of the subject. In particular, I find their analysis of the "when in doubt, warn" tendency²⁸ useful, and I would agree that some courts should exercise greater responsibility in overseeing implementation of the failure-to-warn concept. Moreover, their analysis of warnings that do not reduce inherent risks,²⁹ together with their conclusion that cases such as *Davis v. Wyeth Laboratories, Inc.*,³⁰ must be differentiated from the standard failure-to-warn case, represent for me valuable insights. However, these last-described points in no way support the authors' attempt to respond to my thesis—this particular portion of their analysis has nothing whatever to do with whether the failure-to-warn issue is or is not so polycentric as to be beyond the limits of adjudication. The authors admit as much at the outset of their discussion of failure to warn³¹ and it is important for the reader to appreciate that a substantial portion of the authors' treatment of failure to warn is irrelevant to their rebuttal of my thesis. In fact, the sensible and useful portions of their treatment of this subject are completely consistent with my analysis of the same subject in the earlier Article to which they make repeated reference.

II

JUDICIAL REVIEW OF PRODUCT DESIGN

I trust it is obvious that the success of the authors' attempt to rebut my thesis depends upon the persuasiveness of their argument that "design defect cases . . . are not really all that polycentric."³² Essentially, the authors attempt to distinguish truly polycentric issues from design defect issues on the basis that in cases involving the former, "courts are thrown a complex problem and asked to resolve it on no basis other than general notions of fairness and equity. . . . There is no central focal point that becomes the axis

²⁷ Complexity is not the same thing as polycentricity; it is not the number of issues that is primarily important, but the way in which the issues are related interdependently. *Id.* at 1535-36.

²⁸ Twerski 513.

²⁹ *Id.* at 517-21.

³⁰ 399 F.2d 121 (9th Cir. 1968), discussed in Twerski 517-21.

³¹ Twerski 500.

³² *Id.* at 525.

upon which all considerations must turn.”³³ On the other hand, they argue, “the focal point of [a design defect] case is clearly defined. It revolves around the question of whether . . . the product is not unreasonably dangerous.”³⁴ With all respect to the authors’ obvious sincerity, the distinction which they have advanced is nonexistent.

In the first place, it is unfair to say of the cases which they admit involve polycentricity that the courts would be guided only by general notions of fairness and equity. In Fuller’s prime example, the division of the art collection between two museums,³⁵ the court presumably would be “guided” by what it perceived to be the special needs of each museum as revealed by the evidence. And to assert that the concept of “unreasonable danger”—*i.e.*, “reasonable needs of society for product safety”—is inherently any more specific or precise than “reasonable needs of the art museums” is patently absurd. The authors recognize, as they must, that in deciding the question of “unreasonable risks,” the courts must weigh competing factors such as costs, aesthetics and functional utility.³⁶ I submit that these are precisely the same variety of factors (admittedly couched in different language) that the court would weigh in deciding upon a reasonable division of the paintings in Fuller’s case. To be sure, if safety were to become *the only consideration*, the design defect issue would become single-centered and manageable. But such a position is not, and never has been, recognized in our law³⁷—as the authors themselves are forced to admit.³⁸

What, then, could the authors possibly have in mind when they assert that safety, in a design defect case, becomes “the axis upon which all considerations must turn?” Quite obviously, they mean that in court, presumably for the first time, safety moves to the head of the list of priorities among the various competing factors to be weighed in reaching a decision regarding the reasonableness of the design.³⁹ At the designer’s drawing board, safety was merely one factor among many; in court, it becomes the most important factor. But what does this point have to do with the degree of polycentricity posed in either situation, so long as safety does not so dominate

³³ *Id.* at 526.

³⁴ *Id.*

³⁵ See Fuller, *Adjudication and the Rule of Law*, 1960 PROCEEDINGS AM. SOC’Y INT’L L. 1, 3-4, discussed in Twerski 525-26.

³⁶ Twerski 526.

³⁷ See note 27 and accompanying text *supra*.

³⁸ Twerski 526.

³⁹ See *id.*

in-court analysis as to become, in effect, the *only* factor to be considered? In a word, "nothing."

What the authors are really saying here is that the shift in perspective that they postulate⁴⁰ makes it possible for courts to disagree with the designers—to impose liability in some instances for what are determined to have been unreasonable design choices. Once again, the authors have returned to their basic theme that courts ought to decide the design defect issue because courts will thereby advance the social objective of increasing levels of product safety. What began as an attempt to address the question of whether this particular means (adjudication) is suited to achieving the ends of increased product safety has, once again, been subtly transformed into an assertion that the ends justify the means. Any doubt that this is what has happened is eliminated by the authors' statement at the conclusion of the design defect portion of their Article: "[S]afety is much too important to be left to the designers."⁴¹ To such an assertion I am forced to reply that it begs the very question sought to be answered. Even if it were true that the court would weigh the various factors differently, the fact remains that the problem of weighing the various factors would retain its full measure of polycentricity.⁴²

If this Article were the authors' only published work addressing the in-court handling of the design defect issue, I would nevertheless maintain that the clear meaning of their analysis is as I have characterized it. However, the authors have simplified the task of interpreting their perception of the nature of the design defect issue. In light of the two Articles published by these same authors within the last two years, there can be no doubt that the task of reviewing product design, which they would turn over to the courts to perform, is exceedingly polycentric. Indeed, writing in the *Texas Law Review* in 1974, they described the task for the courts in this way:

It is time to abandon the perspective of the reasonable consumer and the reasonable seller and formulate the strict liability question for what it is. The issue in every products case is whether the product *qua* product meets society's standards of acceptability. The unreasonable danger question, then, is posed in terms of whether, given the risks and benefits of and possible alternatives to the product, we as a society will live with it in its existing state or will require an altered, less dangerous form. Stated succinctly, the

⁴⁰ *Id.* at 526-27.

⁴¹ *Id.* at 532.

⁴² See Henderson 1540 nn. 28-29 and accompanying text.

question is whether the product is a reasonable one given the reality of its use in contemporary society.⁴³

In their Article in the *Duquesne Law Review* in the same year the authors asserted:

The criteria against which the defective and unreasonably dangerous nature of any product is tested are broad and far reaching. In a leading article, Dean Wade has provided a list of seven succinct indicia for this purpose:

- 1) The usefulness and desirability of the product
- 2) The availability of other and safer products to meet the same need
- 3) The likelihood of injury and its probable seriousness
- 4) The obviousness of the danger
- 5) Common knowledge and normal public expectation of the danger (particularly for established products)
- 6) The avoidability of injury by care in use of the product (including the effect of instructions or warnings)
- 7) The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

While certain of these indicia may be quantifiable with the remainder requiring subjective evaluation, the final decision as to whether a product is in fact defective and unreasonably dangerous is an amalgam of all seven. . . .

. . . . This decision has major social and societal significance. It should be made with full understanding of the complex trade-offs which are involved in product design.⁴⁴

It is simply incomprehensible to me how, in light of these quotations from their recent work in the design defect area, the authors can now assert that "design defect cases . . . are not really all that polycentric."⁴⁵ I leave it to the reader to try to reconcile their just-quoted statements with the same authors' assertions in their latest Article that "the focal point of [a design defect] case is clearly defined."⁴⁶ Moreover, notwithstanding their insistence in this latest Article that, in court, safety moves to the head of the list of priorities, what factor appears at the head of the list they adopted as their own in the above quotation from their earlier Article? "The usefulness and desirability of the product"! Enough said.⁴⁷

⁴³ Donaher, Piehler, Twerski and Weinstein, *supra* note 1, at 1307 (footnote omitted).

⁴⁴ Weinstein, Twerski, Piehler & Donaher, *supra* note 1, at 429-30, 433-34 (footnotes omitted).

⁴⁵ Twerski 525.

⁴⁶ *Id.* at 526.

⁴⁷ Well, almost. The authors raise two other points in their effort to characterize the

III

A SENSIBLE SOLUTION TO THE "LITANY
OF LITIGATION PROBLEMS"

It will be recalled that the authors and I are in substantial agreement that the current approach to litigating design defect cases reveals serious symptoms of breakdown and debility.⁴⁸ Having rejected my thesis that the difficulties stem from the nature of the problems being brought to the courts for solution, the authors logically (though erroneously) conclude that the source of the problems must inhere in shortcomings of the litigation process itself. What should be done to correct the situation? Lest I misstate their position on this critical point, I will quote their statement of it verbatim. Referring to our traditional adversary system as "a Model T litigation process which cannot keep up with 1976-type problems,"⁴⁹ the authors explain:

There exists a naive belief by the bar that we can proceed to the trial of complex technological issues under the same format that has governed the presentation of everyday "fender-bender" automobile accidents. Unreasonableness of design, cause-in-fact, proximate causation, and assumption of risk are complex issues. They are often interrelated; yet, they are separate and distinct. To present these problems to a jury in a confused jumble and to ask them to unscramble the problem places too great a strain on the adjudication process. A design defect case cannot, we believe, be tried without a comprehensive understanding of both the product and the total environment of its use. Experts cannot continue to be used solely for the purpose of plugging a narrow evidentiary gap. The experts on either side cannot continue to

design defect issue as single-focused and manageable. I addressed both in my original Article, but they deserve a response here. First, the authors argue, at page 527, that the design defect issue is not polycentric because the standards set by the courts are "negative standards." I can only assume that they are referring to the fact that legal standards are minimum standards. However, as I pointed out in my earlier Article this fact does not detract from their status as standards of behavior, so long as the process of balancing various factors is involved. Henderson 1533 n.13, 1540 nn.28-29 and accompanying text. *See generally* L. FULLER, *THE MORALITY OF LAW* 3-13 (2d ed. 1969). The authors appear to admit as much at the outset of their Article when they assert "that courts have been actively engaged in setting product safety standards in a broad range of cases." Twerski 496.

The authors' second point is that the polycentricity is reduced in some cases because an isolated feature of the product is involved, rather than the entire product. Twerski 528. In some cases this may be true (*see* Henderson 1571 n.164 and accompanying text), but not very often. In most cases, the component part is sufficiently integrated into the whole to require the whole to be considered in the process of judging the acceptability of the part. *See* Henderson 1540 n.29.

⁴⁸ *See* Twerski 535.

⁴⁹ *Id.* at 536.

present *polar positions, rather than thoughtful intermediary positions* which most often truly represent the real area of disagreement without badly compromising the integrity of the case. And, as mentioned earlier, the wholesale acceptance of theoretical evidence cannot be permitted to taint the believability of the litigation process. Yet, as we have demonstrated, some or all of the aforementioned problems compromise the work-product of the best litigated products liability trials.⁵⁰

As I interpret the authors' statement, they are turning an old adage on its head: If Mohammed will not come to the mountain, then the mountain will come (or in this instance will be sent) to Mohammed. That is, if design defect cases are not being rendered amenable to adjudication, then adjudication will have to be modified to suit design defect cases. The nature of the suggested modifications could not alarm me more. In effect, the authors are urging that we try to solve the litigation problems in this area by making the adversary process less adversary and litigation less litigious. The core of their position is contained in that portion of the above quotation in italics—the problems arise because lawyers in these cases naively believe that they can continue to take the traditional “polar positions” of adversaries in a lawsuit, rather than the type of “thoughtful intermediary positions” one might associate with a thoughtful, sensitive discussion between friends. Lawyers, it turns out, are making the mistake of acting too much like advocates in these cases!

I cannot state my negative reaction to such a suggestion too emphatically. *Of course* litigation could handle polycentric problems if it were made over into a thinly veiled process of court-supervised and court-imposed compromise and negotiation.⁵¹ The authors' idea that we can or should rely upon the good will of the parties to narrow “the real area of disagreement” reveals them as more naive than the trial bar to whom they refer at the outset of the above-quoted statement. And the alternative of the court coercing the

⁵⁰ *Id.* at 535-36 (emphasis supplied).

⁵¹ Just because polycentric problems pose difficulties for adjudication does not mean they cannot be solved by other decision processes. *See* Henderson 1538. If my analysis is correct, the only way that the authors' suggested changes in litigation techniques could possibly render the problems manageable would be to change adjudication into an amalgam of other nonadjudicative techniques. These changes would, no doubt, be subtly disguised to preserve appearances. But the lawyer's instincts will detect the implications in the authors' suggestions that lawyers begin to present “thoughtful middle positions” and that judges begin to play a far more active role in determining how these cases are presented. Coupled with the authors' suggestion that neutral experts be utilized (*see* Weinstein, Twerski, Piehler & Donaher, *supra* note 1, at 460 n.31), the real substance of the authors' proposals should be clear to most lawyers who consider them.

parties into such a compromising stance is repugnant to my professional sensibilities (old fashioned as they may be in this regard). In effect, the authors would have the system of adjudication say to trial lawyers: "Look, we obviously cannot cope with this sort of case on the traditional assumptions of our adversary system. So, come on—ease up on your tendencies to represent your clients zealously, and agree to take *thoughtful intermediary positions* in the interests of what is good for society." If anyone doubts that this is exactly what is at stake in taking the authors' suggestions seriously, let him read Fuller's application of the polycentricity concept to the labor arbitration field,⁵² or review the actual experience of both trial courts and the bar in certain recent environmental law cases where, in effect, the reasonableness of environmental design choices are sought to be reviewed judicially on a fairly regular basis.⁵³

⁵² See Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3. In his Article, Professor Fuller posits a labor arbitrator presented with a polycentric problem and "intent on preserving judicial proprieties." *Id.* at 34. Recognizing what he calls the serious quandary facing the arbitrator in such circumstances, Fuller proceeds:

What modifications of his role will enable the arbitrator to discharge this task satisfactorily? The obvious expedient is a resort to mediation. After securing a general education in the problems involved in [reaching a solution], the arbitrator might propose to each side in turn a tentative solution, inviting comments and criticisms. Through successive modifications a reasonably acceptable [solution] might be achieved, which would then be incorporated in an award. Here the dangers involved in the mediative role are probably at a minimum, precisely because the need for that role seems so obvious. Those dangers are not, however, absent. There is always the possibility that mediative efforts may meet shipwreck. Prolonged involvement in an attempt to work out a settlement agreeable to both parties obscures the arbitrator's function as a judge and makes it difficult to reassume that role. Furthermore, a considerable taint of the "rigged" award will in any event almost always attach to the final solution. The very fact that this solution must involve a compromise of interests within the union itself makes this virtually certain.

Id. at 35. I submit that Fuller's description of the pressures upon the arbitrator, and the arbitrator's likely reactions to those pressures, accurately capture the essence of the authors' suggestions for modifying our process of litigation so that it can handle design defect cases satisfactorily. The dangers to which Fuller refers would be far greater if such conduct were indulged in by courts. See the discussion of an actual case in the following footnote.

⁵³ Perhaps the clearest example of a trial court reacting strongly and critically to what it perceived to be a lack of cooperation by defense counsel will be found in the district court decision in *United States v. Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974). The action in that case was brought to enjoin the defendant company's practice of dumping mining wastes into Lake Superior on the ground that the public health was thereby endangered. (Other defendants were joined, but that fact is irrelevant here.) As in product design actions, one important issue was the technological feasibility of alternative courses of conduct. The defendant is a large company employing thousands of persons in northeastern Minnesota. Quite understandably, the task of assessing the risks and balancing the various public interests at stake was most difficult and polycentric. After 139 days of trial, which involved over 18,000 pages of transcript, the federal district court entered an order enjoining the defendant from dumping wastes into the lake. Toward the end of a long opinion, the court reveals tremendous frustration and resentment over the defendant's failure throughout the trial to simplify the issues by adopting what the present authors would undoubtedly call "thoughtful intermediary positions":

Lest I be unfair to the work these authors have done elsewhere on the subject of "modernizing" the processes by which design defect issues are resolved, let me hasten to recognize that they have greatly condensed their views for the purposes of the present Article, and that my reaction to their condensation inevitably tends to some extent to oversimplify their position. I strongly urge readers who are intrigued with the authors' suggestions or concerned with the mix of problems all five of us have tried to describe to read the recent analyses by these same authors cited in this latest Article.⁵⁴ Quite frankly, there is much solid work and useful insight in what they have done, and they have enhanced this writer's understanding of products liability to no small degree. And yet, I believe that the authors' condensation of their position in this latest Article successfully and accurately reflects the essence of their proposed solutions

[I]n this litigation defendants steadfastly maintained that there was no feasible way for them to put the [wastes] on land. They claimed that the costs of such a system would be prohibitive and that furthermore such a system was technologically infeasible. It is the Court's conclusion that this position was taken by defendants in bad faith, that it was contrary to the facts as they knew them, and was pursued for the sole purpose of delaying the final resolution of the controversy.

380 F. Supp. at 64. In effect, what the court expected from the defendant was greater cooperation in the interests of the public good. The plaintiffs claimed that feasible alternatives were available, but apparently had difficulties in proving their claims. Given the potential threat to public health, the court felt that the defendant should have helped the plaintiffs prove their case. The court explains:

It is interesting to note that although the defendants claimed that the calcium situation was a problem that precluded them from developing an on land system of disposal and although they had at their disposal over 400 chemists, they had conducted no engineering studies in an effort to solve the problem.

380 F. Supp. at 68. And finally, referring to the defendant's refusal to develop and share with the court an adequate alternative disposal plan, the court concludes: "Such action in the defense of any lawsuit is a serious matter. In light of the issues in the instant case dealing with health and safety of thousands such action is intolerable." *Id.*

Understandable though the court's reactions in that case might be from a psychological perspective, I submit that in substance the court was admonishing the defendants for having insisted upon turning the case into an "old-fashioned Model T lawsuit." Of course, I am relying upon the opinion as my source of information as to what actually happened in this case. As I read the opinion, the "bad faith" to which the court refers was not a misrepresentation of existing fact, but rather a failure to cooperate in the court's efforts to explore the possibilities in an open-ended fashion. For the reasons I have already advanced, adjudication cannot rationally solve this kind of environmental design problem without more guidance by way of applicable legal standards. Given the impossibility of the task it was asked to perform, the court was reduced under the circumstances to chastising the defendant's lawyers for having behaved too much like advocates representing their client's interests, and not enough like ombudsmen representing the public welfare. Although such a reaction may be understandable, I find it exceedingly unfortunate. Not surprisingly, the United States Court of Appeals for the Eighth Circuit finally removed the district judge from the case for having abandoned his impartiality. *Reserve Mining Co. v. Lord*, 44 U.S.L.W. 2306 (8th Cir., Jan. 6, 1976).

⁵⁴ See, e.g., Articles cited note 1 *supra*.

to the difficulties—in the final analysis, they are calling for a combination of “lawyer’s restraint” and “judicial activism” to overcome difficulties that, at least as I view them, are inherent in the nature of the design defect issue itself. Some of their suggestions might be quite useful in combination with approaches that recognize the element of polycentricity in these cases and attempt to cope with that element; but on their own, without such recognition, the authors’ suggestions must be (and I am quite sure will be) rejected by both bench and bar.

Rejecting the suggestion that we ought to reduce or eliminate the adversariness of the adversary process, or the litigiousness of litigation, what should we adopt as the basis for a rational solution to the recognized difficulties presented in these design defect cases? Essentially, we should concern ourselves with methods of recasting the issues presented in design defect cases so as to make them more adjudicable. By one means or another the rules governing liability must be rendered more specific so that they afford lawyers the opportunity to behave like advocates, and at the same time avoid presenting all the potential issues in these cases “in one neat polycentric mass.”⁵⁵ In effect, the authors call for a combination of greater self-restraint on the part of lawyers and more active involvement on the part of judges to separate out issues procedurally and to narrow the range of disagreement between the parties. I am firmly convinced that this needed separation and narrowing is primarily the responsibility of the substantive law itself.⁵⁶ There must be sufficient formality in the rules governing liability to permit adjudication to work. To some extent, of course, the rule formality of which I speak will serve to reduce the central role of the courts in attaining the social objective of adequate product design safety. So be it. Adjudication has limits which we will continue to exceed only at our peril.

But mine is not the counsel of despair. In the conclusion of my earlier Article, I outlined two basic ways in which design defect cases can be made adjudicable while at the same time allowing courts to play an active role in design defect cases. First, courts can continue to develop and implement the failure-to-warn theory about which much has been said in the foregoing remarks. Second, courts can begin to apply the specific product design standards established administratively by governmental agencies more suited to perform the standard-setting function.

⁵⁵ See Twerski 535.

⁵⁶ See Henderson 1535-36.

To these, I can now add a third possibility, based in part on the advantage of almost three years of hindsight since the publication of my original Article. It is becoming increasingly obvious to me that it may be possible for courts, over time, to develop categories and rules of liability by which the scope of judicial inquiry in design defect cases could be narrowed and focused sufficiently to make them amenable to adjudication. In those product design areas in which the pressures upon courts to intervene are greatest,⁵⁷ courts are to a limited extent intervening.⁵⁸ The early cases have been, and are, unmanageable, for the reasons I have advanced. However, gradually it may be expected that middle ground generalizations and categorizations⁵⁹ will emerge by means of which at least a portion of the ad hoc, open-ended quality of these cases may be eliminated. Such a development would be no more nor less than the sort of gradual, incremental development of doctrine that we have come to associate with the process of common-law decision. It may already be possible to discern the beginnings of such a process of rule development in the relatively active area of judicial review of automobile design.⁶⁰

Even if such a development should be possible, however, we ought not to assume that it will occur, or that it will come at insubstantial cost. Time will be required to develop such a body of workable doctrine. The strain upon the judicial system will be great, possibly too great to be borne without serious loss of morale and eventual breakdown. Perhaps the most important point is that the development will almost certainly not occur, nor will it occur in time, without the help of legal scholars. Ironically, scholarship in the products liability field has been, from the standpoint of rendering design defect cases manageable, almost entirely counterproductive. Most of the articles in the last ten or fifteen years have never even questioned whether design cases pose litigational difficulties, and have instead urged courts to address the most open-ended types of issues in the name of helping to make our society a safer place in

⁵⁷ *Id.* at 1565-66 nn. 145-47 and accompanying text.

⁵⁸ *Id.* at 1566-69, 1571-73.

⁵⁹ Even the proponents of the broadest, most open-ended analyses of the substantive objectives of tort law appear to recognize the necessity for developing categories with which to implement their ideas. *See, e.g.,* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1070 (1972).

⁶⁰ I have in mind decisions such as *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974), and *Mieher v. Brown*, 54 Ill. 2d 539, 301 N.E.2d 307 (1973), in which the courts recognized the existence of a common-law duty to adhere to a general standard of reasonableness in auto design, and yet denied liability as a matter of law. *See* J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 648-49 (1975).

which to live.⁶¹ Doctrinal formalities that might have helped to render the issues more manageable have been almost universally scorned as arbitrary impediments to allowing the jury in every case to render justice in light of all the circumstances.⁶² These tendencies on the part of legal scholars will have to be reversed if the necessary rules governing liability are to be developed.

CONCLUSION

As the foregoing remarks make clear, I disagree with the authors' analysis of a number of basic questions. They maintain that failure to warn is inadequate to ensure product safety; I insist that its inadequacy in this regard begs the very question I meant to raise—*i.e.*, whether, on their own, courts can do more. They assert that failure to warn is complex and polycentric; I argue that the former adjective may sometimes apply, but not the latter. They insist that the design defect issue is not polycentric; I rely upon both my analysis and their own prior work to demonstrate that the design defect issue is highly polycentric. And finally, they advance as a solution the reworking of the adversary process of adjudication to make it less adversary and less adjudicative; I urge as a necessary first step the recognition that the legal rules governing liability must be sufficiently specific and formal to narrow the focus of the inquiry in these cases.

My hope is that I have not been unnecessarily critical of the authors' work. After all, we agree on what I assume to be the most important point—that the litigation of design defect cases reveals serious signs of strain and impending breakdown. As I indicated, there is much in what they have said, including their earlier work, which I find useful. But their analysis will help most in what I hope will be the second phase of recovery from the present difficulties. First, and most basically, we must face the reality that courts—even courts with "1976-type" procedures—cannot solve every type of problem brought to them. More than anything else, we require rules of liability that operate to reduce the open-endedness of these cases to more manageable proportions. I have in these remarks advanced

⁶¹ See Henderson 1531-32 nn.2-3. I hope to demonstrate this same tendency and develop its implications in the broader field of torts in an upcoming article in the *Indiana Law Journal* this spring.

⁶² *Id.* Ironically, this is the attitude reflected in the authors' Article to which my remarks are primarily directed. Although the authors recognize that the "justice under all the circumstances" approach is presently creating difficulties in design defect cases, they attribute these difficulties to shortcomings in procedure rather than in substantive law.

three possibilities which, in combination, would accomplish this institutional imperative.

Reading through their Article again, I am left with an abiding sense that the authors never did really understand the point I was trying to make. Very likely they will feel the same way upon reading these remarks. Perhaps that is why law reviews occasionally indulge in this type of publishing enterprise—to allow their readers to make sense out of what appears to the writers on both sides of an issue to be an intractable impasse.