

The Mirage of Product Safety

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A mirage is an image of something that appears to exist from a distance, but becomes less distinct as one approaches it, until it dissipates completely. As such, it is a good analog for the concept of product safety. Do businesses have an ethical obligation to produce safe products? At first glance, the question seems to answer itself. How could it be otherwise? However, closer inspection causes one's confidence in the answer to fade; indeed, one begins to doubt whether the question is even meaningful.

This chapter begins by examining the treatment--generally a scarce treatment--that product safety has received in the business ethics literature. I then argue that because safety is a relational concept whose definition is inherently a matter of subjective evaluation, the concept of an obligation to produce safe products is not well-formed, and hence that businesses do not have an ethical obligation to produce safe products. I conclude by arguing that businesses do have an ethical obligation not to produce deceptively dangerous products, but that this obligation derives from the general duty of honest dealing, not a distinct duty of product safety.

The State of the Literature

The concept of product safety has received surprisingly little direct treatment by business ethicists. This may be because the subject is naturally assimilated into discussions of the obligations that arise from the law of tort. Whatever the reason, consideration of the ethical

obligation to provide safe products has been sparse.

Manuel Velasquez provides what may be considered the standard treatment of the subject in his discussion of manufacturers' ethical obligations to consumers.¹ Velasquez describes three distinct accounts of a manufacturer's duty to protect the safety of the consuming public that he labels "the contract view, the 'due care' view, and the social costs view."² The contract view holds that a manufacturer's duty to provide safe products is determined by the contract between the manufacturer and the purchaser, and consists of the "duty to provide a product whose use involves *no greater risks* than those the seller *expressly* communicates to the buyer or those the seller *implicitly* communicates by the implicit claims made when marketing the product for a use whose normal risk level is well known."³ The due care view holds that in addition to honoring all express and implied claims of product safety, a manufacturer "has a duty to exercise due care to prevent others from being injured by the product, *even if the manufacturer explicitly disclaims such responsibility and the buyer agrees to the disclaimer,*" where due care is understood as "the care that a reasonable person could have foreseen would be necessary to prevent others from being harmed by use of the product."⁴ The social costs view holds that "a manufacturer should pay the costs of *any* injuries sustained through any defects in the product, *even when the manufacturer exercised all due care in the design and manufacture of the product and has taken all reasonable precautions to warn users of every foreseen danger.*"⁵ To the extent that the social cost view is an account of a manufacturer's duty to provide safe products rather than a theory of who should bear the costs of accidents, it invests manufacturers with an absolute duty to provide products free from injury-producing defects.

Velasquez's alternative accounts of manufacturers' duty to protect consumers is

frequently cited in business ethics literature.⁶ Yet, surprisingly little has been written in the effort to determine which of the three views is correct. An exception to this is supplied by George Brenkert, who has argued in favor of the social costs theory.⁷ Brenkert argues that a duty to compensate consumers injured by defective products regardless of fault on the part of manufacturers can be derived from the commitment to equality of opportunity inherent in the capitalist system and the need to maintain a market in which all parties benefit from voluntary exchange. With a little expansion, this can be shaped into a claim that manufacturers have a duty to provide products free from injury-producing defects. However, other than Brenkert, few business ethicists seem to have addressed this point directly.

In what follows, I provide an argument for an approach that resembles Velazquez's contract theory. However, my argument consists of neither a direct defense of the contract theory nor an attack on the due care or social costs theories. I contend that unless one is willing to tolerate excessive and undue interference with individual autonomy, any theory of product safety will collapse into something like the contract view.

The Concept of Product Safety

It is not novel to assert that product safety is a relative concept—that is, that safety is not a property of products *per se*, but has different meanings in different circumstances.

However, given that product safety is actually shorthand for a complex set of relationships among risks, harms, costs, benefits, and persons, the assertion may be an understatement.

Safety is a concept that varies along at least these five dimensions, each of which

could use some specification. In the context of product safety, risk refers to a possible future harm, where harm is defined as a setback to interests, particularly in life, health, and welfare. Expressions such as minimal risk, reasonable risk, and high risk are often used to refer to the chance of a harm's occurrence—its probability—but may also refer to the severity of the harm if it occurs—its magnitude. With regard to product safety, harm usually refers to a physical injury, but may include psychological injury or purely economic damage as well. Costs refer to the resources that must be expended to attain a benefit and the negative consequences of pursuing and realizing that benefit. In the context of product safety, costs consist of the sacrifices made in the attempt to prevent injury to the users of commercial products. In contrast to risks, costs are usually expressed in monetary terms, as is typical of cost-benefit analyses. Benefits refer to the value that can be derived from the use of the relevant commercial product—the improvement to one's life that the product provides. Like costs, benefits are often measured in monetary terms, although they need not be. Finally, the value provided by commercial products and the potential for injury varies from person to person.

Risk is an irredeemably relative concept. Products can pose anything from an infinitesimal risk of harm, such as a bottle of pure water, to a near certain risk of death, as in the case of a bottle of agitated nitroglycerine. Many of the products commonly used in developed countries pose only small risks of serious harm. How much risk renders a product unsafe? A risk of one in 10,000? One in 1000? One in 100? Cigarettes, the archetypical unsafe product, pose a 321 in 10,000 risk that a fifty-year-old man who has smoked a pack of cigarettes a day for thirty years will develop lung cancer in the

succeeding ten years as compared with a 16 in 10,000 risk for a non-smoker.⁸ So a 305 in 10,000 increase in the risk of serious harm must be sufficient to render a product unsafe, right?⁹

Talk of risk in the abstract is pointless, however. Whether a risk is acceptable or not depends on a host of exogenous factors, such as the benefits provided by the product, the cost of avoiding the harm, the magnitude of the potential harm, who may be harmed, and the circumstances in which the product is used. Consider benefits first. A steak knife presents a much greater risk of harm than a child's butter knife, but it provides a significant benefit to those interested in eating steak. Anti-cancer drugs can be extremely toxic and pose a high risk of harm or death, but if they work, the benefit they confer is life itself. Those who consider cigarettes to be inherently unsafe do so because they evaluate the benefits cigarettes provide, e.g., physical pleasure, the psychological feeling of being "cool," etc., as insignificant in comparison to the elevated risk of death from disease later in life. Soldiers or others facing a high likelihood of an early death from non-natural causes may weigh those benefits differently.

The acceptability of a risk also inherently depends upon the cost of avoiding the potential harm. Many serious injuries from automobile accidents have been avoided at relatively low cost by installing seat belts in cars. Many more such injuries could be avoided by building cars like tanks, but this is a relatively expensive proposition. As the costs incurred to avoid injuries increase, the benefits of the safer products become affordable to a decreasing number of people. At some point, the improvements in product safety completely consume the benefits of using the product. How do we determine the

point at which it costs too much to make a product safer?

Further, although many products pose some risk of death or serious bodily harm, most pose significantly greater risks of less serious, minor injury. What magnitude of harm renders a product unsafe? To be safe, does a product merely have to reduce its risk of serious harm? Is a product that poses the risk of serious bruising unsafe? How do we compare the safety of rollerblades, which pose relatively high risks of cuts, scrapes, and broken bones, with that of small, two-passenger airplanes, which pose a smaller risk of death? Do paper manufacturers have an obligation to strive to eliminate the possibility of paper cuts?

Finally, there is the question of who may be harmed. It is one thing to design a product with the safety of the purchaser, who receives the product new and with instructions, in mind. It is another to design it with the safety of any potential user in mind. It is yet another to design it with the safety of the members of society at large in mind. Automobiles have been made much safer for drivers and passengers over the past several decades. This has had the unanticipated consequence of making the world less safe for pedestrians as more secure drivers exercise less care in driving.¹⁰ As economist Gordon Tullock has pointed out, if the purpose of automotive design is to maximize the number of lives saved, the most effective safety device is a sharp dagger mounted on the steering column and pointed directly at the driver's chest.¹¹

An Economic Conception of Safety

For there to be an obligation to produce safe products, there must be a criterion of what

constitutes a safe product. Given the relativistic nature of the concept of safety, is it possible to provide such a criterion?

An economist might have no trouble answering this question. He or she might respond, “Just place the burden of taking precautions against injury on the least cost avoider.”¹² Either the manufacturer or the consumer of a product or both may take steps to prevent injuries. Manufacturers can design their products to make injuries less likely to occur. For example, the manufacturer of power saws can install hand guards and kill switches to reduce the likelihood that users will be cut. By the same token, consumers may take precautions to protect themselves from harm. For example, the purchaser of a power saw can wear goggles whenever using it.

Whether precautions are taken by the manufacturer or the consumer, they are costly. Hand guards and kill switches constitute expenses for power saw manufacturers; goggles constitute an expense for power saw users. But such precautions are usually not equally costly for manufacturers and consumers. It is relatively expensive for drivers to install seat belts in their automobiles, whereas economies of scale make it considerably less so for automakers to incorporate seat belts into the design of their cars. It would be exceedingly difficult and expensive for parents to have to monitor their children’s behavior sufficiently to prevent them from playing on an unfenced railroad turntable, but exceedingly inexpensive for the railroad to install a simple lock that prevents the turntable from moving and injuring children whose limbs may get caught in the joints.¹³ Automakers can probably do little to prevent injuries to jaywalking pedestrians no matter how much they spend, but pedestrians can protect themselves virtually cost-free by

refraining from jaywalking.

An economist would point out that the most efficient way of preventing injuries is to place the burden of avoiding them on the party that can do so at the lowest cost.¹⁴

When manufacturers can protect consumers from injury more cheaply than the consumers can protect themselves, they should do so. Thus, because building hand guards and kill switches into power saws protects users against cuts more cheaply than any measures power saw users can take to protect themselves, manufacturers should install them. However, when it is cheaper for consumers to take care to protect themselves, they should do so. Thus, because purchasing and wearing goggles is a less expensive way to prevent eye injuries when using a power saw than adding cumbersome shields to the saws themselves, manufacturers should not add such shields. To an economist, therefore, a safe product is one that incorporates all cost-justified precautions—that is, one designed to avoid all injuries for which the manufacturer is the least cost avoider.

Is there any reason to believe that the economic conception of product safety corresponds to the ethical one? Is there an ethical obligation to produce products designed to avoid all and only those injuries for which the manufacturer is the least cost avoider? If the maximization of social wealth is the *summum bonum*, the answer may be yes. Injuries are a drain on society's material resources. Preventing as many of them as possible in the most cost-effective way tends to maximize these resources. If one believes that there is a fundamental and overriding moral duty to maximize social wealth, one can argue that manufacturers are ethically obligated to sell only those products that conform

to the economic definition of safety. Thus, for thoroughgoing utilitarians who define the good in terms of material welfare, there is no need to read further. The question has been answered.

However, there are well-known objections to this form of utilitarianism. As Steven Kelman has pointed out, it leaves no room for the commitment to moral principles or the recognition of individual moral entitlements or rights.¹⁵ If social wealth would be maximized by killing an unproductive member of society and distributing his or her organs to five more productive people who need transplants to survive, the utilitarian must concede that there is an ethical obligation to do so. In addition, it assumes that the only thing of value is material wealth, implying that health, peace of mind, and even life itself have no intrinsic value. Under this form of utilitarianism, there is nothing that cannot be sacrificed for a material improvement to society—nothing that possesses a dignity and therefore is “not for sale.”¹⁶ For those who do not accept these implications and thus have reason to doubt the correctness of a purely materialistic utilitarianism, one’s ethical obligations with regard to product safety remain an open question. Further, in rejecting this form of utilitarianism, one is not rejecting the importance of cost considerations. There is no need to deny that maximizing social wealth can, all things considered, be a good thing, in order to deny that it is the *only* good thing.

Are there any other grounds on which to base the claim that the ethical conception of product safety is identical to the economic conception? Perhaps, but they are not readily apparent. It is difficult to see how deontological, perfectionist, or pluralistic ethical theories can lead to the conclusion that the ethical value of an individual’s safety

is identical to its monetary value. For example, Kant's injunction to treat all persons as ends in themselves and never merely as a means seems unlikely to lead to a conclusion that the value of an individual's safety should be determined purely by its effect on collective material well-being. Even preference utilitarians might struggle to demonstrate that a conception of safety that maximizes material wealth is equivalent to one that maximizes the satisfaction of human desires. It is possible that in the case of product safety, all other ethically relevant considerations cancel each other out, and cost avoidance is left as the ethically determinative factor.¹⁷ But until we have reason to believe that this is the case, we should view the claim that the ethical and the economic conceptions of product safety are identical with some skepticism.

A Legal Conception of Safety

A lawyer may give a different answer to the question of what constitutes product safety. He or she may assert that manufacturers have an obligation to manufacture their products with the degree of care necessary to protect the users of their products against unreasonable risk of injury—meaning, in legal language, to exercise reasonable care. The problem with this response is that it merely pushes the enquiry back one step. To know what constitutes a safe product, one must now know what constitutes reasonable care.

Lawyers have two distinct conceptions of reasonable care, specifying it either in terms of “optimal deterrence” or “corrective justice.” Unfortunately, neither specification advances our understanding of manufacturers' ethical obligations. Under the optimal deterrence approach, reasonable care consists of taking all cost-justified precautions.¹⁸

However, this definition merely identifies reasonable care with the economic definition of safety. However, we have, as yet, no clear reason to believe that this corresponds to the ethical definition of safety. Hence, this definition of reasonable care cannot advance our analysis. Under the corrective justice approach, reasonable care consists of exercising the degree of care necessary to avoid all injuries caused by wrongful conduct.¹⁹

However, this definition is circular. We are seeking to determine the extent to which manufacturers are ethically obligated to prevent injury to the users of their products. It does not advance our understanding to answer that manufacturers are ethically obligated to avoid all wrongfully-caused injuries. Which injuries are wrongfully-caused is precisely what we are trying to determine. Under this definition, reasonable care provides a synonym for product safety, not an explication of it.

The Irrelevance of the Standard of Safety in a Market

Another resolution of the problem of the proper standard of product safety is: Who cares? This response derives from the observation that in a market the standard of safety serves as a default condition that manufacturers and consumers are free to alter at will.²⁰

Assume that we find a compelling argument for the conclusion that the ethically appropriate standard of safety is *caveat venditor*—that the manufacturer must take all possible precautions to prevent injury to consumers. We now know that manufacturers must bear 100% of the burden of protecting the public against injury from their products, and the members of the public need take no precautions to protect themselves. To comply with this standard, manufacturers will have to incorporate features designed to prevent all

preventable injuries into the design of their products, rendering them considerably more expensive. This may be an acceptable state of affairs for the most risk-averse members of the public who are happy to pay more to ensure their safety. However, it will not be acceptable to those who are less risk-averse and would prefer to incur some risk of injury in return for less expensive products. It will also not be acceptable to the less affluent members of the public who have been priced out of the market. The members of these groups will offer to waive their right to be protected by the manufacturers in return for more affordable products. The competitive forces of the market will cause manufacturers or entrepreneurs to attempt to satisfy this unmet demand by offering less safe, but less expensive products to those willing to waive their entitlement to complete protection against injury. Before long, products offering widely varying amounts of protection against injury at a variety of price points would be available. A *caveat venditor* standard may initially require all cars to be as safe as the top of the line Volvo, but there can be little doubt that a significant portion of the car buying public would waive some of this protection to avoid paying the price of such a vehicle. Some might even waive enough of it to permit purchase of a Volkswagen Beetle.

Now assume that we find a compelling argument for the conclusion that the ethically appropriate standard of safety is *caveat emptor*—that consumers must take all necessary precautions to protect themselves against injury from dangerous products. The members of the public now bear 100% of the burden of protecting themselves, and manufacturers need take no precautions to ensure the safety of the public. Freed of the obligation to include expensive safety features, manufacturers will be able to offer their

products to the public at considerably reduced prices. This may be an acceptable state of affairs to the most ruggedly individualistic members of the public who are happy to have the responsibility to protect themselves. However, it will not be acceptable to those who are more risk-averse, and would prefer to pay more for less dangerous products. Again, the competitive forces of the market will cause manufacturers or entrepreneurs to attempt to satisfy this unmet demand by offering less dangerous, but more expensive products to those willing to pay the premium for increased safety.²¹ Before long, products offering widely varying amounts of protection against injury at a variety of price points would be available. For example, even though federal and state governments inspect and regulate the nation's food and water supplies, a significant proportion of consumers are willing to purchase an increased level of safety by buying bottled water and shopping at organic groceries, such as Whole Foods.

Finally, assume we find a compelling argument for the conclusion that the ethically appropriate standard of safety requires manufacturers to exercise reasonable care to protect consumers against injury by their product, whatever reasonable care turns out to be. Manufacturers and the members of the public must now split the burden of safety precautions. Manufacturers will have to incorporate some features designed to prevent injury into the design of their products, rendering them somewhat more expensive than they would otherwise be. This may be an acceptable state of affairs for the members of the public who have a moderate tolerance for risk and are willing to pay a small premium for increased safety. However, it will not be acceptable to either the rugged individualists, who prefer more personal responsibility and cheaper products, or

the intensely risk-averse, who prefer more protection and more expensive products. The competitive forces of the market will cause manufacturers or entrepreneurs to endeavor to satisfy the unmet demand of both groups. Before long, products offering widely varying amounts of protection against injury at a variety of price points would be available.

This line of argument sees the socially accepted standard of safety, whatever it may be, as a starting point from which manufacturers and consumers are free to depart by agreement. Markets allow individuals to purchase the amount of safety each desires and can afford. The importance of the standard of safety that establishes the starting point is not that it determines how much safety the members of the public receive, but that it determines the level of transaction costs the public must bear to attain its preferred distribution of product safety. The standard matters only because the expenses involved in bargaining away from certain starting points may be greater than others. For example, the costs of obtaining waivers from the large number of people who will want cheaper products under a *caveat venditor* regime may be greater than the costs of obtaining waivers from the smaller number of people wanting cheaper products under a regime of reasonable care. But apart from transaction costs, it makes no difference which standard society chooses. As long as parties are free to depart from the standard by agreement, who cares what the standard is?

A possible response to this line of argument is that it misses the point of ethical analysis. Ethics, by its very nature, is designed to place restraints on self-interested action in markets. Skeptics may claim that market imperfections mean that the market

mechanism cannot be relied upon to produce just results for all parties. In the case of product safety, they may argue that the interests of the poor, who may want greater safety, but cannot afford to pay the premium for it, are not adequately represented. No one should be denied safe products because he or she cannot afford them when the costs of safety can be shifted to manufacturers who can more readily bear them.²² A substantive ethical standard of safety is necessary precisely to prevent the distribution of product safety that would result from unrestrained bargaining in a market. Therefore, the ethically appropriate standard of product safety cannot be a mere default condition, but must require manufacturers to supply the appropriate amount of safety regardless of any agreement to accept less by the consumer.

Whether one agrees or disagrees with the response, it requires some measure by which to determine what constitutes the “appropriate amount of safety.” But there’s the rub. For other than the economic conception, it is not clear that there is any useful *objective* conception of safety.²³

The Inherent Subjectivity of Product Safety

We began by noting that product safety can vary along at least five dimensions: risk, benefit, cost, magnitude of harm, and person. The problem with identifying an ethically appropriate realm of product safety is not merely that safety varies along these five dimensions, but that three of them, namely, benefit, cost, and person, are inherently subjective. For this reason, it is difficult for all but a certain class of utilitarians to supply an objective definition of product safety.

Benefits are always benefits to particular individuals and must always be determined in the context of the individual's life plans and value schemes. A hang glider may provide massive benefits to one who loves the feeling of floating free and observing lovely scenery. It provides no benefit to one who has a fear of heights. Convertible sports cars apparently provide sufficient benefits to certain young singles and those undergoing mid-life crises to compensate for their relatively lower safety rating. They provide no benefit to the soccer mom with three children. Breast implants may provide intense benefits to one whose dream in life is to be a Playboy centerfold or to one who has had a mastectomy. They provide no benefit to a woman satisfied with her body's appearance.

Costs are similarly subjective. The side effects of chemotherapy are acceptable costs to a relatively young cancer patient with a good chance of survival. They may be unacceptable to an elderly patient whose life can only be briefly extended. Affluent parents may consider the costs of "child-proofing" their home to be acceptable. Less wealthy parents do not and prefer to exercise heightened personal vigilance. The cost of a ski helmet may be trivial to one who loves to ski fast, but unacceptable to the more restrained skier who finds helmets inconvenient and uncomfortable.

The same is true with regard to persons, whose varying physical characteristics and differing relationships to the product's use mean that products will inevitably impact different persons differently. Air bags make automobiles safer for most people, but more dangerous for very small and very large people.²⁴ Better football helmets made football safer for the wearer, but as the more protected players learned to use their heads as battering rams, the sport became more dangerous for those being blocked and tackled.²⁵

Vioxx was a safer anti-inflammatory medication for those susceptible to stomach bleeding, but was less safe for those without that sensitivity.²⁶

The basic difficulty with providing an objective standard of product safety is that safety consists of protection against an intolerable level of risk. But since tolerability varies from person to person, there is no conception of safety that is independent of the risk preferences of individuals. What standard of protection against intolerable risk could an ethicist advocate that prevented individuals from bargaining for the level of risk that they are willing to tolerate? If safety is inherently a product of individual preferences, how can one construct a standard that guarantees safety while simultaneously frustrating these preferences?

One is always free to ignore the essential nature of safety, and simply propose a regulatory standard designed to realize other ends. For example, utilitarians who subscribe to an objective definition of the good that is not dependent on individual autonomy or preferences are not interested in safety per se, but in maximizing their prescribed ends. Hence, a utilitarian who defines good in terms of material wealth has no trouble demonstrating that the proper standard for product safety is that which is attained by placing the burden of precautions on the party that can prevent the relevant harm at the lowest cost. Similarly, a utilitarian who defined the good as the preservation of human life without regard to individual assessments of its quality would identify the proper level of product safety as that which maximizes collective life-years—an approach that makes the previously mentioned Tullock safety device for automobiles look pretty good. A Benthamite who defines good in terms of pleasure would contend that the proper

level of product safety is that which maximizes the pleasure experienced by members of society—a standard that places cigarettes in a whole new light.

All such proposals will rise or fall with the adequacy of the proposed utilitarian standard on which they are based. However, as previously noted, there is reason to doubt the soundness of such naturalistic forms of utilitarianism.²⁷ Beyond this, I have nothing to say other than that I am skeptical of any ethical theory that places no value on either the satisfaction of human desires or human autonomy. Yet any theory that allows respect for individual preferences or autonomy to play a significant role will have difficulty specifying an objective standard of product safety .

For example, consider preference utilitarianism, which defines the good as the satisfaction of human desires and posits a fundamental ethical obligation to maximize satisfied human desires. Since safety consists of protection against intolerable risk, the proper standard of product safety for a preference utilitarian would be one under which as few people as possible are exposed to risks they find intolerable, consistent with the minimum frustration of people's other desires. Preference utilitarians could argue for a standard under which most people receive the amount of safety they are comfortable with and the number of dissatisfied outliers is minimized—perhaps a somewhat amorphous reasonable care standard. But at most, this provides an argument for an initial default condition. Preference utilitarians may be able to show that the correct *starting point* is the standard under which most people's desire for safety is satisfied. However, this cannot provide an argument for a standard of product safety that restrains individual manufacturers and consumers from bargaining for more or less protection against injury.

Every such bargain would result in either a greater amount of protection against intolerable risk or a smaller amount of frustrated desires for cheaper products; hence, a morally superior outcome. Thus, for preference utilitarians the ethically appropriate standard of safety would mirror the standard determined by the market.²⁸ And this difficulty is likely to be even more pronounced for any nonconsequentialist ethical theory that either takes seriously the injunction to treat individuals as ends in themselves and therefore respect their autonomously-arrived at decisions²⁹ or values individual self-actualization or self-perfection.

To argue that ethics requires us to prevent individuals in a market from bargaining for the level of product safety that they want, one must either reject the subjective conception of safety as protection against intolerable risk or show that something other than the market mechanism does a better job of delivering the desired level of protection. The former approach requires one to have a conception of the level of protection against risk that individuals should have whether they find it intolerable or not. Because this requires continual interference with individuals' value choices and life plans, I reject this approach. But what about the latter approach? Is there reason to believe that the market is not the best mechanism for providing individuals with protection against intolerable risk?

Rejection of a General Duty of Product Safety

Can one argue that there should be restrictions on the ability of individuals to bargain for the level of product safety they find tolerable in order to better provide precisely that

level of safety? If one can show that individuals are not the best judges of the level of safety that they desire, the answer is yes. But to do this, one would have to show either that individuals do not know what they really desire or that certain features of the market make individuals unable to form accurate assessments of what will provide their desired level of safety.

I believe the first strategy to be unavailing. The claim that people do not know what they really desire is frequently misapplied, and when it is not, it is irrelevant. It is misapplied when it is used to mean not that people do not know what they desire, but that people do not desire what they should. Critics of individual choice contend that if people were properly enlightened, they would choose differently than they do. Such critics might contend, for instance, that nineteen-year-old college students would not choose to smoke if they truly appreciated the relative value of long term health and short term physical pleasure. Some who make such claims assert more than merely that people do not have sufficient information to choose correctly or that they are choosing irrationally given their own values and goals; rather, they assert that people choose incorrectly because they do not value things correctly—that they do not appreciate what is truly good or truly in their best interest. To paraphrase John Stuart Mill, one who would choose the life of the satisfied fool over that of the dissatisfied Socrates does so because he or she does not appreciate the “intrinsic superiority” of the latter.³⁰ Since anyone who correctly perceived the value of things would choose the more valuable, one who chooses the less valuable does not really know what he or she desires.

I characterize this approach as a misapplication because it is essentially a

disingenuous way of smuggling in an ostensibly objective definition of the good under the guise of respect for autonomy. Assuming that, despite their expressed preferences, people *really* desire what is truly good eliminates rather than vindicates the role of individual autonomy. Further, this move is useful only under the assumption that one possesses the correct objective conception of the good. But in the present context, this is precisely what we are *not* assuming.

The claim that people do not know what they really desire need not be misapplied, however. People frequently make decisions that do not advance their own values or life goals. People often confront complex situations in which it is difficult either to determine how the instant decision will affect their overall goals or to integrate it into their overall scheme of values. Indeed, people's values schemes may be internally inconsistent or poorly integrated, making it exceedingly difficult for them to make rational decisions that advance their own ends.

These observations, while undeniably true, are also irrelevant (unless they refer to the informational asymmetries discussed below). For there is no practical alternative for improving the outcome. Individuals may be poor judges of what they desire, but they are nonetheless the best judges. How can one human being gain access to another's intimate values and life plans? How can one attain greater understanding of what another genuinely wants than the individual. Even if one could obtain such access and understanding, what could he or she do with it? Every individual has his or her own scheme of values and life plans. Each strikes his or her unique balance between decreasing risk of harm and increasing price. There is no reason to believe that these

balances are similar enough for one to devise a set of general restrictions on individual choice that will result in all or even most individuals obtaining the level of protection they really desire. Although it is theoretically possible to design a set of custom-made restrictions for each individual that would produce this result, this has no practical value in designing a general standard of product safety. How can businesses be required to research each of its customers' values, goals, and life plans sufficiently to understand the balance between protection and cost that a specific customer really desires in purchasing their products better than the individual? Yet, this is what would be necessary for businesses to paternalistically refrain from making sales that are contrary to their customers' "real will."

This leaves the second strategy of showing that certain features of the market make individuals unable to form accurate assessments of what will provide their desired level of safety. One such argument is based on the claim that significant information asymmetries exist between manufacturers and consumers that make it impossible for consumers to become knowledgeable enough to make appropriate decisions about product safety. This claim asserts that contemporary products are so sophisticated and complex that the ordinary consumer is unable to understand how they work or appreciate the dangers they pose. As long ago as 1973, it was argued that the modern product's

functional validity and usefulness often depend on the application of electronic, chemical, or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose.³¹

The argument proceeds by claiming that the informational asymmetry renders consumers unable to protect their own interests. Hence, they are vulnerable to overreaching by manufacturers. “Because manufacturers are in a more advantaged position, they have a duty to take special ‘care’ to ensure that consumers’ interests are not harmed by the products that they offer them . . . *even if the manufacturer explicitly disclaims such responsibility and the buyer agrees to the disclaimer.*”³² Here then is an argument for placing restrictions on individuals’ ability to bargain for a desired level of product safety.

It is a rather poor argument, however. Informational asymmetry between manufacturer and consumer is not a modern phenomenon, but a function of the division of labor that dates back centuries if not longer.³³ The truth of the claim that not every individual can understand the workings of complex products does not imply that information about the quality and safety of complex products is unavailable to such individuals or that consumers have no way of judging the relative level of risk associated with a product. For decades, quality assurance and reporting organizations such as *Consumer Reports*, Underwriters’ Laboratory, and *Good Housekeeping* have supplied the product information necessary for consumers to protect their interests and performed independent evaluations of the relative safety of products. Sears became one of the nation’s leading retailers by testing all the products it sold and providing an assurance of quality and safety. Today product safety information and evaluations are only a click away on the internet, and it is even easier for consumers to overcome informational asymmetries.³⁴ It may be true that utilizing these resources imposes costs in time, money, and effort on consumers, but this does not imply that it is impossible for consumers to

protect their interests. The most dangerous and complex product most consumers buy is the automobile, and, like myself, most consumers have only a vague idea of what takes place under the hood. Yet we have no trouble distinguishing relatively safe cars from relatively unsafe ones. It is no coincidence that the more dangerous and complex the product, e.g., power tools, the more frequently it tends to be reviewed by both the public and private consumer protection services.

However, even if this were false, and consumers were unable to obtain the information necessary to make safety assessments, the most that this would imply is that manufacturers have an obligation to furnish the information in a sufficiently accessible form to allow consumers to make an informed choice, not that manufacturers are obligated to paternalistically make the choice for the consumer. If the requirement of informed consent is adequate to protect patients' interests when they are making life and death medical decisions, it should certainly be adequate to protect consumers' interests when shopping.

Are there any other features of the market that justify placing restrictions on individuals' ability to bargain for the level of product safety they desire? None are readily apparent. There are certainly many critiques of the market. For example, critics point out that in markets suppliers respond only to *economic* demands. It is claimed that this is unfair to the poor who, because they cannot afford to pay the "safety premium," are unable to obtain the level of product safety that they desire. Such critics may further point out that because the poor are less likely to have the money, education, and sophistication required to utilize safety-reporting resources such as Consumer Reports

and Underwriters Laboratories, they really do labor under an informational asymmetry that renders them unable to form accurate assessments of what will provide their desired level of safety.³⁵

In the present context, however, such observations are *non sequiturs*. The market may unfairly prevent the poor from obtaining the level of product safety they desire, and justice may require that something be done to rectify the situation. Perhaps manufacturers should be required to provide the poor with safety information at no cost to alleviate the effect of informational asymmetries.³⁶ But whatever should be done, individuals should not be prevented from bargaining for the safety/price ratio they prefer, *especially if this restriction is coupled with a heightened standard of care for manufacturers*. It is difficult to see how a rule that prevents the poor from voluntarily bargaining for cheaper products while simultaneously requiring manufacturers to make more expensive products can redress any injustice to the poor. It may be unfortunate or even unjust that a carpenter is too poor to afford a power saw with hand guards and kill switches. But if the carpenter is willing to run an increased risk of injury to purchase a cheaper saw without the safeguards, how does it correct any injustice to impede manufacturers from selling such a saw to him or her?

Product safety depends on several inherently subjective elements. What constitutes a safe product varies from individual to individual on the basis of how much benefit the individual receives, how much cost the individual incurs, and the status of the individual, e.g. driver or pedestrian, arthritis sufferer with or without susceptibility to stomach bleeding. For manufacturers to have a general obligation to provide safe

products that cannot be altered by the mutual consent of consumers and the manufacturers, there must be a set of objectively specifiable conditions that would protect all or most people against what they considered intolerable risk more effectively than those people could protect themselves by bargaining for their desired level of risk in the market. I am unable to identify any such set of conditions. Hence, I conclude that manufacturers have no general obligation to provide safe products.

The Duty Not to Produce Deceptively Dangerous Products

Does the lack of an obligation to meet an objective standard of product safety mean that manufacturers are free to disregard consumers' interest in being protected against intolerable risk? Certainly not. All manufacturers are under a duty not to produce deceptively dangerous products.

Human beings enter the marketplace vested with a wide array of moral obligations. One of the most fundamental of these is the obligation to respect the autonomy of others. And one of the most important manifestations of this obligation is the duty to refrain from using deception to override the free will of one's fellows. In markets, individuals constantly use each other as means to their desired ends. There is nothing morally objectionable about this as long as all parties obtain the knowing, voluntary consent of the others when doing so. However, employing deception and trickery to obtain fraudulent consent uses others *merely* as means to one's own ends. Subverting other human beings' ability to realize their autonomously-chosen ends in this way is a quintessential violation of the obligation to respect the personhood of others.

Hence, there is a basic obligation not to employ fraudulent practices in one's business activities, i.e., a fundamental duty of honest dealing.

The same obligation can be derived from the nature of market activity itself. Markets do not function well in the face of widespread fraud. The costs associated with having to protect oneself against active misrepresentation and concealment of material information in every business transaction are sufficient to prevent the formation of many wealth-generating contracts. Unless contracting parties have a duty not to misrepresent material information (or conceal material non-public information), markets become inefficient. Hence, the obligation to refrain from fraud, which is the basic obligation of honest dealing, has been described as part of the "implicit morality of the market itself: the moral rules without which markets fail."³⁷

Applying this fundamental obligation of honest dealing to the field of product safety yields a duty for manufacturers not to misrepresent the dangers associated with the use of their products. Manufacturers may not be obligated to make many representations about a product's safety, but whatever representations they make must be true. Cigarette makers may ethically sell cigarettes despite their addictive properties and the increased risk of disease associated with their use. They may advertise them as tasting good and providing a pleasant experience. They may disclaim all warranties of product safety. However, they may not claim that they are good for your health, or that they are not addictive, or that they do not increase the user's risk of cancer and heart disease.

The obligation of honest dealing thus requires manufacturers to refrain from fraudulently exposing consumers to risks associated with the use of their products. Does

it yield any more extensive duty to protect consumers against intolerable risk? Generally speaking, the answer is no. Neither the duty to respect autonomy nor the nature of markets requires contractors to affirmatively protect other parties' interests. One does not fail to respect another's autonomy by not protecting that person against his or her own lack of industry or failure to exercise proper care. Further, for markets to function efficiently, it is not necessary for contracting parties to ensure that their negotiating partners have exercised due diligence. When all relevant information is publicly obtainable, each party is able to protect his or her own interests. Requiring each party to do the other's homework as well as his or her own creates a wasteful duplication of effort and thus, greater inefficiency. Hence, no duty to see that one's contracting partner is adequately informed can be derived from the nature of a well-functioning market. Ordinarily, the parties to a contract are required to bear their own research costs.

Nevertheless, a reasonable argument can be made that manufacturers do have a more extensive duty; a duty to warn the public about non-obvious risks associated with the use of their products. Although consumers are generally able to obtain the information necessary to protect their own interests, there are at least two circumstances in which this is not the case. The first is when the information is not publicly available—when manufacturers are aware of significant risks posed by their products *that are not detectible through independent testing*. The second is when the consumer is a member of a vulnerable subgroup of the population who is either too impoverished to shoulder the required research costs or too undereducated to effectively utilize the available research tools. In these cases, the informational asymmetry argument previously discussed³⁸ has real bite.

These cases demonstrate that the duty of honest dealing requires more than merely refraining from fraudulent representations. Intentionally concealing material *non-public* safety information from consumers can subvert consumers' ability to realize their autonomously chosen ends and undermine market efficiency just as much as outright falsehoods. Thus, the duty of honest dealing requires manufacturers to disclose such information before marketing their products. Coca-Cola may ethically conceal its formula for Coke as a trade secret. But if it knows that the formula contains a chemical that may produce an allergic reaction in some users and is not easily detectable, it must reveal this fact to the public.

Furthermore, if manufacturers wish to market their products to vulnerable consumers known by the manufacturers to be unable to bear the research costs necessary to protect their interests, respect for their potential customers' autonomy requires the manufacturers to assume these costs.³⁹ The simplest way to do this is not to purchase subscriptions to Consumer Reports and tutors for vulnerable potential customers, but to inform them of any material, non-obvious risks posed by the products. Thus, manufacturers who wish to market their products to impoverished, undereducated, or otherwise vulnerable consumers may be said to have a duty to warn such consumers of non-obvious risks. But since it is easier and cheaper simply to issue a blanket warning than to attempt to warn only the vulnerable, this is equivalent to saying that manufacturers have a general duty to warn the public at large.

It appears that a duty for manufacturers not only to refrain from misrepresenting the risks associated with their products, but also to warn consumers against any non-obvious risks attendant upon their use may be derived from the basic ethical obligation of

honest dealing. When these duties are satisfied, consumers are in a position to decide for themselves what level of risk they wish to bear in return for less expensive products.

These duties, then, which may be jointly described as the duty not to produce deceptively dangerous products, identifies manufacturers' obligation to protect the safety of their consumers. Succinctly expressed, manufacturers have no duty to paternalistically interfere with consumers' autonomous choices about how to balance the risks associated with a product's use against its expense, but, on the contrary, have a duty not to deceptively (or otherwise) undermine consumers' ability to make such choices.⁴⁰

Conclusion

I have argued that manufacturers have no general duty to provide safe products. Because safety is an inherently subjective concept, there is no general standard that can guarantee each consumer his or her desired level of safety at a price he or she would be willing to pay. Only a market can do this. This explains why the duty that manufacturers have—the duty not to produce deceptively dangerous products—derives directly from the basic requirement for a well-functioning market, which is the duty of honest dealing.

This is a fairly negative conclusion and one that may be unsatisfying to some. But perhaps a slightly more positive implication can be drawn. Recall that when we considered the economic conception of safety, we noted the possibility that if all other ethically relevant considerations canceled each other out, cost avoidance could be the ethically determinative factor.⁴¹ This is very close to the actual situation. As long as manufacturers and individual consumers are free to bargain for the safety/price ratio they

mutually prefer, the initial standard of safety is basically irrelevant. There is then, no moral imperative to choose one general standard of safety over another. In such a case, the utilitarian gain that can be realized may justify selecting the economic conception of safety as the initial default condition.⁴² Thus, we can say that when consumers have expressed no preference for a higher or lower level of protection, manufacturers should take all and only those precautions for which they are the least cost avoiders. Although this does not provide a substantive standard of product safety, it does provide a very useful starting point. For if we begin at an economically efficient point and insist that any departure from it be made by mutual consent where manufacturers have both taken steps not to misrepresent the dangers posed by their products and warned consumers of all non-obvious risks, we can arrive at a point at which economic efficiency⁴³ and morally appropriate behavior coincide. Economic efficiency can serve as a “tie-breaker” that permits us to escape agnosticism with regard to the initial standard of product safety. Hence, we can derive a somewhat more positive formulation of manufacturers’ obligations to protect consumers as the duty to take all and only those precautions for which they are the least cost avoiders unless consumers voluntarily agree to accept less protection or to pay for more.

Admittedly, even this positive formulation pales in comparison to the image of a definite, objective duty to provide safe products. Such an image must be as appealing to consumers as the image of an oasis in the desert is to a thirsty traveler. But it is also only a mirage. Because product safety is an inherently subjective concept, it, like beauty, is in the eye of the beholder.⁴⁴

Notes

¹ See Manuel G. Velasquez, *Business Ethics: Concepts and Cases 4th Ed.* (Englewood Cliffs, NJ: Prentice-Hall., 1998), pp. 321-41.

² Velasquez, *Business Ethics*, p. 325.

³ Velasquez, *Business Ethics*, p.330 (emphasis in the original).

⁴ Velasquez, *Business Ethics*, p. 335 (emphasis in the original).

⁵ Velasquez, *Business Ethics*, p. 339 (emphasis in the original).

⁶ See, for example, John Dienhart and Jordan Curnutt, *Business Ethics: A Reference Handbook* (Santa Barbara, CA: ABC-CLIO, Inc., 1998); John Boatright, *Ethics and the Conduct of Business 3rd Ed.* (Upper Saddle River, NJ: Prentice-Hall, 2000) pp.290-300.

⁷ See George Brenkert, "Strict Products Liability and Compensatory Justice," in Tom L. Beachamp and Norman E. Bowie, *Ethical Theory and Business 7th ed.* (Upper Saddle River, NJ: Prentice-Hall, 2004) pp. 184-89.

⁸ These figures were derived by employing the cancer risk assessment tool provided by the government at: <http://smokefree.gov/smokersrisk>.

⁹ This is a serious question. I do not actually know whether this is the correct calculation of the increase in risk, but you get the idea.

¹⁰ Clifford Winston, Vikram Maheshri, and Fred Mannering, "An Exploration of the Offset Hypothesis Using Disaggregate Data: The Case of Airbags and Antilock Brakes," *Journal of Risk and Uncertainty* 32 (2006): 84-85.

¹¹ This is the so-called Tullock safety device. See Richard B. McKenzie and Gordon Tullock, *The New World of Economics 3rd ed.* (Homewood, IL.: R.D. Irwin, 1981) pp. 40-41.

¹² See R.H. Coase, "The Problem of Social Costs," *Journal of Law and Economics* 3 (1960): 1-44. The seminal article on the application of the least cost avoider principle to the problem of product safety is Richard Posner, "A Theory of Negligence," *Journal of Legal Studies* 1 (1972): 29-96.

¹³ See *Chicago, B. & Q.R. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N.W. 880 (1902).

¹⁴ For a definition of cost, see above page ?.

¹⁵ Steven Kelman, “Cost-Benefit Analysis: An Ethical Critique,” *Regulation* 5 (1981): 33-40.

¹⁶ Kelman, Cost Benefit Analysis, p. 38.

¹⁷ See below page ?.

¹⁸ This definition of reasonable care is associated with law and economics scholars and derived from Richard Posner’s seminal article, “A Theory of Negligence,” *Journal of Legal Studies* 1(1972): 29-96.

¹⁹ This definition of reasonable care is derived from Ernest Weinreb’s seminal article on corrective justice, “Toward a Moral Theory of Negligence Law,” *Law and Philosophy* 2 (1983): 37-62.

²⁰ The discussion in the present section is limited to the manufacture and sale of consumer products. It does not address questions of “ultra-hazardous” commercial activities that are typically subject to strict liability such as blasting within a city, operating a nuclear power or chemical manufacturing plant in a residential area, or operating a dam upstream of a populated area.

²¹ The problem of uninformed consumers who are ignorant of the risks associated with the use of certain products will be addressed in the subsequent discussion of the duty to warn.

²² Indeed, this was the argument behind the adoption of products liability in American law as embodied in the second Restatement of Torts in 1965. See *Restatement (Second) of Torts* § 402A (1965); William Prosser, *Handbook of the Law of Torts* (St. Paul, MN: West Publishing Co., 1941), p. 202.

²³ In this chapter, I use the term “objective” to refer to something that is specifiable in terms of an interpersonal standard of value, and hence is not dependent on the personal preferences or evaluations of individuals. In contrast, I use “subjective” to refer to determinations that inherently depend on individual assessments of value that can vary from person to person.

²⁴ See Craig Newgard and K. John McConnell, “Stature, Body Weight, and Serious Injury from Air Bags among Adult Drivers and Passengers Involved in Motor Vehicle Crashes,” *Academic Emergency Medicine* 14 (2007): 108; Richard Kent, David C. Viano, & Jeff Crandall, “The Field Performance of Frontal Air Bags: A Review of the Literature,” *Traffic Injury Prevention* 6 (2005): 12.

²⁵ See Brent Hagel and Willem Meeuwisse, “Risk Compensation: A ‘Side Effect’ of Sport Injury Prevention?,” *Clinical Journal of Sports Medicine* 14 (2004): 194.

²⁶ See Martin J. Stillman and M. Thomas Stillman, “Choosing Nonselective NSAIDs and Selective Cox-2 Inhibitors in the Elderly: A Clinical Use Pathway,” *Geriatrics* 62 (2007):

26.

²⁷ See the discussion of utilitarianism above.

²⁸ A sophisticated preference utilitarian would not have accepted my earlier characterization of the situation. He or she would have said that the correct starting point is not the one with the most presently satisfied desires, but the one that required the lowest transaction costs to reach the state of affairs in which satisfied desires were maximized.

²⁹ See the discussion of autonomy below.

³⁰ John Stuart Mill, *Utilitarianism*, ch. 2 (1863).

³¹ *Codling v. Paglia*, 32 N.Y.2d 330, 340, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973).

³² Manuel G. Velasquez, *Business Ethics: Concepts and Cases*, 3rd ed. (Englewood Cliffs, NJ: Prentice-Hall., 1992), p. 186.

³³ My uncle used to tell the story of how he and my grandparents regarded the light bulb as a mysterious and unfathomable marvel of modern technology when their section of Brooklyn converted from gas to electric lighting.

³⁴ See Steven D. Levitt and Stephen J. Dubner, *Freakonomics* (New York: HarperCollins, 2005) pp. 66-68.

³⁵ In my opinion, there is little empirical evidence to support this claim. The poor tend to be very careful shoppers, often utilizing sophisticated word-of-mouth networks to obtain useful product information. As previously noted, Sears became a major retail institution precisely by providing quality and safety assurance to the poor and less educated portion of the population. However, because the poor's inability to pay for available product information is a theoretical possibility, I consider it for the sake of completeness.

³⁶ See the discussion of the duty to warn below.

³⁷ Dennis P. Quinn and Thomas M. Jones, "An Agent Morality View of Business Policy," *Academy of Management Review* 20 (1995): 34.

³⁸ See page ?.

³⁹ This claim is controversial. I am not sure that the principle of respect for persons can be stretched far enough to generate this conclusion. In the alternative, there may be arguments based on considerations of social or distributive justice that can justify the conclusion. However, I do not intend to pursue the matter in this context. For purposes of

this article, I will assume that a duty for manufacturers to assume the research costs of vulnerable potential consumers can be established.

⁴⁰ I have spoken in terms of the manufacturer's duty to the consumer despite the fact that products pose dangers not only to those who use them, but also to the public at large. Automobiles, for example, are dangerous for pedestrians as well as for drivers and passengers. The reason for this apparent neglect is that in all relevant respects the relationship between manufacturers and the public at large is the same as that between manufacturers and consumers. The members of the general public need protection against injury from products as much as consumers do. As with consumers, the question is how much of the burden of preventing such accidents should be borne by the manufacturer and how much by the members of the public themselves. And, as with consumers, the members of the general public have widely varying preferences with regard to how much safety they are willing to forgo for less expensive products. The fact that members of the public may be injured by products that they themselves did not purchase does not change the analysis. For they do purchase products, and differ with regard to the size of the premium they are willing to pay to have manufacturers protect them against injury as a third party. Hence, the inherent subjectivity of the concept of safety infects the analysis of manufacturers' obligations to the public in the same way as it does the analysis of their obligations to consumers.

⁴¹ See page ? above.

⁴² I use the word "may" advisedly. For a reasonable argument can be made that the proper default condition is the one that requires the lowest transaction costs to move to market solution, and this may not be identical to the one that places the burden of avoiding injury on the party that can do so at the lowest cost.

⁴³ Trades entered into under these conditions make both parties better off and therefore produce a Pareto superior outcome. Hence, all such moves preserve and enhance the economic efficiency of the starting point.

⁴⁴ The author wishes to thank George Brenkert and Tom L. Beauchamp of Georgetown University for the opportunity to produce this article, Ann C. Tunstall of SciLucent, LLC for her insightful comments and literary guidance, and Annette Hasnas of the Montessori School of Northern Virginia and Ava Hasnas of Falls Church, Virginia for causing him to be intensely concerned about the matter of product safety.