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A "Comment J" Parry to Howard Latin's "Good" Warnings, Bad Products, and Cognitive Limitations

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INTRODUCTION

Wherever manufactured products go, product-related injuries follow closely behind. This remains true despite a dearth of incentives for manufacturers to build safe products: reduced insurance costs and the ability to utilize the product’s safety record in marketing provides sellers with a competitive edge, while the negative publicity and massive tort judgments spawned by product accidents deter manufacturers from producing defective products. An absolute victory in the battle to prevent product-related injuries can never be declared, because some socially beneficial products are inherently unsafe or cannot be made ac-
incident-proof without imposing prohibitive costs.\textsuperscript{2} Furthermore, "no one has developed a system to match the creativity of the consumer in finding new and sometimes unsafe ways to use products."\textsuperscript{3}

Given the inevitability of product-related injuries, the legal system must attempt to allocate their costs in a rational and just manner.\textsuperscript{4} Under both strict products liability and negligence regimes, manufacturers may be forced to absorb part or all of these costs. Indeed, there is an "ancient" basis for the "special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products" that can injure them and their property.\textsuperscript{5} When a plaintiff charges a manufacturer with negligence, courts determine whether the manufacturer's actions were "reasonable."\textsuperscript{6} Even if the manufacturer's actions were reasonable, a court may hold the manufacturer partially or wholly liable for the resulting damages if, for example, the manufacturer is deemed to have superior knowl-

\textsuperscript{2} See Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1038 (Or. 1974) ("In design cases, the cost of the change necessary to alleviate the danger in design may be so great that the article would be priced out of the market and no one would buy it even though it was of high utility."); \textbf{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 2 cmt. a (Tentative Draft No. 2, 1995) (hereinafter \textbf{RESTATEMENT (THIRD) DRAFT}) ("Society does not benefit from products that are excessively safe -- for example, automobiles designed with maximum speeds of 20 miles per hour -- any more than it benefits from products that are too risky.").

\textsuperscript{3} \textit{THE 1984 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY REPORT ON PRODUCT SAFETY IN AMERICA} 42 (1985).

\textsuperscript{4} See \textbf{LEWIS BASS, PRODUCTS LIABILITY: DESIGN AND MANUFACTURING DEFECTS} 14 (1986) ("Product liability was and continues to be the creature of social policy. Considerations of a manufacturer's responsibility and limits of responsibility are made on the basis of what is best for society and the individuals that make up society.").


\textsuperscript{6} The most famous statement of the balancing test used to determine whether an actor has exercised reasonable care is the "BFL" formula appearing in Judge Learned Hand's opinion in \textit{United States v. Carroll Towing Co.}, 159 F.2d 169 (2d Cir. 1947). Under Judge Hand's analysis, courts balance the burden to the manufacturer, "B", against the probability of occurrence, "P", multiplied by the degree of injury, "I". \textit{Id.}
edge of how to prevent accidents, and can spread the costs of liability to all consumers through price increases.\(^7\)

A manufacturer can minimize or avoid liability for accidents by reducing or terminating production of a particular product, revising a product's design so that it is less likely to cause injuries, or providing warnings that instruct consumers on how to use the product safely. Warning labels inexpensively inform consumers of a product's inherent dangers and allow them to make fully informed purchasing decisions. Once a consumer has purchased a product, he or she will be able to avoid the product's foreseeable dangers for which there is a warning.\(^8\) The American Law Institute's *Reporter's Study: Enterprise Responsibility for Personal Injury* states the purpose of product warnings as follows:

[T]o provide users with information about risk levels so that users can harmonize their use preferences with their safety preferences in an informed way, to provide users with information about safe and dangerous use so that they can choose optimal risk reduction strategies, or to provide both types of information.\(^9\)

\(^7\) See *Restatement (Second) of Torts* § 402A, cmt. c (1965) ("Public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained ...."). For an introduction to the debate over the desirability of strict liability, see *Restatement (Third) Draft* § 2 cmt. a; Croley & Hanson, supra note 5, at 713-21; Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externalities: An Economic Justification for Enterprise Liability*, 76 *Cornell L. Rev.* 129 (1990); Alan Schwartz, *The Case Against Strict Liability*, 60 *Fordham L. Rev.* 819 (1992).

\(^8\) See Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 *N.C. L. Rev.* 121, 164 (1992) ("The costs of [reading and obeying a warning label] are minimal — a few minutes, at most, spent in the process of reading - and the benefits are enormous — the avoidance of serious personal injury or property damage."); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *Yale L.J.* 353, 398 (1988) (arguing that "warnings should be regarded as generally efficacious"); see also M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 *W. Va. L. Rev.* 221, 222 (1987) ("Nearly any product capable of causing injury can or could be rendered less hazardous by conveying effective warnings....").

\(^9\) 2 *American Law Institute, Reporter's Study: Enterprise Responsibility for Personal Injury — Approaches to Legal and Institutional Change* 66 (1991) [hereinafter ALI Reporter's Study]; see also James A. Henderson, Jr. & Aaron D. Twersky, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 *N.Y.U. L. Rev.* 265, 285 (1990) (asserting that dual function of warnings is to "reduce the risk of product-related injury by allowing consumers to behave more carefully than if they remained ignorant of risks associated with product use" and to
In both negligence and strict liability actions, an adequate warning can shield a manufacturer from liability, since consumers who overlook warnings “are held to have assumed the risk or to have been guilty of contributory negligence,” and a product that warns users of its risks is not “unreasonably dangerous.” This principle, set forth in the Restatement (Second) of Torts, has been dubbed the “comment j presumption.” Critics of current product warning doctrines argue that permitting manufacturers to avoid liability by adding an adequate warning label keeps accident levels unnecessarily high and benefits manufacturers at the expense of consumers. Furthermore, critics argue, warnings are not always read or followed, and a legal doctrine that assumes the opposite is therefore quixotic. The debate over product warnings is interesting both intellectually, as part of the larger battle concerning which legal standards should govern a manufacturer’s liability for its products, and practically, because all of us, as consumers, face numerous product warnings every day.

This Article addresses the issue of product warnings obliquely, by analyzing Professor Howard Latin’s comprehensive criticism of the effectiveness of warnings in his recent article “Good” Warnings, Bad Products, and Cognitive Limitations (“Good” Warnings”). Part I of this Article briefly surveys the

“provide consumers with the information necessary to choose whether or not they wish to encounter certain kinds of risks on a ‘take it or leave it’ basis”); Schwartz, supra note 8, at 396 (“Warnings serve two functions: They indicate risk levels and provide directions for safe use.”).

The manufacturer is not absolved of liability if an injured consumer can predicate liability on other theories, such as defective design or manufacture. See infra notes 321–27 and accompanying text.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

Compare Howard A. Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 U.C.L.A. L. REV. 1193, 1203 (1994) (“Manufacturers should ... be required to incorporate safety devices that can protect tired users whenever feasible against foreseeable risks from mishandling products.”) with ALI REPORTER’S STUDY, supra note 9, at 66 (“Not only is complete safety unachievable, but it is inconsistent with a serious interest in warning issues. This interest presupposes a commitment to individual autonomy -- within limits, to letting informed people decide for themselves what products to buy and how to use products.”).

For an introduction to various views informing this debate, see W. Kip Viscusi, REFORMING PRODUCTS LIABILITY (1991); Croley & Hanson, supra note 5; Schwartz, supra note 8 at 360.

Latin, supra note 13. Professor Latin also discusses some of his objections to comment j in a previous article: Howard A. Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 CAL. L. REV. 677 (1985).
legal duty of a seller to warn product users of certain risks, focusing on the treatment of product warnings in the Restatement (Second) of Torts and the most recent Restatement (Third) Draft. Part II of this Article expounds the powerful criticisms of the Restatement approaches proffered in “Good” Warnings. Part III attempts to repel Professor Latin’s criticisms and bolster the practical underpinnings of the Restatement approaches. Finally, Part IV discusses the problem of judicial confusion in dealing with warnings and the need to develop objective criteria by which courts and manufacturers can properly assess the effectiveness of warnings.

I. THE SELLER’S DUTY TO WARN CONSUMERS ABOUT THE RISKS OF ITS PRODUCTS

A. General Principles

Courts and commentators have attempted to balance the conflicting societal interests at issue in product-related accident lawsuits by developing the doctrine of the “duty to warn.” Under this doctrine, which exposes sellers to liability under neglig-

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16 In “Good” Warnings, Professor Latin attacks the provisions of the Restatement (Second) of Torts and the Restatement (Third) Draft concerning product warnings as “unrealistic,” “inefficient,” and “inequitable.” Latin, supra note 13, at 1294.

17 Under strict liability, a seller’s failure to warn may result in liability if the warning deficiency renders the product “unreasonably dangerous” .... Under negligence principles, a supplier may be liable for injury or damage incident to a failure to warn adequately when it knows or should know that the product is likely to pose an unreasonable risk without warnings, but fails to exercise reasonable care to inform users of the risk. In warranty, an inadequate warning may ... constitute[s] a breach of the implied warranty of merchantability.... [I]n the context of failure to warn jurisprudence, the functional characteristics of strict liability and negligence theories are almost indistinguishable.

Madden, supra note 8, at 222, 243 (citations omitted); see RESTATEMENT (THIRD) DRAFT § 2 cmt. h (Reporter’s note) (“The general obligation to provide reasonable instructions and warnings is so widely recognized that extensive citation is unnecessary.”).

The doctrine of the “duty to warn” has been heavily emphasized in the product liability area over the last twenty years. See Mark R. Lehto & James M. Miller, The Effectiveness of Warning Labels, 11 J. PROD. LIAB. 225, 225 (1988). Lehto and Miller attribute the proliferation of such litigation to “the relative ease of initiating tort actions based upon inadequate warnings, the difficulty in defending against such actions, and the 'apparently' low cost of placing warnings on products.” Id. (citations omitted); see also VISCUSI, supra note 14, at 132 (“The major issue is no longer the physical properties of the product but rather how the product will interact with the product user.”).
gence, strict liability, or warranty theories for products that lack adequate warning labels, commercial vendors of products "owe users and consumers a duty to warn of product-related risks that are not obvious." For the purposes of this Article, the most important consequence of a product’s accompaniment by an "adequate" warning under the Restatement (Second) is that the product is deemed not "unreasonably dangerous."

Generally, the duty to warn attaches for products that:

1. are intrinsically or inherently dangerous to the ultimate user,
2. present a high risk of danger under certain unusual and unintended uses,
3. are dangerous only to a few individuals who possess an idiosyncratic susceptibility,
4. are unavoidably unsafe.

In addition, the duty to warn extends only to those dangers "that are known or reasonably foreseeable and anticipated at the time the product is placed into the stream of commerce," and does not apply to risks that are "obvious." While the seller does not need to warn about dangers that could not reasonably be anticipated, it must "keep abreast of the current state of knowledge and advances of its product available through research, reports of dangers, scientific developments and technical breakthroughs." The seller, therefore, is "held to the

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18 Henderson & Twersky, supra note 9, at 265; see infra notes 23-24 and accompanying text (discussing obviousness of product defects).
19 "Failure-to-warn law does not require manufacturers to fashion product warnings that are ideal in every way. It simply demands that those warnings be 'adequate.'" Jacobs, supra note 8, at 127; see infra notes 232-284 and accompanying text (analyzing debate over adequacy of warnings).
22 Id. at 543; see also Alan Schwartz, Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship, 14 J. LEGAL STUD. 689, 693 (1985) (arguing that only defects that are "reasonably foreseeable" or "discoverable" should render manufacturers liable for failure to warn).
23 In most jurisdictions, "there exists no duty to warn of certain obviously hazardous conditions." Madden, supra note 8, at 253; see Wheeler v. John Deere Co., 862 F.2d 1404, 1414 (10th Cir. 1988); Phelps v. Sherwood Med. Indus., 836 F.2d 296, 303 (7th Cir. 1987). For criticism of the "obvious danger" rule, see Campos v. Firestone Tire & Rubber Co., 485 A.2d 305, 309-11 (N.J. 1984); Jacobs, supra note 8, at 128-37.
24 Sales, supra note 21, at 526. For arguments that a seller's duty to warn should not be limited by foreseeability of product risks, see Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 547 (N.J. 1982) (holding manufacturer strictly liable even though providing warning was impossible because risk was undiscoverable at time of manufacture, since "imposition of liability for failure to warn of dangers which were undis-
standards of an expert on the particular product and presumed
to know all the dangers that exist in a product at the time it is
marketed."25

Some courts have taken as "an article of faith" the proposition
that it is easier and preferable for a court to decide a case on
duty to warn grounds than on design defect grounds.26 Others
have emphasized the limited utility of warnings, given the
inherent danger of certain products and the cognitive limitations
of consumers.27 Regardless of the approach adopted, the duty to
warn has been prominent in products liability litigation and
manufacturers have responded by "both increas[ing] and ma[king]
more explicit the warning labels they provide with
their products...."28

coverable at the time of manufacture will advance the goals and policies sought to be
achieved by our strict liability rules"; Mark McLaughlin Hager, Don't Say I Didn't
Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law
is Wrong, 61 TENN L. REV. 1125, 1135 (1994) ("The negligence approach protects sup-
pliers from liability for risks beyond their knowledge. This encourages suppliers to
leave risks outside their knowledge in order to forestall liability. The negligence ap-
proach, in short, creates an incentive for ignorance.").

25 Beshada, 447 A.2d at 547; see Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d
330, 338 (5th Cir. 1984) ("In assessing what hazards are foreseeable, a manufacturer is
held to the status of an expert.").

For the liability system to be fair and efficient, most courts agree that the
balancing of risks and benefits in judging product design and marketing
must be done in light of the knowledge of risks and risk-avoidance tech-
niques reasonably attainable at the time of distribution. To hold a manu-
facturer liable for a risk that was not foreseeable when the product was
marketed might foster increased manufacturer investment in safety. But
such investment by definition would be a matter of guesswork.

RESTATEMENT (THIRD) DRAFT § 2 cmt. a.

24 A.D. Twersky et al., The Use and Abuse of Warnings in Products Liability -- De-
sign Defect Litigation Comes of Age, 61 CORNELL L. REV. 495, 500 (1976); see also
James A. Henderson, Jr., Judicial Review of Manufacturers' Conscious Design Choices:
The Limits of Adjudication, 73 COLUM. L. REV. 1531, 1531 (1973) ("Courts are inher-
ently unsuited to the task of establishing product safety standards in cases involving
the liability of manufacturers" because of polycentric nature of such task); Jacobs, su-
pra note 8, at 122-23 ("For the past thirty years ... failure-to-warn law has appeared to
function tolerably well without benefit of judicial adjustment or academic influence.").

27 See Kirk v. Hans Corp. of N.C., 16 F.3d 705, 708 (6th Cir. 1994) ("Obvious
risks may be unreasonable risks, and there is no justification for departing from
negligence ... principles merely because the dangers are patent." (citing Owens v.
Allis-Chalmers Corp., 326 N.W.2d 372, 377 (Mich. 1982)).

28 Lehto & Miller, supra note 17, at 225.
B. Treatment of the Duty to Warn in the Restatement

1. The Restatement (Second) of Torts

Section 402A of the Restatement (Second) of Torts establishes a rule of strict liability for a seller of "any product in a defective condition unreasonably dangerous to the user or consumer or to his property" when the product causes physical injury. While sellers "may be required to give directions or warning, on the container" in order to remove certain products from the realm of the "unreasonably dangerous," they are not required to warn of risks that are commonplace or result from overuse of the product. In addition, a seller is not liable if the injury results from "abnormal handling" of a product. Once a seller provides the user with an adequate warning, the Restatement (Second) affords the seller the following presumption: "Where [an adequate] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

2. The Restatement (Third) Draft

The American Law Institute is currently developing the Restatement (Third) of Torts: Products Liability. The most recent

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29 Restatement (Second) of Torts § 402A (a)-(b) (1965). Section 402A applies only if: "(a) the seller is engaged in the business of selling such a product and (b) the product is expected to ... reach the user or consumer without substantial change in the condition in which it is sold." Id. The Restatement does not explicitly state whether injured non-users and non-consumers are covered by the protection of Section 402A. Id. at cmt. o. "[I]n some circumstances a warning will not have any effect on a class of foreseeable users.... Thus, for example, where foreseeable users are ... casual bystanders who may not be alerted to a warning, liability will follow." Twerisky et al., supra note 26, at 506.

30 RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). According to comment j, "a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized." Id. For example, "[g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics ...." Id. at cmt. i.

31 Id. at cmt. h.

32 Id. at cmt. j.

draft separates the standards of liability for defects resulting from faulty manufacturing, faulty design, and inadequate warnings. Sellers must provide reasonable instructions and warnings about risks of injury associated with their products. If they fail to provide adequate instructions and warnings, the product is deemed to be defective.

While the Restatement (Third) Draft imposes strict liability on manufacturers under the theory of manufacturing defects, design defects and inadequate warnings are predicated on a different concept of responsibility, namely, negligence. Thus, in a warnings defect cast, a “risk-utility balancing” is necessary. The aim of this balancing is to achieve the optimal level of safety, not absolute safety, since “[s]ociety does not benefit from products that are excessively safe ....” In addition, imposing a burden on users of “proper product use” fosters equitable results and prevents the subsidization of careless consumers by careful ones.

Courts use a reasonableness test in judging the adequacy of product warnings. The warning must not only alert users to the existence of avoidable risks, but should also “inform users and consumers of nonobvious risks that unavoidably inhere in using or consuming the product.” Requiring an adequate warning enables consumers to make an informed decision on whether to

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34 RESTATEMENT (THIRD) DRAFT § 2.
35 Id. at cmt. h.
36 The RESTATEMENT (THIRD) DRAFT § 2 (c) provides that:
   a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

37 Id. at § 2 cmt. a.
38 Id.; see also Henderson & Twersky, supra note 9, at 296 (explaining that risk-utility balance involves balancing of cost to warn of remote risks against benefit of reduced accident costs).
39 RESTATEMENT (THIRD) DRAFT § 2(c) cmt. a.
40 Id.
41 Id. at cmt h. A warning is required only when the risks inherent in using the product for its particular purpose would not be obvious to a “reasonable product user.” Id. Since reasonable people may disagree as to which risks are “obvious,” that is a question to be decided by the trier of fact. Id.
purchase the product.42

II. HOWARD LATIN'S TREATMENT OF THE COMMENT J
PREASSUMPTION

Howard Latin's "Good" Warnings, Bad Products, and Cogni-
tive Limitations43 provides a comprehensive criticism of the
"comment j presumption."44 Professor Latin argues that the
presence of an adequate warning should not "dilute the manufac-
turer's responsibility for accident prevention."45 He supports this
position by analyzing purportedly severe limitations on the
abilities of consumers "to receive, comprehend, and act upon"
product warnings.46 Professor Latin concludes that these limita-
tions vitiate the effectiveness of many warnings and that "courts
should not allow manufacturers to shift the burden of precaution
when safer product designs or marketing strategies could feasi-
bly reduce accident risks."47 In challenging whether warnings
are effective enough to justify the comment j presumption, Pro-
fessor Latin touches upon the central issue in product warning
law.48

A. Two Behavioral Paradigms

Professor Latin begins his analysis by contrast ing two be-
havioral paradigms that comprise opposing extremes on the

\[\text{...}\]

42 Id. at cmt. f.
43 Latin, supra note 13.
44 Professor Latin uses the phrase "comment j presumption" as a way of denoting a
cluster of functionally equivalent legal treatments: Courts may foreclose assessment of
overall product safety on the rationale that an adequate warning is a sufficient defense
under the comment j presumption, that the failure to heed warnings is a superseding
cause even if the product design is unreasonably dangerous, or that the consumer's
failure to heed warnings is an unforeseeable misuse of the product. Id. at 1257.
45 Id. at 1205.
46 Id. at 1195.
47 Id. at 1198; see Croley & Hanson, supra note 5, at 786-92 (discussing alternative
theory, "enterprise liability," which places full responsibility for accident costs on
manufacturers in order to encourage them to warn of all "residually preventable acci-
dents").
48 Professor Latin's article is an extensively researched, persuasive legal article.
In the second of his article's three sections, entitled "Why Warnings Often Prove In-
effective," Professor Latin explores the reasons why he contends warnings are inef-
fective, and rebuts arguments of those who disagree. The most interesting and divi-
sive arguments from this section of Professor Latin's article will be discussed in this
Article. In order to achieve a thorough understanding of Professor Latin's article, it
should be read in its entirety.
spectrum of accident-causing behavior. He contends that these models serve as underlying assumptions for the majority of products liability law.\textsuperscript{49} The first model, that of the “Rational Risk Calculator” (“RRC”), presumes that people maximize utility by weighing the perceived costs and benefits of activities before deciding whether to engage in particular behavior.\textsuperscript{50} Under the RRC model, people can increase their utility by purchasing cheaper products that are less safe, and using the money saved on activities they value more than accident prevention.\textsuperscript{51} Proponents of the RRC model believe that individuals are free to gamble with their resources, but must also be willing to assume the costs of their choices.\textsuperscript{52} In addition, these proponents contend that it is fundamentally unfair to charge risk-averse consumers—those who choose not to gamble with their resources—higher prices in order to subsidize the accidents costs of those who choose to gamble.\textsuperscript{53}

The second behavioral paradigm that Professor Latin discusses, and the one with which he sympathizes, is the “Mistake and Momentary Inattention” Model (“MMI”).\textsuperscript{54} This model emphasizes the cognitive and temporal restrictions that “preclude assessing all relevant considerations in a ‘rational’ manner.”\textsuperscript{55} Under the MMI paradigm, product-related accidents result from mistakes and carelessness rather than rational risk-utility calculations.\textsuperscript{56} Thus, allowing losses to lie with consumers would not

\textsuperscript{49} See Latin, supra note 13, at 1199.
\textsuperscript{50} Id.
\textsuperscript{51} Id.; see Schwartz, supra note 8, at 357-58 (explaining that utility maximization involves personal decisions between minimizing risk and accompanying cost of risk maximization).
\textsuperscript{52} Latin, supra note 13, at 1199.
\textsuperscript{53} Id. See Croley & Hanson, supra note 5, at 781-82 (stating that under theories other than RRC, “low risk consumers subsidize high risk consumers and thus will be less willing to pay either to insure against or to prevent the loss”); George L. Priest, A Theory of the Consumer Product Warranty, 90 YALE L.J. 1297, 1348 (1981) (asserting that consumers can be separated into different levels of risk based upon their accident probabilities and that by adopting liability framework with single level of protection, high-risk consumers are not benefited while low-risk consumers are penalized).
\textsuperscript{54} Latin, supra note 13, at 1199; see also Howard Latin, Activity Levels, Due Care, and Selective Realism in Economic Analysis of Tort Law, 39 RUTGERS L. REV. 487 (1987) (“[T]he common economic assumption that all actors are ‘rational utility maximizers’ is incompatible with effective legal analysis.”).
\textsuperscript{55} Latin, supra note 13, at 1199.
\textsuperscript{56} Id. at 1199-1200.
deter most product-related injuries. Where "occasional deficient behavior by users is inevitable and predictable from the actuarial perspective of the manufacturer, and if a feasible design improvement would guard against the resulting risks," the MMI model precludes manufacturers from diluting their responsibility for accidents simply by issuing a warning.

Professor Latin emphasizes that the choice between these two paradigms has important ramifications for the role assigned to warnings. Since RRC adherents emphasize consumer choice in safety levels, they are likely to support the comment presumption. In contrast, because MMI adherents believe that accidents result from the carelessness and cognitive limitations of product users, they assert that "strict product liability and regulation may be necessary to encourage the development of relatively 'fool-proof' products whenever greater safety is feasible."

B. The Frequent Ineffectiveness of Warnings

In "Good" Warnings, Professor Latin argues that allowing manufacturers to be absolved of liability for some product-related injuries merely because they issue product warnings would be fatuous, since these warnings often prove ineffective. The first reason Professor Latin posits for the ineffectiveness of warnings is that many people simply fail to read them. While such failure may result from deliberate risk-taking or unusual carelessness, Professor Latin emphasizes several other factors that may contribute to the ineffectiveness of product warnings. These factors recognize that: a certain portion of the population is illiterate; some products are intended for children and "other users who are frequently inattentive, unable or unwilling to devote the time and effort needed to read detailed warnings"; users may lose warnings not attached to products; some people rely on "learned intermediaries," while others rely on their general

57 Id.
58 Id. at 1205.
59 Id. at 1197-98.
60 Latin, supra note 13, at 1201.
61 Id. at 1202.
62 Id. at 1208.
63 Id. at 1207-20. In summarizing Professor Latin's argument, this Article combines some of the individual factors he lists in order to reduce overlap and enhance clarity.
knowledge and experience; detailed warnings can "overload" consumers' cognitive capacities; and competing demands on consumers' time and attention prevent them from giving the necessary attention to warnings. 64

The second reason that leads Professor Latin to conclude that warnings are often ineffective is that consumers frequently fail to understand the "good" warnings they read. 65 Professor Latin provides several explanations for this conclusion, including that: it is difficult for warnings to strike the proper balance between detail and clarity; complex warnings may be ambiguous; users may be uncertain about the consequences of misuse; users may lack the education necessary to evaluate warnings; cognitive heuristics often lead users to ignore warnings; and competing demands divert the time and attention of product users from warnings. 66

The third and final reason Professor Latin offers for the ineffectiveness of warnings is that some consumers fail to follow good warnings that they have read and understood. 67 In support of this contention, Professor Latin asserts that consumers often have imperfect memories, are overconfident, act reflexively during emergencies, disregard low-probability risks, and do not find manufacturer warnings credible. 68 Thus, in Professor Latin's view, the comment j presumption that "people will obey all 'good' warnings" is an "unrealistic behavioral presumption." 69

C. Legal Ramifications of the Comment J Presumption

As a result of this purported ineffectiveness of product warnings, Professor Latin finds that the comment j presumption is an obstacle to judicial assessment of "alternative [and presumably more effective] means to improve safety." 70 By allowing manufacturers to rely on product warnings and avoid liability,
courts forego the opportunity to assess the efficiency of alternative safety measures, such as safer product designs, safer substitute products, alternative marketing strategies, and more comprehensive warnings.\textsuperscript{71}

Professor Latin further contends that the comment j presumption's bar to compensation is inconsistent with several products liability doctrines "that allow full or partial recoveries despite deficient behavior by users."\textsuperscript{72} He first asserts that it would be inconsistent for courts to allow manufacturers to side-step "foreseeable inattention to warnings," when these manufacturers are "required to consider protective measures for reducing the hazards of foreseeable product mishandling."\textsuperscript{73} Second, since the user's failure to discover a product defect does not constitute contributory negligence under Section 402A comment n, a user should not be barred from compensation if he unreasonably fails to locate and comprehend a warning.\textsuperscript{74} Third, while comparative negligence has gained widespread acceptance, the comment j presumption functions as a complete bar to recovery.\textsuperscript{75} Fourth, the presumption bars non-product user victims from claiming that the manufacturer and the product user are jointly and severally liable when the user did not heed a legally adequate warning.\textsuperscript{76} Finally, although the patent danger rule has "fallen into disfavor,"\textsuperscript{77} comment j allows manufacturers to market dangerous products with impunity if they simply warn users of the product's hazards.\textsuperscript{78}

Professor Latin concludes "Good" Warnings by discussing three alternative legal treatments of warnings: risk-utility balancing which includes warnings; risk-utility balancing without

\textsuperscript{71} Latin, supra note 13, at 1259-75.
\textsuperscript{72} Id. at 1276.
\textsuperscript{73} Id. at 1277.
\textsuperscript{74} Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section ....
\textsuperscript{75} RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).
\textsuperscript{76} Latin, supra note 13, at 1196; see also Uptain v. Huntington Lab., Inc., 723 P.2d 1322, 1326 (Colo. 1986) (adopting comment j as applicable rule and concluding that product misuse absolves manufacturer from liability).
\textsuperscript{77} Latin, supra note 13, at 1279.
\textsuperscript{78} Id. at 1279.
\textsuperscript{78} Id. at 1281.
warnings; and “true strict liability.”

III. A RESPONSE TO “GOOD” WARNINGS’ SUBSECTION, “WHY WARNINGS OFTEN PROVE INEFFECTIVE”

The majority of “Good” Warnings is devoted to the argument that it is unrealistic to assume that product users follow warnings with the frequency required to justify comment j. Adequate counters to Professor Latin’s animadversions on warning effectiveness, or to his argument that consumers’ failure to follow warnings should negate the comment j presumption, will vitiate “Good” Warnings. After developing Professor Latin’s arguments in order to present them fairly, this section of the Article attempts to refute his arguments and demonstrate the functional necessity of comment j.

Professor Latin commences the subsection “Why Warnings Often Prove Ineffective” with an ad horrendum litany of the daily “innumerable risks” to which product users are exposed. The fact that “almost all products present substantial risks if improperly manufactured, designed, or used,” however, is not sufficient to justify an anti-comment j approach. First, the comment j presumption does not absolve a manufacturer who provides adequate warnings from liability for an improperly manufactured or designed product. Second, the Restatement drafters specifically designed the comment j presumption to prevent the improper use of products, the residual danger that Professor Latin fears. The mere inherent potential of any product to cause injury, therefore, does not argue for or against comment j.

Professor Latin’s second criticism of the comment j presumption is that “[p]eople would have to read, understand, remember and follow innumerable product warnings to protect themselves from all product-related risks they may confront.”

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79 Id. at 1282-94.
80 Id. at 1205.
81 Latin, supra note 13 at 1206.
82 See infra notes 321-27 and accompanying text.
83 Latin, supra notes 13, at 1206.
This challenge, although facially formidable, is misleading. It consolidates a list of risks to which a person may be exposed over time and erroneously implies that a person must continuously juggle numerous product warnings in his head regardless of when he actually uses the products. This argument fails to consider the actions of a reasonable product user. For example, a rational person will not be distracted by the warnings accompanying the microwave oven that cooked his breakfast during his or her drive to work.

A. Failure to Read Product Warnings

1. Functional Illiteracy

The first reason Professor Latin offers for the ineffectiveness of warnings is that consumers may simply not read them. Professor Latin's first explanation for this phenomenon is functional illiteracy. There are several ways, however, to address this problem. One way is simply to recognize that a product warning is not "adequate" under comment j when it is foreseeable that many of the product's users will be functionally illiterate in English, unless the warning takes this into account. For example, a

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84 Professor Latin ignores the phenomena of intentional risk-taking and egregious laxity, which are likely to explain why some consumers may not read warnings. The former is inconsistent with his MMI paradigm, while the latter is awkward to defend.

85 Id. at 1207.

86 Id. at 1207-08.

87 Comment j allows manufacturers to assume users have read the warnings on a product and, in most states, a plaintiff's failure to read a product warning constitutes contributory negligence. See, e.g., Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 299-300 (8th Cir. 1996) (holding that under Nebraska's adoption of comment j, seller can assume adequate warnings will be read and failure to read warnings precludes assertion that warning defect constituted proximate cause of injury); E.R. Squibb & Sons, Inc., v. Cox, 477 So. 2d 963, 971 (Ala. 1985) (holding that seller's inadequate warning could not constitute proximate cause of consumer's injury since consumer failed to read warning); Kane v. R.D. Werner Co., Inc., 657 N.E.2d 37, 39 (Ill. App. Ct. 1995) (same); Bloxom v. Bloxom, 512 So. 2d 839, 850-51 (La. 1978) (same); Levin v. Walter Kidde & Co., Inc., 248 A.2d 151, 154 (Md. 1968) (plaintiff read, but ignored, instructions constituting negligence in failure to use reasonable care, barring him from recovery). But see Shell Oil Co. v. Gutierrez, 581 P.2d 271, 280 (Ariz. Ct. App. 1978) (explaining that proof of failure to read warning not necessarily adequate to absolve seller of liability); Bushong v. Garman Co., 843 S.W.2d 807, 811 (Ark. 1992) (stating that "failure to read a label does not automatically preclude a claim for inadequate warning."). Recovery is often precluded on both strict liability and negligence grounds. However, "[i]f failure to read a warning does not bar recovery when the plaintiff is challenging the adequacy of the efforts of the manufacturer or seller to communicate the dangers of the product to the buyer or user." Thornton v. E.I. Du Pont de Nemours and
manufacturer of a machine intended for use by poorly-educated industrial workers may be required to supplement its warnings with symbols, tape-recordings, or periodic live demonstrations of proper usage techniques whenever feasible. Likewise, in a state with a large Hispanic population, the highest court, legislature, or an appropriate regulatory agency might mandate that certain product warnings appear in both Spanish and English. Manufacturers who failed to comply with these or other similar requirements would not be permitted to avail themselves of the comment presumption.

Furthermore, Professor Latin’s functional illiteracy argument proves too much. To some extent, all consumers are functionally illiterate in the language of product warnings. This is increasingly true as products become more sophisticated and specialized. Applying Professor Latin’s rationale, most product warnings could be opposed on the grounds of efficiency since consumers frequently encounter product dangers expressed in technical language beyond their understanding. Furthermore, since warnings increase the cost of products, if a significant number of product users have difficulty comprehending a manufacturer’s warning and if providing such cautions will not reduce a seller’s liability, the cost of these warnings may outweigh their

Co., Inc., 22 F.3d 284, 290 (11th Cir. 1994).

See, e.g., Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965) (opining that manufacturer’s warning may be inadequate since it lacked symbols and foreseeable product users included people with “limited education and reading ability”); Campos v. Firestone Tire & Rubber Co., 485 A.2d 305, 310 (N.J. 1984) (explaining that symbols could be used in warning when foreseeable users included unskilled and semi-skilled workers).

But see Ramirez v. Plough, Inc., 863 P.2d 167, 173-74 (Cal. 1993) (recognizing that warning written in Spanish may have been appropriate since foreseeable product users included Spanish speaking consumers, but holding that manufacturer did not have legal obligation to include bilingual warning). Even in the absence of a legal obligation, however, it may be a good business practice for a manufacturer to affix bilingual labels and warnings on particular products as a way to attract and protect Hispanic and other non-English speaking consumers. The FDA has stated that it “encourages the preparation of labeling to meet the needs of non-English speaking ... populations.” Id. at 173 (citing Labeling for Oral and Rectal Over-the-Counter Aspirin and Aspirin-Containing Drug Products; Rye Syndrome Warning, 53 Fed. Reg. 21,633, 21,633 (June 9, 1988)).

benefits for both the manufacturers and consumers.\(^9\)

Legal ambivalence toward warnings is an extreme measure and is unwarranted since a less drastic and equally effective alternative exists. Rather than discounting the value of warnings, functionally illiterate product users could be required to find a literate person who will read and explain to them the product’s risks. Many areas of law either require those who are functionally illiterate to seek help in reading and understanding documents or simply presume their competence. In order to receive a driver’s license, for example, an applicant must pass a written test demonstrating knowledge of the rules of the road and the ability to read and understand road signs.\(^9\) Similarly, signing a contract, whether it is a lease or a credit card receipt, affects the signatory’s rights and duties, regardless of whether that person fully understands the complex legalese contained in the contract.\(^9\) Rather than eviscerate contract law, it is less ex-

\(^9\) Even if only a subset of consumers can understand a certain warning, a manufacturer may still decide that such a warning should be provided. If more than a critical mass of consumers follows the warning, the manufacturer’s liability expenses may decrease more than the cost of producing the product rises. See Salvi v. Montgomery Ward & Co., Inc., 489 N.E.2d 394, 397, 403 (Ill. App. Ct. 1986) (noting that manufacturer included warning on product for benefit of consumers outside class of typical product purchasers in order to reduce liability).

Consumers may desire product warnings, even if they must pay extra for them, to avoid the pain and suffering that inevitably accompanies product accidents. For an argument that “leads to the conclusion that consumers likely do demand some level of pain-and-suffering insurance,” see Steven P. Croley & Jon D. Hanson, The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law, 108 HARV. L. REV. 1787, 1791 (1995). Product liability rules are ultimately measured against consumer preferences. Id. at 1792; see also Lehto & Miller, supra note 17, at 254 (discussing study which indicated that consumers are attracted to products that contain warning labels).


\(^9\) See, e.g., United States v. Fletcher, 279 F. 160, 162 (W.D. Tex. 1922) (upholding surety obligation on bond by presuming illiterate signatory should have bond read to him); Wasserbauer v. Marine Midland Bank-Rochester, 400 N.Y.S.2d 979, 987 (N.Y. Sup. Ct. 1977) (stating illiterate signer’s failure to procure reading of instrument to him constituted gross negligence); see also 17A AM. JUR. 2D Contracts §§ 225, 226 (1991) (stating that illiterate persons are presumed to know contents of contract and are negligent for failing to have contract read to them). Courts in a number of jurisdictions, however, have refused to apply this presumption to contracts of adhesion. See, e.g., Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1342 (D. Kan. 1996) (stating that exploitation of illiterate signatory is factor to be considered in ascertaining whether contract is one of adhesion and suggesting that illiterates are presumed to have such contracts read to them); Ponder v. Blue Cross of S. Cal., 193 Cal. Rptr. 632, 640 (1983) (stating that words of adhesion contract must be un-
pensive and more sensible to require functionally illiterate signatories to obtain assistance in understanding the contract.94

The same principles of duty and presumed competence should apply to product warnings. Functionally illiterate product users who value their safety will learn the dangers of operating heavy equipment, mixing drugs, or using industrial cleaners beforehand, even though the costs of learning this information would be higher than the costs to literate users.95

2. Predictably Inattentive or Incompetent User Groups

Professor Latin next suggests a scenario in which consumers “who are frequently inattentive, unable or unwilling to devote the time and effort needed to read detailed warnings,” such as children and unskilled laborers, utilize various products.96 Such product uses may be viewed as a specialized functional illiteracy problem, since manufacturers of these products are aware that their merchandise is especially likely to be used by people who are unable to comprehend adequate warnings and should design their products and accompanying warnings accordingly.

The BB gun is an example of a product designed primarily for use by children that can cause serious injury if misused.97

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94 See 17A AM. JUR. 2d Contracts § 226 (1991). Of course, many people do not understand what they are signing. An MMI adherent might argue that this conveys a weakness in the proposed solution, but an RRC supporter can respond that a person making an appropriate risk-benefit analysis can and should “sign away” and take his chances. See Peter M. Kinkaid & William J. Stuntz, Note, Enforcing Waivers in Products Liability, 69 Va. L. Rev. 1111, 1152 (1983) (asserting that enforcing product liability waivers allows consumers who make informed purchasing decisions to allocate their own level of liability).

95 Some people may assume that certain usually-innocuous products, such as cosmetics, do not pose a risk of harm. The single word “Warning,” a symbolic exclamation point, or other generally recognized warning indications can place consumers on notice that they should obtain help in discovering the product’s dangers. See Dan Flynn, Letter to the Editor, Reducing Choking Deaths in Children, 275 JAMA 1313, 1314 (1996) (noting that warning packages on balloons, recommended by Balloon Council in 1991, have reduced choking deaths among children from swallowing balloons).

96 Latin, supra note 13, at 1208.

97 In Sherk v. Daisy-Heddon, the court held that a fourteen-year-old boy possessed sufficient knowledge of a pump-up Air Rifle’s lethal capacity to be civilly liable for injuring another teenager with the rifle, even though the rifle’s warning label did not explicitly warn of such danger. Sherk, 450 A.2d 615, 617-18 (Pa. 1982). Professor Latin criticized Sherk and other decisions dismissing design-defect actions where child users failed to read or follow warning labels, arguing that such decisions permit manufacturers to rely on “foreseeably ineffective warnings.” Latin, supra note 13, at 1208. Professor Latin argues that such reliance should not shield manu-
How can sellers make these products safer, given children's predictable inattentiveness? One possible solution is to address warnings to both the children and their parents or guardians. Another possible solution would be to allow manufacturers or the government to prohibit retailers from selling the product directly to minors.98

Either solution would ensure that, while children would be the ultimate users of BB guns and other potentially dangerous products, a parent or guardian would be burdened with the duty of informing the child of the product's proper use and potential dangers. If an accident occurs when the product is being used improperly, the responsibility would rest on the shoulders of the adult charged with conveying the warning to the child.99 This solution resonates with familiarity. Parents and guardians already have across the board legal responsibility in negligence for their children; the obligation to inform their children of the hazards and proper safety procedures associated with products would simply be a special case of this pre-existing duty.100

98 After a court, legislature, or regulatory agency implements such a prohibition, several possible measures can help to ensure compliance. For example, police can conduct highly publicized crackdowns, such as those used to deter sales of tobacco, alcohol, and pornography to minors. See, e.g., Terry Pristin, Enforcing Tobacco Laws, N.Y. TIMES, June 19, 1996, at B1 (discussing training of health officials to conduct undercover "sting" operations to prevent sale of tobacco to minors); Susan Fraker et. al., Crackdown on Porn, NEWSWEEK, Feb. 28, 1977, at 21, 22 (discussing legislative action designed to reduce availability of pornography). Alternatively, retailers may be required to record the name and address of the purchasing adult for each unit sold; that adult would then be responsible for the transmission of the warning to the child. Id. at 27.

99 A similar system of imputed duty would remedy the problem posed by Professor Latin's example of the unskilled laborer. Rather than imputing responsibility to a parent or guardian, the employer would be required to instruct its workers regarding a product's warnings and to assume responsibility for the failure to adequately convey such warnings. See Carol A. Cheney, Comment, Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees, 85 NW. U. L. REV. 562, 563 (1991) (arguing that "learned intermediary doctrine" should be applied in context of industrial employment).

The foreseeability of use by children may affect the manufacturer's duty to warn of "open and obvious" dangers, see supra note 23, since "the determination of what is open and obvious to children should be based upon what is true for children as opposed to what is true for adults." Klen v. Asahi Pool, Inc., 643 N.E.2d 1360, 1366 (Ill. App. Ct. 1994), appeal denied sub nom. Klen v. Doughboy Recreational, Inc., 649 N.E.2d 417 (Ill. 1995).

100 Parents and guardians must ensure that their wards do not place themselves in
3. Reliance on Explanations by Intermediaries

While the proposed solutions to the previously discussed problems necessitate the use of an intermediary, Professor Latin views the closely related "learned intermediary" rule as a problem that itself contributes to the failure to read warnings. Under the Restatement (Second) of Torts, the chain of causation between the manufacturer's conduct and the final injury suffered by the plaintiff may be interrupted or superseded when "an act of a third person ... by its intervention prevents the [manufacturer] from being liable for harm."

Professor Latin expresses concern that warnings transmitted from doctors to patients, employers to employees, and salespeople to consumers are not always read, and that this negligence may be detrimental to the injured children's cases against third parties, such as manufacturers. See, e.g., Townsend v. Wright, 469 S.E.2d 281 (Ga. Ct. App.), cert. denied, 469 S.E.2d 281 (Ga. 1996).

In Townsend, the defendant accidentally ran over a two-year-old girl who was playing behind a parked car. Id. at 282. The girl's mother "sat under a tree in the yard" while her two small children "played in the yard." Id. The Court of Appeals of Georgia found the trial court's jury charge, that "it would be normally the duty of a parent to see that the child would not be in a place of obvious danger," to be a correct "general statement of the duty of parents and other custodians of children." Id. at 283. The court further stated that "[t]he most simple and direct statement of this duty is that children of tender years and youthful persons generally are entitled to care proportioned to their ability to foresee and avoid perils that they may encounter." Id.; see also Mayer v. Tulane Med. Ctr., 527 So. 2d 329, 332 (La. Ct. App. 1988) ("Parents are under a duty to properly supervise and protect their young children. This duty is measured by a standard of what a reasonable parent would do under the same or similar circumstances.")(citations omitted).


Professor Latin, supra note 13, at 1209-10. Professor Latin's "Reliance on Explanations by Intermediaries" subsection is the fourth subsection in "Good" Warnings. It is dealt with out of order here because of its close relationship to Professor Latin's first two reasons why product users fail to read product warnings.

Restatement (Second) of Torts § 440 (1965). It is very difficult for a manufacturer to avail itself of this doctrine. "Proof of sufficiently intrusive third party conduct sufficient to break causation is a formidable task and [the manufacturer] must show that the third party's conduct is itself the proximate cause of injury." Madden, supra note 8, at 278.
persons to buyers "may be incomplete, ambiguous, or obsolete, and may underemphasize safety concerns to increase sales or productivity." Reliance on a learned intermediary, however, may actually enhance the transfer of information between a manufacturer and a consumer. A pharmaceutical company, for example, can inform a physician who is "better trained to process the risk information and convey the risks to [each individual] patient" of the complex risks of certain drugs. Likewise, an employer whose workers use industrial equipment for specific purposes and who is familiar with the employees' cognitive abilities can supplement general manufacturer warnings with specific task-related information conveyed in a manner that is more likely to be effective.

As with any possible solution, reliance on learned intermediaries is imperfect. But the comment j presumption should not yield merely because a learned intermediary, whether through negligence or malice, misinforms a user. If the manufacturer misinforms the learned intermediary, there is a clear justification for discounting the shielding effect of the warning. If the manufacturer does not supply misinformation, pallid support exists for Professor Latin's attack on the comment j presumption.

When information from an intermediary is the only warning given to the user, the manufacturer has assumed the requisite responsibility for its product by properly warning the intermediary, the person most likely to impart the message effectively to the user. When an intermediary merely complements the warning accompanying the particular product, there is even less ground for discounting the warning's effect. A summary of the

103 Latin, supra note 13, at 1209; see Madden, supra note 8, at 232 ("[I]t is in the professional user and the employer-purchaser jurisprudence that one still finds a high incidence of retrogressive opinions defeating the recovery of injured parties whose superiors may have been informed of a product's risk, but who were, themselves, never made aware of the danger.").

104 See Schwartz & Driver, supra note 66, at 68-72 (positing that employer can provide most effective warnings orally by adapting message to individual employee's needs and answering specific questions).

105 Viscusi, supra note 14, at 144.

106 See Beale v. Hardy, 769 F.2d 213, 214-15 (4th Cir. 1985) (holding that manufacturer had no further duty to warn product users who had experience and expertise in handling and hazards associated with silica dust); Mays v. Ciba-Geigy Corp., 661 P.2d 348, 365 (Kan. 1983) (affirming decision holding that manufacturer not under duty to furnish each employee with product manuals).
warnings regarding a product provided by a learned intermediary is a supplement to, not a replacement for, reading the warnings. This summary complements the manufacturer's warning in much the same way as reading the "Cliff's Notes" to *War and Peace* enhances one's understanding of the novel, without substituting for the knowledge one acquires by reading the novel.

After Professor Latin expresses his fears regarding learned intermediaries and their failure to transmit effective warnings, he concludes that "a blanket exemption from liability based on a 'good' warning to the intermediary is [not] appropriate when manufacturers could make the product itself safer at a reasonable cost." The proper inquiry, however, is not whether the product can be made safer at a reasonable cost, but whether adequate warnings should exempt manufacturers from liability even when producing safer products is economically feasible. Even granting *arguendo* that the transformation of the learned intermediary from the RRC's "Dr. Jekyll" to the MMI's "Mr. Hyde" will transpire, an ineffective learned intermediary doctrine does not constitute a valid reason for dismantling the comment j presumption. At best, it is evidence that doctors do not always properly fulfill their duty to warn.108

4. Misplaced or Unavailable Directions

Professor Latin further asserts that consumers sometimes neglect to read product warnings because "instruction manuals, tags, or package inserts ... can be detached and misplaced while the product is still in use." This premise, however, does not lead to Professor Latin's conclusion that a manufacturer should not be entitled to presume its warnings will be heeded. In the context of the workplace, it is far more sensible to suggest that an employer who fails to provide proper training and instructions for its employees, including awareness of and access to the warnings accompanying particular equipment, should be held responsible for any resulting injury to such employees.110

108 Even if one argued that the learned intermediary rule itself needs reform, this neither effects warning law in cases where intermediaries are not present nor betrays any inherent weakness in the comment j presumption.
110 In most employment accidents covered by a workmen's compensation statute, the employee relinquishes his or her common-law right to sue the employer for dam-
side the workplace, people who misplace warnings or purchase products for which manuals or inserts are unavailable, are not absolved of the responsibility of reading the manufacturer's warnings. If the product's original warnings are lost, or are otherwise unavailable to a second-hand purchaser, this purchaser may allocate the risk in several ways. He could lower the purchase price, buy the item from a seller who has the warnings, buy the product and obtain the manual independently, or not buy the product at all.

When the original purchaser continues to use a product after losing the original warnings, the most efficient way to reduce accident costs is to require the consumer to obtain a new copy of the warnings. A liability-wary manufacturer should happily provide them. If the consumer conducts a cost-benefit analysis and determines that procuring replacement warnings is an excessively burdensome task, he may choose to rely on his memory of the warnings, or to improvise when his memory fails. The wisdom of these choices varies according to each product's inherently dangerous characteristics, the strength of the consumer's memory, and his or her skill in using the product.

111 See Barry v. Eckhardt Porsche Audi, Inc., 578 P.2d 1195, 1195 (Okla. 1978) (holding that seller of used auto did not have duty to warn of inoperative seat belt buzzer).

112 The likelihood of such behavior is roughly related to the complexity and dangers posed by the product. For example, a purchaser is more likely to haggle over a missing automobile manual than a toaster manual. Cases in which purchasers do not account for missing manuals, therefore, are likely to involve products which are the least likely to result in serious harm. See Lehto & Miller, supra note 17, at 254.

113 See id. (suggesting that consumers evaluate extent to which ensuring safety requires expenditures of time and money). A reasonable conclusion is that consumers make decisions consistent with "safety-related knowledge" when the perceived hazard is severe and the action to ensure safety requires little effort. Id.
5. Reliance on General Knowledge and Expertise

Professor Latin also examines situations where consumers simply ignore available product warnings and rely solely on their past experience and knowledge. In support of his argument, Professor Latin cites a study\(^{114}\) in which all one hundred participants who were "asked to complete a simple construction project" failed to read or acknowledge the warning on hammers provided to them before beginning their assigned task.\(^{115}\)

The authors of the study concluded that there is "no way of knowing what percentage of product users actually read the warning label or even recognize that one exists, but casual observation suggests that the figure may not be high."\(^{116}\) Professor Latin adds that "it is doubtful that most consumers will read detailed warnings and directions accompanying hammers, aspirin, bicycles, light bulbs, detergents, and many other products that are in widespread use."\(^ {117}\)

\(^{114}\) Latin, supra note 13, at 1210.

\(^{115}\) See Alan L. Dorris & Jerry L. Purswell, Warnings and Human Behavior: Implications for the Design of Product Warnings, 1 J. PROD. LIAB. 255 (1977). This study required one hundred high school and college students to perform a simple construction project which consisted of making a "starter hold." Id. at 256-57. The participants received hammers to which three alternative warnings were affixed. Id. One of the warnings, (a), had been present on the hammer when it was purchased, while the other two warnings were created solely for the purposes of this study. Id. The three labels read:

(a) Caution! A hammer can be made to chip if struck against another hammer face or another hardened surface resulting not only in damage to the hammer but possibly in bodily injury.

(b) Caution! Do not proceed further. Ask for instruction before you continue this operation. It is important that you do not use this hammer to strike.

(c) Caution! Do not proceed further.

Dorris & Purswell, supra at 256-57.

At the completion of the task, the researchers asked the participants if the hammers contained warning labels. None of the one hundred participants recalled noticing a warning label. Id. Davis and Purswell suggested that these results may be a function of the artificial atmosphere in which the experiment was conducted, but expressed doubt that the results would be different in a non-controlled environment. Id. The authors stated that the experiment suggested that the wording of a warning label does not decrease the possibility of product related injuries since few users read the warning. Id.

Professor Latin suggested that this study was plausible and agreed that, while this conclusion may not apply to all products in all circumstances, the majority of consumers fail to read warnings affixed to common products in widespread use. Latin, supra note 13, at 1210.

\(^{117}\) Dorris & Purswell, supra note 115, at 256.

\(^{117}\) Latin, supra note 13, at 1210; see also Dorris & Purswell, supra note 115, at 259 ("The extent of the perceived hazard is undoubtedly influenced by past experience with
It seems quite sensible, however, for consumers who have been riding bicycles, changing light bulbs, using laundry detergent, and hammering nails for years not to reread the warnings for these products every time they handle them.116 When products are relatively simple and commonplace, consumers are presumably aware of the minimal dangers these products present, and it may not be worth even the small amount of effort needed to constantly re-inform themselves of these warnings.119 When dealing with complex or dangerous products, such as drugs, it is reasonable to assume that users will be less likely to ignore "good" warnings and rely instead on their general knowledge of the product's proper use.120

Professor Latin's position becomes more untenable when, despite adequate warnings and instructions, a court finds "blatant and massive misuse"121 of a product by a user who "[did not] pay any attention to whether it had instructions or not" because "[h]e figured [he] knew what [he] was doing."122 If one views such consumer behavior as irresponsible, or simply inappropriate, relieving manufacturers of liability is beneficial since it will encourage consumers to read warnings. In products liability cases, the deterrent effect of tort law is most often addressed by encouraging manufacturers to take desirable precautions in

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116 See Dorris & Purswell, supra note 115, at 259. Researchers have found that consumers are reluctant to accept warnings regarding natural disasters. Id. Dorris & Purswell suggest that this reluctance extends to warnings about common products. Id. Professor Latin posits that consumers rely upon prior knowledge and past experiences with common products and assume that they already know the requisite safety procedures. Latin, supra note 13, at 1210-11. Professor Latin contends that this presumed knowledge causes overconfidence and extends the failure to read product warnings into other fields. Id. at 1211.

119 Professor Latin's empirical claim that product users do not always re-check warnings on innocuous products does not lend support to his argument. Deciding not to re-check warnings on innocuous products is classic RRC behavior that allows product users to save time without incurring a substantial probability of injury. See supra notes 49-52 and accompanying text (discussing RRC paradigm).

120 See Dorris & Purswell, supra note 115, at 259 (asserting that individuals respond to warnings according to their beliefs and attitudes towards hazard, product, and warning).


122 Id. at 362. Several courts have held that "a plaintiff who does not read an allegedly inadequate warning cannot maintain a negligent-failure-to-adequately-warn action unless the nature of the alleged inadequacy is such that it prevents him from reading it." E.R. Squibb & Sons, Inc. v. Cox, 477 So. 2d 963, 971 (Ala. 1985); see also Hurt v. Coyne Cylinder Co., 968 F.2d 1319, 1329 (6th Cir. 1992); Kane v. R.D. Werner Co., Inc., 657 N.E.2d 37, 39 (Ill. App. Ct. 1995).
designing and producing their products. The concept of deterrence, however, can also be analyzed from the perspective of the consumer. If consumers are aware that they must bear their accident costs when they ignore good warnings, they will think twice about ignoring warnings. Just as fear of tort costs can drive manufacturers to provide adequate warnings, fear of absorbing accident costs can encourage consumers to read them.

6. Information Overload

Professor Latin next discusses the “debate in the social sciences literature about whether extended descriptions of product attributes will induce information overload.” He presents the common argument that detailed product warnings may be as problematic as uninformative warnings because consumers will be selective in which information they read, and excessive information increases the difficulty of selecting which information to heed, increasing the probability of consumer inattention to warnings.

The first reply to this argument is that, as Professor Latin admits, there is a debate in the literature over whether consumers can appropriately process warnings. As a matter of com-

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123 See O'Brien v. Muskin Corp., 463 A.2d 298, 306 (N.J. 1982) (holding manufacturer had duty to produce “state-of-the-art” design, rather than merely complying with industry standards, since increased burden on manufacturer was reasonable in light of severity and probability of injury).

124 Although this only partially contradicts Professor Latin's argument regarding consumer inadvertence, deterrence is possible where a consumer consciously decides to ignore warnings and rely on his general knowledge and experience. See Doris & Purswell, supra note 115, at 263 (stating that further research should be conducted in order to determine common fears of hazards to make warnings more effective); see also Lehto & Miller, supra note 17, at 226-27 (suggesting that further research in area of warning effectiveness will benefit consumers). Professors Lehto and Miller believe that the existing research indicates an increased tendency in consumers to act in accordance with warnings that they deem credible. Id. at 255. This perceived tendency suggests that deterrence may be achieved by increasing the credibility and effectiveness of warnings. Id.

125 Latin, supra note 13, at 1211. For another discussion on the debate over information overload effects, see Lehto & Miller, supra note 17, at 222-23.

126 Latin, supra note 13, at 1211.

127 Id. This is especially problematic, according to Lehto & Miller, since “[i]n response to [the] proliferation of litigation based upon the duty to warn, many manufacturers have both increased and made more explicit the warning labels they provide with their products ....” Lehto & Miller, supra note 17, at 225.

128 “The information overload idea as commonly expressed rests on questionable experiments that their principal investigator now cautions decisionmakers not to take literally.” David M. Grether et al., The Irrelevance of Information Overload: An Analy-
mon sense, one can assume that a 500-page warning booklet accompanying a toaster will be very lonely. It is harder to draw firm conclusions when we move into the more empirically important gray area. One prominent article concludes that "legal implications of the information overload phenomenon ... must be rejected because consumers in fact do not 'overload.'" Instead, when too much strain is placed upon a consumer's cognitive capacities, experimental evidence shows that the consumer "satisfices": he "do[es] as well as one can, given the circumstances." Since people decide matters in ways that further their own best interests when they satisfice, "the best inference from the evidence is that consumers do not experience serious problems as a result of the amount of information that markets and the state now generate."

A plethora of evidence shows that, in general, "consumers respond appropriately to the provision of safety information." This is partially due to the nature of product use: safe handling techniques are often "common knowledge or easily learned." It is precisely when a consumer is unfamiliar with a product's proper use or inherent dangers that he is more likely to be wary and eager to consult the product's warnings.

Professor Latin concludes that "[g]iven the asymmetry in product safety information and risk-assessment expertise, the concept of information overload in a meaningful sense—too much information can interfere with the efficiency of consumer choices—should be treated as relevant, not irrelevant, to the legal imposition of responsibilities for prevention of product-related accidents." Given the uncertainty in the social science literature, and that the amount of detail in a warning determines its legal adequacy, it is equally plausible to conclude


129 Id. at 279. Stated more strongly, the authors' conclusion is that "the information overload idea—that too much information causes dysfunction—is a myth." Id. at 301.

130 Id. at 279.

131 Id. at 294. For another criticism of the "information overload" idea, see Hager, supra note 24, at 1146 ("For all its increasingly frequent invocation, the overload argument has scant empirical or theoretical substantiation.").

132 Schwartz, supra note 8, at 398.

133 Id.

134 Latin, supra note 13, at 1215.

that "typical general warnings and category instructions are adequate, subject to particular contrary evidence." 136

7. Competing Demands on Time and Attention

Professor Latin concludes the section on the failure of consumers to read product warnings by elaborating on the "information overload" theme. 137 While warnings themselves may be too long or complex for consumers to process, these consumers must contend with numerous other distractions. Since our "decisionmaking capacities are limited and ... people have many competing demands made on their time and attention," it is foreseeable that some people will not read certain product warnings. 138 Professor Latin discusses two inapposite cases to illustrate the supposed tendency of product users "to ignore warnings associated with common household products in order to conserve time and attention." 139 These cases fail to exemplify a situation in which competing demands on consumers' attention diverted them from heeding warnings. Instead, they exhibit consumers' failures to heed simple, clear warnings. In one case, the only "distraction" was a deceptive product name, 140 while the only apparent competing demand on the user's attention in the other case was attractive packaging. 141

In Maize v. Atlantic Refining Co., 142 the plaintiff was injured after ignoring the following warning on a rug cleaner: "Caution. Do not inhale fumes. Use only in well ventilated place." 143 The logo "Safety-Kleen" was in large type on all four sides of the product's can, while the warning appeared in smaller type on two sides of the can. The Pennsylvania Supreme Court upheld a judgment for the plaintiff, stating that the product's name, Safety-Kleen, "would naturally lull the user of that fluid so-

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137 Schwartz, supra note 8, at 398.
138 See Latin, supra note 13, at 1215-20.
139 Id. at 1216; see also Lehto & Miller, supra note 17, at 230 ("Humans selectively attend to information, ignoring what they consider to be irrelevant. A major difficulty in designing an effective warning label is to design it so that it will not be filtered out.").
140 Latin, supra note 13, at 1216-17.
143 Maize, 41 A.2d at 851.
named into a false sense of security.” Since the product’s name “was so prominently featured” on its packaging, the court found it to be understandable that some consumers would discount the ventilation warning as being “of comparatively minor import.” The court thus concluded that the manufacturer negligently designed the product’s warning label.

While supporting the court’s decision, Professor Latin “take[s] exception ... to the court’s emphasis on the name of the cleaner,” since “[m]any people will assume a product intended for home use is sufficiently safe that they need not examine detailed warnings.” However, Safety-Kleen’s spartan warning could hardly be considered “detailed.” In addition, it is thoroughly absurd for a consumer to assume that he does not have to read a product warning merely because that product is “intended for home use.” Prescription medication, microwave ovens, lawn-mowers, chain saws, blenders, and weightlifting equipment are all intended for home use, but there is no justification for ignoring warnings on these products.

It is equally difficult to comprehend how Brown v. Gulf Oil Corporation illustrates the proposition that “increasing amounts of consumer time and attention” are spent reading warning labels. The warning was simple and direct:

**CAUTION:**

Flammable if overheated or exposed to open flame. Always melt Gulfwax by heating in a pan over boiling water, as in a double boiler. Never melt directly in pan over fire, hot plate or in hot oven.

The wax caught fire while being heated in a saucepan and burned Mrs. Brown and her husband while they attempted to discard the pan. Mrs. Brown “assumed there was no danger ...
because the wax was beautifully packaged which made the product appear innocuous.\textsuperscript{152} The Tennessee Court of Appeals rejected the plaintiffs' attempt to analogize their case to \textit{Maize}, holding that "the cases are distinguishable in that the Gulfwax package makes no explicit representation of safety. A picture of candles, fruits, and a candy jar on the package is illustrative of the uses of the product, not of its safety."\textsuperscript{153}

Furthermore, a Gulfwax user would be more likely than the average product user to read the warning because of its positioning on the package. The cautionary message was printed on the bottom panel of the package, along with information about "General Uses" and "Preserving and Canning."\textsuperscript{154} Since no other instructions or directions appeared on the package, "anyone wanting any information on the product would have to see this panel."\textsuperscript{155} Instead of acknowledging that this unfortunate consumer suffered injury because of her own carelessness, or advocating the mandatory placement of warnings on the front of all packages,\textsuperscript{156} Professor Latin attempts to buttress his argument with an unsubstantiated criticism of Tennessee's duty to inspect packages.

Professor Latin relies upon the decisions in \textit{Maize} and \textit{Gulf Oil} to support his argument that some users may not read warnings. Professor Latin concludes that "[w]hether or not ideal consumers ‘should’ examine all warnings and directions, the caselaw provides empirical support for the conclusion that product users frequently do not read them."\textsuperscript{157} While Professor Latin provides anecdotal evidence of careless consumers, such evidence fails to support his conclusion that users "frequently" fail to read product warnings, either in an absolute sense or as a percentage

\textsuperscript{152} \textit{Id.} at §27,838.
\textsuperscript{153} \textit{Id.} at §27,845.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} The prominence of the warning and the manufacturer's marketing techniques, both at issue in \textit{Gulf Oil}, are two factors a court must consider in evaluating the adequacy of a warning. \textit{See infra} notes 297-313 and accompanying text. These factors may also render a product's advertising or packaging misleading and possibly subject the manufacturer to penalties imposed by the Federal Trade Commission, Food and Drug Administration, or various consumer protection laws. \textit{See} 21 U.S.C. §352 (Supp. 1996) (requiring drug and medical device manufacturers to provide "adequate warnings ... where [the product's] use may be dangerous to health ... in such manner and form as are necessary for the protection of users").
\textsuperscript{157} Latin, \textit{supra} note 13, at 1219.
of all consumer interactions with products. Furthermore, the reality that some consumers will fail to read warnings and that some products will cause harm does not diminish the legal importance of warnings. To analogize, the fact that many people will negligently cause harm to others does not justify abandoning a negligence standard and leaving the cost of losses with victims. Similarly, the failure of many drivers to obey posted speed limits, whether they carelessly fail to read the speed limit sign, have competing demands on their time and attention, or for any other reason, does not justify abating police enforcement of traffic laws.

B. Failure to Understand “Good” Warnings

Professor Latin’s next argument is that, even if a product user reads a warning, he may not understand it. Professor Latin anticipates that juries will engage in Monday-morning quarter-backing by “overestimat[ing] a typical user’s degree of comprehension,” resulting in inadequate awards that fail to compensate fairly product injury victims.158 Many of the arguments Professor Latin makes in this section of “Good” Warnings speak to the issue of what warnings should be considered legally adequate to qualify as a warning under comment j. These concerns could be addressed in an equally effective manner by setting a high standard for what counts as a “good” warning.159

1. Inability of Manufacturers to Design Clear and Comprehensive Product Warnings

Professor Latin first asserts that consumers fail to understand good warnings because, while “[m]any risks are complex and cannot be explained in simple terms,” verbosity may “decrease the clarity or impact” of warnings.160 In other words, if warnings are too brief, they may omit important information, while if they are prolix, their tedium will bore consumers into danger. Sellers face a “catch-22” situation that constrains them from placing the judicious amount of information in a warning

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158 Latin, supra note 13, at 1220. But cf. Schwartz, supra note 8, at 398 (“[T]he commitment of juries to the compensation goal suggests that ... the fear that consumers would bear excessive accident costs in a world where adequate warnings are exculpatory seems unwarranted.”).

159 See infra notes 297-313 and accompanying text.

160 Latin, supra note 13, at 1221.
since "[n]o tradeoff among clarity, comprehensiveness, and impact can prove optimum for all warning contexts and product users."\textsuperscript{161} This is merely an extension of Professor Latin’s "information overload" argument: complexity reduces consumers’ ability to read or comprehend warnings, while oversimplification dilutes the messages contained in warnings.\textsuperscript{162}

In support of his argument, Professor Latin cites a study comparing the effects of differing amounts of detail in drug warnings. The study concluded that "the short version [of the test warning] may have been more successful at conveying fairly simple facts, whereas the longer version may have been more successful at communicating complex information requiring integration."\textsuperscript{163} This study simply reaffirms the common-sensical proposition that the length of a warning must correspond to the nature and complexity of its message. The drafters of the Restatement stress that a manufacturer must consider the effects of length on clarity when drafting a warning.\textsuperscript{164} It is unimportant that no individual warning may be perfect; the objective should be to design warnings that are understood well enough to prevent frequent injury. This is an empirical question that cannot be answered with simple laboratory experiments and anecdotal evidence.

It is interesting that Professor Latin chooses the example of drug warnings to illustrate the proposition that there is an inherent tension between the desire for brevity and the necessity of comprehensiveness. First, it is inherently more difficult to achieve a "safer design" for drugs than for most other products. While there may be many alternative ways to design and position a gas tank on a car, or to place a hand guard on a printing press, a new prescription drug is usually the product of years of research and testing, and the consumer must often risk side effects or other dangers in order to attain the drug’s benefit.\textsuperscript{165} Second, the range of possible warnings that can accompany drugs seems rather limited: a patient may need to take the drug...

\textsuperscript{161} Id. at 1222; see also RESTATEMENT (THIRD) DRAFT § 2 cmt. h ("Warnings that are too numerous or detailed may be ignored and thus ineffective.").
\textsuperscript{162} See supra notes 126-36 and accompanying text.
\textsuperscript{163} Kanouse & Hayes-Roth, supra note 135, at 151.
\textsuperscript{164} See RESTATEMENT (THIRD) DRAFT § 2 cmt. h.
\textsuperscript{165} See Carlin v. Superior Ct., 920 P.2d 1347, 1350 (Cal. 1996) (stating that liability of manufacturers must be limited to encourage research and development of new products).
at specific times; there may be contraindications; and there may be side effects. Such warnings will rarely generate internecine battles between detail, clarity, and impact. Third, warnings on prescription drugs are often directed at the doctors who prescribe the drugs, rather than the patients. This complicates Professor Latin's warning analysis by introducing learned intermediary doctrine issues, such as a doctor's duty to warn.

2. Textual Ambiguity

Professor Latin next addresses the "textual ambiguity" that allegedly infects "[s]tatements of any significant complexity." The main causes of nebulosity in product warnings, Professor Latin asserts, are vague terminology and oxymoronic messages "declaring that the product is desirable, efficacious, and safe for use, but also hazardous and subject to misuse." The problem of ambiguity is compounded, according to Professor Latin, when consumers fail to recognize that ambiguity exists.

Professor Latin illustrates the problem of textual ambiguity by discussing the case of Procter & Gamble Manufacturing Company v. Langley. In this case, the plaintiff, Mrs. Langley, lost some of her hair after applying one of the defendant's "New Milk Wave Lilt Home Permanent" kits. The plaintiff alleged that Procter & Gamble impliedly warranted that the product "was wholesome and noninjurious and did not contain any harmful substance." The following directions accompanied the solution:

BEFORE YOU START

Remember - you shouldn't use any permanent, unless your hair is in good condition. So, a few reminders ...

166 Most users of prescription drugs lack scientific training, and do not need to know the underlying scientific reasons for the danger that the drug poses. The warning must simply state the drug's dangers, how to avoid those dangers, and possible results of noncompliance with the warning. See Lehto & Miller, supra note 17, at 171.


168 Latin, supra note 13, at 1222.

169 Id.

170 Id. at 1223 ("Consumers may not recognize ambiguity in warnings before an accident occurs and courts may underestimate the ambiguity after subsequent events have clarified product risks and appropriate preventive measures.").

171 422 S.W.2d 773 (Tex. Civ. App. 1967); see Latin, supra note 13, at 1223.

172 Langley, 422 S.W.2d at 774.

173 Id.
3. If your hair is bleached, tinted or color-treated in any way or if it is in delicate condition (dry, brittle, breaking off, etc.) make test curls to see if your hair can take a wave. If at any time, these strands feel sticky or gummy, use the liquid neutralizer at once and do not wave any more of your hair.\textsuperscript{174}

The plaintiff testified that she read this warning and understood that the instruction and warning in regard to the strands of hair being sticky meant 'Just what it says.'\textsuperscript{175} Since her hair had recently been tinted, Mrs. Langley made a test curl, but left the lotion on for four minutes as opposed to the recommended ten. At this time, the test curl was sticky. Instead of using the liquid neutralizer as the directions required, however, she applied the solution to all of her hair. She further exacerbated the situation by leaving the preparation in for twice the amount of time specified in the instructions.\textsuperscript{176}

Professor Latin's use of \textit{Langley} as an example of textual ambiguity is not persuasive. When the Texas Court of Civil Appeals stated that the product's "instructions and warnings are unambiguous and explicit,"\textsuperscript{177} it was not simply engaging in pretentious overestimation of a consumer's ability to comprehend the warning, for "Mrs. Langley herself testified that she read the instructions and warnings and understood them to mean just what they say."\textsuperscript{178} Professor Latin's assessment that the warnings were textually ambiguous is not only in direct contradiction to the findings of the court, but also to Mrs. Langley's express acknowledgment of the warning's clarity. Professor Latin's conclusion, therefore, can be sustained only if he knows Mrs. Langley's true understanding better than Mrs. Langley herself.

Professor Latin stresses that there "is nothing inherently uncomfortable or threatening in the sensation of stickiness and the test curl felt no different from the product itself before the application."\textsuperscript{179} These facts, however, are irrelevant to the issue of the ambiguity of the product's warning. There is nothing "inherently uncomfortable" in many potentially dangerous actions that manufacturers typically warn against, such as swal-

\textsuperscript{174} \textit{Id.} at 775.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Langley,} 422 S.W.2d at 780.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} \textit{Latin, supra} note 13, at 1224.
following a massive overdose of powerful medication, or placing one's hand in dangerous proximity to the moving blades of a blender. The way the product felt before the test curl is irrelevant since that simply "is not the test."\(^{180}\)

At most, *Langley* merely presents an issue of the effectiveness of the warnings which accompanied the home permanent kit. A potentially viable challenge to the warning in *Langley* is that it is "more likely that [Mrs. Langley] did not really understand the significance of the sticky condition or the possibility that disfigurement, rather than unsatisfactory hair styling, could result from product use."\(^{181}\) This criticism anticipates the next subsection of "Good" Warnings.

3. Uncertainty About the Consequences of Misuse

Professor Latin next addresses the uncertainty of consumers regarding the consequences of product misuse.\(^{182}\) Placing this discussion under the larger category of "failure to understand 'good' warnings" is odd, since Professor Latin does not claim that the users misunderstood the warnings. Rather, the warnings at issue inadequately disclosed the potential harms or risks associated with product misuse. A warning that contains incomprehensible language or is buried within the fine print cannot fully alert users to a product's risks. Similarly, a warning that fails to disclose the possible harm that can result from product misuse may not impress upon the user the necessity of following product instructions.

Professor Latin cites *Cooley v. Carter-Wallace, Inc.*\(^{183}\) to illustrate this proposition. Rather than supporting his position, this case demonstrates that his criticism would be more appropri-
ately directed at the standard for what constitutes a "good" warning. Indeed, the "precise question" on appeal in Cooley was "the adequacy of the warning" on a container of Nair depilatory cream. While the package clearly warned against application of the cream to "vaginal/genital areas," the plaintiff applied Nair to his scrotal area before undergoing a vasectomy and developed a severe infection. The only mention of the potential consequences of misuse contained on the product was that "[i]rritation or allergic reaction may occur with some people."

A warning's sufficiency "is dependent upon both the language used and the impression that the language is calculated to make upon the mind of the average user of the product." Since the warning on Nair "was such that a prospective user could fairly assume that any possible adverse effect of the product would be mild, whereas the product was actually capable of producing serious and permanent injury," the court held that the warning was inadequate.

Professor Latin correctly states that consumers cannot "make 'rational' risk calculations if they are not aware of the stakes." However, he draws two erroneous conclusions: first, that this negatively implicates comment j; and second, that if provided with only a partial list of potential harms, users "may not understand the risks created by any deviation from the specified directions." The evidence that consumers disadvantage themselves by miscalculating risks is weak. And not only is it impossible for a manufacturer to anticipate every potential misuse of its product, it is also impossible to predict every harm

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14 Id. at 376.
15 Id.
16 Id.
17 Id. at 378 (citation omitted).
18 Cooley, 478 N.Y.S.2d at 379.
19 Latin, supra note 13, at 1226.
20 Id.
21 Schwartz, supra note 8, at 413. Some of the studies which Schwartz cites show that:

- housing prices correctly reflected earthquake risks ... [and] the probability of defects ...[;] consumers have a substantial willingness to pay to reduce the injury rate from common household products such as drain openers ...[;] workers appreciate risks to life and health and exact substantial wage premiums for bearing them ... [;] consumers routinely purchase extended warranty coverage when buying expensive items such as cars and computers.

Id. at 379 (citations omitted).
that might occur from such misuse. The existence of these difficulties does not compel abandoning the requirement of adequate product warnings. A potential user can make an informed decision about whether to purchase the product and whether to heed the warning as long as the warning mentions the most severe, and the most common, risks.  

4. Inadequate Evaluative Expertise

Professor Latin's next subsection, premised on the proposition that consumers "may not grasp the meaning of product warnings because they lack the necessary education and evaluative skills," largely rehashes his discussions of functional illiteracy and predictably incompetent user groups. One can concede that "people with higher education levels tend to consider more information and derive more meaning from it" and still believe that a manufacturer's warning need only be adequate for a reasonable person. The fact that a consumer simply cannot understand a particularly complex warning because his education falls below that of a reasonable person does not render the warning inadequate; the user must find someone to explain it to him.

An expectation of reasonableness on the part of actors, whether or not it is attainable in a particular case, is in accord with many other areas of tort law. For example, under the Restatement (Second) of Torts, "[m]ental deficiency which falls short of insanity ... does not excuse conduct which is otherwise contributory negligence." The establishment of standards based upon the elusive "reasonable person" resonates in practicality, since "[i]f the rule were otherwise, there would be a different standard for each level of intelligence resulting in confusion

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192 See Gurley v. American Honda Motor Co., 505 So. 2d 358, 361 (Ala. 1987) (stating that warning need only be reasonable under circumstances to be legally adequate); see also Pfizer v. Jones, 272 S.E.2d 43, 44-45 (Va. 1980) (holding that warnings need not include exhaustive list of potential dangers); Barry v. Don Hall Lab., 642 P.2d 685, 689 (Or. Ct. App. 1982) (stating that manufacturer does not have to warn of "all attendant risks").

193 Latin, supra note 13, at 1226; see supra notes 85-100 and accompanying text.

194 Latin, supra note 13, at 1226.

195 See supra notes 85-100 and accompanying text. If warnings are not accessible to some people, Professor Latin's argument is not devoid of reason. However, this Article develops an equally effective counter-argument in order to minimize the force of Professor Latin's assertion and to demonstrate that Professor Latin's argument is a critique not only of comment j, but of other universally accepted areas of tort law.

196 RESTATEMENT (SECOND) OF TORTS § 464 cmt. g (1965).
and uncertainty in the law.”

5. Individual Variations in Capabilities, Motivations, and Beliefs

The next subsection, in which Professor Latin asserts that “decision-making capacities and proclivities vary greatly among different people and in different settings,” simply reiterates the arguments made in the previous subsection of “Good” Warnings. Professor Latin concludes that “inadequate evaluative expertise” and “varied educational and experiential backgrounds among product users ensure that the level of their understandings of warnings will also vary widely.” Rather than recognizing that a well-designed warning will effectively alert most consumers to the dangers of a product, Professor Latin proposes a standard under which every warning is bound to be inadequate. While acknowledging that “increased uniformity in warning terminology may well be desirable,” he rejects proposals for standardization because “no warning can be perfectly effective given wide variations in human decisionmaking competency and personality traits.” Taking Professor Latin’s argument to its logical extreme, the words “no legal doctrine” must be substituted for the words “no warning,” because the disparate backgrounds, personality traits and ability levels that prevent perfect comprehension of warnings also confound the ability of actors to behave non-negligently, or to conform to the strictures of the criminal

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187 Wright v. Tate, 156 S.E.2d 562, 565 (Va. 1967) (holding mentally incompetent adult to same standard of care as person of greater intellect); see also Jolley v. Powell, 299 So. 2d 647, 649 (Fla. Dist. Ct. App. 1974) (applying reasonable person standard to insane tortfeasor). “It is surely not unusual in tort law nor indeed is it unfair that persons may be held responsible for failing to live up to a standard which, as a matter of fact, they cannot meet.” Id. at 648; see OLIVER W. HOLMES, JR., THE COMMON LAW 108 (1881) (“The standards of the law are standards of general application .... It does not attempt to see men as God sees them, for more than one sufficient reason .... [The awkward man’s] slips are no less troublesome to his neighbors than if they sprang from guilty neglect.”).

In actions for breach of the implied warranty of merchantability, courts have based decisions on whether the reaction was appropriate based upon the expectation of an “ordinary objective consumer,” not whether the individual consumer is particularly squeamish. See Phillips v. Town of West Springfield, 540 N.E.2d 1331, 1333 (Mass. 1989) (addressing whether ordinary consumer could expect to find bone shard in cafeteria food).

188 Latin, supra note 13, at 1227.
189 Id.
190 See supra note 189 and accompanying text.
191 Latin, supra note 13, at 1229.
Professor Latin's concerns raise questions about how prominent cognitive disparities will be for most product warnings. Will the fact that "human behavior is characterized by diversity and change," mean that some people, or the same people over a period of time, will be unable to resist using electric equipment in the bathtub, or is there only a danger at the margins, when consumers tangle with complex products created for specialized uses? As long as the warning is clear, the former does not seem plausible, while the latter does not seem empirically worrisome: a first-time user of a complex product is likely to be alert and cognizant of warnings, while a long-time user has experience on his side.

Just as Professor Latin's concerns should not be read to emolish all of tort, contract, and criminal law, neither should they be casually dismissed. Research concerning the interrelation between a person's behavior, perception, and subsequent understanding may be used as an important tool to construct and judge legally adequate warnings. In utilizing this knowledge, both manufacturers and courts will have the opportunity to "give adequate consideration to the multiplicity of factors that affect user comprehension of product risks and warnings."303

6. Cognitive Heuristics and Biases

Professor Latin next provides a lengthy discussion of the "fertile area of psychological research" known as cognitive heuristics.304 Cognitive heuristics are the simplifying strategies people adopt to process complex information.305 Professor Latin argues that cognitive heuristics are one of the reasons why individuals vary in capability or belief, or why some consumers may have trouble dealing successfully with textual ambiguity.306

302 Id.
303 Id.
304 Id.
305 Id.
306 Heuristics are ways of reasoning that quickly produce an acceptable, but imperfect, result. They arise from the need to reduce difficult and prolonged thought, and allow the decisionmaker to develop "tricks" by which decisions can be made rapidly. STUART SUTHERLAND, IRRATIONALITY: WHY WE DON'T THINK STRAIGHT 320 (1992); see also Allen Newell, The Heuristics of George Palaya and Its Relation to Artificial Intelligence, in METHODS OF HEURISTICS 195 (Rudolf Gomers et al. eds., 1983).
307 Latin, supra note 13, at 1229-30.
The first heuristic Professor Latin discusses is "representativeness," which "reflects the tendency of people to make improper probability estimates because they generalize from inadequate samples or superficial analogies." Professor Latin fears that users may rely on their limited, uneventful experiences with a particular product, or all products in general, to conclude that a particular product is safe. Placed in socio-scientific terms, Professor Latin's concern is: "When consumers use particular products without injury, the 'input' in their assessment of product safety—these safe experiences—will lead to an expected 'outcome' of continued safety."

Professor Latin's fear that repeated safe product uses will lull consumers into complacency is exaggerated. The safety of each product use is not completely independent and unrelated to that of its previous uses. If a particular product is not improperly designed or manufactured, and the consumer has used the product safely in the past, he will likely continue to use it safely in the future. In other words, a person who has used a product competently and safely usually should expect that his future experience with the product will be safe. Unless a product's safety quickly deteriorates with age, the danger level associated with its usage will be relatively constant. The belief that "representative" safe experiences while following a product's warnings will later lead users wantonly to ignore those warnings is untenable.

The second heuristic Professor Latin discusses is that of "availability," which posits that since "safe experiences with virtually all products are far more frequent than injuries ...[,] the great majority of product risks cannot be available to product us-

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207 Id. at 1230. A person who follows the representativeness heuristic "evaluates the probability of an uncertain event or a sample, by the degree to which it is: (i) similar in essential properties to its parent population; and (ii) reflects the salient features of the process by which it is generated." Daniel Kahneman & Amos Twersky, Subjective Probability: A Judgment of Representativeness, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIOASES 32, 33 (1982).

208 See Latin, supra note 13, at 1230-31.

209 Id. at 1232.

210 See Alan Schwartz & Louis L. Wilde, Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests, 69 VA. L. REV. 1387, 1439 (1983). Consumers know that the design and manufacture of appliances may be affected by human error. Id. Since numerous product successes would imply a forthcoming failure, the representativeness heuristic biases users towards pessimism, making it unlikely that users will wantonly ignore warnings. Id. at 1440.
In the context of product safety, the lack of publicity regarding common risks like adverse reactions to cosmetics and drugs, or falls from ladders, is not widely recognized. Professor Latin fails to establish a causal connection between this lack of publicity and a tendency to ignore good warnings. He ignores powerful reminders of potential product problems, such as safety recalls, large monetary judgments, consumer safety groups, and the experiences of acquaintances. Finally, he also overlooks the most obvious source of "availability" of danger: the warning itself. A product's warning is associated specifically with the particular product, not with a general risk of product accidents. A product warning can be more powerful than a newspaper account of product injury since the latter may simply blend into normal tragic incidents reported by the newspaper, while the former is in propinquity with the product.

"Cognitive dissonance," the next heuristic that Professor Latin discusses, "leads people to reject or underemphasize information inconsistent with their beliefs and actions." A person who admires a Corvette's pulchritude and speed, posits Professor Latin, may undervalue its potentially dangerous nature. It is precisely the purpose of a warning, however, to provide the "reality check" that consumers need when they are entranced by a product's attributes. While attending to warnings may dampen a consumer's initial euphoria, there is no reason to believe that adhering to warnings by wearing seat belts or maintaining properly inflated tires will cause users to "minimize the significance" of these hazards or reduce the usefulness of the

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211 Latin, supra note 13, at 1234.
212 Id. at 1233; see David W. Bates, et al., Incidence of Adverse Drug Events and Potential Adverse Drug Events: Implications for Prevention, 274 JAMA 29 (1995) (listing 180,000 deaths and over 1 million injuries each year from adverse drug reactions); Patricia Braus, Who's Crashing and Smashing, AM. DEMOGRAPHICS, Oct. 1, 1995, at 16 (stating that there were 7.7 million hospital visits in 1994 due to tripping and falling from ladders and steps); Home Accident Figures Remain High, PRESSWIRE, May 19, 1995, at M2 (reporting approximately 42,000 accidents annually involving ladders); Patricia McCormick, Allergic Reactions? Check Your Cosmetics, THE RECORD, Dec. 13, 1984, at B7 (noting that FDA received 247 complaints in 1982 regarding skin problems caused by cosmetic use).
213 Latin, supra note 13, at 1233.
214 Id. at 1234. In Professor Latin's view, positive attributes of a product may cause consumers to ignore negative attributes, resulting in cognitive dissonance affecting product selection. See id.
215 Id. "Framing" refers to the phenomenon whereby individuals respond in "unexpected" ways to information depending upon its presentation. Id. at 1235.
Furthermore, it strains credulity to anticipate that a person could purchase a product such as an automobile without realizing that it is potentially dangerous, and be dumbfounded and heartbroken after discovering the contents of its warnings. Professor Latin next considers the heuristics of “framing” and “anchoring,” which emphasize the relationship between the presentation of information and the recipient’s subsequent reaction. These heuristics are based upon the premise that manipulation of statistics and verbalizations affect the way individuals perceive risk. For example, consumers may be risk-averse if information is presented in terms of “potential lives saved,” but risk-seeking if it is presented in terms of “potential lives lost,” despite the lack of probabilistic reason to differentiate between these statistics. Consumers may also “anchor” estimates of probability on initial statistics regarding the frequency of occurrences that they receive. Test subjects who are furnished with different “anchors” may estimate product risks differently.

Professor Latin does not demonstrate how these heuristics affect a product user’s ability to follow and comprehend warnings; instead, he utilizes them to question how “the RRC assumption that people make ‘rational’ choices in pursuit of personal preferences [can] be taken seriously ....” As for framing, it is difficult to imagine a product warning’s impact changing significantly by replacing “Do Not Expose to Fire” with “Keep Away from Open Flame.” Assuming this change dilapidates the warning’s effectiveness, the warning will be legally inadequate, and comment j will not apply. In addition, if adroit framing makes advertising or product packaging misleading, the warning

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216 Latin, supra note 13, at 1235; see also Paul Slovic et al., Facts Versus Fears: Understanding Perceived Risks, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 464-655 (1982) (describing inherently subjective nature of risk assessment and difficulties encountered by consumers in evaluating risks). Contrary to Professor Latin’s view, studies indicate that “availability” causes people to judge an event as “likely or frequent if instances of it are easy to imagine or recall.” Id. at 465.

217 Latin, supra note 13, at 1235-38.


219 See Slovic et al., supra note 216, at 466-67.

220 Latin, supra note 13, at 1236-37.
may not satisfy the requirements of consumer protection laws.221

One response to the anchoring heuristic is that it is not inherently "irrational" to base one's estimates on an anchor. In the example Professor Latin cites, experiment subjects differed in their estimates of forty mortality risks depending upon whether they were initially told that 50,000 people per year die in automobile accidents, or that electrocution kills 1,000 people per year.222 It is unlikely that most people would know the number of people who suffer lethal injuries each year. If the mortality rate of automobile accidents, fairly high, or electrocution, fairly low, is the only information available, it is thoroughly rational to use this limited data to help estimate other mortality risks.223 While not ideal, it is still the best information the consumer possesses.

In addition, product warnings generally do not require the user to apply cognitive reasoning skills in contrived settings. They simply alert users to the risks of particular products; a comparative analysis of risks across products is not necessary. A crane operator who wishes to avoid electrocution will attempt to ensure that his crane rig avoids high voltage power lines.224 The operator's estimate of the frequency of electrocution does not affect his behavior.

Finally, Professor Latin discusses “prospect theory,” which integrates several cognitive heuristics, including framing and anchoring.225 According to a study by Professors Kahneman and Twersky, users undervalue probabilistic insurance.226 Professor Latin assumes that the “same reasoning would likely apply to

222 See Latin, supra note 13, at 1237; see also Slovic et al., supra note 216, at 466-67.
223 See SUTHERLAND, supra note 205, at 200; Slovic et al., supra note 216, at 478.
226 “[P]eople greatly undervalue a reduction in the probability of a hazard in comparison to the complete elimination of that hazard .... [P]robabilistic insurance represents many forms of protective action, such as having a medical checkup, buying new tires, or installing a burglar alarm system.” Twersky & Kahneman, supra note 218, at 346.
any precautionary aspect of a product warning that does not enable the consumer to eliminate product risks. The example Professor Latin provides is that "a risk reduction from 40% to 30% may not be perceived as equal in value to a reduction from 30% to 20%, although the objective benefits and costs of marginal prevention may be identical ...." Professor Latin's misgiving may be misplaced since it is unclear that any existing, or realistically possible, warning will alert users to specific probabilities of risk reduction. A casual inspection of product warnings shows that the line between risk-reduction and risk-elimination is blurred; little information is given on the effectiveness of following warnings, or the statistically probable results of noncompliance. The norm is simply "Warning: do not do X." To imply that product users nevertheless calculate percentages of risk-reduction is to imbue them with the mental abilities at which the rest of "Good" Warnings scoffs. Even when a product warning is of the format "To reduce the probability of Y, do not do X," consumers who wish to avoid result Y will avoid doing X.

C. Failure to Follow "Good" Warnings

Even if a consumer reads and understands a warning, Professor Latin argues, he may still not heed the warning "for several reasons that are inconsistent with the RRC model."

228 Id. at 1239 n.203.
229 See, e.g., Hager, supra note 24, at 1151-52 (refuting common presumption that warnings alter behavior and prevent harm); Lehto & Miller, supra note 17, at 226-28 (analyzing inherent difficulties in designing warning labels caused by human limitations).
230 This Article omits a discussion of "Competing Demands on Time and Attention," the final subsection in "Good" Warnings. That subsection is largely a redux of the subsection of the same name appearing under reasons why people fail to read product warnings. See supra notes 84-156 and accompanying text.
231 Latin, supra note 13, at 1242; see also Lehto & Miller, supra note 17, at 245 ("It is often assumed, quite naively we believe, that a comprehended warning message will be heeded. This assumption is unfortunate, because many additional factors complicate the transition between understanding what should be done and actually behaving safely. Among these factors, aspects of memory and decision making play an important role."). While Lehto & Miller concede that "little research is available that evaluates the capabilities of warning labels to encourage people to select appropriate responses," they extrapolate from studies evaluating safety education programs and safety propaganda, which they claim have been "limited in their success." Id. at 248-49.

While Professors Latin, Lehto, and Miller emphasize an anti-plaintiff role, Professors Henderson and Twersky argue that, presuming a product user followed a
1. Imperfect Memory

Professor Latin first submits that a person may fail to adhere to a comprehended warning because “human memory is inherently limited and imperfect.” Although there is little research that documents consumers’ abilities to retain information they have read on warning labels, the general proposition about the fallibility of memory can be readily granted. Still it is misleading to say that “[i]nformation is unlikely to prevent accidents caused by forgetfulness or inattention,” since the precise virtue of supplying written warnings and instructions is to fill the lacunae left by failed memories. If, to borrow Professor Latin’s example, “users of cosmetics and hair care products ... forget how long the applications should last,” they can simply reread the applicable warnings. Even if the consumer has discarded the warning, a mere phone call or an additional trip to the beauty parlor will usually resolve any uncertainty. On the other hand, where a user purposely chooses to ignore warnings in order to “conserve time and effort,” he has taken a calculated risk for which the odds vary with the quality of the risk.

good warning, “a mirror image of a presumption that defendants enjoy under comment j,” benefits plaintiffs. Specifically, this presumption eases the plaintiffs’ burden on the issue of causation:

To establish causation a plaintiff should, in theory, be required to prove not only that she would have read, understood, and remembered the warning, but also that she would have altered her conduct to avoid the injury. How is the plaintiff to carry these burdens? ... A plaintiff typically can offer little more than self-serving testimony and anecdotal evidence to establish her proximate causation case.

Henderson & Twersky, supra note 9, at 278, 305. If courts strictly applied a causation analysis, plaintiffs would be unable to prevail. Thus, “plaintiff’s causation case is made excessively easy because any other reaction would make the case unacceptably difficult.” Id. at 306; see also Conti v. Ford Motor Co., 743 F.2d 195, 198 (3rd Cir. 1984) (“[T]he evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury.”); Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993) (“Although empirical evidence may not demonstrate the soundness of a heeding presumption, an examination of the strong and consistent public policies that have shaped our laws governing strict products liability demonstrates the justification for such a presumption.”).

Latin, supra note 13, at 1242.

See Lehto & Miller, supra note 17, at 247. One study found that less than 10% of antacid purchasers recalled any portion of the product’s warning label. Id. Analogous studies measured the ability to recall propaganda posters, traffic safety posters, and traffic signs, and all reported dismal results. Id.

Latin, supra note 13, at 1243.

Id. at 1242.

Id.
taker's memory. Such risk-taking is paradigmatic RRC behavior. 237

Professor Latin discusses Conti v. Ford Motor Company 238 to illustrate his contention. Mrs. Conti suffered an injury while entering a car her husband had started without first disengaging the clutch. 239 The Third Circuit found it to be "clear from the record that Mr. Conti was not paying attention to what he was doing when he started the car," and that a jury could reasonably infer that warnings in addition to those already in the operator's manual would not have helped him. 240 Ford could not have prevented the manual transmission car from rolling when started in this manner, and a fortiori could not have done so at a reasonable cost. 241 Assuming that Professor Latin agrees that all manual transmission cars are not ipso facto defectively designed, that they roll when started with the clutch engaged, and that Ford adequately warned of this danger in its operator's manual, only Mr. Conti could have prevented this accident. While the occurrence of the accident is unfortunate, there is no logical justification in Conti for expunging comment j.

2. Overconfidence

Another reason consumers fail to follow good warnings, according to Professor Latin, is that they may be "unduly optimistic about their ability to avoid [the] hazards" enumerated in warnings. 242 Professor Latin cites social science research which implies that people "may disregard some risks if they believe careful behavior will prevent accidents and they consider themselves unusually capable and careful." 243 The validity of the data which supports this conclusion is suspect for two reasons. First, decision strategies that are inappropriate to laboratory settings often could be appropriate in real life. Second, the tasks people

237 Id. at 1199-1206; see supra notes 49-53 and accompanying text (discussing RRC paradigm).
238 743 F.2d 195 (3rd Cir. 1984).
239 Id. at 196-97.
240 Id. at 198.
241 The jury rejected the plaintiffs' design defect claim but found Ford liable on the failure to warn allegation. Id. at 197.
242 Latin, supra note 13, at 1243.
243 Id. at 1243-44; see also Lehto & Miller, supra note 17, at 231 ("Experienced users might be more prone to ignore warning-related information because of past, benign experience, in which accidents rarely occur.").
are assigned in laboratories sometimes seem too artificial to support a strong inference that persons routinely misperform important tasks in their actual lives.\textsuperscript{244} In fact strong data demonstrate the opposite of Professor Latin's conclusion: the salience of strongly-worded warnings is likely to stand out in consumers' minds, which necessarily implies that "consumers will attach disproportionate weight to negative data, and thus overreact to product-related risks."\textsuperscript{245}

Product users who ignore warnings because they "think they are better than average drivers" fail to take advantage of an efficient, effective safety device.\textsuperscript{246} The very purpose of a warning is to alert the user to a risk inherent in the use of the product, and thus allow the consumer either to forego purchasing the product or to use it without incident.\textsuperscript{247} It is the consumer's prerogative to be unjustifiably overconfident, to attend only "to warning labels placed on products perceived as being dangerous,"\textsuperscript{248} just as the consumer may use a product without reading the warning. Consumers could "rationally choose not to use particular kinds of protective equipment if they felt it was too burdensome to do so."\textsuperscript{249} For example, consumers who forego wearing gloves every time they use Drano because they find the use of gloves to be more costly than the expected injury costs behave rationally, even if the product warns that gloves should be worn.\textsuperscript{250}

If society determines that in some cases individuals should be required to follow certain precautions, society can regulate product use and ensure that these precautions are adopted. Should users neglect warnings and subsequently suffer injuries, there is no moral or logical imperative militating that comment j must be abandoned in order to compensate them for their risk-taking behavior. The only reason to eviscerate comment j would be a belief that accident victims should not bear any responsibil-

\begin{thebibliography}{100}
\bibitem{244} Schwartz, \textit{supra} note 8, at 380.
\bibitem{245} \textit{Id.} at 381.
\bibitem{246} Latin, \textit{supra} note 13, at 1244; \textit{see also} Baruch Fischhoff, \textit{Cognitive Liabilities and Product Liability}, 1 J. \textit{PROD. LIAB} 207, 212 (1977) ("[Seventy-five to ninety percent] of drivers believe that they are better than the average.").
\bibitem{247} \textit{See} Wiseman v. Northern Pac. Ry. Co., 7 N.W.2d 672, 675 (Minn. 1943) ("The purpose of a warning is to apprise a party of the existence of danger of which he is not aware to enable him to protect himself against it.").
\bibitem{248} Lehto & Miller, \textit{supra} note 17, at 232.
\bibitem{249} \textit{VISCUSI, supra} note 14, at 137.
\bibitem{250} \textit{See id.} at 138-39.
\end{thebibliography}
Ity for accidents. This belief contravenes the “main message of hazard warnings,” which is “that safety is a joint responsibility, not simply a responsibility of producers.”

3. Reflexive Actions During Emergencies

The next reason Professor Latin proffers for the failure of consumers to follow good warnings is that “[p]eople [] do not follow safety instructions when they must respond rapidly or even instinctively to emergency circumstances.” The two categories of examples set forth by Professor Latin, however, provide unconvincing support for the proposition that the comment j presumption is an unrealistic legal fiction.

Professor Latin’s first example is the situation where attempts are made by “machine tool operators ... to clear obstructions or correct other problems without first shutting down the equipment as the directions required.” In support of this example, he cites *Campos v. Firestone Tire & Rubber Company* which examined the adequacy of the manufacturer’s warning and the employer’s instructions. In *Campos*, the plaintiff was injured while reaching into a protective cage in the course of assembling a tire. The plaintiff had received written and oral instructions warning against doing this, and had been involved in a similar accident six years earlier. The most prominent issues raised on appeal were whether the defendant had a duty to warn of an obvious danger and, more importantly, whether the “defendant should have produced a graphic or symbolic warning against inserting one’s hand in the protective cage during the inflation process.” In determining the adequacy of the warnings, the New Jersey Supreme Court noted that symbols may have been appropriate since a large portion of the class of foreseeable users could not read English. The court remanded the

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251 Latin, supra note 13, at 1197 (stating that “the comment j presumption imposes losses on accident victims whenever users do not obey ‘good’ warnings.”).  
252 VISCUSI, supra note 14, at 156.  
253 Latin, supra note 13, at 1244.  
254 Id.  
256 Id. at 307.  
257 Id. at 307-08.  
258 Id. at 308.  
259 *Campos*, 485 A.2d at 310. There was a chart on the wall of the workplace warning workers to inflate tires in safety cages. *Id.* at 307. The plaintiff “received some oral instructions from his supervisor,” who knew that the plaintiff’s first lan-
case for a new trial, reasoning that the plaintiff's failure to comprehend the warning rebutted the presumption of his contributory negligence.  

The tendency of drivers to "exceed the safe-handling tolerances of their vehicles" during "traffic emergencies" is the second example of reflexive action introduced by Professor Latin. 261 Professor Latin fails to cite a case in which a motor vehicle manufacturer defended a product liability case resulting from a traffic emergency on the ground that the driver failed to read and heed a warning during the emergency. Indeed, it is misleading for Professor Latin to state that drivers "frequently do not follow" warnings under emergency circumstances. 262 It is difficult to imagine that the presence or lack of an adequate warning, as opposed to a manufacturing or design defect, would constitute a central issue in such cases. When a traffic emergency arises, it is unlikely that a warning applies since a manufacturer cannot warn drivers against unpredictable, exigent driving situations. 263 Thus, the comment on presumption is largely irrelevant to driving emergencies. Insofar as someone can be said to "ignore" a warning while responding to an emergency situation, it is because that person engages in prototypical RRC behavior by deciding that the emergency response supersedes the warning. 264

4. Disregard of Low-Probability Risks

Professor Latin next cites two social science studies, one of which indicates "that people often ignore low-probability risks," 265 and a contrary study indicating "that people often exag-

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260 Id. at 307-08.  
261 Id. at 312. Professor Latin also cites Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976), in which a worker was injured while operating dangerous machinery. Although the adequacy of the warning was not at issue, the New York Court of Appeals concluded that "legal responsibility, if any, for injury caused by machinery which has possible dangers incident to its use should be shouldered by the one in the best position to have eliminated those dangers." Id. at 578. However, "[t]his does not compel a manufacturer to clothe himself in the garb of an insurer in his dealings." Id.  
262 Latin, supra note 13, at 1244.  
263 The manufacturer can, however, warn against placing oneself in a situation likely to become an emergency. For example, an automobile manufacturer can warn drivers never to drive on snowy or icy roads without snow tires.  
264 See Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978) ("[A] warning is not effective in eliminating injuries to instinctual reactions....").  
265 Latin, supra note 13, at 1245.
gerate the significance of low-probability risks." Professor Latin, in attempting to draw a lucid conclusion from these contradictory studies, states that:

[R]equiring safer product designs instead of exclusive reliance on 'good' warnings would be desirable unless (a) people pay careful attention to low-probability risks in the majority of product-use contexts and (b) manufacturers and courts can identify the accident contexts where this pattern prevails.

Given the state of uncertainty of the research, Professor Latin cleverly selects unrealistic prerequisites for maintaining comment j. The conditions imposed by Professor Latin are virtually unobtainable, and largely irrelevant, since comment j and consumers' possible tendency to ignore low-probability risks are not incompatible. Two social scientists, Kunreuther and Slovic, indicate that many low-probability threats must be ignored or else individuals "would become so burdened that any sort of productive life would become impossible." Although consumers are forced into being selective about which risks they choose to ignore, this does not compel reducing reliance on a system of warnings. First, a good warning allows users to determine the degree of risk and adjust their activity levels accordingly. Second, the fact that a warning highlights a danger increases the danger's salience and decreases the tendency to disregard it. Third, even a rational consumer's decision to ignore low-prob-

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265 Id. at 1246; see W. KIP VISCUSI, FATAL TRADEOFFS 109 (1992) (noting that consumers may overestimate risk of low probability events).
266 In an attempt to justify the inconsistent results reached by social scientists, Professor Latin notes that "one explanation for the disparity between experimental evidence that low-probability risks are overweighted and observations that people often ignore these risks is that experimental methodology forces high salience for the risks under study while 'real life' experiences seldom make low-probability risks available." Latin, supra note 13, at 1246.
267 Id. at 1247.
268 Latin, supra note 13, at 1245 n.230 (citing Howard Kunreuther & Paul Slovic, Economics, Psychology, and Protective Behavior, 68 AM. ECON. REV. 64, 67 (1978) (analyzing test subjects' risk assessments in controlled study)); see also Croley & Hanson, supra note 91, at 1847-48 (discussing Professor Latin's reliance on Kunreuther & Slovic study).
269 See RESTATEMENT (THIRD) OF TORTS § 2 cmt. h (noting that adequate warnings direct user's attention to potential risks and allow users to adjust their conduct appropriately); see also Schwartz, supra note 8, at 396 (noting that warnings indicate risk levels and provide proper method of product use).
270 See generally Dorris & Purswell, supra note 115, at 258-59 (stating that tendency of individual to respond to warning is affected by person's assessment of hazard, language of warning, and source of warning).
bility risks is a gamble. Consumers exhibit varying levels of risk aversion and choose to ignore different risks regardless of the adequacy of the warning.

For example, even if we adopt Professor Latin's suggestion that adhering to the warnings on lawnmowers is a Herculean task,\(^2\) consumers will nevertheless make their own judgments regarding the utility of adhering to the warnings, in effect performing their own Judge Learned Hand test.\(^2\) When an adequate warning provides users with risk assessment information, including the intensity of the product's risks and how to avoid them, a consumer's choice to disregard the warning does not render the warning ineffective.\(^4\)

5. Lack of Manufacturer Credibility

Professor Latin's final argument posits that "[c]onsumers sometimes fail to follow product warnings because they do not find the disclosures credible."\(^2\) Professor Latin rhetorically asks whether "manufacturers really believe people normally follow these warnings or [whether] their main objective [is] to limit potential liability?\(^2\) The answer, despite Professor Latin's false dichotomy, is both. While manufacturers certainly aim to limit their liability, it is usually reasonable for them to assume that users follow the provided warnings.\(^2\)

In Temple v. Velcro USA, Inc.,\(^2\) cited by Professor Latin, a

\(^{272}\) In light of the repetitive and time-consuming nature of the lawn mowing task, the inconvenience of stopping and restarting the engine, the numbers of passersby who might temporarily move into proximity, the difficulty of locating small objects in the grass, the ignorance of most consumers about how far various objects might be propelled, and the likelihood that previous safe usage could create a false sense of security, it would be unrealistic to expect all users to comply with the burdensome safety instructions.


\(^{273}\) See Schwartz, supra note 8, at 385-86 (discussing Judge Learned Hand's balancing test).

\(^{274}\) See Coffman v. Keene Corp., 628 A.2d 710, 721 (N.J. 1993) (noting that "[t]he relevance of the [user's] conduct on the issue of proximate causation necessarily implicates the issue of contributory negligence").

\(^{275}\) Latin, supra note 13, at 1247.

\(^{276}\) Id.

\(^{277}\) RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) ("Where warning is given, the seller may reasonably assume that it will be read and heeded..."); see Coffman, 628 A.2d at 718 (recognizing that implicit in duty to warn is presumption that warnings will be heeded).

\(^{278}\) 196 Cal. Rptr. 531, 532 (Ct. App. 1983).
consumer disregarded an emphatic warning based on the misconception that it was merely a legal disclaimer. The plaintiff sued Velcro for the wrongful death of her husband, who died in a balloon crash when a Velcro closure holding the balloon’s deflation panels gave way. When Velcro learned that its product was being used to secure balloon deflation panels, it repeatedly, though unsuccessfully, attempted to persuade the F.A.A. “to issue an airworthiness directive forbidding the use of its closures in deflation panels of hot air balloons.” Velcro then issued a severe warning to all known owners of balloons that utilized Velcro, including the plaintiff. The main issue on appeal was the adequacy of the warning. The appellate court affirmed the granting of summary judgment in favor of Velcro, stating that the “warning was very clear, understandable and completely unambiguous” and acknowledging that Velcro exhausted all reasonable options under the circumstances. Professor Latin concedes that a warning “might have been the best action available after Velcro’s manufacturer discovered the hazards of this type of use,” but highlights the technical and legal terminology scat-

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279 Id. at 531.  
280 Id. at 531-32. In general, “a manufacturer is required only to produce a product that is reasonably safe for its intended use.” Madden, supra note 8, at 259. “When the misuse of the product is of such a nature as to have been not reasonably foreseeable, the paramount logic of the rule of law precluding a plaintiff’s recovery ... is that the manufacturer is not required to produce a product that is wholly incapable of injuring the user.” Id. at 266-67.  
281 The warning stated, in part:  
WARNING - EXTREME DANGER ... VELCRO closure has not been designed and is not proper for use to secure the deflation panels in hot air balloons. Any balloon which uses VELCRO closure for this purpose is unsafe because the deflation panel is subject to unintentional opening which could result in untimely and rapid deflation, uncontrollable descent and serious injury or death to those using the balloon. You should not fly any hot air balloon unless and until it has been retrofitted with a design of deflation panel which does not employ VELCRO closure .... DO NOT FLY ANY HOT AIR BALLOON WHICH USES VELCRO CLOSURE TO MAINTAIN THE DEFLATION PANEL IN PLACE .... INDIVIDUALS WHO IGNORE THIS WARNING DO SO AT THEIR OWN RISK AND MAY SUFFER SERIOUS INJURY OR DEATH .... The use of VELCRO closure in this manner is extremely dangerous, and you must not fly any hot air balloon under any circumstances unless and until it has been retrofitted with a deflation panel which does not employ or rely on VELCRO closure to hold it in place.  

Temple, 196 Cal. Rpt. at 534 (emphasis in original).  
282 Id. at 533.  
283 Id.
tered throughout the warning. Given the extreme danger created by the product’s misuse and the emphatic, compelling warning received by the plaintiff’s husband, Temple should be viewed as a desperate attempt by the plaintiff to obtain some consolation for her tragic loss rather than a “lack of manufacturer credibility.”

IV. A RIPER TARGET FOR “GOOD” WARNINGS: INCOHERENT JUDICIAL TREATMENTS

In “Good” Warnings, Howard Latin mounts a formidable challenge to the effectiveness of warnings and the comment j presumption. While this Article seeks to repel Professor Latin’s onslaught, it does not attempt to defend the current regime of warning law. A survey of relevant caselaw reveals that the current cryptic judicial standards in warning cases further complicate a complex area of the law and fails to serve both manufacturers and consumers. They also allow critics of comment j to conflate the issues of warning adequacy with the legal effect of warnings, and to win sympathy by juxtaposing the imbroglio of warning law and the pronounced human suffering caused by product-related accidents.

A. The Current Judicial Confusion

An additional, unintended irony exists in Professor Latin’s use of quotation marks around “good” whenever it modifies “warning.” While Professor Latin’s ostensible task is to demonstrate that warnings often prove ineffective, much of his criti-

284 Latin, supra note 13, at 1248. For example, in explaining the dangers of using Velcro in deflation panels, Velcro USA specifically warned all known balloon owners utilizing their product that “the VELCRO closure seams are subjected to circumferential and meridional stresses which were heretofore unknown and unexpected and have not been accounted for in the design of your hot air balloon.” Temple, 196 Cal. Rpt. at 533-34. The warning also stated that “VELCRO USA INC. MAKES AND HAS MADE NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, CONCERNING THE SUITABILITY OR SAFETY OF VELCRO CLOSURE IN THIS USE AND IT EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES, INCLUDING, WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE.” Id. at 533.

cism and analysis of pro-defendant decisions would be more properly directed at the need to establish clear standards for determining what constitutes a “good” warning. For example, in Richards v. Upjohn Company, a manufacturer discovered that a drug that had been used topically for over a decade had a greater potential for causing irreversible deafness than scientists originally believed. In subsequent editions of the Physician’s Desk Reference (“PDR”), Upjohn reflected this perceived increase in danger by indicating that “the drug was for intramuscular use only.”

Given that the drug had been used topically for more than a decade before Upjohn withdrew its recommendation to use it this way, and it was not common for practicing physicians to consult the PDR every time they administer a drug, the adequacy of a warning usually “is a question of fact to be determined by a jury.” Since the effectiveness of Upjohn’s new warning was disputed, it is startling that the trial court granted summary judgment for the defendant without advising the appellate court of its reasoning. The trial court merely stated that “there remains no genuine issue of material fact,” despite Court of Appeals Judge Sutin’s observation that “summary judgment has never been upheld in a case of such complexity.”

Another example of judicial ineffectiveness in a warning case is Uptain v. Huntington Laboratories, Inc. The plaintiff, a hospital housekeeper, suffered severe chemical burns her third day on the job after she wrung out a swab covered with “Sani-Tate” cleaning compound. The Sani-Tate bottle was conspicuously labeled as a poison and contained a specific admonition regarding the possibility of chemical burns.

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227 Id. at 1194.
228 Id.
229 Id. at 1195.
230 Richards, 625 P.2d at 1196.
231 Id. at 1195.
232 Id. at 1198.
234 Id. at 219.
235 Id. at 220.

The front side ... carries the word “poison” in large red letters on a white background between two skull and cross-bones logos. Beneath the word “poison,” again in large letters, is “Danger; keep out of reach of children.” Beneath this, in smaller letters, is stated, “Read carefully additional cautionary and first aid statements on back.” On the back, again in smaller letters, is a paragraph labeled “precautions” which reads: “Danger: Corrosive.
The Colorado Court of Appeals, in affirming a jury verdict for the defendant, proffered a vague and ineffectual standard for adjudicating the adequacy of warnings: "A warning is adequate if, considering the character of the product, one may conclude that it reasonably informs the user of the scope of the danger involved." These vague criteria do not assist in determining the adequacy of the Sani-Tate warnings. For example, the front of the bottle cautioned that the product was poisonous and unsafe for use by children. Considering that Sani-Tate is an industrial strength toilet bowl cleanser, the chances of accidental ingestion or use by a child are slim. The possibility that it might come into contact with a worker's hands, however, is significant. The fact that Sani-Tate's labels warned of various hazards does not answer the critical question in the case: whether the phrase "Produces chemical burns" printed on the back of the bottle, in conjunction with the general warnings on the front of the bottle, combine to make the entire warning adequate.

B. The Need to Clarify the Criteria that Make Warnings Legally Adequate

The current, convoluted judicial approach towards a manufacturer's duty to warn has led to inconsistent protection for consumers and inadequate protection from liability for manufacturers who are "[r]equired to provide product warnings, but [are] furnished neither with practical limitations on the kinds of risks that they must mention nor with any useful prescription for a properly drafted warning." The failure to consistently apply a precise standard subjects manufacturers to the whim of ubiquitous judges and juries, unfairly trapping them between Scylla

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Fatal if swallowed. Do not breathe vapor or fumes. Produces chemical burns. Do not get in eyes, skin, or on clothing. Contains hydrochloric acid. Do not mix with chlorine type bleaches or other household chemicals."

Id.


Jacobs, supra note 8, at 157.
and Charybdis. Manufacturers must either incur liability by listing every imaginable hazard, thereby producing an overly detailed, unreadable warning, "or they must knowingly edit from those warnings any mention of possibly obvious or remote risks and thereby flirt with the distinct likelihood that if one of those risks results in serious injury, they will be found responsible. 3

The "frequent confusion, inconsistency, and unpredictability of decisions in the warning defect area of product liability law" should impel the legal community, especially defenders of the comment j presumption, to promulgate acceptable guidelines for judging the adequacy of product warnings. Due to the lack of "clear, academically-based criteria" to help courts evaluate the merits of particular warning labels, "warning-related legal decisions are frequently based upon intuitive rather than scientific grounds." 3 Many decisions are left open to criticism from Professor Latin and other scholars who claim that the warning labels currently applied to products "would not fare well" when tested for effectiveness.

Reaching a consensus on the appropriate standards for determining the adequacy of warnings is not an easy task. 304 Due to the necessarily product-specific nature of warnings, courts must evaluate each product's warning individually. 305 Since

303 *Id.*

304 Latin, supra note 13, at 1275. Overlapping and occasionally conflicting federal regulatory agencies further complicate the standardization of adequate warnings. See Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 296 (1994) ("[I]t is difficult for agencies to maintain consistency in the content and format of label warnings for the products that they regulate. Even when an agency is internally consistent, it often fails to coordinate its actions with other agencies.").

305 Lehto & Miller, supra note 17, at 225.

306 *Id.* at 261-62.

307 Michael Jacobs argues that "courts have struggled in vain with the adequacy requirement, trying to bring solid legal form to a hopelessly malleable set of concepts." Jacobs, supra note 8, at 145. See Noah, supra note 301, at 296-97 (positing that interests of disparate groups resulted in increasingly complicated and ineffective warnings). 308 *See, e.g.*, Madden, supra note 8, at 310-11 ("[G]enerally the adequacy of warnings or instructions will be a question of fact."); see also Cheney, supra note 99, at 566 ("A manufacturer's duty to warn arises if the manufacturer knows of a possible danger associated with the use of the product or when, by virtue of its special skill or knowledge, the manufacturer reasonably should be expected to know of the danger.").

309 Even if the relevant behavioral sciences were more developed, and courts more inclined and able to employ them seriously and intelligently, the very structure of our traditional system of adjudication steers courts in failure-to-warn cases away from optimal levels of risk information transfer. The difficulty, which we refer to as the "seriatim effect," stems from the
judging a warning's adequacy "requires consideration of both form and content," courts should consider general aspirational criteria, the warning's clarity, level of detail, effectiveness in the communication of the risk of harm, the size and location of warnings, the use of symbols to supplement or replace

fact that courts address claims \textit{ad seriatim}, on a case-by-case basis. A possible solution to the difficulties in sketching the boundaries of optimal information transfer, which the seriatim effect prevents, is to consider clusters of fact patterns involving a given product at one time. Henderson & Twersky, supra note 9, at 302; see Viscusi, supra note 14, at 156 ("The best method of achieving a well-designed warnings system is not to let the warnings systems emerge from a series of decentralized court cases."); Jacobs, supra note 8, at 140 (stating that seriatim consideration of warnings leads "to the piecemeal and uncontrolled expansion of the content of warning labels").

Madden, supra note 8, at 311. One recent article suggests that courts should shift the focus of their inquiries from the content of warnings to the process by which the warnings are adopted. Under this scheme, courts adopt a presumption of legal adequacy for any warning created and published pursuant to scientifically valid procedures. See Jacobs, supra note 8, at 177-199.

See, e.g., Sales, supra note 21, at 551-52 (proposing dual standard for evaluating adequacy of warning: "(1) Is the warning calculated to reach the user of the product in a form that would reasonably be expected to catch the attention of a prudent person in the circumstances or environment of its use?" and "(2) Is the warning comprehensible to the average user and does it convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person?"); Madden, supra note 8, at 309-10 (noting that warnings provide consumers with product safety information available only to manufacturers).

The use of concrete, rather than abstract words within warning labels and the use of simple, short sentences, constructed in the standard subject-verb-object form are two general rules for improving comprehension." Lehto & Miller, supra note 17, at 236 (citation omitted). Clarity also enhances visual perception of information. For a summary of "design parameters which have been found to be important in the design of visual displays," see Dorris & Purswell, supra note 115, at 260.

The level of detail of warnings raises concerns of both under-inclusiveness and over-inclusiveness. On the one hand, there is the debate over the problem of information overload. See supra notes 125-36 and accompanying text. On the other hand, a warning "may be found to be inadequate if the generality of the warning as a whole, sometimes coupled with the promotion of the product in the most laudatory terms, serves to detract from the warning's impact in the perception of the consumer or user." Madden, supra note 8, at 317; see also Schwartz, supra note 8, at 397 ("Labels have little room ... and therefore usually give only 'category' instructions, such as 'avoid open flames,' which leave consumers with considerable discretion.").

See, e.g., Sales, supra note 21, at 557 ("In general, an adequate warning must communicate with such a degree of intensity that would cause a reasonable person to exercise for his own safety the caution commensurate with the potential danger."); Madden, supra note 8, at 223 ("To be adequate under any theory of liability, a necessary warning, by its size, location and intensity of language or symbol, must be calculated to impress upon a reasonably prudent user of the product the nature and extent of the hazard involved.")

A standardized warning format and lexicon, such as those promulgated by the Food and Drug Administration for food, drug, and cosmetic labeling, would reduce the
words, and communication of the consequences of misuse. Furthermore, courts must acknowledge the difficulty of designing a warning and recognize that "the warning need only be one that is reasonable under the circumstances and ... not ... the best possible warning."

C. Warnings as Scapegoats

Professor Latin exploits the combination of the lack of proven scientific legitimacy supporting warning law and a given case's particularly grim facts even when there is little doubt that the warnings at issue were adequate. Such tactics appeal to our natural commiseration with accident victims and garner support for the proposition that accident victims should not bear the costs of their accidents. When a person suffers an injury, the natural reaction is to blame someone or something, or at least attempt to ease the victim's suffering. The manufacturer is usually the someone and, in the absence of a defectively designed or manufactured product, comment j is the something.

An example of Professor Latin's appeal to emotion is his analysis of Temple v. Velcro USA, Inc. While the victim's death was tragic and unnecessary, the victim chose to use Velcro in a way unintended by the manufacturer and contrary to a clear, strongly-worded warning that was mailed to him personally. Despite the natural pangs of sympathy one feels for the victim's surviving wife, this case does not impugn the reliability of good warnings or the comment j presumption.

Another example of Professor Latin's appeal to emotion is his analysis of Sherk v. Daisy-Heddon, where a fourteen-year-

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313 For a summary of the literature on the use of safety symbols to communicate safety messages, see Lehto & Miller, supra note 17, at 238-245.
316 196 Cal. Rptr. 531 (Ct. App. 1983); see supra notes 277-83 and accompanying text.
317 450 A.2d 615 (Pa. 1982).
old shot and killed a friend with a pump-up air rifle. The user was aware of the rifle's dangerous propensity, but took the gun without obtaining permission from his parents or having read the instructions. When he “pointed the barrel of the Power King at the decedent’s head” while “horsing around,” the rifle discharged. The Pennsylvania Supreme Court found that the instructions and warning were adequate, and that the gun’s user was “legally chargeable with sufficient appreciation of the risk of his misuse of the Power King ....” Although this particular accident could not have been prevented by either a design improvement or a warning, the victim’s death was tragic and unnecessary. The pity we feel for the victim’s family does not change the fact that the tragic nature of this accident can be attributed to the reckless conduct of the teenager and perhaps his parents, not the product’s warning.

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318 Id. at 618-19.
319 The court stated that:
Robert Saenz was aware that “depending on how many times you pumped [the rifle] up,” the BBs fired from the rifle could shatter ... bottles and pierce through ... cans. He also testified that he had known that the air rifle was “some[what more] powerful” than the spring BB guns he had previously used. Moreover, he knew that a BB fired from the Power King could blind a person and that he should never point a gun at anyone. Indeed, Robert Saenz testified that he had expected to use the Power King to kill rabbits and rats.

Id. at 617-18.
320 Id. at 618.
321 Id. The gun’s operator manual stated in part:
The Pump-Up Air Gun is a new, much more powerful type gun than the traditional Daisy spring-air BB guns. It ... must be treated with great care and respect. ALWAYS HANDLE A GUN AS IF IT WERE LOADED. ‘Handling’ means every time you touch your gun. It also means you must never point your gun toward any living thing nor at any part of your own body nor at anything that could be damaged by an accidental shot ... CAUTION: Due to the additional power of the Pump-up Air Gun, extra precaution is required in selecting a safe target.

Id. at 619 n.5.
322 For cases that address the responsibility of a parent to oversee a child, see supra note 100.

Michael v. Warner/Chilcott, 579 P.2d 183 (N.M. Ct. App. 1978), is another example of a consumer abusing a product despite a reasonable, effective warning. In Michael, the plaintiff damaged his kidneys by taking four over-the-counter sinus medication tablets per day for several years. Id. at 184-85. The drug’s warning label stated: “This medication may damage the kidneys when used in large amounts or for a long period of time. Do not take more than the recommended dosage, nor take regularly for longer than 10 days without consulting your physician .... IN CASE OF ACCIDENTAL OVERDOSE, CONTACT A PHYSICIAN IMMEDIATELY.” Id. at 184. While the defendant contended that the plaintiff’s “serious abuse of the product
CONCLUSION

The debate over the adequacy of warnings should not be viewed as an all-or-nothing struggle between exculpating the manufacturer or forcing it to pay. If a product contains a legally adequate warning, an injured consumer may still recover damages under an alternate theory of liability. Although the comment j presumption precludes holding a manufacturer strictly liable on the theory that the product is “unreasonably dangerous” for use, a plaintiff is not barred from pursuing the alternative theories of manufacturing defect or design defect. Furthermore, a manufacturer cannot contract out of negligence by providing a warning. Thus, all potentially hazardous products do not raise the concerns enunciated by Professor Latin: only those products that can cause harm and which were properly designed and manufactured are entitled to the comment j presumption.

The Restatement (Third) Draft elucidates this point. The Draft denotes three kinds of product defects: manufacturing defects, design defects, and warning defects. Manufacturers are strictly liable for manufacturing defects, while design defects and warning defects are judged by a negligence standard. In addition, the availability of these three separate causes of action under the Restatement (Third) Draft does not prevent the plain-

'is so extreme as to be almost beyond belief,'” the New Mexico Court of Appeals refused to grant summary judgment to the defendant, holding that a genuine issue of material fact existed as to the warning’s adequacy. Id. at 186.

Professor Latin asserts that the “comment j presumption in effect precludes judicial assessment of alternative means to improve product safety.” Latin, supra note 13, at 1257. He claims that current warning law precludes further legal analysis “by excluding consideration of better product designs, product substitutes, marketing practices, or better warnings that could reduce accident risks.” Id. at 1196. He further contends that “[c]ourts in ’good’ warning cases have typically been unwilling to determine whether manufacturers provided ‘the maximum of protection’ or even a reasonable level of protection on the ground that users could have avoided the injuries if they had heeded product warnings.” Id. at 1196-97 (emphasis in original).

“[W]arnings will not exculpate when the product has a manufacturing or design defect.” ALI REPORTER’S STUDY, supra note 9, at 57-58.

See Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978) ("[W]arnings cannot absolve the manufacturer or designer of all responsibility for the safety of the product.")

RESTATEMENT (THIRD) DRAFT § 2; see supra notes 33-42 and accompanying text.

RESTATEMENT (THIRD) DRAFT §2 cmt. a; see Uloth, 384 N.E.2d at 1192 (noting that adequate warnings do not absolve product manufacturer of liability where reasonable design alternatives exist); see also Sales, supra note 21, at 585 ("Logically, the concept of warning falls within the aegis of negligence and not strict tort liability.").
tiff from proving that the product was "physically flawed, damaged, or incorrectly assembled," or that "a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and ... the omission of the alternative design rendered the product not reasonably safe."

The fact that an adequate warning on a dangerous product will be worded to reduce the product's marketability, which will force manufacturers to improve the design of the product or remove it from the market, further mitigates the anti-consumer effects of comment j. McCormack v. Hankscraft Company illustrates this proposition. The defendant manufactured a vaporizer that spilled scalding water when tipped over, creating a serious risk of severe burns. Professor Twersky and his co-authors suggest the following warning as adequate for this product:

THIS VAPORIZER WHEN OPERATING IS FILLED WITH SCALDING HOT WATER—IF THIS VAPORIZER IS TIPPED, THE WATER WILL POUR OUT AND ONE COULD BE SERIOUSLY INJURED OR KILLED—DO NOT USE IN THE

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328 RESTATEMENT (THIRD) DRAFT §2 cmt. b; see, e.g., Glover v. Bic Corp., 6 F.3d 1318, 1324 (9th Cir. 1993) ("[A] product with a manufacturing defect ... cannot be made 'non-defective' simply by placing a warning on the product.") (emphasis in original); Alter v. Bell Helicopter, 1996 WL 617321 (S.D. Tex. June 17, 1996).
329 RESTATEMENT (THIRD) Draft §2 cmt. c. In discussing the relationship between product design and warnings, the Restatement (Third) Draft also realizes that:

instructions and warnings may be ineffective because it reasonably can be foreseen that users of the product cannot be adequately reached, are likely to be inattentive, or are insufficiently motivated to follow the instructions or heed the warnings. Thus, when a safer design can reasonably be implemented, adoption of the safer design is preferable to a warning that leaves a residuum of risk. When an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will be sufficient to render the product reasonably safe.

Id. at cmt. k. This partially addresses Professor Latin's concern that "[p]roduct warnings and other disclosure mechanisms can be effective only when intended recipients are able to receive, comprehend, and act upon the information imparted." Latin, supra note 13, at 1195. It also partially allays his fear that a good warning can excuse a product that is "badly designed." Id. at 1264.
330 If an accurate warning renders a product unmarketable, the manufacturer will certainly evaluate alternative designs in an effort to increase sales and avoid the imposition of strict liability under a design defect cause of action. See Twersky et al., supra note 26, at 501 (citing Note, Foreseeability in Product Design and Duty to Warn Cases: Distinction and Misconception, 1965 Wis. L. Rev. 228, 234 (1965)).
331 164 N.W.2d 488 (Minn. 1967).
332 Id. at 491.
VICINITY OF CHILDREN.\textsuperscript{333}

Such a warning "would sharply curtail if not entirely eliminate the marketability of the product as well as its utility for use with children."\textsuperscript{334} Professor Twersky is sympathetic to "the court's sensitivity to the harshness of an edict that would require a manufacturer to place a warning on a product which would destroy its marketability."\textsuperscript{335} If the product is as dangerous as the warning claims, however, the product does not deserve to be marketable, unless its dangers are deemed reasonable under the totality of the circumstances.\textsuperscript{336} A warning label is the messenger, not the message, and a product poses a threat of injury whether or not consumers are aware of the product's inherent danger. Devious manufacturers will attempt to avoid disclosing unattractive facts about its products. The courts, however, do not have to act as accomplices in this dangerous deception.

While this Article attempts to refute Professor Latin's strong attack on the comment j presumption, the larger issues of the scope of a manufacturer's duty to warn, the form that product warnings should take, and the legal effect that warnings should have remain to be settled. The consequences of these battles will be of no small import. It is no surprise that the product warnings battlefield is increasingly crowded, for not only do product warnings confront us daily, but, as Professor Latin states, the legal analysis of warnings "raises, in perhaps its most striking form, the fundamental question whether manufacturers or consumers should bear the primary responsibility for accident prevention in product-use settings."\textsuperscript{337}

\textsuperscript{333} Twersky et al., supra note 26, at 503.
\textsuperscript{334} See id.
\textsuperscript{335} Id. at 504.
\textsuperscript{336} Id.
\textsuperscript{337} Latin, supra note 13, at 1197.