An ALI Report Markets a Defective Product: Errors at Retail and Wholesale

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I. INTRODUCTION

Through its long and distinguished history of constructive criticism of tort law, the American Law Institute (ALI) has been a forum for spirited discussion of the law, with its drafts providing a repository of competing views represented by careful scholarship.

A new study recently offered to the Institute bids fair to generate much discussion, in part because its views require further tempering by the facts.

The work, a "Reporters' Study" (the *Study*) entitled *Enterprise Responsibility for Personal Injury*,[1] is grand in its ambition and frequently provocative in its execution. The process by which the Reporters came to bring their study to the floor of the ALI for discussion merits separate discussion. This essay focuses on a single chapter in the *Study* as an example of insufficient consideration of competing points of view in legal scholarship.

I shall principally analyze the chapter titled "Product Defects and Warnings."[2] This subject presents one of the principal focal points of the *Study*,[3] as well as being a topic of expanding commentary for more than a quarter century. I found it particularly interesting as a subject for commentary because of my own ongoing scholarship in the field.[4]

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1. AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ALI STUDY].
2. 2 ALI STUDY, *supra* note 1, ch. 2.
3. *See* 1 ALI STUDY, *supra* note 1, at 9-10.
4. *See, e.g.*, 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY (2d ed.

II. Too Few Pages of History

The opening paragraphs of the chapter, although concededly aiming at condensation of complex historical material, appear to betray a certain lack of sophistication and mastery of the historical complexity of the subject. For example, in the first paragraph of the chapter, the Reporters declare that in addition to warranty liability, "[b]eginning in the 1920's manufacturers were . . . liable in negligence regardless of the absence of privity of contract between defendant and plaintiff."[5] Curiously, this statement, which is essentially repeated in a footnote in the next paragraph,[6] cites for its only support the 1916 case of *MacPherson v. Buick Motor Co.*[7] More generally, one should note as a matter of historical texture that *MacPherson* was only the first of a long line of cases in which state supreme courts fell into line on negligence liability without privity over a period of many years.[8]

One can appreciate the desire of the Reporters to avoid reinventing the historical wheel while one laments the inaccuracy of a presentation that comes close to caricature. The authors say that the criticism of "[t]his common law of defective products"—apparently, the warranty-based law—rested "on two related grounds." These grounds, the authors say, centered on the seller's ability to disclaim implied warranties and on the other requirements of the "sales law," particularly the notice requirement and the privity barrier. The result, the authors tell us, was that since victims "of unfit products" could seldom sue their makers in warranty, "unregulated consumer markets allocated product defect risks inefficiently and unfairly."[9] The Reporters make no reference to perceived problems of proof, and to judicial concern about the intellectual games that accompanied certain applications of the doctrine of *res ipsa loquitur.* Moreover, they speak not at all of the belief that consumers were at a serious informational disadvantage in products cases, a most serious omission in light of the fact that so much economic theory is imbedded in the chapter. In an especially glaring omission, they do not refer to any of the concerns about the nature of product representations, product appearance or consumer assumptions that were evident at the dawn of the modern development of strict liability for products.[10]

1990 & Supps. 1991, 1992).

5. 2 ALI Study, *supra* note 1, at 34.

6. *Id.* at 34 n.4.

7. 111 N.E. 1050, 217 N.Y. 382 (1916).

8. *See* W. Page Keeton et al., Prosser And Keeton On The Law of Torts 682-83 (5th ed. 1984).

9. 2 ALI Study, *supra* note 1, at 34.

10. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 337 P.2d 897,

Continuing the exaggerated strokes of their caricature, the Reporters move the reader quickly forward: "In the early 1960's the American Law Institute helped to create a new form of strict liability."[11] There is no sense of the historical elision from warranty to tort that took place in the early sixties. This lack of historical focus is not the only defective aspect of the Reporters' summary of the development of strict liability and tort for products. The Reporters go on to say that besides rendering disclaimers unenforceable, the strict liability doctrine created a situation in which "procedural rules that limit a defendant's liability, such as the requirement that there be privity of contract . . . are inapplicable."[12] To say the least, the reference to the privity requirement as a "procedural" rule is an unconventional characterization.

Most remarkably, the Reporters assert in a summary of the development of strict liability theory that the doctrine "meant that the maker of a 'defective' product had to compensate any person who was injured by it."[13] They declare that "[t]his version of strict liability was adopted almost everywhere in the United States."[14] This characterization is so inaccurate that it introduces some doubt as to the concept of strict liability that guides the Study generally. Among other things, it fails to take into account a large body of products law based on the conduct of plaintiffs, utilizing concepts that include contributory neglience, assumption of risk and misuse.

The flawed nature of the *Study's* historical lens is evident in the very next paragraph. The Reporters assert that "[w]hile the law explicitly authorized actions based on defects in manufacture, it generally neglected the hazards in a product's design."[15] The Study cites as authority for this proposition a historical intent argument that it attributes to Professor Priest.[16] There is, one hardly need add, no "explicit" declaration in section 402A of the *Restatement (Second) of Torts* that limits the reach of the section to manufacturing defects, nor one that excludes design defects.

At least as curious is the next assertion in the text. The Reporters say that the courts then "expanded the substantive basis of strict

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27 Cal. Rptr. 697 (1963).

11. 2 ALI STUDY, *supra* note 1, at 35.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* (referring to George Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2361 (1989)).

liability: a manufacturer became liable for injuries caused by defectively designed as well as defectively manufactured products."[17] Oddly, this statement relies on one decision: *Larsen v. General Motors Corp.*[18] The Reporters have part of the analysis right: *Larsen* did involve allegations of poor design, but those allegations, as summarized in the first sentence of the Eighth Circuit's decision, invoked negligence theory and not strict liability.[19] It also rings unharmonically to cite *Larsen*, a 1968 case, for the proposition that "[b]y the 1970's," having "come to believe that the prevalent approach to the new form of strict liability was too limiting . . . . [T]he courts expanded the substantive basis of strict liability."[20]

The *Study* then proceeds to summarize "the current taxonomy of defective products," which it divides conventionally into " 'manufacturing defect[s]' " and " 'design defect[s].' "[21] One would have hoped that in a critique that aims to be authoritative, there would be some critical analysis of this traditional dichotomy. Thus, the authors might have noted that there is a considerable overlap between the concepts of manufacturing defect and design defect. For example, many quality control decisions that lead to "manufacturing defects" represent the same kind of strategic choice which informs design decisions.

The authors describe a product as having a "design defect" when "an appropriately safer design was feasible when the product was marketed."[22] This bald, simplistic statement does not take into account the rich matrix of thought that courts and commentators have applied to the design defect question.[23] The authors only hint at the character of this fabric of commentary in their statement that "[t]he law now has a set of 'defect tests' " on the design question.[24] Most generally, and most critically, I must invoke a sense of the feel and texture of this summary: it gives the reader a sense of a kind of a "Dick and Jane" rehearsal of the law, which does not even begin to capture the dimensions of the judicial struggle in what is, after all, a difficult task.

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17. *Id.*
18. 391 F.2d 495 (8th Cir. 1968).
19. The court summarized the case as involving "an alleged negligent design of the steering system of [an] automobile." *Id.* at 496.
20. 2 ALI STUDY, *supra* note 1, at 35.
21. *Id.* at 36.
22. *Id.*
23. *See generally* 1 SHAPO, *supra* note 4, at ch. 9; *see also id.* at ¶ 8.04[3]-[5] (summarizing various defect tests).
24. 2 ALI STUDY, *supra* note 1, at 36.

III. THE DUTY TO WARN

The authors next confront the problem of liability for failure to warn, keying their discussion with the statement that "[a] product may also have a 'warning defect.' "[25] Although one can never be certain of proving a negative about a lack of authority, I am not sure that I have ever encountered this term.

The difficulty inherent in the term is evident in cases of this sort: A plaintiff harmed by a product claims that a defendant did not warn of a hazard known to it when the plaintiff used the product. There may be four types of questions here: Did the defendant know of the hazard? Was the hazard one that required notification to the consumer? If it was, did the defendant provide an adequate cautionary notice based on the information? With the cautionary notice, was the product reasonably safe for use? The first question is a straight negligence question, which arguably is conceptually divisible from typical "warnings" issues. The second and third questions involve issues concerning "duty to warn" and negligence in failing to warn adequately. Only the fourth question is a "defect" question. When judges use the rubric of warnings, they seem—and rather sensibly—to satisfy themselves with putting the questions of whether there was a duty to warn and whether a communicated warning was adequate.[26]

The authors' general summary of the law on warnings implies that the giving of a warning on risk levels will exculpate the seller.[27] But unless the notion of "the risk level" is an impossibly broad one, it is not at all clear that warnings of risk levels will be exculpatory. And in any event, it certainly is not clear that this should be so as a theoretical matter. The authors do declare that "[r]isk level warnings . . . cannot substitute for technologically feasible product improvements." Though employing a rather prissy example—"a tractor maker that announced that its tractors not infrequently roll over"—they note that many states would impose liability, despite such a warning, "if a more stable design or safety modification were

25. *Id.*

26. Compare the Reporters' statement that "the concept of 'defect' utilized in product design or warning litigation incorporates the key elements of standard negligence law by asking whether, given the state of the art at the time, the manufacturer's design or warning decision created an unreasonable risk of consumer injury." 2 ALI STUDY, *supra* note 1, at 39.

27. "[A] well made product has a warning defect if the producer fails to inform consumers of the risk level that the product poses. Conversely, an adequate warning will preclude such liability." *Id.* at 36-37.

feasible."[28]

One may observe, in passing, that the authors seem to accept uncritically the commingling of "instructions for safe use" and warnings.[29] The distinction between these categories, if not entirely crisp, has commended itself to courts.[30]

The authors' summary of the law on failure to warn is somewhat baffling. They say that "a product has a warning defect if (1) it is unavoidably unsafe and the manufacturer failed to warn about the risk level; or (2) it is improvable and the manufacturer failed to give appropriate instructions in safe use."[31] This classification system presents at least two problems. First, the term "unavoidably unsafe" has come to be a term of art, which has been used essentially to immunize manufacturers of products that merit that label.[32] Secondly, the two categories hardly seem airtight as against each other. The authors do take into account the possibility of liability in cases where it is foreseeable "that safety instructions will on occasion be ignored."[33]

A general observation about the *Study's* treatment of the warnings question is that when courts speak of "strict" liability for failure to warn, they appear to have developed a hybrid concept. The authors make clear that the law on warnings allows defendants substantial leeway to argue that there is no liability because there was no negligence.[34] One should emphasize that this seems to be quantitatively a very important category, accounting for a substantial amount of sensible case law.

IV. An "Absolute Liability" Contrivance

The authors present as one alternative to liability for "design defect[s]" a theory of "absolute liability subject to a contributory negligence defense."[35] I hope it is not quibbling to point out that this terminology presents a contradiction in terms, at least if those terms are the traditional legal usages of these words. The phrase "absolute liability," as I understand it, signifies a form of liability that is not subject to a contributory negligence defense. The authors' commentary on this subject makes some interesting theoretical points, but it would have been more convincing had it framed those points in more practical terms.

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28. *Id.* at 37.
29. *See id.* at 37-38.
30. *See* 1 Shapo, *supra* note 4, at ¶ 19.01[2][a] (discussion of authorities).
31. 2 ALI Study, *supra* note 1, at 38.
32. *See* Restatement (Second) of Torts §402A cmt. k (1965).
33. 2 ALI Study, *supra* note 1, at 38.
34. *See id.* at 39.
35. *See id.* at 41, pt. A(1).

A more substantive concern is that the authors give no evidence for their assertion that "the imposition of absolute liability could increase moral hazard and therefore accident costs, notwithstanding the defense of contributory negligence."[36] Apart from confusion about terminology, it is unclear what the behavioral assumptions are behind this assertion, and the authors present no empirical evidence for it.

V. DISMISSIVENESS ON CONSUMER EXPECTATIONS

The authors' broadside at the consumer expectations test for defect, referring to the "uninformed safety expectations" of "uninformed consumers," hardly makes the case that the test is "arbitrary."[37] The authors do not give even implicit credence to the conditioning of consumer safety expectations by advertising. Almost 20 years ago, this writer showed at length how product portrayals influence courts responding to complaints under nonrepresentational theories as well as representational doctrines.[38] In this connection, it seems fair to observe that the authors might at least have noted the view that judges decide how safe products ought to be, whereas juries might be left to decide only what expectations really were.[39] One may also note, in passing, that a principal provision in the European products liability directive, recently minted as a standard for the entire European Community, defines a product as "defective when it does not provide the safety which a person is entitled to expect," with one of three named relevant circumstances to be considered being "the presentation of the product."[40]

With respect to the consumer expectations test, the authors rely on only one extravagant example: "a consumer drives a car into a lake and is injured when it sinks," and "testifies honestly that he had believed the car would float."[41] The authors comment that "[t]he

36. *Id.* at 42.
37. *Id.* at 44.
38. *See generally* Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1113, 1204-80 (1974) (demonstrating the influence of product promotion on decisions under negligence, warranty and strict liability doctrines).
39. *See, e.g.*, Heaton v. Ford Motor Co., 248 Or. 467, 473, 435 P.2d 806, 809 (1987).
40. Council of the European Communities, Council Directive of Liability for Defective Products, Offic. J. Eur. Communities, L 210/29 (Aug. 7, 1985) §§ 6, 6(a).
41. 2 ALI STUDY, *supra* note 1, at 44.

consumer's expectation is unreasonable . . . because the safety feature that the consumer said he expected would fail any conceivable risk-utility test." This provides a basis for their assertion that the consumer expectations notion "has no independent existence," but "rather it collapses into other tests or legal rules."[42] The authors here again neglect the central importance of the process by which expectations are created—by media, among other forces. One should note that even if we focus, for example, on risk-benefit analysis rather than "consumer expectations," the techniques of product promotion are central to consumer formulation of the calculus of risks and benefits. It is perhaps telling that the authors present no real examples of the problem to which their analysis addresses itself.

It is true that some judicial decisions feature confusing conflations of defect concepts. However, the authors' single example of this kind of conceptual shifting is an odd one. They cite a case involving a tampon, in which they quote the court to the effect that "any user of an o.b. [brand] tampon, including [the plaintiff], could reasonably expect, and had every right to expect, that the use of the product would not lead to a serious (or perhaps fatal) illness." The authors further quote the decision on the proposition that after having heard expert testimony that the "tampon was defective in design," the jury could "reasonably conclude that the tampon had failed to meet consumer expectations as to safety."[43] One may at least wonder why "any user of an o.b. tampon" would not have a reasonable expectation that the product will not cause a serious illness. The authors' selection of this illustration seems, if anything, to point up the value of a consumer expectations test.

The authors complain that sometimes "courts let juries speculate without guidance as to whether it would be 'reasonable' to expect a different design."[44] They cite as "[a]n egregious example of this technique" a California case, *Campbell v. General Motors Corp.*[45] This writer would only comment that it is at least an open question as to whether *Campbell* relies heavily, if at all, on a consumer expectations test for which it is condemned as "egregious."[46]

The authors contend that "[a] defect test such as this which commonly collapses into risk-utility analysis is superfluous and confusing

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42. 2 ALI STUDY, *supra* note 1, at 45.

43. *Id.* at 46, n.19 (quoting West v. Johnson & Johnson Products, Inc., 174 Cal. App. 3d 831, 866, 220 Cal. Rptr. 437, 458 (1985)).

44. *Id.* at 46.

45. *Id.* (citing Campbell v. General Motors Corp., 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982)).

46. *See, e.g.*, 32 Cal. 3d at 118-19, 694 P.2d at 227-28, 184 Cal. Rptr. at 894-95 (appearing to focus principally on the risk-benefit prong of the standard announced in Barker v. Lull Eng'g Corp., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), rather than on the consumer expectations branch of *Barker*).

in application."[47] It is not clear why an independent consumer expectations test cannot be conditioned on a consumer who takes costs and benefits into account. And, again, it is important to understand that the most crucial part of the process is the *creation* of expectations by modern advertising and product portrayal.

In addition to condemning the consumer expectations test for its alleged superfluousness to the risk-utility test, the authors also complain that sometimes "the consumer expectations test collapses into the express warranty test or the test for fraud."[48] It would seem that the more important point is that cases decided under the negligence and strict liability headings often subtly reflect the nonexpress warranty and nonfraud uses of product portrayals.

The authors further express their concern that courts are able to use a consumer expectations test to buttress a strict form of liability in warnings cases, because that test "permits a jury to find that a product was less safe than the reasonable consumer would expect when there was no warning against the danger in question, even though the maker neither knew or should have known of that danger."[49] It would appear that the important point in such cases is that the courts are imposing strict liability, and that one would want to confront that question directly,[50] rather than focusing on an ancillary concern about the use of consumer expectations language.

VI. RISK-UTILITY TEST

The authors criticize the use of the risk-utility test in defect analysis,[51] discerning a "pronounced family resemblance between design defect law and the famous Learned Hand negligence calculus."[52] They do not indicate that Learned Hand-type tests may implicitly embody behavioral assumptions concerning comparative access to information.

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47. 2 ALI STUDY, *supra* note 1, at 46.
48. *Id.*
49. *Id.* at 47.
50. *See, e.g.*, Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 36, 402 N.E.2d 194, 199 (1980), in which the court distinguishes its imposition of strict liability in the transfusion hepatitis case of Cunningham v. MacNeal Mem'l Hosp., 47 Ill. 2d 443, 216 N.E.2d 897 (1970), on grounds that that case involved "a defect in a product" as contrasted with a situation where "a warning may be required because a product is unavoidably unsafe." The court in *Woodill* emphasizes the need to place a "logical limit" on strict liability in the prescription drug setting. *See* 79 Ill. 2d at 37, 402 N.E.2d at 199-200.
51. 2 ALI STUDY, *supra* note 1, at 47-51.
52. *Id.* at 48, n.24 (citing United States v. Carroll Towing Co., Inc., 159 F.2d 169 (2d Cir. 1947)).

Moreover, they do not appear to take into account the fact that the negligence standard of reasonableness, as actually applied by courts, encompasses factors other than efficiency: factors such as fairness, and even the appropriateness of spreading.

The authors criticize the risk-utility test as "apparently permit[ting] juries to overrule buyers when deciding whether a product has sufficient social utility." They deem this "an error because a product has sufficient social utility if informed consumers are willing to purchase it given its cost, including accident costs."[53] It is perhaps informative, if hardly dispositive, for a teacher of the subject to note that he argues to his classes the point of view espoused by the authors, but that he has noticed that he does not appear to be able to convince very many students that "[t]his is an error."

The authors also condemn the rationalization of the risk-utility test on the basis of "the comparative abilities of the parties to spread losses or insure against them." They declare that "in the view of almost anyone who has thought seriously about this issue in recent years . . . the primary function of product liability law is *not* to make the manufacturer the insurer of all product-related harms."[54] One might counter that "almost anyone who has thought seriously about this issue" at all would say that this sentence sets up a straw person. The attribution of an emphasis on spreading to "[a]dvocates of the risk-utility test"[55] appears to give more emphasis to spreading than those advocates give.[56] However, taking this point on its own ground, the authors do not deal with the fact of the persuasive power that the spreading rationale has exerted over some courts.

VII. INSURANCE

In further criticism of the risk-utility test, the authors deal with the relationship of tort law and insurance. From their straw person declaration that "tort law is a poor vehicle for delivering insurance services"[57] they proceed to a declaration that "[m]oral hazard and risk diversification concerns . . . suggest that producers are poor insurers."[58] However, it appears that the authors leap rather quickly to

53. *Id.* at 48-49.
54. *Id.* at 49.
55. *Id.*
56. The authors attribute the "classic exposition of this view" to Justice Traynor's separate opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 462, 150 P.2d 436 (1944). *Id.* at 49 n.27. But besides referring to the ability of manufacturers to insure and to distribute risk, that opinion also speaks of the manufacturer's comparative advantage in avoiding product hazards, the unpreparedness of accident victims to deal with the consequences of injuries and the potential of "overwhelming misfortune" to victims. 24 Cal. 2d at 462, 150 P.2d at 440-41 (Traynor, J., concurring in the judgment).
57. 2 ALI STUDY, *supra* note 1, at 50.
58. *Id.*

the proposition that "producers cannot monitor consumer use of their products."[59] In fact, in the very process of design, producers generate a pretty good statistical idea about how their products will be used. It would seem also that their constant use of marketing surveys helps them to determine how products are employed by consumers in real life. And, of course, they have access to accident reports and claims.

In a particularly puzzling sentence, the authors declare that "[r]equiring producers to insure consumers on an absolute liability or no-fault basis would . . . pose serious moral hazard concerns."[60] Unless this is simply another straw person, it is unclear what the target is of the authors' concern about "absolute liability," and it is even less clear how "no-fault" terminology finds its way into this critique. Moreover, given the seriousness of many product injuries, one has to wonder which "moral hazard" it is that concerns the authors. One might infer that their concern is that product users will frequently be suicidal.

The authors declare that "it is not feasible for a firm to act as an insurer when risks are highly correlated," because in such situations, a firm will not be able to " 'diversify its risks' " by employing "offsetting risks" in its "portfolio."[61] Again, the Delphic nature of the authors' concerns bedevils the reader. What set of litigations is the focus of concern? Could it be asbestos? One of the associate Reporters for the Project that produced the *Study* made clear the justification for lawsuits in that "highly correlated" group of risks.[62] Did the authors have any other groups of risks in mind?

Many courts and commentators properly concern themselves with the justice of imposing a true strict liability for recurrent risks that are concentrated within a single industry. Yet, in noting the seriousness of that question, one must observe that the authors appear to be focusing on a set of cases in which the defendants frequently were at least negligent, and arguably engaged in even more culpable conduct.

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59. *Id.*
60. *Id.*
61. *Id.*
62. *See* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

VIII. OFF TO SEE THE STRAW PERSON

In another of the sentences in the chapter so tantalizing concerning the authors' meaning, they declare that "whenever there is a substantial time lag between purchase of a product and manifestation of the losses it causes, a meaningful linkage between the two through product prices is very difficult to maintain."[63] It is not clear where this statement points. It would seem astonishing that the authors mean that producers should be able to get away with anything when a product hazard has a long tail. It would have been helpful if they had been clearer about their operational conclusion. In the very next sentence, the authors say that "using the tort system primarily as a vehicle to insure those whose health is risked in any way by a product is an unwise undertaking."[64] Here, the straw person of tort as a vehicle for "insurer" liability again comes bounding down the Yellow Brick Road, like a character from the Wizard of Oz.

The authors' attack on cost-benefit analysis employs as a *cause celebre* a New Jersey case involving above-ground swimming pools.[65] This is a point of legal history and policy judgment on which reasonable persons might differ. It does seem that the authors make a great deal more of the case itself than of the more significant and more recent development, that of the "retreat"[66] from more extreme forms of strict liability, including the retreat in New Jersey.[67]

The authors now rehearse a motif that sounds in several places elsewhere in the *Study*, with a reference to "the perspective, information and expertise" possessed by the "well staffed regulatory agency."[68] They do not suggest which agencies possess these qualities and which have consistently employed them. This reference to agency expertise reveals a fundamental weakness that was evident from the beginning of the Project that produced the *Study*: a weakness rooted in the obsession with comparative institutional analysis that provided so much of the intellectual framework of the very first "Progress Report" that launched the *Study*.[69] There is no evidence in the chapter that regulatory agencies have proved superior to litigants in providing courts with socially important information concerning product hazards. Moreover, the authors evince no recognition of the value of the litigation system as a decentralized

63. 2 ALI STUDY, *supra* note 1, at 51.
64. *Id.* at 51-52.
65. O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298 (1983).
66. 2 ALI STUDY, *supra* note 1, at 54 n.32.
67. *See, e.g.*, 1 SHAPO, *supra* note 4, at ¶ 19.09[3][b][ii].
68. 2 ALI STUDY, *supra* note 1, at 54.
69. *See* AMERICAN LAW INSTITUTE, COMPENSATION AND LIABILITY FOR PRODUCT AND PROCESS INJURIES PROGRESS REPORT 11-25 (1987).

watchdog on new syndromes of injury and illness. The authors' discussion of federal product regulation in a prior chapter[70] only tends to underline the relative poverty of regulation in practice as contrasted with what one infers is the authors' ideal image of a regulatory regime.

IX. THE JURY

The authors also express concern about jurors who are reluctant to do the bidding of the high priests of efficiency.[71] They seem to exhibit no recognition that this attitude of jurors may exist because the law of torts, including the law of products liability, reflects a deterrence focus that departs from notions of economic optimality.[72] Certainly in this chapter, and so far as I can tell from a less intensive reading of the thirty-odd other chapters in the full *Study*, the Reporters give no credence to this approach, nor do they even take any account of it. To paraphrase Holmes, one must recognize that the law of products liability does not enact the latest definition of economic efficiency in the *Journal of Law and Economics*.

The *Study* would have benefitted from a recognition that the principal role of juries in design defect cases is to say what designs are unacceptable.[73] At some level of generality, everyone would agree with the authors' statement about the "limited capacities of courts and juries to make design-related decisions."[74] However, the authors would have presented a more balanced argument if they had more explicitly recognized the ability of both judges and juries to say what is wrong, as contrasted with what is right.

The authors declare, unqualifiedly, that designs "should be deemed defective if and only if there was a feasible alternative design which, consistent with the consumer's expected use of the product, would have avoided the particular injury, and if the costs of the alternative design are less than the costs of the injuries thereby avoidable."[75] Considering the many products that could be put on the market which would be extraordinarily dangerous but for which there are no substitutes, this seems a remarkably wooden test. One

70. *See* 1 ALI STUDY, *supra* note 1, at 280-83.
71. *See* 2 ALI STUDY, *supra* note 1, at 52-54.
72. *See, e.g.*, AMERICAN BAR ASS'N., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4-3 to 4-12 (1984) (M. Shapo Reporter).
73. *See, e.g.*, 2 ALI STUDY, *supra* note 1, at 56-57.
74. *Id.* at 80.
75. *Id.* at 56.

cannot help thinking, reading this line of criticism, that the authors verge on the belief that if a product is useful and does not have a flaw like a metallurgical flaw, there should be no suit allowed for injuries that occur from its use.

One might add, interstitially, that there appears to run through the chapter a generalized hostility to the role of juries. There is now much research in progress on jury performance. One might observe that there will be plenty of time to consider whether the Seventh Amendment should be changed, but that it seems inappropriate to approach that question *sub silentio* because of canker about the evolution of a particular area of the law.

X. Warnings and the Process of Communication

One of the most significant problems to which the Study addresses itself is the nature of the communication process for warnings. The authors' approach to this subject appears to comprehend a group of three somewhat overlapping categories. In this universe, there are (1) rational consumers, who can effectively assess data on risk, (2) consumers who "vary widely in their prior experience, ability to read, ability to use tools and the like," and (3) a presumably large set of people who cannot process data as jurors.[76] To pause at the role of the juror once more, one certainly gets the sense that the authors disapprove of leaving warnings questions to the jury without expert testimony.[77] One may wonder if there lurks here a belief that the warnings problem is so complex that it is inappropriate to assign it to juries, although jurors every day decide cases of considerable complexity. Since jurors are basically a sample of the general consumer population, such a view would pose problems for economic theory—which must rely on the ability of consumers to make meaningful product choices—not to mention democratic theory.

A process concerned with the finding of specific facts should be extended as far as it can be in the determination of the particular impacts on consumers of specific warnings. However, a reading of the text on "effective communication"[78] leads this reader to wonder whether the problem of product warnings does not bend back upon the question of whether consumers' *general* expectations of products have been justified. If that is so, then it would appear the authors have been too quick to be dismissive of the "consumer expectations" test.

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76. *See id.* at 52-61 (quoted clause at 59-60).
77. *See id.* at 61.
78. *See, e.g., id.* at 60-61.

In discussing the difficulty of estimating the effectiveness of warnings, the authors suggest that "more deference should be paid to experts on this subject."[79] This stimulates the question of why, given the incentives of adversary litigation, one does not find more use of experts in the cases. Should one be reluctant to suggest that this might be because counsel and courts are inclined to trust the good sense of jurors on warnings issues? Whether that suggestion persuades the reader or not, it does seem that the authors should try to explain, or at least to speculate, on why the decisions have manifested so relatively few attempts to use social science in this arena.

XI. THE PROBLEM WITH WARNINGS LAW AND THE PROBLEMS OF THE REPORT

There is a good case to be made that, within the universe of products cases, there is a relative unpredictability about the results in litigation about duties to warn.[80] However, the crucial question would appear to be whether, on balance, the current law provides socially destructive incentives either to provide unnecessarily florid warnings, or not to sell useful products. A useful way to classify the issue is to pose it as one of the distribution of uncertainty: should consumers bear the burden of uncertainty with respect to the risk of injury or should producers bear that burden with respect to the risk of liability? One should at least note that there are certain advantages in imposing a significant amount of that burden on producers, who have the resources to make changes in products.[81] The authors fix reasonably on the problem inherent in the fact that "there is almost always an instruction that in retrospect would have avoided the actual accident that occurred had the instruction been seen and followed."[82] This is a particular problem, given the constraints which always exist on the amount of warnings that can be given.[83] In this regard, the authors praise a Louisiana decision affirming a manufacturer's verdict in a case involving a power drill.[84] A warning on the

79. *Id.* at 61.
80. For the authors' emphasis on this point, see *id.* at 61.
81. I am grateful to my student, Paul Janaskie, for his thoughts on this point. Memorandum from Paul Janaskie, Northwestern University School of Law, Class of 1993, to Marshall S. Shapo (August 1991) (on file with author).
82. 2 ALI STUDY, *supra* note 1, at 61.
83. *See id.* at 62 n.41. Judge Williams provides one of the best commentaries on the problem of warnings dilution in Cotton v. Buckeye Prods. Co., 840 F.2d 935, 938-940 (D.C. Cir. 1988).
84. *Id.* (summarizing Broussard v. Continental Oil Co., 433 So. 2d 354 (La. Ct.

tool enjoined the user: "CAUTION: For Safe Operation See Owner's Manual." Among the instructions in the manual was a statement that one should not use the product the way the plaintiff used it, and the court mentioned "the problem of attempting to put multiple warnings on a hand drill of the size and nature involved." It is certainly fair to employ such a decision as an example of the problem of "constraint of label space."[85] However, a consistent reader of cases on the subject would immediately ask, given the facts summarized, whether there were some other appropriate, and more parsimonious, explanation for the outcome. For example, using traditional doctrinal categories, one might theorize that the true reason for the manufacturer's judgment was misuse, or contributory negligence, or a judicial belief that the product had no defect.

In a somewhat gnarled summary paragraph on the general problem of warnings issues, the authors declare that "[t]he question is whether this commitment to consumer sovereignty should survive an explicit recognition of the fact that any feasible warning must leave consumers with much of the responsibility for buying safe products and for using products safely."[86] It would have been helpful to have examples of how this abstract statement would apply in particular cases.

The authors' section on "criteria for hazard warnings"[87] stimulates a rather general comment as to the relationship of warnings and design defects. Specifically, this is the suggestion that frequently what are characterized as warnings issues mask questions which are appropriately chalked up under the design defect heading. If that is so, then an appropriate solution would be closer judicial analysis and more straightforward recognition of that point.

The authors speak of "the need . . . for a comprehensive warnings policy that (a) ranks all the risks the particular product poses and requires warnings whose length varies directly with the seriousness of the risk, and (b) ranks products generally in relation to the risks they pose."[88] The authors assert that "[s]uch a policy cannot evolve effectively through common law adjudication."[89] However, it is not at all clear that such a policy would evolve more "effectively" under other auspices than under the warnings law currently being developed by courts. This writer has already acknowledged that warnings law has a certain fuzziness about it, but any student of the cases can discern a struggle by the courts to reach a consensus on the true

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App.), *cert. denied*, 440 So. 2d 726 (La. 1983)).

85. *See id.*
86. *Id.* at 63.
87. *See id.* at 63-66.
88. *Id.* at 69.
89. *Id.*

issues about warnings and to try to discern from strings of particular cases as comprehensive a policy as specific facts will permit.[90]

XII. OBEISANCE TO REGULATION

The authors' strategy for a comprehensive warnings policy emphasizes a proposal to exculpate defendants who comply "with specific government regulations respecting the form and content of product warnings."[91] Although a later chapter of the *Study* discussed the "shortcomings" of regulation,[92] this suggestion seemed to override the many objections to complete reliance on any regulatory framework: the problem of the captive agency, the problem of outright bribery, the hazard of insufficient analysis of specific products by agencies. The authors do say they would require a defendant "to show that it did not withhold information from the agency in the proceeding that generated the regulation, but rather cooperated fully during the regulatory process."[93] One may observe that this would presumably be a place where a significant amount of the litigation on the subject would ordinarily focus.

Attached to their proposal to make compliance with regulations exculpatory is the authors' declaration of "[t]he ideal" as being "to require each firm to produce safety until its own marginal costs and benefits of further production were equal."[94] This exclusive focus on the producer seems to remove any consideration of the nature and qualities of the receptor of warning messages: the consumer.

The authors return to their obeisance to the expertise of regulators with the assertion that agencies "usually have more" of that commodity "than do even well informed juries at assessing the communicative impact of particular language and warning formats."[95] They do not explain how this "expertise" necessarily will triumph over politics in agency approval of particular warnings. They also do not

90. Some good illustrations of these struggles appear in the judicial development of the "sophisticated user" doctrine, *see* 1 SHAPO, *supra* note 4, at ¶ 19.06[4]; in judicial references to information costs as an element of decision, *see id.* at ¶ 19.08[1]; and in the effort to define the boundaries of defenses based on common knowledge of danger, *id.* at ¶ 19.10[1], [3] and "obviousness," *id.* at ¶ 19.11[1]. The relevant essence of this case law lies not in a high level of judicial agreement but in the discourse.

91. 2 ALI Study, *supra* note 1, at 72.

92. *See* 2 ALI STUDY, *supra* note 1, at 85-86.

93. *Id.* at 73.

94. *Id.*

95. *Id.* at 74.

indicate why agencies, under political pressure, are likely consistently to perform better on this subject than juries informed by experts and trained advocates.

One could hardly disagree that "[c]onsideration should be given"[96] to the creation of a uniform vocabulary on risk levels.[97] Many practical problems, however, intrude on this suggestion by the authors. The *Study* says that it should be "[t]he federal government" that creates this "vocabulary."[98] One must ask, what part of the federal government? Which agency? What kind of process?

At this point, we confront a problem inherent in any general study of a legal system. Frequently, such analysis stumbles on the details, wherein, we have been told, the Deity resides. Thus, one would ask the authors whether they would require that in order to bar litigation, "uniform vocabulary" warnings must identify the specific risk at issue and that they meet criteria of materiality. Perhaps most poignantly, the authors give not a single example of a case in which a uniform vocabulary would have changed results for the better.

Although my experience on the subject is personal and anecdotal, I find it rather astonishing that the authors cite the Truth in Lending Act as an example of the "benefits to providing information in standardized formats."[99] They instance the "particular approved format" of "the annual percentage rate" under the Act.[100] I would simply note that in the process of my recent purchase of an automobile, I was treated to a highly deceptive rendition of the presumably relevant statistics on interest rates, a presentation that I suspect was within the confines of the law.

Still, the authors' discussion of their proposals for a comprehensive warnings policy engenders the belief that a uniform group of symbols could be useful, particularly if the symbols channel people to words that describe risks with some particularity. Yet, we must recognize that consumers frequently are likely to be overwhelmed as much by a uniform vocabulary as by the warnings now given, which after all come with the stamp of people who have a considerable stake in making them effective, namely the producers. In this regard, the point recurs that perhaps the warnings issue is often a surrogate for other things, including the design defect issue.

Among other comments, the authors predict that courts which become "more sensitive to the difficulties of communicating safety-related data in the context of mass consumer transactions" will become "more reluctant to hold firms liable for failing to instruct

96. *Id.* at 82.
97. *See id.* at 74-76.
98. *Id.* at 74.
99. *Id.* at 75.
100. *Id.*

consumers how to avoid very low-probability accidents."[101] It would have been particularly useful to provide some examples on this point, together with some commentary on the problem of the accident that has very low probability but is likely to be extremely severe when it happens. I would hypothesize that as the severity of injuries increases, it will lessen the tendency of courts to be more lenient toward defendants even as the probability of accidents decreases.

XIII. A FAILURE OF CRITICISM

A quite abstract statement in the penultimate sentence of the chapter is particularly provocative. The authors say that the courts "have foreclosed" policy choice on warnings issues "by intervening extensively in consumer and labor markets based on judicial views respecting what risk allocations would maximize safety and compensation, views that are only partly correct."[102] A statement of such abstraction merits a response at the same level of generality. The authors do not explain which views are "only partly correct," and what parts of these views are correct and incorrect. Indeed, in the chapter as a whole, they reveal little about their own views of the premises, both articulate and inarticulate, that have underlaid judicial decisionmaking in this area for the last thirty years. It seems fair to comment that one cannot say where the courts have gone wrong—if indeed they have strayed from the paths of justice—unless one undertakes a sympathetic criticism of both their articulated reasoning, and their implicit premises.

XIV. CONCLUSION

This essay has sought to explore, under sharp focus, a product designed as a blue-ribbon effort to improve the law. It has been relatively critical in tone, but the writer is sympathetic to the authors on the same grounds that the authors ought to have been more sympathetic to the work product of the courts whose work they so summarily criticize.

To put it simply, the defects of both this chapter and of the performance of the judiciary over the last quarter century occur mainly because of the difficulty of the subject. The key to analysis, especially for scholarly criticism, would appear to lie in a full recognition of that difficulty, and in a balanced presentation of competing points

101. *Id.* at 81-82.
102. *Id.* at 82.

of view. Unfortunately, the *Study* lacks depth of historical focus, it arguably does not take existing doctrine with sufficient seriousness, and it suffers from some serious deficiencies in both terminology and analysis. Moreover, it does not adequately summarize the grounds of judicial concern that have generated the present body of products liability law. Along with the *Study's* distressing failure to give sufficient weight to competing points of view, one of its most serious defects is its consistent failure to present specific and relevant applications. Often it does not give examples where the text cries out for illustration. Occasionally the examples are simply frivolous. And in a way that might win debate points but seems insufficiently suited to the gravity of the task and the forum, the *Study* has a tendency to select the "egregious" example and to imply that it may be illustrative.

From the standpoint of the difficulty of the undertaking, the chapter merits our admiration for its ambition. However, despite its frequent stylistic felicity, the effort appears to suffer from production flaws, a lack of quality control, and ultimately, a pervasive series of defects in design.