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Warning Labels May Be Hazardous to Your Health: Common-Law and Statutory Responses to Alcoholic Beverage Manufacturers' Duty to Warn

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WARNING LABELS MAY BE HAZARDOUS TO YOUR HEALTH: COMMON-LAW AND STATUTORY RESPONSES TO ALCOHOLIC BEVERAGE MANUFACTURERS' DUTY TO WARN

INTRODUCTION

Over the years, manufacturers of alcoholic beverages have faced sporadic products liability actions for failing to warn consumers of the health risks associated with the use of their products.[1] Until very recently, such manufacturers have escaped liability. State and federal courts, in summarily dismissing charges against them, have held as a matter of law that the adverse health effects of consuming alcohol are matters of common knowledge, and therefore require no warning.[2]

In December 1987, the Court of Appeals for the Third Circuit decided *Hon v. Stroh Brewery Co.*,[3] ending the long-standing immunity from civil liability enjoyed by manufacturers of alcoholic beverages. In *Hon*, the plaintiff's husband died as a direct consequence of

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1 *See, e.g.*, Hon v. Stroh Brewery Co., 835 F.2d 510 (3d Cir. 1987) (pancreatitis); Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1982) (physical and mental injuries); Maguire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986) (drunk driving); Desatnik v. Lem Motlow Properties, Inc., No. 84 C.A. 104 (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file) (acute alcohol poisoning); Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984) (acute alcohol poisoning); Brune v. Brown-Forman Corp., 758 S.W.2d 827 (Tex. Ct. App. 1988) (acute alcohol poisoning); Malek v. Miller Brewing Co., 749 S.W.2d 521 (Tex. Ct. App. 1988) (drunk driving); Morris v. Adolph Coors Co., 735 S.W.2d 578 (Tex. Ct. App. 1987) (drunk driving); Abernathy v. Schenley Indus., 556 F.2d 242 (4th Cir. 1977) (acute alcohol poisoning), *cert. denied*, 436 U.S. 927 (1978).

2 *See, e.g.*, Garrison v. Heublein, 673 F.2d 189 (7th Cir. 1982) ("dangers of the use of alcohol are common knowledge to such an extent that the product cannot objectively be considered to be unreasonably dangerous"); Abernathy v. Schenley Indus., 556 F.2d 242 (4th Cir. 1977) (no duty to warn of danger of acute alcohol poisoning under either Food, Drug, and Cosmetic Act or Consumer Products Safety Act), *cert. denied*, 436 U.S. 927 (1978); Maguire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986) (no duty to warn of dangers of drinking and driving); Desatnik v. Lem Motlow Properties, Inc., No. 84 C.A. 104 (Ohio Ct. App. 1986) (LEXIS, States library, Ohio file) (no duty to warn of danger of acute alcohol poisoning); Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984) (no duty to warn of danger of acute alcohol poisoning); Malek v. Miller Brewing Co., 749 S.W.2d 521 (Tex. Ct. App. 1988) ("no duty to warn consumers of the dangers of alcohol, given the common knowledge of dangers involved in its use"); Morris v. Adolph Coors Co., 735 S.W.2d 578 (Tex. Ct. App. 1987) ("an alcoholic beverage, in its regular form, is not unreasonably dangerous such that it would impose the duty upon a manufacturer or a distributor of such a beverage to warn of the risks involved with over-consumption of the product"). *See infra* Part II(B).

3 835 F.2d 510 (3d Cir. 1987); *see also* Hon v. Stroh Brewery Co., 665 F. Supp. 1140 (M.D. Pa. 1987).

consuming the defendant's beer products over an extended period of time.[4] The plaintiff brought a products liability action alleging that the defendant's products were unreasonably dangerous because they carried no warning of the lesser-known risks of prolonged alcohol consumption.[5] The court held that a material dispute of fact existed as to "whether the sale of Stroh's beer products with no warning was safe for its intended purpose."[6]

Less than one year after *Hon*, Congress enacted the Alcoholic Beverage Labeling Act of 1988 ("ABLA").[7] The ABLA was a response to Congress's determination that the American public need be made aware of the many adverse health effects associated with the consumption of alcoholic beverages.[8] The ABLA requires that a nonconfusing and nationally uniform warning notice be affixed to the containers of any alcoholic beverage manufactured, imported, or bottled for sale or distribution in the United States.[9] The ABLA further provides that no additional health warning statement shall be required under state law.[10]

This Note examines both the common-law and statutory responses to the question of an alcoholic beverage manufacturer's duty to warn consumers of the potential health risks associated with the use of its products. Part I is by way of background, summarizing the principal dangers of alcohol use and abuse. Part II introduces the common-law approach to the duty question by briefly setting forth the doctrine of strict liability in tort, and then contrasting the long-standing immunity from civil liability enjoyed by alcoholic beverage manufacturers with the decision in *Hon v. Stroh Brewery Co.* Part III argues that the common-law approach, with its reliance on the jury, is an inadequate response to the question of an alcoholic beverage manufacturer's duty to warn. Part IV introduces the statutory approach to the duty question by briefly discussing the background and major provisions of the ABLA. Part V argues that the statutory approach, like that of the common-law, is an equally inadequate response to the question of an alcoholic beverage manufacturer's duty to warn. As Part V makes clear, the ABLA fails entirely

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4 835 F.2d at 511.

5 665 F. Supp. at 1146.

6 835 F.2d at 515. *See infra* notes 52-54 and accompanying text.

7 Pub. L. No. 100-690, 102 Stat. 4518 (1988) (codified at 27 U.S.C.A. §§ 201-219a) (West Supp. 1989)). The ABLA was part of the larger Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at 21 U.S.C.A. §§ 1501-1509) (West Supp. 1989)). The effective date of the Act is November 18, 1988. 27 U.S.C.A. § 213 (West Supp. 1989). *See infra* note 80.

8 27 U.S.C.A. § 213 (West Supp. 1989). *See infra* notes 81-83 and accompanying text.

9 *Id.* § 215(a). *See infra* notes 84-88 and accompanying text.

10 *Id.* § 216. *See infra* note 89 and accompanying text.

as an educational and informational device; moreover, the government warning provides only "selective" product safety informational, yet preempts all common-law causes of action for injuries resulting from risks not addressed in the warning. Part VI suggests that even "comprehensive" product warnings, given their societal costs and practical limits, are of questionable efficacy. Finally, Part VII advances an "institutionally-based" approach to the prevention of alcohol abuse as an alternative to both the common-law and statutory responses.

I
THE DANGERS OF ALCOHOL USE AND ABUSE

Alcohol abuse and alcoholism are problems of great significance in this country.[11] An estimated 18.3 million Americans are "heavy drinkers," consuming more than 14 drinks per week.[12] Correspondingly, the number of American adults with symptoms of alcoholism has risen at least 8.2 percent since 1980.[13] In addition to alcoholism, there is a close correlation between alcohol consumption and various other diseases. Cirrhosis of the liver, most often caused by alcohol abuse, is the ninth leading cause of death in this country.[14] Alcohol consumption also increases the risk of cancer of the mouth, pharynx, larynx and esophagus,[15] and is clearly related to hypertension and heart disease.[16] Moreover, alcohol consumption during pregnancy may lead to birth defects ranging from lower

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11 *See generally* DEPARTMENT OF HEALTH AND HUMAN SERVICES, SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH (1987) [hereinafter SIXTH SPECIAL REPORT]; ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION (Mark H. Moore & Dean R. Gerstein eds. 1981) [hereinafter BEYOND THE SHADOW OF PROHIBITION].

12 134 CONG. REC. S663 (daily ed. Feb. 4, 1988) (statement of Senator Strom Thurmond); *see also* Alcohol Use and Abuse in America, 265 GALLUP REPORT 7-11 (1987) (statistics on drinking habits).

13 134 Cong. Rec. S663 (daily ed. Feb 4, 1988) (statement of Senator Strom Thurmond).

14 SIXTH SPECIAL REPORT, *supra* note 11, at xiv. Cirrhosis is an irreversible condition with an average 50 percent survival rate after five years. *Alcohol Warning Labels: Hearings on S. 2047 Before the Subcomm. on the Consumer of the Comm. of Commerce, Science, and Transportation*, 100th Cong., 2d Sess. 25 (1988) [hereinafter *Hearings*] (statement of Enoch Gordis, M.D., Director, National Institute on Alcohol Abuse and Alcoholism).

15 *Hearings*, *supra* note 14, at 26 (statement of Dr. Enoch Gordis). Moreover, several studies have shown that moderate alcohol consumption by women can increase the risk of breast cancer by as much as 50 percent. *See, e.g.*, Arthur Schatzkin & Yvonne Jones, et al., *Alcohol Consumption and Breast Cancer in the Epidemiologic Follow-up Study of the First National Health and Nutrition Examination Survey*, 316 NEW ENG. J. MED. 1169 (1987).

16 BEYOND THE SHADOW OF PROHIBITION, *supra* note 11, at 213. All available evidence suggests that as much as 11 percent of hypertension in men, but a smaller percentage in women, may be due to alcohol consumption at a level of three or more drinks per day. *Hearings*, *supra* note 14, at 26 (statement of Dr. Enoch Gordis).

birth weight and subtle neurological disturbances[17] to the debilitating physical, mental and behavioral abnormalities that constitute Fetal Alcohol Syndrome.[18]

While alcohol-related motor vehicle accidents have declined, such accidents continue to claim over 23,000 lives each year in the United States.[19] Studies show that moderate alcohol consumption, even at legal levels, can increase the likelihood of a fatal accident.[20] Motorists whose blood alcohol level exceeds the legal limit, however, are three to five times more likely than nondrinking motorists to be involved in a fatal collision.[21]

Although there is evidence of modest declines in the use of alcohol by underage youth, alcohol remains the most widely used drug among American teenagers.[22] Alcohol abuse among teenagers has been linked to drug abuse, juvenile crime, health problems, teenage suicide and poor scholastic achievement.[23] Moreover, alcohol-related traffic fatalities are the leading cause of death in young adults between the ages of fifteen and twenty-four.[24]

II
COMMON-LAW LIABILITY

A. In General

Section 402A of the Restatement (Second) of Torts sets forth

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17 *Hearings, supra* note 14, at 24 (statement of Dr. Enoch Gordis). Alcohol consumption by men during the month before conception also has been linked to lower birth weights in infants. Ruth E. Little & Charles F. Sing, *Association of Father's Drinking and Infant's Birth Weight*, 314 NEW ENG. J. MED. 1644 (1986) (letter to the editor).

18 Fetal Alcohol Syndrome has been observed only in the children of women who drink heavily throughout pregnancy, and is characterized by retarded growth, distinctive facial deformities, cranial and other skeletal abnormalities, behavioral dysfunction and various neurological abnormalities, including mental retardation. *Hearings, supra* note 14, at 24 (statement of Dr. Enoch Gordis); *see also* SIXTH SPECIAL REPORT, *supra* note 11, at 80-83. Significantly, Fetal Alcohol Syndrome is the only one of the three major causes of birth defects that is potentially preventable. *See* Gerald C. Goeringer & Gregory J. Morosco, *Preventing Fetal Alcohol Syndrome*, 8 ALCOHOL HEALTH & RES. WORLD 31-32 (1983).

19 In 1987, for example, 46,386 people were killed in motor vehicle accidents in this country. *Hearings, supra* note 14, at 24-25 (statement of Dr. Enoch Gordis). Of these deaths, 23,630, or 51 percent, were alcohol-related. *Id.* at 25. These figures make fatal motor vehicle accidents the leading cause of death in the United States for persons under forty years of age. *Id.* at 24.

20 DEPARTMENT OF HEALTH AND HUMAN SERVICES, FIFTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 95 (1983).

21 *Id.*

22 SIXTH SPECIAL REPORT, *supra* note 11, at xiv.

23 AMERICAN BAR ASSOCIATION, POLICY RECOMMENDATION ON YOUTH ALCOHOL AND DRUG PROBLEMS 5 (1985 & 1986 update).

24 *Id.*

the standard of strict products liability in tort.[25] Section 402A imposes strict liability for physical harm on the seller of "any product in a defective condition unreasonably dangerous to the user or consumer,"[26] even though the seller has "exercised all possible care in the preparation and sale of the product."[27] Put another way, liability attaches only when the product is "defective" in a way that subjects persons or tangible property to an "unreasonable" risk of harm.[28]

Three types of defects make a product unreasonably dangerous: (1) a manufacturing defect;[29] (2) a design defect;[30] and (3) a warning defect.[31] Comment j to section 402A sets forth a seller's

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25 RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT] provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

26 *Id.* § 402A(1).

27 *Id.* § 402A comment a.

28 Many commentators have argued that the use of both "defect" and "unreasonably dangerous" is unnecessary as the term "unreasonably dangerous" is meant only as a definition of a "defect." *See, e.g.*, W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 99 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 598 (1980); W. Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 32 (1973); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830-33 (1973); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965).

29 A product is defectively manufactured if an abnormality or flaw in the product makes it more dangerous than intended. *See* PROSSER & KEETON, *supra* note 28, § 99(1); *see also* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

30 A product is defectively designed if it is more dangerous than the ordinary consumer would expect when using it in an intended or reasonably foreseeable manner, or if the benefits of the challenged design do not outweigh the risks inherent in its use; *see* PROSSER & KEETON, *supra* note 28, § 99(3); *see also* Cipollone v. Liggett Group, Inc., 644 F. Supp. 283 (D.N.J. 1986); Barker v. Lull Eng'g. Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516, *cert. denied*, 303 Md. 471, 494 A.2d 539 (1985); Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1978), *reh'g denied*, 282 Or. 411, 579 P.2d 1287 (1978).

31 A flawlessly produced and designed product may be rendered unreasonably dangerous because of the seller's failure to warn (or adequately warn) of a risk or hazard associated with the product's use. *See* PROSSER & KEETON, *supra* note 28, § 99(2). *See*

duty to warn of the risks associated with the use of its product.[32] Comment j provides that a seller must warn only of those dangers which are not generally known, or which one would not reasonably identify with the product.[33] Moreover, a seller is not required to place warnings on products which are only dangerous when consumed in excessive quantity, or over a long period of time, where the danger is generally known and recognized.[34]

The reasoning behind comment j is clear. Almost all products involve some potential risk of harm, either in their intended or reasonably foreseeable use.[35] Yet it does not follow that all products

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generally James B. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521 (1982). It should be noted that some courts and commentators regard product warnings as part of a product's overall design. According to this view, failure to warn of the potential dangers associated with the use of a product would constitute a design defect. *See, e.g.*, Phillips v. Kimwood Mach. Co., 269 Or. 485, 497-97, 525 P.2d 1033, 1038 (1974). The better approach, however, is to treat a manufacturer's failure to warn as an independent source of liability. *See* PROSSER & KEETON, *supra* note 28, § 99. *See generally* Sales, *supra*.

32 RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965) provides in pertinent part:

> *j. Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger . . . .
>
> But 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. Again the dangers of alcoholic beverages are an example . . . .

33 *Id.*

34 *Id.* Interestingly, comment j cites alcoholic beverages as an example of such a product. *See supra* note 32 (quoting comment j). Comment i, which supplies the definition of an unreasonably dangerous product, also makes reference to alcoholic beverages:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.

Id. § 402A, comment i.

35 *See* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 38 (1983); *see also* Hethcoat v. Chevron Oil Co., 364 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1978) ("Virtu-

posing some risk of harm are therefore unmarketable. Rather, the manufacturer of such products must supply the ultimate user or consumer with enough information to make an informed choice as to whether the product's utility outweighs its potential risks.[36]

B. The Long-Standing Civil Immunity of Alcoholic Beverage Manufacturers

Manufacturers of alcoholic beverages have enjoyed a long-standing immunity from civil liability under section 402A for failing to warn consumers of the dangerous propensities of their products. Both state and federal courts have held as a matter of law that the risks associated with alcohol consumption are matters of common knowledge, and therefore require no warning.[37] In the language of the Restatement, the courts have found that alcoholic beverages marketed without warnings are not defective in a way that subjects persons or tangible property to an unreasonable risk of harm.

Garrison v. Heublein, Inc.[38] is typical of the cases holding that an alcoholic beverage manufacturer owes no duty to warn of the risks associated with the use of its products. In *Garrison*, the plaintiffs sued the manufacturer and distributor of Smirnoff vodka, alleging that one of the plaintiffs had "suffered physical and mental injuries as a result of consuming the defendant's product over a twenty-year period."[39] The crux of the plaintiffs' claim was not that the product was "adulterated or tainted,"[40] but that the defendant had failed to warn the consuming public of the dangerous "propensities" of its product.[41]

The Court of Appeals for the Seventh Circuit decided the case

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ally every machine is capable of being the instrument of hurt. . . . There is virtually no part of a machine, including the ordinary electric motor and the ordinary automobile which does not present potential dangers to a repairman.").

36 Both courts and commentators have emphasized that the consumer has a fundamental right to choose whether to subject himself or herself to identifiable product dangers. *See, e.g.*, Davis v. Wyeth Laboratories, 399 F.2d 121, 129-30 (9th Cir. 1968) (recipient of polio vaccine entitled to make a "true choice judgment" whether to be inoculated with Sabin III vaccine). In many cases, while the manufacturer cannot eliminate all potential dangers associated with the use of its product, the consumer nevertheless can use the product safely if he or she is aware of the risks involved and acts so as to minimize those risks. Schwartz & Driver, *supra* note 35, at 38. For cases, see, *e.g.*, Torsiello v. Whitehall Laboratories, 165 N.J. Super. 311, 325-26, 398 A.2d 132, 139-40 (manufacturer must warn consumers of the side effects of aspirin), *certif. denied*, 81 N.J. 50, 404 A.2d 1150 (1979); Michael v. Warner/Chilcott, 91 N.M. 651, 655, 579 P.2d 183, 187 (N.M. Ct. App.) (manufacturer required to warn of the dangers of sinus medication), *cert. denied*, 91 N.M. 610 (1978).

37 *See* cases cited *supra* note 2.

38 673 F.2d 189 (7th Cir. 1982).

39 *Id.* at 189.

40 *Id.*

41 *Id.*

under section 402A of the Restatement. The court held as a matter of law that "the dangers of the use of alcohol are common knowledge to such an extent that the product cannot objectively be considered to be unreasonably dangerous."[42] The court found no duty to warn of such commonly known dangers.[43]

Malek v. Miller Brewing Co.[44] is one of the most recent cases to hold that the risks associated with alcohol consumption are sufficiently known to consumers to preclude any duty to warn.[45] Relying on comments i and j of the Restatement, the Court of Appeals of Texas concluded that the defendant "had no duty to warn and that the product, as marketed, was not unreasonably dangerous."[46] The court noted that "[s]tatutes subjecting persons . . . to criminal sanctions for driving while intoxicated represent society's harshest 'warnings.' "[47]

C. Heralding in the New Era: *Hon v. Stroh Brewery Co.*

Alcoholic beverage manufacturers' long-standing immunity from civil liability ended with the decision in *Hon v. Stroh Brewery Co.*[48] In *Hon*, the plaintiff's husband died of pancreatitis, complicated with hepatic disease and gastric ulcerations[49]—the direct result of his consumption of alcoholic beverages over a prolonged period of time.[50] The plaintiff sued Stroh Brewery Co., alleging that the defendant's products were "unreasonably dangerous because there was no warning of lesser-known dangers of prolonged consumption, such as pancreatitis, as opposed to commonly-recognized risks, such as alcoholism and liver cirrhosis."[51]

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42 *Id.* at 192.

43 *Id.*

44 749 S.W.2d 521 (Tex. Ct. App. 1988).

45 *Id.* at 524. In *Malek*, the plaintiff was injured in an automobile accident with a drunken driver who became intoxicated after consuming beer manufactured by the defendant Miller Brewing Company. *Id.* at 521-22. The plaintiffs alleged that the defendant manufacturer's liability "arose from its failure to warn consumers about the dangers of excessive beer consumption and driving an automobile, and its failure to instruct on the safe use of its product." *Id.* at 522.

46 *Id.* at 524.

47 *Id.* at 523.

48 835 F.2d 510 (3d Cir. 1987); *see also* Hon v. Stroh Brewery Co., 665 F. Supp. 1140 (M.D. Pa. 1987).

49 835 F.2d at 511.

50 *Id.* at 511 n.2. The record contains evidence of William Hon's drinking habits for the six years immediately preceding his death. During that time, Hon's alcohol consumption consisted mainly of Old Milwaukee Beer and Old Milwaukee Light Beer, both products which the defendant manufacturered. *Id.* at 511. Hon consumed beer at the rate of two to three cans per evening, approximately four evenings per week. *Id.*

51 665 F. Supp. at 1146. The plaintiff conceded that it was unnecessary "to label alcoholic beverages as to commonly known and associated dangers and risks of harm that result when used over a lengthy period of time or in excess. . . ." *Id.* at 1142 n.3.

The Court of Appeals for the Third Circuit decided the case under section 402A of the Restatement (Second) of Torts. Recall that a product is defective under section 402A where it lacks a warning needed to make it safe for its intended purpose.[52] The evidence in *Hon* tended to show that the general public is unaware that moderate but prolonged consumption of alcohol can lead to serious adverse health effects.[53] The court therefore held that a genuine issue of material fact existed as to whether the defendant's products were safe for their intended purpose without a warning.[54]

At least one court already has followed *Hon*. The Court of Appeals of Texas expressly adopted the Third Circuit's reasoning in *Brune v. Brown-Forman Corp.*[55] Relying on the language of section 402A, the Texas court concluded that a trier of fact could properly find that the amount of alcohol the decedent consumed was "dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with ordinary knowledge common to the community . . . ."[56] The court then held that a genuine issue of material fact existed as to whether tequila is safe for its intended purpose without a warning or instruction on its use.[57]

III
THE INADEQUACY OF THE COMMON-LAW APPROACH

The decision in *Hon v. Stroh Brewery Co.*[58] both merits praise and demands criticism. The court of appeals correctly recognized the potential dangers associated with alcohol consumption and the need to disseminate accurate information regarding those dangers. However, the court incorrectly assumed that the common-law approach to products liability is the appropriate means by which to regulate the dissemination of such information. The common-law approach,

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52 *See supra* Part II(A).

53 835 F.2d at 514.

54 *Id.* The district court had granted the defendant manufacturer's motion for summary judgment. 665 F. Supp. at 1142. The lower court held as a matter of law "that defendant's beverages were not defective and that defendant was not under a duty to warn of the dangers cited by plaintiff." *Id.*

55 758 S.W.2d 827 (Tex. Ct. App. 1988). In *Brune*, the plaintiff's daughter died of acute alcohol poisoning after consuming tequila manufactured and bottled by the defendant Brown-Forman Corp. *Id.* at 827-28. The plaintiff brought suit against the defendant manufacturer, alleging that "the tequila in question contained a marketing defect because it was an unreasonably dangerous product in the absence of a warning and/or instructions for its safe use." *Id.* at 828. Specifically, the plaintiff alleged that "while many risks are assumed with the drinking of a bottle of tequila, many teenagers are unaware that the mere ingestion of the drug in excess quantity can cause an overdose resulting in death." *Id.*

56 *Id.* at 831.

57 *Id.*

58 835 F.2d 510 (3d Cir. 1987); *see also Hon*, 665 F. Supp. 1140.

with its reliance upon the jury, is inadequate to resolve the question of an alcoholic beverage manufacturer's duty to warn of the risks inherent in the use of its product. Two arguments support this conclusion: (1) juries may be inconsistent in finding a duty to warn; and (2) assuming that such a duty to warn exists, juries are ill-equipped to assess the adequacy of the warning provided.

A. Decisional Consistency

Hon was the first in a long line of decisions to question seriously the so-called "universal recognition of all potential dangers associated with alcohol."[59] While the court of appeals recognized that many of the dangers of alcohol use are matters of common knowledge, the court declined to rule as a matter of law that the consumption of alcohol for "any extended period, no matter how short, in any quantity, no matter how small, presents generally known dangers."[60] Such a determination, the court held, is a matter best left to the jury.[61]

The court of appeals' holding in *Hon* has troubling implications for what may be termed "decisional consistency."[62] Myriad factors, each of which may vary from trial to trial, inform a jury's decision.[63] Allowing juries to decide on a case-by-case basis whether the risks of alcohol consumption are generally known, and consequently whether a particular manufacturer of alcoholic beverages has a duty to warn of such risks, undoubtedly will lead to inconsistent jury verdicts.[64] For example, one jury may conclude that Brand X alcoholic

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59 665 F. Supp. at 1144 n.7. *Cf.* cases cited *supra* note 2.

60 835 F.2d at 515.

61 *Id.* at 514.

62 As used in this Note, the term "decisional consistency" refers to the ability of different juries to reach similar decisions in similar cases.

63 Such factors include evidence produced at trial, the demeanor of the witnesses, the charge given by the judge and, perhaps most importantly, the psychological and socio-economic makeup of the jury itself.

64 The threat of such inconsistent jury verdicts and their effect on products liability insurance rates led the Department of Commerce to publish the Model Uniform Products Liability Act, 44 Fed. Reg. 62,714 (1979) ("MUPLA") in October, 1979 and to offer it for voluntary use by the states. MUPLA sets forth uniform standards for products liability tort law. Section 101, entitled "Findings," explicitly identifies the problems that brought MUPLA into existence. That section provides in relevant part:

> (A) Sharply rising product liability insurance premiums have created serious problems in commerce resulting in:
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> (1) Increased prices of consumer and industrial products;
>
> (2) Disincentives for innovation and for the development of high-risk but potentially beneficial products;
>
> (3) An increase in the number of product sellers attempting to do business without product liability insurance coverage, thus jeopardizing both their continued existence and the availability of compensation to injured persons. . . .
>
> (B) One cause of these problems is that products liability law is

beverages are "unreasonably dangerous"[65] without a warning while another jury may conclude that the same brand of alcoholic beverages require no warning to be safe as marketed.

Such inconsistency is particularly distressing given that alcohol is a generic product.[66] For one jury to conclude that Brand X alcoholic beverages are "unreasonably dangerous" absent a warning and another jury to conclude that Brand Y alcoholic beverages are not would lead to the bizarre result of allowing recovery in the one case, while denying recovery for harm caused by an identical product in the other. Such a state of affairs clearly is untenable.[67]

B. Assessing the Adequacy of the Warning

Where a manufacturer has attempted to warn consumers of the risks associated with the use of its product, courts often will require juries to determine the adequacy of the warning provided.[68] The standard for assessing the adequacy of product warnings is perhaps

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> fraught with uncertainty and sometimes reflects an imbalanced consideration of the interests it affects. The rules vary from jurisdiction to jurisdiction and are subject to rapid and substantial change. These facts militate against predictability of litigation outcome.
>
> (C) Insurers have cited this uncertainty and imbalance as justifications for setting insurance rates and premiums that, in fact, may not reflect actual product risk or liability losses. . . .
>
> (E) Uncertainty in product liability law and litigation outcome has added to litigation costs and may put an additional strain on the judicial system.

Id.

65 RESTATEMENT, *supra* note 25, § 402A(1).

66 A generic product is one that relates to or is descriptive of a whole group or class. BLACK'S LAW DICTIONARY 617 (5th ed. 1979).

67 To avoid such inconsistency, courts might consider allowing subsequent plaintiffs to employ offensive collateral estoppel. For a scholarly discussion of the use of offensive collateral estoppel in the tort context, see Kurt Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning With the Unreasonable*, 14 ST. MARY'S L.J. 19 (1982); Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141 (1984); Douglas J. Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 MISS. L.J. 765 (1982); Michael Weinberger, *Collateral Estoppel and the Mass Produced Products: A Proposal*, 15 NEW ENG. L. REV. 1 (1979). Courts, however, continue to refuse to apply offensive collateral estoppel in design and failure-to-warn cases. *See, e.g.*, Setter v. A. H. Robins, 748 F.2d 1328 (8th Cir. 1984) (refusal to apply offensive collateral estoppel in case involving defective birth control device); Goodson v. McDonogh Power Equip. Co., 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983) (refusal to apply offensive collateral estoppel in case involving defective power lawn mower). *But see* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 482 N.E.2d 63, 492 N.Y.S.2d 584 (1985) (application of offensive collateral estoppel in DES case).

68 *See, e.g.*, Wolfe v. Ford Motor Co., 6 Mass. App. Ct. 346, 350-51, 376 N.E.2d 143, 146 (1978); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 101, 337 A.2d 893, 902 (1975); Pearson v. Hevi-Duty Elec., 618 S.W.2d 784, 787 (Tex. Civ. App. 1974). *But see* Dunkin v. Syntex Laboratories, Inc., 443 F. Supp. 121, 124 (W.D. Tenn. 1977); Chambers v. G.D. Searle & Co., 441 F. Supp. 377, 384 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977).

the most unsettled and confusing aspect of warnings liability.[69] Not surprisingly, juries are ill-suited for this difficult task.[70]

Despite the difficulties involved in evaluating the adequacy of product warnings, few courts provide more than open-ended generalities when instructing juries in this area.[71] Where courts have attempted to define precise standards of adequacy for product warnings, however, their success has been limited at best. Courts have focused on the intensity[72] and the cost[73] of warnings, rather than on the ability of the manufacturer to communicate instructional information effectively through written warnings.[74] Manufacturers are therefore encouraged to design legalistic warnings that bring them within a judicially prescribed "safe harbor."[75]

Adding to the confusion regarding the standard of adequacy is the emotional context in which juries evaluate product warnings.[76]

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69 Schwartz & Driver, *supra* note 35, at 53. Courts have attempted to define adequacy in a variety of ways; *see, e.g.*, Schmeiser v. Trus Joist Corp., 273 Or. 120, 132, 540 P.2d 998, 1004 (1975) ("[A] warning must be fair and adequate, to the end that the user, by the exercise of reasonable care on his own part, shall have a fair and adequate notice of the possible consequences of use or even misuse.") (quoting ROBERT D. HURSH & HENRY J. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 8:19 at 193 (2d ed. 1974)); Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962) ("If warning of the danger is given and this warning is of a character reasonably calculated to bring home to the reasonably prudent person the nature and extent of the danger, it is sufficient to shift the risk of harm from the manufacturer to the user."); Lopez v. Aro Corp., 584 S.W.2d 333, 335 (Tex Civ. App. 1979) ("Whether a warning is legally sufficient depends upon the language used and the impression that such language is calculated to make upon the minds of the users of the product.") (quoting Leon Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1211 (1976)).

70 Note that the concerns of "decisional consistency" developed in the preceding discussion equally apply to the question of adequacy. *See supra* Part III(A).

71 Schwartz & Driver, *supra* note 35, at 75. For a sampling of cases, see, *e.g.*, Kammer v. Lamb-Grays Harbor Co., 55 Or. App. 557, 562 n.1, 639 P.2d 649, 651 n.1 (1982) (stating that "[e]ven if you find that a warning was given, it must be such as would reasonably be expected to reach and be understood by the user."); Berry v. Coleman Sys. Co., 23 Wash. App. 622, 596 P.2d 1365 (1979) (court need not supply guidelines to aid jury in its determination of adequacy of product warnings); *see also* cases cited *supra* note 69.

72 *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1104 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (characterizing product warning as too "mild"); Tampa Drug Co. v. Wait, 103 So. 2d 603, 609 (Fla. 1958) (duty to warn with enough "intensity" to cause a reasonable man to exercise caution); Wolfe v. Ford Motor Co., 6 Mass. App. Ct. 346, 350, 376 N.E.2d 143, 146 (1978) ("[f]orcefulness of the warning must be commensurate with the danger involved"); D'Arienzo v. Clairol, Inc., 125 N.J. Super. 224, 230, 310 A.2d 106, 110 (Super. Ct. 1973) (duty to warn is not "one of clarity but of intensity").

73 *See, e.g.*, West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 211-12 (Iowa 1972) (jury should consider the cost of placing a warning label on an allegedly dangerous product); Moran v. Faberge, Inc., 273 Md. 538, 543-44, 332 A.2d 11, 15 (1975) (jury should balance the risk of harm against the cost of product warnings).

74 Schwartz & Driver, *supra* note 35, at 75.

75 *Id.*

76 *Id.* at 54.

Juries have obvious conceptual difficulties in endorsing the adequacy of a warning that has not prevented an accident.[77] Moreover, because product warnings are evaluated on an individual, case-by-case basis, both trial and appellate courts have been reluctant to broaden the narrow focus of such litigation to consider whether the legal rules and their unguided application by juries will encourage or discourage the creation of better warnings.[78] The result of all this has been to provide juries considerable leeway in compensating an injured plaintiff out of the manufacturer's deep pocket.[79]

IV
STATUTORY LIABILITY UNDER THE ALCOHOLIC BEVERAGE LABELING ACT OF 1988

On November 18th, Congress enacted the Alcoholic Beverage Labeling Act of 1988 ("ABLA").[80] The ABLA was a response to Congress's determination that the American public need be made aware of the many health risks associated with the consumption of alcoholic beverages.[81] Congress decided that a nonconfusing, nationally uniform warning notice would both avoid the dissemination of incorrect or misleading information and minimize burdens on interstate commerce.[82] Requiring such warning notices on all alcoholic beverage containers was, in Congress's estimation, appropriate and necessary in view of the substantial role of the federal government in promoting the health and safety of the Nation's

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77 *Id.* Professors Schwartz and Driver argue that the adequacy of a product warning can never be determined solely by its effectiveness in preventing accidents:

> No product warning, no matter how effective as a communication, can guarantee compliance. . . . A warning which prevents only one percent of the accidents associated with a product should be considered legally adequate if, under the circumstances, that is all that is possible. Similarly, a warning which prevents ninety-five percent of the accidents associated with use of a product should be considered legally inadequate if a better warning would have been included by a reasonably prudent manufacturer at the time it sold the product.

Id. at 54-55 (footnote omitted).

78 *Id.* at 40-41.

79 *See id.* at 40; *see also* Aaron D. Twerski & Alvin S. Weinstein, *A Critique of the Uniform Products Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 232-33 (1977) (arguing that juries often sustain very weak products liability cases).

80 Pub. L. No. 100-690, 101 Stat. 4518 (1988) (codified at 27 U.S.C.A. §§ 201-219a). The ABLA was part of the larger Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (to be codified at 21 U.S.C. §§ 1501-1509). The effective date of the ABLA is November 18, 1989. 27 U.S.C.A. § 213 (West Supp. 1989). In past years, Congress and various federal agencies have considered whether to require product warnings on alcoholic beverage containers. For a compilation of the major legislative and administrative efforts regarding such warnings, see S. REP. No. 596, 100th Cong., 2d Sess. 2-3 (1988) [hereinafter S. REP.].

81 27 U.S.C.A. § 213 (West Supp. 1989).

82 *Id.*

population.[83]

Specifically, the ABLA makes it unlawful for any person to manufacture, import or bottle for sale or distribution in the United States any alcoholic beverage[84] unless the container[85] of such beverage bears the following statement:

> GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health[86] problems.[87]

The ABLA provides that the above statement shall be located in a "conspicuous and prominent place" on the beverage container, and shall be of a particular type and size.[88] The ABLA further provides that no additional health warning statement shall be required under state law to be placed on any container of an alcoholic beverage, or

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83 *Id.*

84 Section 214(1) defines the term "alcoholic beverage" as "any beverage in liquid form which contains not less than one-half of one percent of alcohol by volume and is intended for human consumption." *Id.* § 214(1). The term is obviously intended to include distilled spirits, beer, wine, wine coolers and any similar products that may emerge.

85 Section 214(5) defines the term "container" as the "innermost sealed container irrespective of the material from which made, in which an alcoholic beverage is placed by the bottler and in which such beverage is offered for sale to members of the general public." *Id.* § 214(5). This section is drafted so as to ensure that the obligation to affix the warning label to the alcohol beverage container is on the bottler, rather than on those who only sell the product.

86 The term "health" includes, but is not limited to, the prevention of accidents. *Id.* § 214(6).

87 *Id.* § 215(a). Section 217 provides that if the Secretary of the Treasury determines, as a result of investigation and consultation with the Surgeon General beginning two years after the date of the ABLA's enactment, that available information would justify a change in the government warning, the Secretary is to report that information to Congress. *Id.* § 217. This section will enable the Secretary to inform Congress of recent scientific developments so that Congress may consider the need to make changes in the warning requirement.

88 *Id.* § 215(b). Pursuant to section 215(b), the Bureau of Alcohol, Tobacco, and Firearms promulgated temporary regulations in February, 1989 implementing the provisions of the ABLA. *See* Implementation of the Alcoholic Beverage Labeling Act of 1988, 54 Fed. Reg. 7160 (1989) (to be codified in scattered sections of 27 C.F.R.). Although effective as of February 16, 1989, the temporary regulations did not become mandatory until November 18, 1989. *Id.* The regulations provide that the government warning "shall be stated on the brand label or separate front label, or on a back or side label, separate and apart from all other information . . . ." *Id.* at 7163 (to be codified at 27 C.F.R. § 16.21). The regulations require that the warning itself appear in "script, type, or printing" and be at least 2 millimeters high for containers of more than eight fluid ounces and at least one millimeter high for containers of eight fluid ounces or less. *Id.* (to be codified at 27 C.F.R. § 16.22(b)). The regulations further provide that all labels "shall be so designed that the statement required by § 16.21 is readily legible under ordinary conditions, and such statement shall be on a contrasting background." *Id.* (to be codified at 27 C.F.R. § 16.22(a)).

on any box, carton or other package that contains such a container.[89] The ABLA imposes a civil penalty of not more than $10,000 for persons violating its provisions.[90]

V
THE INADEQUACY OF THE STATUTORY APPROACH

Courts and commentators have long recognized the substantial advantages the statutory approach to products liability offers over the remedies available at common-law.[91] In general, the statutory approach displaces the high cost and frustration of individual litigation.[92] Moreover, such an approach minimizes the "social waste" implicit in assessing the need for improved safety standards only upon action by an injured plaintiff.[93] In addition, statutory standards greatly aid the plaintiff in the proof of his or her case. The plaintiff may establish a claim merely by showing that the product was within the statutory regulation, that the warning failed to meet the statutorily prescribed standards, and that this failure caused or contributed to the injury.[94] The plaintiff therefore need not show either that the product was dangerous, or that the manufacturer had or should have had knowledge of this fact. Furthermore, the diffi-

89 27 U.S.C.A. § 216 (West Supp. 1989). The states retain the authority, however, to enact legislation in other areas to protect the health and safety of their citizens from the dangers associated with alcohol consumption. Consequently, the ABLA does not affect other state requirements regarding alcoholic beverages (*e.g.*, warning posters or notices in public places). S. REP., *supra* note 80, at 7.

90 *Id.* § 218. Each day constitutes a separate offense under section 218.

91 *See, e.g.*, Hardy Cross Dillard & Harris Hart, *Product Liability: Directions For Use and the Duty to Warn*, 41 VA. L. REV. 145, 169-77 (1955); James A. Henderson, Jr., *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). *But see* LOUISE JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); Louise Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954); A.D. Twerski, A.S. Weinstein, W.A. Dohaher & H.R. Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

92 Dillard & Hart, *supra* note 91, at 169.

93 *Id.*

94 *See, e.g.*, Crist v. Fitzgerald, 189 Va. 109, 118, 52 S.E.2d 145, 148 (1949) (The "violation of a statute constitutes negligence per se, and if it proximately causes or contributes to an injury, it will support a recovery of damages for such injury."). Absent a specific legislative intent to occupy the field, however, statutory warning requirements do not affect the common law duty to warn. *See, e.g.*, Mahr v. G.D. Searle & Co., 72 Ill. App. 3d 540, 561, 390 N.E.2d 1214, 1229 (1979) (compliance with FDA warning requirements does not alter common-law duty to warn); Michael v. Warner/Chilcott, 91 N.M. 651, 654, 579 P.2d 183, 186 (N.M. Ct. App.) (statutes and regulations merely set minimum standards), *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978). Therefore, even if a manufacturer fully complies with federal or state regulations, a court may nevertheless find the product warning inadequate. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.) (polio vaccine), *cert. denied*, 419 U.S. 1096 (1974); McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 528 P.2d 522 (1974) (oral contraceptive); *Michael*, 91 N.M. at 651, 579 P.2d at 183 (sinus medication).

cult jury issue dealing with the adequacy of the warning actually given is greatly simplified because statutory standards are supplied.[95]

Despite its substantial advantages over common-law liability, however, the statutory approach ultimately may do more harm than good in the context of alcoholic beverage labeling. The statutory remedy of the ABLA is inadequate to resolve the question of an alcoholic beverage manufacturer's duty to warn of the hazards associated with the use of its product. Three arguments support this conclusion: (1) warning labels in general do not qualify as a program of public health education; (2) the government warning in particular is ineffective as an informational device; and (3) the government warning provides only "selective" information to consumers, yet preempts all common-law products liability actions for injuries resulting from risks that require no warning.

A. Warning Labels Do Not Qualify as a Program of Public Health Education

Research in the areas of psychology, sociology and health education suggests that warning labels do not qualify as a program of public health education, and therefore are ineffective as a means of behavioral modification.[96]

1. *Health Belief Model*

For several decades, health educators have been developing and testing what has been termed the "Health Belief Model."[97] This Model is intended as an aid in the design of public health education programs that are effective in preventing or reducing behavior that is harmful to individuals. The Model concludes that merely telling someone that a particular behavior is harmful will not affect that person's conduct.[98] The process of behavioral modification is

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95 Dillard & Hart, *supra* note 91, at 170. *See supra* Part III(B).

96 For a general discussion of consumer behavior, see CONSUMER BEHAVIOR AND THE BEHAVIORAL SCIENCES: THEORIES AND APPLICATIONS (Stewart Henderson Britt ed. 1966); LINCOLN H. CLARK, CONSUMER BEHAVIOR (1958); JAMES T. ENGEL, DAVID T. KOLLAT & ROGER D. BLACKWELL, CONSUMER BEHAVIOR (1968); ROM J. MARKIN, JR., CONSUMER BEHAVIOR: A COGNITIVE ORIENTATION (1974); DIMENSIONS OF CONSUMER BEHAVIOR (James U. McNeal 2d ed. 1969).

97 *See generally Hearings*, *supra* note 14, at 152 (statement of Dr. Ruth C. Engs, Associate Professor, Department of Applied Health Science, Indiana University).

98 *Id.* The "Health Belief Model" is in this respect consistent with the theory of cognitive dissonance developed by researchers in the field of consumer behavior. *See generally* Leon Festinger & Dana Bramel, *The Reactions of Humans to Cognitive Dissonance*, in EXPERIMENTAL FOUNDATIONS OF CLINICAL PSYCHOLOGY (Arthur J. Bachrach ed. 1962); JACK W. BREHM & ARTHUR R. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962); R. MARKIN, *supra* note 96, at 143-62 (1974); James U. McNeal, *Cognitive Dissonance and Consumer Behavior*, in DIMENSIONS OF CONSUMER BEHAVIOR, *supra* note 96. The theory of

infinitely more complex. Under the Model, the individual must (1) feel personally susceptible to the health problem; (2) feel that the problem can cause he or she serious harm; (3) know what actions can be taken to avoid the harm; and (4) know the costs or benefits of these actions.[99]

When viewed in the context of the Health Belief Model, the warning mandated by the ABLA fails entirely as a means of public health education. The warning does not indicate how an individual is personally susceptible to the harms noted. Moreover, the warning neglects to outline possible means of avoiding such harms. What the warning does do is introduce a set of harms that may or may not affect those who consume alcohol in some undescribed quantity over some unnamed period of time.[100] Such a warning is not only uneducational, but may not even be credible.

2. *Fear Arousal Techniques*

Research has shown that fear arousal techniques (*i.e.*, "scare tactics") are an ineffective means of modifying behavior, and in particular, abusive health behavior.[101] In some cases, such techniques may even be counterproductive.[102] A written warning that induces a state of fear in the reader may cause him or her to feel overly threatened, and as a result, to reject the personal relevance of the

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cognitive dissonance is predicated upon the assumption that each individual strives toward consistency among his opinions, attitudes and values. See R. MARKIN, *supra* note 96, at 145. The theory predicts that consumers generally expose themselves to information which is consonant with their existing attitudes and beliefs, and avoid information which may be irritating or dissonant. *Id.*

99 *Hearings*, *supra* note 14, at 152 (statement of Dr. Ruth C. Engs).

100 *See id.*; *see also id.* at 88 (statement of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University).

101 *See, e.g.*, R. MARKIN, *supra* note 96, at 327 ("Fear appeals have been shown to be less effective in persuading the audience to certain prescribed attitudes and behavior than appeals that are tempered with reason and more calmly emphasize a given threat."); Michael L. Ray & William L. Wilkie, *Fear: The Potential of an Appeal Neglected by Marketing*, 34 J. MARKETING 54 (1970); John L. Wheatley, *Marketing and the Use of Fear-or-Anxiety-Arousing Appeals*, 35 J. MARKETING 62 (1971). Significantly, research has shown that attempts to alter attitudes or modify behavior through fear arousal techniques are effective only with respect to those individuals who do not perceive themselves as the targets of such attempts. *See* Ray & Wilkie, *supra*, at 59.

102 For example,

> telling teenagers that they should not have sex until they are married because they might get pregnant or catch a sexually transmitted disease has had little effect on teenage pregnancies or disease rates. Teenagers who have had sex a few times and have not become pregnant or diseased, or who have not caused someone else to become so, do not believe the threatening message, or feel that it does not apply to them. Because they do not believe it, they continue to have sex, resulting in our country having one of the highest rates of teenage pregnancies in the industrialized world.

Hearings, *supra* note 14, at 152 (statement of Dr. Ruth C. Engs).

warning entirely.[103] Moreover, if the content of the warning conflicts with the individual's personal experience, it is likely that the warning will lose all credibility.[104]

The warning mandated by the ABLA uses fear arousal techniques in an attempt to modify behavior. The caveat against consuming alcoholic beverages during pregnancy because of the risk of birth defects is exemplary. Such a fear-inducing warning may cause some women to become defensive and to reject not only the informational content of the warning, but also that of any well-designed public health education program.[105]

3. *Reactance Theory*

The basic premise of reactance theory is that individuals value their sense of freedom and autonomy, and seek to project an image of self-control.[106] Reactance theory suggests that whenever an individual's freedom is threatened, that individual enters into a "reactance motivational state" and acts to regain control.[107] Accordingly, attempts to bring about conformity in behavior often result in opposition and noncompliance.[108]

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103 *Id.*

104 Dillard & Hart, *supra* note 91, at 162. For cases, see, *e.g.*, Farley v. Edward E. Tower & Co., 271 Mass. 230, 171 N.E. 639 (1930) (warning on plastic hair comb insufficient); Maize v. Atlantic Ref. Co., 352 Pa. 51, 41 A.2d 850 (1945) (plaintiff ignored warning where the name of the product was "Safety-Kleen"). The effect of a group of psychological phenomena known as "selective exposure," "selective perception" and "selective retention" on the communication process is well summarized by Professor Markin in his much read book on consumer behavior:

> Not only do we selectively expose ourselves to the media, messages, and appeals that support our predispositions, but we perceive what we want to perceive. Media messages and appeals that are in conflict with our norms of behavior and our predispositions are converted, in the event of exposure, to positions more nearly compatible with our own. We tend to see, hear, and believe only those things that we wish to see, hear, and believe. Finally, our predispositions induce us to retain only what is congruent or compatible with our life style.

R. MARKIN, *supra* note 96, at 321. For well-documented examples of and research into these phenomena, see BERNARD BERELSON & HAZEL GAUDET, THE PEOPLE'S CHOICE (1948).

105 *Hearings*, *supra* note 14, at 153 (statement of Dr. Ruth C. Engs).

106 *See* R. MARKIN, *supra* note 96, at 407; *Hearings*, *supra* note 14, at 153 (statement of Dr. Ruth C. Engs).

107 R. MARKIN, *supra* note 96, at 407. *Accord Hearings*, *supra* note 14, at 153 (statement of Dr. Ruth C. Engs).

108 R. MARKIN, *supra* note 96, at 407. This point is well supported by recent studies documenting alcohol consumption among college students. *See Hearings*, *supra* note 14, at 153. The results of these studies are summarized by Dr. Engs:

> Despite the prohibition against drinking by students younger than 21, a higher percent of underage students drank compared to those of legal age and a higher percent were heavy drinkers and exhibited several other alcohol abuse problems compared to students of legal age . . . . [P]rohibiting drinking among these underage students may have been

Some may interpret the warning mandated by the ABLA as a threat to their autonomy and freedom to drink. Reactance theory suggests that such a warning will be counterproductive, in that consumers are likely to do exactly that which they are warned against—they will consume alcoholic beverages irrespective of, and oblivious to, the risks involved.

B. The Government Warning Is an Ineffective Informational Device

To be effective as an informational device, a warning must convey new knowledge in a persuasive manner.[109] Past informational campaigns such as those intended to encourage seatbelt use and to deter cigarette smoking have had limited success.[110] The primary purpose of those efforts was to exhort, rather than to provide con-

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seen as a restriction of freedom and autonomy, thereby leading to more drinking and abuse compared to the legal drinkers. Also directly relevant may be the fact that most states require warning signs in liquor stores and taverns that it is illegal for minors to purchase alcohol.

Id.; *cf.* M. Venkatesan, *Experimental Study of Consumer Behavior*, 3 J. MARKETING RES. (1966) (individuals exposed to group norm and induced to comply were less responsive than individuals who were not induced to comply).

109 W. KIP VISCUSI & WESLEY A. MAGAT, LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION 24 (1987). *See, e.g.*, Ellis v. International Playtex, Inc., 745 F.2d 292, 306-07 (4th Cir. 1984) (tampon necessitated warning of toxic shock syndrome); Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 404 (1st Cir. 1965) (warning required skull and crossbones); Seley v. G.D. Searle & Co., 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 837 (1981).

Courts often impose the further requirement that manufacturers use the best possible means available to inform consumers of the dangers associated with the use of their products. *See, e.g.*, Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 162 (D.S.D. 1967) (although manufacturer advised physicians of product's risk by means of a series of product cards, a letter and the Physician's Desk Reference Book, warning efforts held inadequate because manufacturer did not require those persons employed in the promotion and sale of its products to inform physicians of possible side effects), *aff'd*, 408 F.2d 978 (8th Cir. 1969). *Cf.* Incollingo v. Ewing, 444 Pa. 263, 288-89, 282 A.2d 206, 220 (1971) (although drug manufacturer included sufficient warnings on package label, manufacturer's salesmen rendered warnings insufficient by overemphasizing the effectiveness of the drug while underemphasizing its risks).

110 Congress enacted the Federal Cigarette Labeling Act in 1965. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-40). The Act required the following legend to appear on all cigarette packages: "Caution: Cigarettes May Be Hazardous To Your Health." Pub. L. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified at 15 U.S.C. § 1333 (1965 & Supp. V 1969)). In 1970, Congress amended the Federal Cigarette Labeling and Advertising Act, requiring that the legend read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." Public Health Cigarette Smoking Act, Pub. L. No. 91-222, § 2, 84 Stat. 88 (1970) (codified at 15 U.S.C. § 1333 (1970)). The Act also barred radio and television advertising. Pub. L. No. 91-222, § 2, 84 Stat. 89 (1970) (codified at 15 U.S.C. § 1335 (1970)). Statistical evidence of cigarette consumption patterns indicates that both per capita and total consumption increased after the warning labels were instituted and the broadcast ban went into effect. *See* Camille P. Shuster & Christine Pacelli Powell, *Comparison of Cigarette and Alcohol Advertising Controversies*, 16 J. ADVERTISING 26, 27 (1987).

sumers with new and meaningful information.[111] The lack of major consumer response is therefore not surprising.

In terms of substantive and persuasive merit, the warning mandated by the ABLA is of questionable efficacy. The consuming public is generally aware of the dangers of drinking and driving.[112] Similarly, the risks to pregnant women who consume alcohol are matters of common knowledge.[113] The government warning therefore appears largely intended to frighten consumers into modifying their behavior, rather than provide them with any new and useful information. As a result, the warning is unlikely to serve a constructive purpose.

C. The "Selective Approach" of the Government Warning

The ABLA adopts a "selective approach" to warning labels. Although myriad health hazards are associated with the consumption of alcoholic beverages,[114] the government warning addresses only those hazards which Congress apparently considers to involve the most risk.[115] While generally desirable and perhaps unavoidable,[116] selective product warnings are not without their costs.

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111 Even the most recent statutorily mandated warnings for cigarette packages fail to provide consumers with any new and meaningful information regarding the potential health hazards associated with cigarette smoking. *See* Comprehensive Smoking Education Act, Pub. L. No. 98-74, 98 Stat. 2200 (1984) (codified at 15 U.S.C. §§ 1331-41 (1988)) (effective October 12, 1985). The Comprehensive Smoking Education Act requires that the following four rotational warnings appear on cigarette packages:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema And May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth And Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333. Such warnings fail to inform consumers that smoking nearly doubles one's risk of heart disease, that smokers are between ten and twenty-five times more susceptible to lung cancer than are non-smokers, and that between seventy and eighty percent of all deaths caused by emphysema and chronic bronchitis are attributable to smoking. *See* Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation, ch. 1 at 11-31 (May 1981).

112 Newspaper coverage of the dangers of drinking and driving has risen by a factor of more than thirty in the past decade. *Hearings*, *supra* note 14, at 87 (NEXIS count of Associated Press stories).

113 A special *Gallup Report* on alcohol use and abuse in America indicated that 90 percent of the population agrees that "[t]he use of alcohol by pregnant women can cause birth defects." GALLUP REPORT, *supra* note 12, at 25 (1987). Comparison of these results with those of a 1982 survey shows an increase either in overall public understanding or in the strength with which those views are held. *Id.* at 24.

114 *See supra* Part I.

115 *See supra* text accompanying note 87 (quoting government warning).

116 *See infra* Part VI.

Where the consumer is warned only of selected risks, he or she may remain unaware of other risks not included in the product warning.[117] Indeed, the consumer may mistakenly believe that those risks identified in the warning are the only risks associated with the use of the product.[118] Such misreliance on a selective warning may lull the consumer into being inattentive or careless, and therefore *increase* the potential for injury.[119]

The selective approach of the ABLA is especially distressing when viewed in the light of the Act's preemption provision. Section 216 of the ABLA provides:

> No statement relating to alcoholic beverages and health, other than the statement required by section 215 of this title, shall be required under State law to be placed on any container of an alcoholic beverage, or on any box, carton, or other package, irrespective of the material from which made, that contains such a container.[120]

This section, while admittedly furthering Congress's goal of national uniformity,[121] may be read to preempt all common-law products liability actions for injuries caused by risks not addressed in the government warning.[122] With respect to this issue, the experience of injured plaintiffs under the Federal Cigarette Labeling and Advertising Act[123] is especially instructive. In the past three years

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117 Schwartz & Driver, *supra* note 35, at 61. Courts frequently hold warnings adequate in substance only where they are comprehensive as to both the nature and severity of the risks associated with a product's use. *See, e.g.*, Ellis v. International Playtex Inc., 745 F.2d 292, 306-307 (4th Cir. 1984) (tampon required warning of toxic shock syndrome); Sprnill v. Boyle-Midway Inc., 308 F.2d 79, 85 (4th Cir. 1962) (warning on furniture polish insufficient to inform consumers of danger of ingestion); Tucson Indus. v. Schwartz, 108 Ariz. 464, 468-69, 501 P.2d 936, 940 (1972) (warning on contact cement insufficient to alert consumers that product gave off toxic fumes which might cause blindness to people in adjoining rooms without proper ventilation); Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387, 393 (Tex. Civ. App. 1968) (warning on roach poison inadequate because it did not inform consumers that there was no antidote once poison absorbed into the bloodstream); Haberly v. Reardon Co., 319 S.W.2d 859, 867 (Mo. 1958) (warning that paint is irritating to skin insufficient to alert consumers of potential injury to sight if paint comes into contact with eyes).

118 Schwartz & Driver, *supra* note 35, at 61. *See* cases cited *supra* note 117.

119 *Id.* It is worth noting that as the length of the message decreases, so must its specificity. The more general the warning, however, the greater the possibility of ambiguity, and the more likely the behavioral response elicited will differ from that intended. *Id.* at 61 n.110. *See, e.g.*, Johnson v. Husky Indus., 536 F.2d 645, 649 (6th Cir. 1976); Kritser v. Beech Aircraft Corp., 479 F.2d 1089, 1096 (5th Cir. 1973).

120 27 U.S.C.A. § 216 (West Supp. 1989).

121 *See id.* § 213; *see also supra* text accompanying note 82.

122 *See generally supra* note 94.

123 Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-40). The Federal Cigarette Labeling and Advertising Act was subsequently amended in 1970 by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 88 1970) (codified at 15 U.S.C. § 1333 (1970)), and again in 1984 by the

alone, four separate United States Courts of Appeals have held that the preemption provision of that Act—with language nearly identical to that of section 216 of the ABLA[124]—preempts state law products liability actions for inadequate or ineffective warnings, where the warning provided complies with the statutory requirements.[125]

Recall that the government warning provides consumers with no new and convincing information.[126] Should the ABLA prove to preempt all state law products liability actions against manufacturers of alcoholic beverages for warning defects, plaintiffs injured as a result of risks not included in the government warning, and of which they were unaware, would in effect be left remediless. The inequity of such a result is striking.

VI
COMPREHENSIVE WARNINGS: AN UNWORKABLE ALTERNATIVE

Comprehensive warnings at first glance may appear to be an effective and easy solution to the problems respecting selective warnings. The unexamined premise that comprehensive warnings are not costly, however, is highly questionable.[127] When estimating the burden of supplying adequate product warnings, it is necessary to focus on costs other than those of label printing.[128] Often over-

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Comprehensive Smoking Education Act, Pub. L. No. 98-74, 98 Stat. 2200 (1984) (codified at 15 U.S.C. §§ 1331-41 (1982 & Supp. II 1984)) (effective October 12, 1985).

124 Section 1334 of the Federal Cigarette Labeling and Advertising Act, entitled "Preemption," provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

15 U.S.C. § 1334(a). Unlike the preemption provision of the ABLA, section 1334 also preempts state law with respect to requirements or prohibitions on the advertising and promotion of cigarettes. It provides:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id. § 1334(b).

125 *See* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); *see also* Kotler v. American Tobacco Co., 685 F. Supp. 15 (D. Mass. 1988); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987).

126 *See supra* notes 112-13 and accompanying text.

127 *See* Twerski, Weinstein, Dohaher & Piehler, *supra* note 91, at 514-17.

128 *Id.* at 517. Courts face a unique problem when called upon to decide whether a product is unreasonably dangerous without a warning. A court must balance the probability and gravity of harm if care is not exercised against the cost of taking appropriate precautions. *Id.* at 514. For cases doing this, see, *e.g.*, Hon v. Stroh Brewery Co., 835 F.2d 510, 512 (3d Cir. 1987) ("The court must thus balance the product's social

looked are the societal costs of overwarning and the practical limits to a rule of full disclosure.

A. Societal Costs of Overwarning

The societal costs of overwarning are important limitations on the length and comprehensiveness of a product warning.[129] To be effective, warnings must be both selective[130] and credible. They must call to the consumer's attention only those risks which are significant and probable.[131] Requiring consumers to guard against trivial or remote risks will result only in confusion and in an inability to assimilate information concerning more important risks.[132] Moreover, consumers who consider one of the risks included in a product warning trivial or remote are likely to discount the importance of the other risks similarly addressed.[133]

The societal costs of overwarning are especially distressing

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utility against its unavoidable risk to determine whether the condition of the product could be labeled 'unreasonably dangerous' and the risk of loss placed on the manufacturer."); Azzarello v. Black Bros. Co., Inc., 391 A.2d 1020, 1025-27 (Pa. 1978). Many courts and commentators have argued that such a cost-benefit analysis seldom can justify the absence or inadequacy of product warnings. *See, e.g., Hon*, 835 F.2d 510; Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975); Schwartz & Driver, *supra* note 35, at 38-39. The attitude of the court in *Moran* is not atypical:

> [W]e observe that in cases such as this the cost of giving an adequate warning is usually so minimal, amounting only to the expense of adding some more printing to a label, that this balancing process will almost always weigh in favor of an obligation to warn of latent dangers, if the manufacturer is otherwise required to do so.

273 Md. at 543-44, 332 A.2d at 15. According to this view, the cost of almost any serious injury will therefore justify the minor expense of supplying warnings. *But see* Twerski, Weinstein, Dohaher & Piehler, *supra* note 91, at 514-17.

129 *See generally* Twerski, Weinstein, Dohaher & Piehler, *supra* note 91, at 514-17.

130 This statement may at first glance appear to contradict the argument made earlier that the ABLA, although at heart a rule of limited disclosure, is inadequate to resolve the question of an alcoholic beverage manufacturer's duty to warn of the hazards associated with the use of its product. *See supra* Part V(C). Recall, however, that the ABLA is ineffective not because its approach is selective, but because section 205 of the Act (codified at 27 U.S.C.A. § 216 (West Supp. 1989) preempts all common-law products liability actions for injuries caused by risks not addressed in the government warning. *See supra* notes 120-25 and accompanying text.

131 Twerski, Weinstein, Dohaher & Piehler, *supra* note 91, at 514. For a classic illustration of the societal costs of overwarning, see Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975) (cologne manufacturer required to warn of product's combustibility). *See supra* note 128.

132 Wesley A. Magat, W. Kip Viscusi & Joel Huber, *Consumer Processing of Hazard Warning Information*, 1 J. RISK & UNCERTAINTY 201, 229 (1988). *See generally* James R. Bettman, John W. Payne & Richard Staelin, *Cognitive Consideration in Designing Effective Labels for Presenting Risk Information*, 5 J. MARKETING & PUB. POL'Y 1-28 (1986); JAMES R. BETTMAN, AN INFORMATION PROCESSING THEORY OF CONSUMER CHOICE (1979).

133 Schwartz & Driver, *supra* note 35, at 59; *see also Hearings*, *supra* note 14, at 89 ("Some consumers will be unduly alarmed, and others may dismiss [the government warning] altogether because warning information that makes no distinctions regarding the amount of usage is not credible.") (statement of Professor W. Kip Viscusi).

when viewed in the aggregate. If a significant number of products were to carry lengthy and comprehensive warnings, all warnings would become less effective.[134] Were every possible risk in life accompanied by a warning, consumers would become so preconditioned to the existence of such warnings that warnings would no longer be meaningful.[135] Indeed, consumers would eventually ignore warnings entirely.

The societal costs of overwarning are also important from a legal perspective. It is not uncommon for a court to hold a manufacturer liable for failing to warn of an obvious or extremely remote risk associated with its product.[136] In such cases, courts generally have focused on the particular hazard that caused the plaintiff's injury, and not the full panoply of possible hazards.[137] It may therefore be said that "the legal system's apparent preference for comprehensive warnings is less the result of a considered evaluation of the warnings problem than the net effect of hundreds of narrowly focused products liability cases."[138] Manufacturers are in this respect encouraged to design legalistic warnings intended to escape liability, rather than to prevent accidents.[139]

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134 Schwartz & Driver, *supra* note 35, at 60; *see also Hearings*, *supra* note 14, at 90 ("If individuals are warned about hazards through overly broad warning labels that lack believability then these efforts diminish the credibility of all warnings programs. Individuals who see similar warnings for other products will draw the conclusion that they are no more valid than the warnings for alocholic [sic] beverages and will consequently assess a low level of risk.") (statement of Professor W. Kip Viscusi).

135 *See* Hethcoat v. Chevron Oil Co., 364 So. 2d 1243 (Fla. Dist. Ct. App. 1978). As the court in *Hethcoat* stated:

> To hold that every part subject to repair at grave risk must have a posted warning would result in an impossible and even undesirable situation. One wonders, for instance, where the warning should be posted on a bicycle chain subject to severing the fingers of a repairman; the gas tank of an automobile subject to exploding while in the process of repair; the electric motor on all sorts of household devices (blenders, dishwashers, washing machines, air conditioners, etc.) subject to electrocuting a repairman if the current is not cut off.

Id. at 1244-45.

136 *See, e.g.*, *Hethcoat*, 364 So. 2d 1243; Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975) (cologne manufacturer required to warn of product's combustibility); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 517, 476 P.2d 713, 719 (1970) ("[T]he manufacturer of the obviously defective product ought not escape because the product was obviously a bad one."). *Cf.* Micallef v. Miehle Co., 39 N.Y.2d 376, 382-86, 348 N.E.2d 571, 575-77, 384 N.Y.S.2d 115, 119-21 (1976) (questioning Campo v. Scofield, 30 N.Y. 468, 95 N.E.2d 802 (1950), the leading case standing for the proposition that there is no recovery for patent dangers). *But see* Jamieson v. Woodward & Lothrop, 101 U.S. App. D.C. 32, 37-38, 247 F.2d 23, 28-29 (recovery denied where elastic exerciser slipped off purchaser's foot and injured eye), *cert. denied*, 355 U.S. 855 (1957); Zidek v. General Motors, 66 Ill. App. 3d 982, 985, 384 N.E.2d 509, 512 (1978) (no duty to warn that tires will skid on wet pavement).

137 Schwartz & Driver, *supra* note 35, at 60.

138 *Id.* at 60-61 n.108.

139 *Id.* at 60. *See supra* text accompanying notes 71-75.

B. Practical Limits

Almost all products involve some degree of danger, even when properly used.[140] Many products pose a variety of potential risks. Not surprisingly, the information necessary to warn about those risks can be complex and voluminous. When the optimal medium for communicating such warnings is the product itself, a comprehensive warning is clearly impracticable.[141] In such circumstances, however, the use of an overly selective warning may be ineffective, misleading and potentially dangerous.[142]

Even when feasible, a comprehensive warning may not be desirable. Typically, a consumer encounters a product warning just before using the product.[143] Because the consumer is unlikely to postpone his or her use of the product, the warning must be communicated in a relatively short period of time. When the consumer is presented with too much information, however, comprehension generally suffers.[144] Indeed, an "encyclopedic" warning may discourage a consumer from even attempting to assimilate its content.[145] Such practical concerns limit the amount of information that can be communicated effectively in a product warning.

VII
THE INSTITUTIONALLY-BASED APPROACH: A PROPOSAL FOR THE FUTURE

Warning labels are limited with respect to the kinds and amounts of information they can adequately convey. Where the goal is to inform the American public about the risks associated with alcohol consumption, warning labels have proven to be an inadequate information transfer mechanism. This Note proposes, as an alternative, an "institutionally-based" approach to the prevention of

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140 *See supra* note 35.

141 *See* Hethcoat v. Chevron Oil Co., 364 So. 2d 1243, 1245 (Fla. Dist. Ct. App. 1978); *see also Hearings, supra* note 14, at 89 (information necessary to inform consumers of the causal links between alcohol consumption and birth defects, cancer and other similar health disorders is too lengthy and complex for a short alcoholic beverage label) (statement of Professor W. Kip Viscusi).

142 Schwartz v. Driver, *supra* note 35, at 58 n.96.

143 Labels are most useful as a warning device in situations where reading the label is an essential part of using the product. Consumers need not read the government warning in order to drink an alcoholic beverage, and in many cases do not even see the container during their use of the product.

144 *See generally* COLIN MARTINDALE, COGNITION AND CONSCIOUSNESS, 1-12 (1981); ARNOLD LEWIS GLASS, KEITH JAMES HOLYOAK, COGNITION 25-56 (1979). For a general discussion of consumer processing of product warning information, see W. VISCUSI & W. MAGAT, *supra* note 109; Bettman, Payne & Staelin, *supra* note 132, at 1-28; Magat, Viscusi & Huber, *supra* note 132.

145 Schwartz & Driver, *supra* note 35, at 59.

alcohol abuse and alcoholism. Such an approach is well supported by basic communications theory.

A. The Institutionally-Based Approach

Social institutions do much to shape public attitudes toward alcohol use and abuse.[146] Among those institutions particularly adapted to this purpose are schools at all levels, hospitals and other health maintenance organizations, and the media. Such institutions have constant access to and impact on the American public. Indeed, their scope and resources are such that they dwarf the efforts of public health educators and others attempting to modify individual behavior.[147]

To effectively educate consumers about the dangers of alcohol consumption and thereby influence their drinking habits would require the dissemination of accurate product safety information by no less than all of the aforementioned social institutions. A successful health education and training program must therefore combine a carefully designed mass media information campaign with personalized behavioral training provided through schools, hospitals and various other health maintenance organizations.[148] The main goals

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146 *See generally* James F. Mosher & David H. Jernigan, *Public Action and Awareness to Reduce Alcohol-Related Problems: A Plan of Action*, 9 J. PUB. HEALTH POL'Y 17 (1988) ("changing the institutional environment around alcohol must be a priority for prevention efforts"); BEYOND THE SHADOW OF PROHIBITION, *supra* note 11, at 79-99; John L. Hochheimer, *Reducing Alcohol Abuse: A Critical Review of Educational Strategies*, in BEYOND THE SHADOW OF PROHIBITION, *supra* note 11; H. T. Blane & L. E. Hewitt, Mass Media, Public Education and Alcohol: A State-of-the-Art Review (1977) (final report prepared for the National Institute on Alcohol Abuse and Alcoholism).

147 *See* Mosher & Jernigan, *supra* note 146, at 17.

148 The Three Community Study of the Stanford Heart Disease Prevention Project serves as a model for such a program. *See generally* Nathan Maccoby, John W. Farquhar, Peter D. Wood & Janet Alexander, *Reducing the Risk of Cardiovascular Disease: Effects of a Community Based Campaign on Knowledge and Behavior*, 3 J. COMMUNITY HEALTH 100-114 (1977) (analyzing the Three Community Study); J. Hochheimer, *supra* note 146, at 286-335 (discussing various studies); STEVE OLSON & DEAN R. GERSTEIN, ALCOHOL IN AMERICA: TAKING ACTION TO PREVENT ABUSE 90-91 (1985) (describing the Three Community Study); Nathan Maccoby & John W. Farquhar, *Communication for Health: Unselling Heart Disease*, 25 J. COMM. 114-126 (1975). The Three Community Study was designed to determine whether state-of-the-art programming of the mass media in connection with intensive interpersonal training would be effective in modifying behaviors known to contribute to the risk of heart disease. Three towns in central California, each with a population of approximately 13,000, were selected. One town received health messages solely through the media; a second town received health messages through both the media and through an intensive program of personal instruction for high risk cases; the third town served as a control. The results of the Three Community Study were striking:

> Surveys and medical examinations were undertaken after one, two and three years of the campaign. As might be expected, those receiving intensive training in addition to the media campaign showed the sharpest initial reduction in risk. By the end of two years, however, the town re-

of such a program would be to (1) generate awareness about the program and its focus; (2) increase the public's knowledge of the risks associated with alcohol consumption; (3) motivate consumers to adopt new behaviors such as low risk drinking and abstention; and (4) reinforce those newly learned behaviors so that consumers will maintain them. Such an "institutionally-based" approach would be more effective in reaching individuals and changing their behavior than the simplistic solution of printed warning labels on alcoholic beverage containers.

The institutionally-based approach to health education, with its emphasis on "counteradvertising,"[149] is also more effective and raises fewer constitutional issues than state and federal bans on alcoholic beverage advertising.[150] Proponents of such bans frequently cite a 1981 study by Atkin and Block purporting to find a

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> ceiving health messages through the media only had caught up with the community including the intensive instruction group. When overall risk of heart disease was calculated, participants showed reductions of between 16 and 18 percent after two years. In the town that received no educational campaign, the average risk had increased by 6.5 percent. There was some retrogression during the third year in the mass-media-only town when educational programming was sharply curtailed, but not in the mass-media town that included intensive instruction. Apparently the supplemental value of face-to-face instruction has more staying power.

BEYOND THE SHADOW OF PROHIBITION, *supra* note 11, at 94-95.

149 Unlike a ban, counteradvertising seeks to reduce alcohol abuse by educating the public about the potential dangers of alcohol consumption. Counteradvertising is therefore consistent with the first amendment tradition of shouting down inaccurate information rather than suppressing it. *See* Comment, *Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising*, 34 UCLA L. REV. 1139, 1181-90 (1987) (authored by Steve Younger).

150 The constitutionality of such bans has generated much debate in the law reviews and journals. *See, e.g.*, Gary B. Wilcox, Dorothy Shea & Roxanne Hovland, *Alcoholic Beverage Advertising and the Electronic Media*, 8 COMM. & L. 31 (1988); Comment, *supra* note 149; Comment, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632 (1985) (authored by Mathew L. Miller); Comment, *Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 NOTRE DAME L. REV. 779 (1985) (authored by Karen L. Sterchi). Several states have enacted restrictions on alcoholic beverage advertising by relying on their regulatory powers under the twenty-first amendment. *See, e.g.*, Fla. Stat. Ann § 561.42(10)-(12) (West 1987); Kan. Stat. Ann § 41-714 (Supp. 1988); Mass. Ann. Laws ch. 138, § 24 (Law Co-op. 1971); Miss. Code Ann. §§ 671-85 (1972 & Supp. 1989); Okla. Stat. Ann. tit. 37, § 516 (West Supp. 1968); Utah Code Ann. § 32A-12-22 (1985). Several courts have upheld such restrictions against constitutional attack. *See, e.g.*, Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983) (upholding Mississippi ban), *cert. denied*, 467 U.S. 1259 (1984); Oklahoma Telecasters Ass'n v Crisp, 699 F.2d 490 (10th Cir. 1983) (upholding Oklahoma ban), *rev'd on other grounds sub nom.* Capital Cities Cable, Inc., 467 U.S. 691 (1984). For a recent Supreme Court decision suggesting that Congress may have the power to ban alcoholic beverage advertising from the airwaves, or, at the very least, mandate counteradvertising, see Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986). *See also* Comment, *supra* note 149, at 1165-77 (discussing the implications of *Posadas*).

casual connection between alcoholic beverage advertising and alcohol consumption.[151] Numerous other studies have refuted these findings, however.[152] Furthermore, after a considered analysis of all the available data, the Federal Trade Commission reported that there is "no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse."[153] Given the absence of evidence that alcoholic beverage advertising has any significant effect on alcohol consumption, an advertising ban would be nothing more than a cosmetic solution to a serious national health problem. Only through an institutionally-based approach such as the one here described will the American public have unrestricted access to a variety of accurate educational materials necessary in the prevention of alcohol abuse and alcoholism.

B. Basic Principles of Communications Theory

An institutionally-based approach to the prevention of alcohol abuse and alcoholism is well supported by several basic principles of communications theory.

1. *Sender Characteristics*

It is a well recognized principle of communications theory that product safety information should be provided by the sender who can do so most effectively.[154] Product manufacturers, therefore, will not always be in the best position to design and distribute product

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151 C. Atkin & M. Block, Content and Effects of Alcohol Advertising (1981) (unpublished manuscript).

152 *See, e.g.*, DAVID J. PITTMAN & M. DOW LAMBERT, ALCOHOL, ALCOHOLISM AND ADVERTISING: A PRELIMINARY INVESTIGATION OF ASSERTED ASSOCIATIONS 66 (1978) (alcoholic beverage advertising has no significant effect on consumption); Paul M. Kohn & Reginald G. Smart, *The Impact of Television Advertising on Alcohol Consumption: An Experiment*, 45 J. STUD. ALCOHOL 299 (1984) (found no scientific evidence indicating that alcoholic beverage advertising has any significant impact on rate of alcohol misuse or alcoholism); Strickland, *Alcohol Advertising: Orientations and Influences*, J. ADVERTISING 307, 318-19 (1982). For an excellent overview of the scientific research concerning the link between alcoholic beverage advertising and consumption, see Wilcox, Shea & Hovland, *supra* note 150, at 33-35 (empirical studies show lack of evidence linking bans on alcoholic beverage advertising to reduced alcohol consumption).

153 *Beer and Wine Advertising: Impact of the Electronic Media, Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 604 (1985).

154 The effectiveness of a communication is largely dependent upon the sender's credibility, status and opinion leadership. ARNOLD E. SCHNEIDER, WILLIAM C. DONAGHY & PAMELA JANE NEWMAN, ORGANIZATIONAL COMMUNICATION 93-96 (1975). These variables are thought to help change the attitude of the receiver and thus lead to a change in behavior. *See generally* MARVIN KARLINS & HERBERT IRVING ABELSON, PERSUASION: HOW OPINIONS AND ATTITUDES ARE CHANGED (2d ed. 1970). *Cf.* Hochheimer, *supra* note 146, at 312-14 (a credible, attractive and powerful source would be best for communicating health education).

safety information. A manufacturer separated from consumers by a distribution system beyond its control may be unable to anticipate and meet the informational and motivational needs of the product user.[155] Where the goal is to inform pregnant women of the health risks associated with alcohol consumption, for instance, a physician is the most effective and credible means through which such information may be communicated. The legal system must therefore be aware of those situations in which the product manufacturer is not the best sender, both in formulating and applying the legal rules regarding warnings liability.[156]

2. *Receiver Characteristics*

Effective and persuasive communication of product safety information depends not only on the characteristics of the sender, but also on the informational and motivational needs of the intended receiver.[157] As a practical matter, however, product warnings cannot be adapted to the needs of each individual product user. Product safety information must therefore be highly generalized and directed at large and often diverse groups with whom the manufac-

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155 Schwartz & Driver, *supra* note 35, at 63. Manufacturers of prescription drugs and medical devices, for example, are required to supply the prescribing physician with safety information, not the patient to whom the drug is prescribed. *See, e.g.*, Salmon v. Parke Davis & Co., 520 F.2d 1359 (4th Cir. 1975) (chloromycetin); Chambers v. G. D. Searle & Co., 441 F. Supp. 377 (D. Md. 1975) (oral contraceptive); Stephens v. Parke Davis & Co., 9 Cal. 3d 51, 107 Cal. Rptr. 45, 507 P.2d 653 (1973) (chloromycetin); Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541, 548 (Ind. Ct. App. 1979) (oral contraceptive); Terhune v. A. H. Robins Co., 90 Wash. 2d 9, 577 P.2d 975 (1978) (intrauterine contraceptive device). The reasoning behind this rule was well summarized by the court in *Terhune*:

> Where a product is available only on prescription or through the services of a physician, the physician acts as a "learned intermediary" between the manufacturer or seller and the patient. It is his duty to inform himself of the qualities and characteristics of those products which he prescribes for or administers to or uses on his patients, and to exercise an independent judgment, taking into account his knowledge of the patient as well as the product. The patient is expected to and, it can be presumed, does place primary reliance upon that judgment. . . . It has also been suggested that the rule is made necessary by the fact that it is ordinarily difficult for the manufacturer to communicate directly with the consumer.

90 Wash. 2d at 14, 577 P.2d at 978.

156 Schwartz & Driver, *supra* note 35, at 62.

157 *See* Hochheimer, *supra* note 146, at 321-22; Wilbur Schramm, *How Communication Works*, in THE PROCESS AND EFFECTS OF MASS COMMUNICATION 3, 6 (Wilbur Schramm ed. 1955); R. MARKIN, *supra* note 96, at 308; *see also* Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965) ("jury could reasonably have believed that defendant should have foreseen that its admittedly dangerous product would be used by . . . farm laborers, of limited education and reading ability"); Ziglar v. E. E. Du Pont de Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981) (decedent's contributory negligence in mistaking poisonous liquid for water was a question for the jury).

turer has no direct contact.[158]

Such generalizations are particularly inappropriate with respect to alcoholic beverages, where a number of non-constant factors influence an individual's bodily reaction to the presence of alcohol. Recent government studies have indicated that "[c]omplex interactions of demographic, social, economic, and biological factors determine whether a person drinks, how much and how often that person drinks, and what the individual response will be to alcohol."[159] Even age, sex and ethnic background are significant determinants of a person's drinking patterns and susceptibility to drinking problems.[160] To prevent and treat alcohol abuse and alcoholism successfully, one must have a thorough knowledge and understanding of these factors.

3. *Media and Channels*

The selection of the media and channels through which product safety information will be made available to the consumer is an important consideration for communications theory.[161] The most common method of communicating such information is through written warnings either attached to or otherwise accompanying the product.[162] Where the number of risks associated with a product is high, and the information necessary to avoid those risks complex (such as with alcoholic beverages) written channels alone may be

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158 Schwartz & Driver, *supra* note 35, at 63; *see also* R. MARKIN, *supra* note 96, at 304-05.

159 SIXTH SPECIAL REPORT, *supra* note 11, at 23.

160 *Id.*

161 *See* Schwartz & Driver, *supra* note 35, at 64; *see also* Schramm, *supra* note 157, at 13; R. MARKIN, *supra* note 96, at 312 (discussing the elements of an effective message). Professors Schwartz and Driver list three goals which should be kept in mind when selecting the media and channels by which product safety information will be communicated:

> First, product safety information should be communicated via media that are reasonably likely to be encountered by the product user at a time when he is likely to be receptive to such information. Second, the media and channels chosen should be capable of catching and holding the attention of the user long enough to communicate its message. Third, the media and channels chosen should be designed to make the message accessible to the expected product user.

Schwartz & Driver, *supra* note 35, at 64.

Recall that the temporary regulations promulgated by the Bureau of Alcohol, Tobacco, and Firearms require that the government warning be placed on a front, back or side label and be at least 2 millimeters high for containers of more than eight fluid ounces and at least one millimeter high for containers of eight fluid ounces or less. *See supra* note 88. Given these requirements, it is unlikely that consumers will actually read the government warning at all.

162 Schwartz & Driver, *supra* note 35, at 64-65.

ineffective.[163] In such instances, face-to-face communication involving both oral and visual channels is preferable in that it allows both the sender and the receiver of the communication to use more of their senses in the process.[164] The objective of the warning and the characteristics of the expected consumer must therefore inform the choice of media and channels.[165]

CONCLUSION

Almost all products involve some potential for harm, either in their intended or reasonably foreseeable use. Alcoholic beverages are no exception: the debilitating effects of alcohol abuse and alcoholism are wide spread in this country. If the American public is ever to cease being victimized by the drug alcohol, then it must be well informed about the myriad health risks associated with its use.

Hon v. Stroh Brewery Co. was the first in a long line of decisions to question the so-called "universal recognition" of the dangers of alcohol consumption. Yet the common-law approach to products liability, with its reliance on the jury, is inadequate to resolve the question of an alcoholic beverage manufacturer's duty to warn consumers of the health risks inherent in the use of its product. On the one hand, juries often are inconsistent in finding a duty to warn. On the other hand, assuming that such a duty exists, juries are ill-equipped to assess the adequacy of the warning provided.

The Alcoholic Beverage Labeling Act of 1988 (ABLA), although providing a nonconfusing and nationally uniform product safety warning, is equally ineffectual. The ABLA fails entirely as an educational and informational device. Moreover, the government warning provides only "selective" information to consumers, yet preempts all common-law products liability actions for injuries resulting from risks not addressed in the warning.

Where the goal is to inform the American public about the risks associated with alcohol consumption, warning labels have proven to be an inadequate information transfer mechanism. Even comprehensive warnings, given their societal costs and practical limits, are of questionable efficacy. To successfully educate consumers about

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163 *Id.* at 64; *see* John Pacilio, Jr., *The Effect of Three Methods of Instruction on Task Performance*, 1977 PROC. ACAD. MGMT. 380-84.

164 Schwartz & Driver, *supra* note 35, at 65. *See generally* Charles A. O'Reilly & Louis Pondy, *Organizational Communication*, in ORGANIZATIONAL BEHAVIOR 119 (S. Kerr ed. 1979). The criteria for determining when face-to-face communication is appropriate include: "(1) the difficulty of the material, (2) the number of receivers, (3) the desire for source-receiver interaction, (4) the personal preferences of the receiver, [and] (5) the source of the message . . . ." A. SCHNEIDER, W. DONAGHY & P. NEWMAN, *supra* note 154, at 101.

165 Schwartz & Driver, *supra* note 35, at 65.

the dangers of alcohol consumption and thereby influence their drinking habits requires an "institutionally-based" approach—one that combines a carefully designed mass media information campaign with personalized behaviorial training provided through schools at all levels, hospitals and other health maintenance organizations. Ultimately, all warning mechanisms attempt to modify individual behavior by providing accurate and convincing information about the risks associated with a given activity. Only through an institutionally-based approach will the American public have unrestricted access to the necessary educational materials concerning alcohol use and alcohol-related problem prevention.

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