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### Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers Notes

Thomas H. Lee

*Fordham University School of Law*, [thlee@fordham.edu](mailto:thlee@fordham.edu)

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# A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers

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## I. INTRODUCTION

Los norteamericanos hablan el inglés.

Los Américains parlent anglais.

Americans speak English.

This simple statement, which represents a patriotic imperative<sup>1</sup> for some Americans and a simple declaration of measurable observation for others,<sup>2</sup> potentially plays havoc with products liability warning law. Products liability law, a byproduct of both common and statutory law, has developed state by state in a crazy quilt pattern across the country; although the states are virtually unanimous on broad doctrines, they have taken a Balkanized approach to details.<sup>3</sup> Today, every jurisdiction recognizes that product manufacturers and sellers have a duty to warn consumers and users adequately of the inherent dangers associated with their products.<sup>4</sup> This recognition, however, does not obscure the utter confusion regarding adequate warning requirements.<sup>5</sup> Most warning cases revolve around this confusion, which has become a doctrinal morass that is detrimental both to the growing number of Americans who speak English poorly and to the entrepreneurs who market to them.

On a societal level, the statement "Americans speak English" is perhaps best understood as a tautology. This view implies that people who do not speak English are not Americans.<sup>6</sup> The tautology, how-

1. See notes 67, 81-84 and accompanying text.

2. Nearly 199 million Americans, 86% of those counted in the 1990 Census, speak English at home. 1990 Census of Population and Housing, Summary Social, Economic and Housing Characteristics, U.S. Department of Commerce, 1990 CPH-5-1, 15 ("1990 Census").

3. See notes 23-45 and accompanying text (describing the development of products liability law and the influence of the Restatement (Second) of Torts § 402A (1965)).

4. See Part II.

5. The definition of warning adequacy has generated a small mountain of scholarship. See generally James A. Henderson, Jr. and Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 Cornell L. Rev. 1512 (1992); Michael S. Jacobs, *Toward a Process-Based Approach to Failure to Warn Law*, 71 N.C. L. Rev. 121 (1992); W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398 (1970); John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551 (1980).

6. This general insistence on lingual purity runs contrary, however, to the American story. See John Elson, *The Great Migration*, Time, Special Issue: The New Face of America 28-33 (Fall 1993). For a thorough discussion of the history of language and the law in the United States, see generally Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English*, 77 Minn. L. Rev. 269 (1992). Perea notes that each wave of American immigration has challenged the previous cultural, political, economic, social, and linguistic order, frequently resulting in the formation of communities within, but culturally distinct from, the larger surrounding communities. *Id.* at 332-36. The factors determining whether immigrants preserve their original language and develop a subculture or assimilate into the English-speaking culture are varied, including political, social, demographic, cultural, and linguistic reasons. Jean Molesky, *Understanding the American Linguistic Mosaic: A Historical Overview of Language Maintenance and Language Shift*, in Sandra Lee McKay and Sau-ling

ever, ignores twentieth-century American statistics: more than thirty-one million Americans do not speak English at home.<sup>7</sup> More than ten percent of the citizens of seventeen states, which contain nearly half of the United States' total population, speak a language other than English at home.<sup>8</sup> If all the Americans who speak Spanish at home lived in a single state, it would be the third most populous state in the country.<sup>9</sup> In many of the largest cities in the United States, more than twenty percent of the population does not speak English at home, or at all.<sup>10</sup> These statistics explain why non-English newspapers, television stations, and radio stations comprise a rapidly growing market for readers and advertisers.<sup>11</sup>

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Cynthia Wong eds., *Language Diversity: Problem or Resource* 32-33 (Newbury House, 1988). For a recent study of the difficulties nonwhite immigrants face in assimilating, see generally Alejandro Portes and Min Zhou, *The New Second Generation: Segmented Assimilation and Its Variants*, 530 *Annals Am. Acad. Pol. & Soc. Sci.* 74 (1993).

7. The 1990 Census counted 31,844,979 Americans who speak one of 298 languages other than English at home. Nearly 199 million Americans speak English as a first language. The most popular languages, after English, with the number who speak them at home in parentheses, are as follows: Spanish or Spanish Creole (17,345,064), French or French Creole (1,930,404), German (1,547,987), Chinese (1,319,462), and Italian (1,308,648). 1990 Census of Population and Housing Summary Tape File 3C. The Census Bureau counted 170 Native North American languages spoken by approximately 330,000 individuals. *Id.* Language barriers suggest these Census estimates are low, due to the inability of non-English-speaking persons to complete Census questionnaires. Hearings before the Subcommittee on Censns, Statistics and Postal Personnel of the House Committee on Post Office and Civil Service, 10 Cong., 1st Sess. (Oct. 7, 1993) (statement of Harry A. Scarr, acting director, Bureau of the Census) (available from LEXIS, NEWS library, CURNWS file). See also U.S. Department of Commerce, Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population, 56 *Fed. Reg.* 33582 (1991) (statement by Secretary Robert Mosbacher that the 1990 Census failed to count 1.6% of all Americans and 5.2% of Hispanics).

8. In seven states, more than twenty percent of the population speaks a non-English language: Arizona, California, Hawaii, New Jersey, New Mexico, New York, and Texas. In ten other states, at least ten percent of the population speaks a language other than English: Alaska, Colorado, Connecticut, the District of Columbia, Florida, Illinois, Louisiana, Massachusetts, Nevada, and Rhode Island. 1990 Census at 1990 CPH-5-1 (cited in note 2). For a list of states with at least a five-percent bilingual population, including major languages spoken in each state, see Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 *Wis. L. Rev.* 761 (appendix).

9. Only California, with 29,760,021 people, and New York, with 17,990,455, would have more people. 1990 Census at 1990 CPH-5-1, 2 (cited in note 2).

10. Laredo, Texas is the least English-literate metropolitan area in the nation. Of the area's 119,740 persons age five and older, 110,183—an astonishing 92%—do not speak English at home. Nearly 50% of the community reports it “does not speak English very well.” 1990 Census at 1990 CPH-5-15 (cited in note 2). Other metropolitan areas, including Miami, Fla., El Paso and McAllen, Tex.; and Las Cruces, N.M., also report non-English-speaking populations in excess of 50% of their total population. *Id.* at 1990-CPH-5-9, 16-17. Many other metropolitan areas have non-English-speaking populations exceeding 20%.

11. Major-market, English-language newspapers, struggling with declining advertising revenues, have begun Spanish-language supplements and editions, including *La Estrella* (Fort Worth, Texas Star-Telegram); *La Raza's Domingo* (Chicago Sun-Times); *Exito* (Chicago Tribune); *Nuestro Tiempo* (L.A. Times); *Las Noticias* (Denver, Colo., Rocky Mountain News); *El Nuevo*

Nonetheless, the tautology and its corollary have survived in the public consciousness and have great potential to impact the law. All Americans, at least those who speak English, are entitled to significant legal privileges and rights, including many that are constitutionally or statutorily based and others that derive from common-law doctrines. Although statutes and constitutional doctrine<sup>12</sup> are beginning to reflect the reality that many people in the United States do not speak English, the common law has developed more slowly.<sup>13</sup> Thus, the common law fails to answer the following questions adequately: Must a manufacturer warn consumers in every language spoken by Americans?<sup>14</sup> How should a manufacturer put someone who does not understand English on notice if the warning is written in English? Is someone who does not speak English even entitled to American rights, remedies, privileges, or any warning at all?<sup>15</sup>

This Note examines the problems associated with the duty-to-warn doctrine and the non-English-speaking consumer or product user. Part II explains the current duty-to-warn doctrine, emphasizing when a warning is required, to whom the warning must be directed, and how the warning must be given. Next, Part III examines state and federal language-specific statutes, constitutional provisions, and case holdings, emphasizing the most recent cases addressing product warning requirements for non-English-speaking plaintiffs. Part IV then outlines the risks to both product sellers<sup>16</sup> and consumers of

*Tiempo* (Santa Barbara, Cal., News-Press); *El Sol* (Idaho Falls Post-Register); and *El Nuevo Herald* (Miami Herald). These editions, and others, reach what will be the largest ethnic minority in the United States by 2010. Laura Castenada, *Matter of Interpretation: Star-Telegram to Publish Spanish Edition*, Fort Worth Star-Telegram 1D (Feb. 2, 1994). A Spanish-language newspaper supplement, *Vista*, reaches 1.1 million readers in 37 U.S. markets. Christy Fisher, *Read All About It: Market Gets Papers*, Advertising Age S-10 (Jan. 24, 1994).

Non-English newspapers are far behind the electronic media, however, in market share and advertising clout. In Los Angeles and San Antonio, Spanish-language radio stations are the top-rated stations in their markets. In the McAllen-Brownsville-Harlingen, Texas, market, three Spanish-language radio stations attract more than 25% of the area's radio listeners. Susen Taras, *Hispanic Radio Heats Up the Airwaves; Latino Stations "Better Promoted, Better Researched, Better Executed,"* Advertising Age S-8 (Jan. 24, 1994). Four of eight low-power television stations in Orlando, Fla., broadcast in Spanish. Rene Stutzman, *"Everyone" Targeting Hispanics*, Orlando Sentinel 15 (Jan. 17, 1994). The Telemundo television network, which broadcasts exclusively in Spanish, reaches 85.4% of the Latino households in 53 U.S. markets. News Release, Telemundo Group Inc. (Feb. 3, 1994) (available in NEXIS, NEWS library, CURNWS file).

12. See notes 68-79 and accompanying text.

13. See Part III.

14. See Part IV.

15. Recent feminist and critical-race legal scholarship has captured this sense of disenfranchisement in storytelling. See, for example, Victoria Guest, *St. Landry Loan Company v. Avie*, 14 Harv. Women's L. J. 327 (1991) (imagining the experiences of a French-speaking Creole man in 1962 New Orleans).

16. This Note uses the terms "product seller" and "product manufacturer" interchangeably because strict products liability law does not differentiate between the two. For a discussion of

continuing the current haphazard approach and suggests a statutory solution to the doctrinal confusion, drawing from the jurisdictional tenet of purposeful availment. Finally, Part V argues that traditional understandings of language and the law are no longer accurate, calling on legislatures and courts to adopt the doctrinal approach suggested in Part IV.

## II. THE DUTY TO WARN AND CONSUMER CAPABILITY

The duty to warn consumers of product dangers originated in the common law as a tortious action in commercial misrepresentation.<sup>17</sup> As contract law doctrines of the late nineteenth century developed, however, courts began to perceive an express promise of product safety as an element of the seller's consideration, voluntarily exchanged rather than societally prescribed, for a premium on the buyer's price.<sup>18</sup> Under this view, the parties defined their liabilities by private negotiations confirming their respective expectations.<sup>19</sup>

By grounding the seller's warranty in contract law, courts could enforce strict liability if the seller breached.<sup>20</sup> Three new problems emerged, however. If the product lacked the promised quality, resulting in physical harm to the buyer, courts could not compensate the injured consumer because contractual privity between the consumer and the responsible party often was missing.<sup>21</sup> Perhaps even more important, contract law allowed the seller to shape his potential liabil-

this principle's rationale, see *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896, 391 P.2d 168, 171-72 (1964). Pending federal legislation differentiates between manufacturers and sellers, preempting state strict liability law to the extent that sellers are held to a simple negligence standard in products liability cases. Product Liability Fairness Act S.687: Report of the Senate Committee on Commerce, Science, and Transportation, [CCH Special 1] Prod. Liab. Rep. (CCH) 36-39 (Dec. 27, 1993).

17. See J.B. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 8 (1888). The early cases only involved express warranties. *Ford Motor Co. v. London*, 217 Tenn. 400, 398 S.W.2d 240 (1966), and Restatement (Second) of Torts § 402B (1965) are modern statements of the commercial misrepresentation doctrine.

18. See Arthur Linton Corbin, 1 *Corbin on Contracts* § 1.14 (West, Rev. ed. 1993).

19. The accuracy of this view is debatable. Compare *id.* at § 1.1 with Samuel Williston, 1 *Williston on Contracts* § 1.1 (Lawyers Co-op., 4th ed. 1990).

20. Strict liability always has been a feature of contract law. E. Allan Farnsworth, *United States Contract Law* 174 (Transnat'l Juris, 1991).

21. Privity was frustrated in two ways. Manufacturers could shield themselves by promising quality or safety and then marketing the product through independent, mid-level distributors or retailers. The English case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842), led American courts to adopt this doctrine. See Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 53 Am. L. Rev. 209, 280-85, 289-310 (1905) (arguing that U.S. courts misinterpreted *Winterbottom* to allow manufacturers to avoid liability). Privity also was broken if the injured party was merely a consumer or user of the product and not the actual purchaser.

ity unilaterally through his promise. Furthermore, under the popular freedom-of-contract rubric of the time, a party was not deemed to have promised what he had not promised in writing or clear oral agreement.<sup>22</sup>

### A. *The Emergence of the Duty to Warn in Tort Law*

Solutions emerged in, and were forced by, the embryonic consumer economy of the early twentieth century. For the first time, courts recognized implied warranties of product safety, whether or not sellers provided any express warranties.<sup>23</sup> Unlike express promises made between parties to a contract, these implied promises, which were imposed on every transaction, rendered privity irrelevant.<sup>24</sup> Courts acknowledged that a cause of action for a seller's failure to notify a consumer of a product's risks most closely resembled an action in tort. Nonetheless, some contractual features, most notably strict liability, remained.<sup>25</sup>

22. If the seller did not want to warn someone about a product danger, he was only required to do so if pressed by the buyer, who was likely ignorant of all of the product's attendant dangers. See notes 18-21 and accompanying text.

23. *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913). *Mazetti* involved the sale of spoiled beef tongue that was represented to be "pure and wholesome and fit for food." *Id.* at 633. In holding the seller liable, the court found that when "the rule [of liability] does not rest upon any principle of contract, or contractual relation existing between the person delivering the article and the person injured, . . . there is no contract or contractual relation between them." *Id.* at 634 (citation omitted). The *Mazetti* court further noted that the unequal position of food packagers and consumers required the imposition of an implied warranty:

The wholesaler, the retailer, and the user of these goods, whether in the capacity of caterer, seller, or host, sustain an entirely different duty, respecting a knowledge of their contents and quality, than prevails with regard to knowing the quality of those food products which are open to the inspection of the seller or victualer. With reference to these it may well be considered . . . that, having an opportunity to know. . . the quality of their merchandise, [product sellers] are charged with a responsibility amounting to a practical guaranty.

*Id.* at 635.

*Mazetti* came three years before Judge Cardozo's famous opinion in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which eliminated the privity requirement in cases of faulty design or manufacturing in New York. "We have put the source of the obligation where it ought to be. We have put its source in the law." *Id.*

24. Courts have compared the product seller's implied warranties to the implied covenants that run with the land in sales of real property. *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 S. 305, 307 (1927).

25. Though products liability today is grounded firmly in tort law, two states recognize failure-to-warn claims only as breaches of implied or express warranties. See *Cline v. Prowler Indus. of Maryland, Inc.*, 418 A.2d 968, 976 (Del. 1980); *Bay State-Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 533 N.E.2d 1350, 1354 (1989). See also *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1045 n.6 (4th Cir. 1983) (interpreting Virginia's warranty theory to be the "functional equivalent" of strict liability). For a history of the development of implied warranties in products liability law, see generally William L. Prosser, *The Assault Upon the Citadel*, 69 Yale L. J. 1099 (1960).

By blending traditional negligence concepts of societal duty with contract law's strict liability, the doctrinal dissonance of these decisions gave rise to a potent remedy for consumers who were ignorant of a product's dangers.<sup>26</sup> This remedy was adopted in Section 402A of the Restatement (Second) of Torts (1965).<sup>27</sup> In a widely accepted statement of law that commentators have likened to "holy writ,"<sup>28</sup> courts have read Section 402A to extend the strict liability approach developed in the early warnings cases to all products liability actions, including actions for flaws in design,<sup>29</sup> manufacturing,<sup>30</sup> and warnings.<sup>31</sup> The comments accompanying Section 402A, although

Three states base failure-to-warn cases only on the negligence of the product seller. See *Atkins v. American Motors Corp.*, 335 S.2d 134, 138-39 (Ala. 1976) (adopting most of Restatement (Second) of Torts § 402A (1965) but rejecting its no-fault foundation); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984); *Buck v. Tweetsie Railroad, Inc.*, 44 N.C. App. 588, 261 S.E.2d 517, 519 (1979). Virginia also recognizes failure-to-warn claims in negligence. *Bly*, 713 F.2d at 1044.

26. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), offers one of the earliest, and best, explanations of the policies undergirding implied causes of action.

27. Section 402A, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," reads as follows:

- (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.

Restatement (Second) of Torts § 402A (1965).

28. Professors Henderson and Twerski found at least 3000 cases citing § 402A. Henderson and Twerski, 77 Cornell L. Rev. at 1512 n.1 (cited in note 5).

29. See, for example, *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897 (1963); *Codling v. Paglia*, 32 N.Y.2d 300, 298 N.E.2d 622 (1973). See generally Wade, 33 Vand. L. Rev. 551 (cited in note 5). Dean Wade was the reporter for the Restatement (Second) during the drafting of Section 402A. But compare James T. O'Reilly, *Product Defects and Hazards: Litigation and Regulatory Strategies* §§ 4.3-4.4 (Wiley Law Pub., 1987) (suggesting that other sections of the Restatement (Second), namely Section 398, indicate that the drafters actually intended a negligence standard for defective design cases and that such a standard would be preferable to strict liability); Henderson and Twerski, 77 Cornell L. Rev. at 1531 (cited in note 5) (citing cases and arguing that a risk-utility test should replace strict liability in design cases in the upcoming Restatement (Third) of Torts). The ideas of Henderson and Twerski should be compared to Wade's ideas for at least one reason: Henderson and Twerski have been appointed Reporters for the products liability sections of the Restatement (Third) of Torts, now underway. *Id.* at 1513.

30. See, for example, *Hall v. Chrysler Corp.*, 526 F.2d 350, 352 (5th Cir. 1976); *Wiseman v. Goodyear Tire & Rubber Co.*, 29 Wash. App. 883, 631 P.2d 976, 980 (1981). See John W. Wade, *On the Nature of Strict Liability for Products*, 44 Miss. L. J. 825, 841 (1973).

31. Restatement (Second) of Torts § 402A cmt. j (1965). For cases adopting the Restatement approach, see *Hill v. Searle Laboratories*, 884 F.2d 1064, 1067 (8th Cir. 1989) (applying Arkansas law); *Rohrbaugh v. Owens-Corning Fiberglass Corp.*, 965 F.2d 844, 846 (10th

rejecting the implied warranty doctrine as a legal fiction,<sup>32</sup> nonetheless adopt the doctrine's trappings in failure-to-warn cases by stating that liability flows from a manufacturer's failure to include directions or warnings on products that are more dangerous than the ordinary consumer would contemplate, regardless of the manufacturer's care in designing or manufacturing the product.<sup>33</sup>

Cir. 1992) (applying Oklahoma law); *Hull v. Eaton Corp.*, 825 F.2d 448, 453-54 (D.C. Cir. 1987); *Snawder v. Cohen*, 749 F. Supp. 1473, 1479 (W.D. Ky. 1990) (applying Kentucky law); *Prince v. Parachutes, Inc.*, 685 P.2d 83, 87 (Alaska 1984); *Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, 667 P.2d 750, 754 (1983); *Ontai v. Straub Clinic and Hosp., Inc.*, 66 Haw. 237, 659 P.2d 734, 739 (1983); *Rojas v. Lindsey Mfg. Co.*, 108 Idaho 590, 701 P.2d 210, 212 (1985); *Lamkin v. Towncr*, 138 Ill. 2d 510, 563 N.E.2d 449, 457 (1990); *Duggan v. Hallmark Pool Mfg. Co.*, 398 N.W.2d 175, 177 (Iowa 1986); *Hill v. AirShields, Inc.*, 721 S.W.2d 112, 116 (Mo. Ct. App. 1985); *Streich v. Hilton-Davis*, 214 Mont. 44, 692 P.2d 440, 444 (1984); *Rahmig v. Mosely Machine Co.*, 226 Neb. 423, 412 N.W.2d 56, 69 (1987); *Fyssakis v. UNX Chem., Inc.*, 108 Nev. Adv. Op. 40, 826 P.2d 570, 571 (1992); *Thibeault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843, 850 (1978); *Jones v. Minnesota Mining & Mfg. Co.*, 100 N.M. 268, 669 P.2d 744, 747 (1983); *Codling v. Paglia*, 32 N.Y.2d 300, 298 N.E.2d 622, 628 (1973); *Dauphin Deposit Bank and Trust Co. v. Toyota Motor Corp.*, 408 Pa. Super. 256, 596 A.2d 845 (1991); *Castriginano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 779 (R.I. 1988); *Jahnig v. Coisman*, 283 N.W.2d 557, 560 (S.D. 1979); *Evrige v. American Honda Motor Co., Inc.*, 685 S.W.2d 632, 636 (Tenn. 1985); *Brune v. Brown-Forman Corp.*, 758 S.W.2d 827, 828 (Tex. Ct. App. 1988); *Menard v. Newhall*, 135 Vt. 53, 373 A.2d 505, 506 (1977); *Ayers v. Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 818 P.2d 1337, 1345 (1991); *Vineer v. Esther Williams All Aluminum Swimming Pool Co.*, 69 Wis. 2d 330, 230 N.W.2d 794, 797 (1975); *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 341 (Wyo. 1986).

For cases critical of Section 402A's approach to warnings, see the cases cited in note 25; *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666, 680 (1979). See also *Gordon v. Niagara Machine & Tool Works*, 574 F.2d 1182, 1189 (5th Cir. 1978) (applying Restatement (Second) of Torts § 388 to failure-to-warn cases); *Prentiss v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176, 180-86 (1984) (rejecting strict products liability in favor of a risk-utility balancing test, but noting that, under Michigan law, actions in negligence and breach of implied warranty require identical proof). See James A. Henderson, Jr. and Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 271-289 (1990) (urging a rejection of Section 402A's strict liability approach in warning cases).

For a sample of state statutes adopting Section 402A's approach, see Conn. Gen. Stat. § 52-572q (West 1991); Ind. Code § 33-1-1.5-1 et seq. (1988); Pattern Instructions for Kansas (Second) § 1305 (Supp. 1992) (Civil); La. Rev. Stat. Ann. § 9:2800.57 (West 1989); Me. Rev. Stat. Ann. tit. 14, § 221 (West 1980); N.J. Stat. Ann. § 2A:58C-4 (West 1987); N.M. Stat. Ann. § 13-1415-1418 (Michie Repl. 1992); N.D. Cent. Code § 28-01.1-05(1) (1991); Ohio Rev. Code Ann. §§ 2307.73(A)(1), 2307.76 (Page 1991); Or. Rev. Stat. § 30.920(3) (1979); S.C. Code Ann. §§ 15-73-10 to -30 (Law. Co-Op. 1976).

32. Comment m criticizes the warranty doctrine on the privity issue, stating that the lack of a contract between the injured consumer and the party with the duty to warn may thwart recovery. Restatement (Second) of Torts § 402A cmt. m (1965). But see text accompanying notes 23-26.

33. Restatement (Second) of Torts § 402A cmt. i (1965). This concept is known as the "consumer-expectations" test, and most states have adopted it either by judicial decision or statute. See, for example, *Prince v. Parachutes, Inc.*, 685 P.2d 83, 88 (Alaska 1984); La. Rev. Stat. Ann. § 9:2800.57.B(1) (West 1989); Henderson and Twerski, 77 Cornell L. Rev. at 1533 n. 25 (cited in note 5). Georgia applies a manufacturer's expectations test in warnings cases, enforcing a duty to warn only when the manufacturer reasonably believes the product may cause harm. See, for example, *Weatherby v. Honda Motor Co.*, 195 Ga. App. 169, 393 S.E.2d 64, 66 (1990).

Henderson and Twerski recommend replacing the "open-ended and unstructured" consumer expectations test with a risk-utility analysis akin to Judge Learned Hand's B<PL calculation in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Henderson and Twerski, 77

Similar to the early implied warranty cases, society's expectations, rather than the contractual expectations of the parties or the unilateral belief of one party, now establish the seller's duty. Whether the jurisdiction applies the consumer-expectations test embodied in comment i or the risk-utility analysis suggested in comment j to define the scope of the duty, all of the Section 402A and implied warranty jurisdictions have reached a common ground: Consumers deserve to know if products they buy and use daily carry unexpected risks of harm.<sup>34</sup> Therefore, manufacturers and sellers who fail in their duty to relieve consumer ignorance of these hidden dangers face, in the words of Section 402A's title, "special liability."

### B. Adequacy: *The Restatement's Silence*

The Restatement, however, provides little guidance to courts and legislatures to determine what a warning should say and how a warning should be stated.<sup>35</sup> Thus, legislatures and courts are left without any help when determining warning requirements; their

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Cornell L. Rev. at 1532-34 (cited in note 12). Hand's formula multiplied the probability of harm (P) by the extent of the actual harm (L) and compared it to the burden necessary to avoid the harm in the first place (B). *Carroll Towing*, 159 F.2d at 173. Henderson and Twerski would consider consumer expectations as only one factor in determining whether the risks posed by the product outweigh the utility of the warning under the Restatement (Third) version of Section 402A. They claim this is in keeping with Dean Wade's own understanding in Wade, 44 Miss. L. J. at 837-38 (cited in note 30). Henderson and Twerski, 77 Cornell L. Rev. at 1533 n. 27 (cited in note 5).

34. The debate between consumer-expectations and risk-utility analyses occupies much of the current duty-to-warn literature and legislative consideration. See Henderson and Twerski, 77 Cornell L. Rev. at 1532-34 (cited in note 5); Henderson and Twerski, 65 N.Y.U. L. Rev. at 296-303 (cited in note 31); James B. Sales, *Product Liability Law in Texas*, 23 Houston L. Rev. 1, 64-68 (1986). A full critique of the debate is beyond the scope of this Note. Further, under the solution outlined in Part IV, the application of either analysis will result in liability for failure to warn a non-English-speaking consumer in her own language assuming similar case facts.

35. The comments to Section 402A do not describe the requirements of a warning. They also say little about how the lack of a warning causes a plaintiff's injury, except that a "seller may reasonably assume [a warning] will be read and heeded." Restatement (Second) of Torts § 402A cmt. j (1965). A majority of courts hold that a plaintiff is entitled to a presumption that she would have read a warning if given one. See, for example, *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1382 (Okla. 1974); *Butz v. Werner*, 438 N.W.2d 509, 517 (N.D. 1989); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972). Under this view, causation is hardly a factor in duty-to-warn cases. Some courts allow defendants to prove that a plaintiff's conduct was not, or could not be, influenced by an appropriate warning. John S. Allee, *Product Liability* § 7.05[2] nn. 11-12.1 (L. J. Seminars, 1993).

Henderson and Twerski would require plaintiffs to prove that the lack of an adequate warning proximately caused their injuries. This requirement imposes the difficult burden of proving a supposition "that, if an adequate instruction or warning had been supplied, use and consumption would have been altered so as to reduce or eliminate the plaintiff's injury." Henderson and Twerski, 77 Cornell L. Rev. at 1522 (cited in note 5).

watchword has become adequacy.<sup>36</sup> An adequate warning must identify both the scope of the attendant danger and the seriousness of the harm that could result from foreseeable misuse of the product.<sup>37</sup> Adequate warnings allow consumers to make informed choices about the risks they will incur by using the product.<sup>38</sup> They prominently and clearly communicate the pertinent risks, effectively informing society of the product's dangers.<sup>39</sup> Finally, adequate warnings protect each buyer's safety by emphasizing the product's dangers to that buyer.<sup>40</sup>

This latter requirement is the foundation of the adequacy test. No matter the typeface, color of print, or choice of language, if consumers are not able to grasp the warning's meaning, then they are unable to make an informed analysis of the risks they might encounter by using the product.<sup>41</sup> Hence, a manufacturer's failure to satisfy

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36. Allee, *Product Liability* at § 4.05 (cited in note 35); *Adequate and Inadequate Warnings*, 2 Prod. Liab. Rep. (CCH) ¶ 30,401 (Mar. 1993). See, for example, N.M. Stat. Ann. § 13-1418 (Michie 1992 Repl.) (listing requirements of legally adequate warnings for jury instructions); *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 581 P.2d 271, 279 (1978).

37. See N.J. Stat. Ann. § 2A:58C-4 (West 1987). La. Rev. Stat. Ann. 9:2800.53(9) (West 1989) defines "adequate warning" as "a warning or instruction that would lead an ordinary reasonable user or handler of the product to contemplate the danger in using or handling the product and whether to decline to use or handle the product in such a manner as to avoid the damage for which the claim is made."

38. A famous example of a warning message that failed to satisfy this requirement is the asbestos manufacturer's label at issue in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973). The full warning read as follows: "This product contains asbestos fiber. Inhalation of asbestos in excessive quantities over long periods of time may be harmful." *Id.* at 1104. In finding the warning inadequate, the court said: "It should be noted that none of these so-called 'cautions' intimated the gravity of the risk: the danger of a fatal illness caused by asbestosis and mesothelioma and other cancers. The mild suggestion that inhalation of asbestos in excessive quantities over a long period of time 'may be harmful' conveys no idea of the extent of the danger." *Id.* (emphasis in original). See *Nature of Hazard/Severity of Risk*, 2 Prod. Liab. Rep. (CCH) ¶ 30,403 (Mar. 1993). Dean Keeton believed this consumer-empowering function was at the heart of the warning requirement and argued for strict liability enforcement. Keeton, 48 Tex. L. Rev. at 411 (cited in note 5). This approach also offers an effective rejoinder to those who argue that warnings merely drive up the costs of production and add little to overall safety that experience in the marketplace would not otherwise correct. Richard A. Epstein, *Modern Products Liability Law* 95 (Quorum, 1980). Duty-to-warn law, in fact, serves an important information-distribution function by allowing the unfortunate experience of one consumer to result in the protection of others similarly situated. See W. Kip Vicusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 Am. U. L. Rev. 601, 601-02 (1990).

39. See, for example, *Bituminous Casualty Corp. v. Black & Decker Mfg. Co.*, 518 S.W.2d 868, 872-73 (Tex. Ct. App. 1974). *Adequate and Inadequate Warnings*, 2 Prod. Liab. Rep. (CCH) ¶ 30,401 (Mar. 1993).

40. *Adequate and Inadequate Warnings*, 2 Prod. Liab. Rep. (CCH) ¶ 30,401 at 55, 208 (Mar. 1993). See, for example, *Henry v. Crook*, 195 N.Y.S. 642, 643 (1922); *Ziglar v. E. I. Du Pont de Nemours & Co.*, 53 N.C. App. 147, 280 S.E.2d 510, 516 (1981); *Evridge v. American Honda Motor Co., Inc.*, 685 S.W.2d 632, 636 (Tenn. 1985).

41. "If the warning is going to have any effect whatsoever on behavior, people must be able to understand it. . . . Manufacturers have a legal duty to communicate all that they know, or ought to know, about the risks of using their products in ways that *all*, and not just a select group of, foreseeable users can understand." *Clear Communication*, 2 Prod. Liab. Rep. (CCH) ¶ 30,402 (Mar. 1993) (emphasis in original).

this bottom-line requirement impairs all three critical functions of an adequate warning—consumer empowerment, information spreading, and societal protection.

### C. Adequacy and Capability/Status-Affected Consumers

Courts have addressed this issue in a set of cases that may be grouped under a rubric of capability-status questions. In these situations, courts are faced with consumer-plaintiffs whose ability to understand the meaning of a warning is affected by their status as a minor, an illiterate, a physically challenged individual,<sup>42</sup> or a non-English-speaking American.<sup>43</sup> From a product seller's perspective, these cases also threaten to open the floodgates of litigation and increase the costs of products.<sup>44</sup> Without some limit on a manufacturer's duty, particularly under a strict liability regime, entrepreneurs preparing to enter the marketplace would have to spend hours formulating warnings that would satisfy every group of capability-affected consumers.<sup>45</sup> Hence, courts must consider the interests of both capability-affected consumers and product manufacturers.

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42. No reported case has considered the issues implicated by blind consumers. For a discussion of adequacy issues involving consumers physically challenged by their age, see Jacobs, 71 N.C. L. Rev. at 154 n.137 (cited in note 5). Compare *Nassif v. National Presto Indus., Inc.*, 731 F. Supp. 1422, 1425-26 (S.D. Iowa 1990) (holding that a manufacturer had no duty to warn persons with sensory defects of the "open and obvious dangers" of putting their feet too close to a portable space heater).

43. These issues do not differ conceptually from the sophisticated or knowledgeable-user defense available in most states. See Allee, *Product Liability* at § 4.04[1] (listing cases discussing knowledgeable-user defense) (cited in note 35). Under this defense, the manufacturer may assert that the subjective knowledge of the product user is sufficient to render a warning mere surplusage. The defense usually is applied to professionals or others with special expertise. It is generally not available to sellers of consumer products on the open market. *Id.*

The capability-status cases offer the reverse of the sophisticated-user defense, but with doctrinal similarities. Both theories shape a manufacturer's duty by consideration of the skills and know-how of the product's foreseeable consumers; both rely on a subjective examination of the particular plaintiff before the court to determine if she is sophisticated or illiterate; and both are distinct from the open and obvious doctrine, which is based on an objective analysis to determine whether a product hazard is obvious to all, thus relieving the manufacturer of its duty to warn of that hazard. See, for example, *Delahanty v. Hinckley*, 564 A.2d 758, 760 (D.C. 1989) (holding that a handgun manufacturer has no duty to warn of dangers of criminal misuse because the danger is obvious). See Allee, *Product Liability* at § 4.05[4] (listing cases discussing open and obvious doctrine) (cited in note 35).

44. The consumer-expectations test outlined in comment i to Section 402A recognizes the perspective of the ordinary consumer. Consideration of consumer capability, an issue not addressed by the Restatement (Second), requires the manufacturer to consider extraordinary consumers.

45. Savvy manufacturers and sellers already target their marketing toward groups that might be considered extraordinary consumers, particularly non-English-speaking consumers. For the business that finds its products in the hands of a Tagalog-speaking individual in the Midwest, however, a foreseeability requirement has real meaning.

Courts that have analyzed these questions frequently rule for the plaintiffs. When presented with compelling facts, the plaintiff's capabilities, and the manufacturer's ability to foresee the danger, courts generally have prevented a product manufacturer from using a plaintiff's status against him.

### 1. *Evridge v. American Honda Motor Company*

A paradigm case concerning capability-affected consumers is *Evridge v. American Honda Motor Company*,<sup>46</sup> in which a six-year-old girl rode on the back of a Honda Express motorbike operated by a nine-year-old neighbor. As she rode, her foot slipped and was trapped between the rear wheel and the hot exhaust pipe. She suffered third degree burns.<sup>47</sup> The motorbike had two decals cautioning that only the operator should ride the motorbike.<sup>48</sup> The owner's manual, which neither the two children nor their parents ever saw because the boy's family bought the bike used, contained a statement that only one person should ride the bike and a separate warning that the exhaust pipe becomes extremely hot during operation.<sup>49</sup> Neither the girl nor her parents saw the decals on the motorbike or the owner's manual.<sup>50</sup>

Seeking affirmation of a summary judgment order, Honda argued that the warnings were sufficient as a matter of law.<sup>51</sup> With little discussion, the court affirmed the long-standing principle<sup>52</sup> that

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46. 685 S.W.2d 632 (Tenn. 1985).

47. *Id.* at 634.

48. A decal on the headlight, which was visible only to the operator, read "WARNING. OPERATOR ONLY. NO PASSENGERS." *Id.* On the oil tank under the luggage rack behind the seat, another decal read "CAUTION. VEHICLE CAPACITY LOAD: 180 lbs. (82 Kg) OPERATOR ONLY." *Id.*

49. On the inside front cover, the owner's manual contained the following: "IMPORTANT NOTICE. OPERATOR ONLY. NO PASSENGERS. This motorcycle is designed and constructed as an operator only model. The seating configuration does not safety [sic] permit the carrying of a passenger. Do not exceed the vehicle capacity load limit shown on the tire information label." *Id.* Another item later in the manual, under the headline "WARNING," stated: "Exhaust pipe and muffler become very hot during operation and remain sufficiently hot to inflict burns if touched . . ." *Id.*

50. *Id.* at 635.

51. *Id.* at 636. Honda also argued that the girl's actions in riding the Express constituted "an intervening cause sufficient to relieve [Honda] of liability, assuming liability would otherwise exist." *Id.* at 635. The court, however, held that the child's actions were foreseeable, given the motorbike's design and that other children in the neighborhood also had "doubled" their friends on Honda Express motorbikes. *Id.*

52. The court cited *Henry v. Crook*, a case in which a fireworks manufacturer was held liable for failure to warn children of the dangers of playing with sparklers. A child's dress caught fire from one of the flying sparks, burning her severely. *Henry v. Crook*, 195 N.Y.S. 642, 643 (1922). The package contained the following message: "The sparks are harmless. Do not touch glowing wire. Safe and sane. . . . A harmless and delightful amusement for children. Are known the world over as cold fire." *Id.* at 642. The trial judge's instructions, upheld by the New York Supreme Court, stated, "[I]t is for you to say whether, in describing this instrument as a perfectly

an adequate warning must be calculated to "bring home to" a reasonably prudent user<sup>53</sup> of the product the nature and the extent of the danger involved.<sup>54</sup> The court held that Honda was required to account for the fact that the Honda Express was designed for children's use in formulating its warnings.<sup>55</sup> The supreme court, therefore, reversed the grant of summary judgment and remanded the case for trial on the merits under the child-warning standard.<sup>56</sup>

## 2. *Ziglar v. E.I. Du Pont de Nemours & Co.*

In *Ziglar v. E.I. Du Pont de Nemours & Co.*,<sup>57</sup> the issue was not the plaintiff's minority, but her illiteracy. Mrs. Ziglar, a tobacco farm laborer who never learned to read or write, watched her boss take a drink from a mason jar of clear liquid that sat on the bed of a pickup truck next to some paper cups and another container of clear liquid. Mrs. Ziglar then took a drink from the other container. The jar from which the farmer drank held water; the container from which Mrs. Ziglar drank held a colorless and toxic pesticide. She died the same day.<sup>58</sup>

The container from which Mrs. Ziglar drank was the original pesticide container that had been bought that morning from a local hardware store.<sup>59</sup> The front panel label contained the words "Danger-Poison" in red letters about one-sixth of an inch high and a red skull-

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harmless instrument, and whether saying 'Do not touch the glowing wire' is enough. Ought not children, and the parents of children, to be told more?" *Id.* at 644.

53. "We also cannot say it was not foreseeable that a nine-year-old child would fail to heed the warnings." *Evrige*, 685 S.W.2d at 636.

54. *Id.*

55. *Id.* at 637. See also *Suchomacz v. Hummel Chem. Co.*, 524 F.2d 19, 28-29 (3d Cir. 1975). For cases holding manufacturers of disposable lighters liable for failing to design warnings with foreseeable child users in mind, see *Todd v. Societe Bic*, 991 F.2d 1334 (7th Cir. 1993), vacated, reh'g granted, 991 F.2d 1344 (7th Cir. 1993); *Bean v. BIC Corp.*, 597 S.2d 1350 (Ala. 1992). Compare *Wilson v. Good Humor Corp.*, 757 F.2d 293, 1305-08 (D.C. Cir. 1985) (requiring a street vendor to warn children of the "peculiar risk" of buying ice cream from a truck stopped on a busy highway).

56. The decision was four to one. The lone dissenting justice filed a three paragraph opinion stating that he believed Honda's warnings were sufficient as a matter of law. *Evrige*, 685 S.W.2d at 637 (Fones, J., dissenting).

57. 53 N.C. App. 147, 280 S.E.2d 510 (1981).

58. 280 S.E.2d at 512.

59. Du Pont manufactured the pesticide and packaged it in one-gallon jugs similar in appearance to plastic milk jugs. *Id.* The hardware store was also a defendant in the action, though the appeals court held it was entitled to summary judgment because it was not negligent. *Id.* at 515. North Carolina does not enforce strict liability in duty-to-warn cases. See the cases cited in note 25.

and-crossbones symbol slightly less than a quarter-inch square.<sup>60</sup> The back panel contained antidote and first-aid information and repeated the poison warning with the small skull-and-crossbones symbol.<sup>61</sup>

Reversing the trial court's grant of summary judgment in favor of Du Pont, the appeals court held that the warnings were inadequate for two reasons.<sup>62</sup> First, the court held that the skull-and-crossbones symbol on the label was too small.<sup>63</sup> The court also said that Du Pont must account for the fact that farm laborers like Mrs. Ziglar are foreseeably illiterate.<sup>64</sup> The court reversed the summary judgment order in Du Pont's favor and remanded the case.<sup>65</sup>

Courts' concerns for warning adequacy and consumer capability or status have led to their refusal to grant manufacturers summary judgment. These same concerns become even more important when considering shifting demographics and prejudice. A common example is the plaintiff who buys a product that has a warning printed in English only but cannot read or speak English. To protect these people adequately, legislatures and appellate courts must take stronger actions than remanding cases.

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60. *Ziglar*, 280 S.E.2d at 512. According to the description in the case, the skull-and-crossbones symbol would be about one-eighth of the size of an average postage stamp.

61. *Id.*

62. *Id.* at 516.

63. *Id.*

64. "[I]t should not have been unforeseeable to Du Pont that [the insecticide] would be used in close proximity to farm laborers, who might be illiterate, since it intended the insecticide 'to be used mainly as a spray or transplant water treatment' on tobacco, which is generally known to be a labor-intensive crop." *Id.* The pesticide also had a "distinct odor like rotten eggs," but the court held that the odor was not sufficient, as a matter of law, to inform farm laborers of the attendant dangers of drinking the clear liquid. *Id.* at 519.

65. *Id.* But see *Thomas v. Clairol, Inc.*, 583 S.2d 108 (La. App. 1991), in which an illiterate plaintiff suffered a severe allergic reaction to a hair dye. The plaintiff alleged that Clairol's warnings of possible allergic reaction to the dye were inadequate because the manufacturer could foresee that "illiterate people in small country towns who could not read the instructions" would buy the product. At trial, the court awarded a \$1000 judgment to the plaintiff. *Id.* at 110.

Thomas's counsel, however, made two significant trial errors in the judgment of the appeals court. First, he did not show the court how the manufacturer alternatively could have conveyed the warnings. *Id.* Second, he gave no evidence of use of the hair dye by illiterates. "[H]e had the burden to show the use by illiterates was sufficient that defendant should have foreseen it and provided additional warnings or other safety precautions." *Id.* at 111. The appeals court reversed the trial court and dismissed Thomas's suit, but it clearly held the door open for a well-proven case to establish the relevancy of a plaintiff's illiteracy in warnings cases.

## III. LANGUAGE, LAW, AND LIABILITY

A. *Official English Versus Bilingualism in Public Policy*

A legal tug-of-war match is currently underway over language law and policy in the United States. At one end of the rope, state legislatures and Congress are pulling for a broad range of statutory and regulatory provisions that recognize the growing non-English-speaking population in the United States.<sup>66</sup> At the other end of the political rope, members of Congress, along with many of the same state legislatures that passed multilingual laws, are pulling equally hard for the establishment of English as an official language.<sup>67</sup>

Arizona requires lenders to notify borrowers of their terms in Spanish,<sup>68</sup> and requires process servers to provide notice of legal actions in Spanish.<sup>69</sup> Maine requires the Secretary of State to prepare election ballots in French.<sup>70</sup> Hawaii's constitution acknowledges both English and Hawaiian as official languages.<sup>71</sup> New Jersey requires any retailer who regularly uses a language other than English in the ordinary course of business to provide a notice of consumer warranty

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66. See generally Bill Piatt, *¿Only English?: Law and Language Policy in the United States* 37-144 (Univ. of N.M., 1990). Piatt follows a survey of state-law non-English notice requirements with an argument for a constitutional right to speak one's chosen language. Piatt argues that laws depriving people of the right to speak the language of their choice destroy an important link between language and culture. *Id.* For this and other reasons, Piatt says monolingual laws amount to a violation of the Equal Protection Clause. *Id.* For a review of Piatt's book and criticism of his proposal, see Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 *Nw. U. L. Rev.* 790 (1991).

67. Efforts to amend the Constitution with an "official English" provision have failed in Congress, despite strong support from some current and former members. See *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. at 11 (statement of Sen. Denton), 15 (statement of Sen. Huddleston), 53 (statement of former Sen. Hayakawa, co-founder, U.S. English) (1984).

At least 17 states have established English as their official language by statute or constitutional amendment. For a list of relevant state provisions, see Piatt, *¿Only English?* at 31-32 (cited in note 66). In 1990, a federal district court declared Arizona's English-only amendment unconstitutional. *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990). Ironically, only four states with English-only provisions—California, Florida, Colorado, and Illinois—have non-English-speaking populations comprising more than ten percent of their states' populations. 1990 Census at CPH-5-1 (cited in note 2).

68. *Ariz. Rev. Stat. Ann.* § 6-651 (West Supp. 1993).

69. *Ariz. Rev. Stat. Ann.* § 12-2406 (West 1982).

70. Title 21-A *Me. Rev. Stat. Ann.* § 603(5) (1993). More than 81,000 citizens of Maine speak French at home, including approximately 25% of the population of Lewiston, Maine. 1990 Census at 1990 CPH-5-1, 15 (cited in note 2).

71. *Hawaii Const.*, Art. XV, § 4.

rights in both English and the other language in its advertising.<sup>72</sup> The Illinois legislature instructed state health clinics to provide women a pamphlet written in Spanish explaining obstetrical health issues.<sup>73</sup> Pennsylvania's controversial abortion regulations require women seeking abortions to receive a notice of adoption possibilities printed in English, Spanish, and Vietnamese.<sup>74</sup> Congress considered the rights of non-English-speaking Americans in Section 203 of the Voting Rights Act,<sup>75</sup> mandating that a state provide assistance to non-English-literate voters under certain circumstances.<sup>76</sup>

In many cases, these provisions reflect simple demographic reality.<sup>77</sup> Other laws respecting languages other than English, however, serve broader purposes, such as the law creating the Council for Development of French in Louisiana.<sup>78</sup> These provisions and others like them<sup>79</sup> share a principle common to the adequacy concept in products liability law. That is, when individuals need to be notified of state or private actions implicating their legal rights and obligations

72. N.J. Stat. Ann. § 17:16C-61.6 (d) (West 1984). Compare Cal. Civil Code § 1689.7 (West Supp. 1993) (requiring home-solicitation contracts to be written in the same language as the oral sales presentation leading to the contract).

73. Ill. Rev. Stat. ch. 20 § 2310/55.66(a) (West 1993).

74. 18 Pa. Cons. Stat. Ann. § 3208 (a) (Purdon 1993).

75. 42 U.S.C. § 1973aa-1a (1993).

76. Congress re-authorized Section 203 in 1992, extending it for fifteen years, but altered its triggering mechanisms. Voting Rights Language Assistance Act of 1992, H. Rep. No. 102-655, 102d Cong., 2d Sess. (1992), reprinted in 1992 U.S.C.C.A.N. 766. The law requires non-English voting materials and assistance if at least 10,000 persons or five percent of a state or political subdivision's citizens of voting age are members of a "single-language minority and are limited-English proficient." The bilingual assistance requirement also is triggered when "the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate." 42 U.S.C. § 1973aa-1a(b)(2)(A).

77. In each of the previously mentioned states, at least ten percent of the population speaks a language other than English at home. 1990 Census at CPH-5-1 (cited in note 2).

78. "Said council is empowered to do *any and all things necessary* to accomplish the development, utilization and preservation of the French language as found in the state of Louisiana for the cultural, economic and tourist benefit of the state." La. Rev. Stat. Ann. § 25:651 (West 1989) (emphasis added). See also La. Const. Art. XII, § 4 (protecting Louisianans' right to preserve their "linguistic and cultural origins"). See also R.I. Gen. Laws § 42-5.1-1 (1992 Supp.) (affirming "the right of every resident to nurture his or her native language" and stating that "[i]f Rhode Island is to prosper in foreign trade and international exchange, it must have citizens that are multilingual and multicultural"). For a discussion of the law's treatment of Louisiana's unique Acadian population, see generally James Harvey Domengeaux, Comment, *Native-Born Acadians and the Equality Ideal*, 46 La. L. Rev. 1151 (1986).

79. See Perea, 77 Minn. L. Rev. at 309-27 (cited in note 6) (discussing the history of language-specific provisions in Pennsylvania, California, New Mexico, and Louisiana). See also *Ramirez v. Plough, Inc.*, 25 Cal. Rptr. 2d 97, 863 P.2d 167, 174-75 (1993) (listing language-specific California statutes); Title III, H.R. 965, 103d Cong., 1st Sess. (Mar. 18, 1993) (proposing bilingual warning labels on buckets to prevent infant drowning as part of the Child Safety Protection Act).

or significantly affecting their health and welfare, the notice is ineffective if the receiver of that information cannot understand it.<sup>80</sup>

Spurred by reports of rising illegal immigration, an economic downturn in the early 1990s,<sup>81</sup> and perhaps most pointedly, accounts of a 1993 United States citizenship ceremony conducted primarily in Spanish,<sup>82</sup> the English-only advocates re-invigorated their argument in 1993.<sup>83</sup> Proposed Congressional findings attached to the Language in Government Act of 1993 summarize the objective premises of the English-only argument that English, as the historical common language of the United States, serves as a common thread that binds citizens from different cultures, and is necessary to preserve unity in multiculturalism.<sup>84</sup>

### *B. Products Liability and Non-English-Speaking Consumers: A Wavering Approach*

The common law falls somewhere between the two ends of the tug-of-war rope. This tension between subjective and objective understanding is readily apparent in the courts' struggles with products liability warning cases involving non-English-speaking plaintiffs.

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80. For an argument that courts should take increased notice of parties' subjective experiences when pluralist values are implicated in a case, see generally Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 *Vand. L. Rev.* 273 (1994).

81. Bruce W. Nelan, *Not Quite So Welcome Anymore*, *Time*, Special Issue: The New Face of America 10-12 (Fall 1993).

82. Seventy-six immigrants, all Hispanic, took part in the bilingual ceremony administered by U.S. District Judge Alfredo Marquez of Tucson, Arizona. The actual citizenship oath was administered in English. One of the grateful new citizens stated after the ceremony: "I can understand more. I feel more emotion [in Spanish] than in English." *New U.S. Citizens Take Oath in Controversial Ceremony*, *L.A. Times* A23 (July 3, 1993). See also *Citizenship Ceremony in Spanish Enrages English-Only Advocates*, *Chicago Trib.* 6 (July 4, 1993); *Whatever Happened to the English Rite?*, *Ariz. Republic* C5 (July 4, 1993). See S. 1678, 103d Cong., 1st Sess. (Nov. 23, 1993) (proposing that "public ceremonies for the admission of new citizens shall be conducted solely in English").

83. Eighty-eight members of the House of Representatives sponsored a bill to make English the "official language of the Government of the United States." *Language of Government Act of 1993*, H.R. 123, 103d Cong., 1st Sess. (Dec. 8, 1993). The Act's scope falls short of previous constitutional amendment efforts because it would not regulate private conduct, requiring only that "the Government shall conduct its official business in English." *Id.* at § 3(a). The Act exempts "actions or documents that protect the public health or safety" and "actions that protect the rights of victims of crimes or criminal defendants" and "shall not preempt any law of any State." *Id.*

84. Those findings include the following: "[T]o prevent division along linguistic lines, the United States should maintain a language common to all people; [and] [t]hat English has historically been the common language and the language of opportunity in the United States. . . ." *Language of Government Act of 1993* at § 2(a) (cited in note 83).

### 1. *Hubbard-Hall, Campos*, and Twenty-five Years of Silence

In the first reported case to confront this issue, *Hubbard-Hall Chemical Company v. Silverman*,<sup>85</sup> two migrant farm workers, natives of Puerto Rico, dusted crops with a toxic pesticide, Parathion. Although the Parathion was sold in packages carrying warning labels approved by the United States Department of Agriculture,<sup>86</sup> the labels were of little value to the farm workers, who were functionally illiterate in English.<sup>87</sup> One morning, the farm workers dusted with the Parathion without wearing the protective gear recommended by the warning label. By nightfall, they had died from the poison. A jury found Hubbard-Hall negligent and liable for the deaths based on a failure-to-warn theory.<sup>88</sup>

On review, the First Circuit held that Hubbard-Hall should have foreseen that its admittedly dangerous product would be used by farm laborers who were either illiterate or unable to speak English.<sup>89</sup> Considering Parathion's use by non-English-reading persons to be foreseeable, the court held that the warnings were inadequate<sup>90</sup> and that Hubbard-Hall should have added pictograms, such as a large skull-and-crossbones symbol, that would have communicated Parathion's danger to the non-English-literate consumer.<sup>91</sup>

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85. 340 F.2d 402 (1st Cir. 1965).

86. The First Circuit summarily rejected Hubbard-Hall's argument that its warning was sufficient as a matter of law because it had been approved by the U.S.D.A. "Neither Congress nor the Department explicitly or implicitly provided that the Department's approval of the label carried with it as a corollary the proposition that defendant had met the possibly higher standard of due care imposed by the common law of torts. . . ." *Id.* at 405. This approach was rejected by the California Supreme Court's recent reliance on provisions of the Federal Food, Drug, and Cosmetic Act to limit a nonprescription drug manufacturer's duty to warn non-English-speaking consumers. See text accompanying notes 109-131.

87. *Hubbard-Hall*, 340 F.2d at 403. The label read:

CAUTION: May Be Fatal if Swallowed, Inhaled or Absorbed Through Skin. Rapidly Absorbed Through Skin. Do not get in eyes or on skin. Wear natural rubber gloves, protective clothing and goggles. . . . Wear a mask or respirator of a type passed by the U.S. Department of Agriculture for parathion protection.

*Id.* Hubbard-Hall, the Parathion manufacturer, obtained registration of the label as required under the Federal Insecticide, Fungicide, and Rodenticide Act, codified at 7 U.S.C. §§ 136 et seq. (1993). *Hubbard-Hall*, 340 F.2d at 403.

88. *Hubbard-Hall*, 340 F.2d at 404-05. *Hubbard-Hall* was decided in January, 1965. The Restatement (Second) of Torts and § 402A's push for strict products liability were not published until later that same year.

89. *Hubbard-Hall*, 340 F.2d at 405.

90. *Id.* The trial court had charged the jury "[a]n adequate warning . . . is one calculated to bring home to a reasonably prudent person, a reasonably prudent user of the product, the nature and extent of the danger of the product involved." *Id.* at 404. Compare Restatement (Second) of Torts § 402A cmt. j (1965).

91. *Hubbard-Hall*, 340 F.2d at 405. The American National Standards Institute, in conjunction with FMC Corp., has developed standards for effective pictograms. See *Standard Warning Label Elements*, 2 Prod. Liab Rep. (CCH) ¶ 30,419 at 55,216-18 (Mar. 1993). For

*Hubbard-Hall's* emphasis on the non-English-speaking abilities of its plaintiffs went judicially unnoticed for nearly twenty years until *Campos v. Firestone Tire & Rubber Company*.<sup>92</sup> Armondo Campos, Portuguese by birth, worked for a truck-trailer manufacturer assembling tires, a procedure so dangerous it was performed inside a cage to safeguard workers if the tire rim exploded under air pressure.<sup>93</sup> Campos noticed one day that a locking mechanism on a rim was opening as a tube inflated. Firestone, the rim manufacturer, had provided Campos's employer with a warning sign cautioning of this occurrence.<sup>94</sup> But Campos could neither read nor write Portuguese or English; he was incapable of reading the instructions. As Campos reached into the cage to lock the rim shut, the rim exploded under the air pressure, severely injuring him.<sup>95</sup> Campos sued Firestone under New Jersey's strict products liability law and won a jury verdict of \$255,000.<sup>96</sup>

On appeal, the New Jersey Supreme Court had no difficulty holding that Firestone had a duty to warn those employees who assembled tire rims.<sup>97</sup> The question was whether, given Campos's English illiteracy, Firestone's warnings were adequate. The court held the warnings were not adequate due to the foreseeable number of unskilled or semi-skilled workers, who often cannot read English. *Campos* suggests that in such a case manufacturers should use warnings in the form of symbols.<sup>98</sup>

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examples of warning pictograms, see FMC Corporation *Product Safety Sign and Label System*, 2 *Prod. Liab. Rep. (CCH)* ¶ 30,425 at 55,224-25 (Mar. 1993).

92. 98 N.J. 198, 485 A.2d 305 (1984).

93. 485 A.2d at 307.

94. The warning sign read: "ALWAYS INFLATE TIRE IN SAFETY CAGE OR USE A PORTABLE LOCK RING GUARD. USE A CLIP-ON TYPE AIR CHUCK WITH REMOTE VALVE SO OPERATOR CAN STAND CLEAR DURING TIRE INFLATION." *Id.*

The National Highway Traffic Safety Administration prepared the warning for Firestone and other tire rim manufacturers to distribute. *Id.* *Campos* does not say whether the government's imprimatur on the warning had any bearing on its adequacy.

95. *Id.*

96. *Id.* at 308.

97. *Id.* at 310.

98. *Id.* The court's finding of an inadequate warning failed to sustain Campos's judgment because the court held the trial court had not charged the jury properly on the issue of causation. The Supreme Court remanded for a new trial, adopting the causation standard Henderson and Twerski now advocates for inclusion in of the Restatement (Third) of Torts' version of § 402A. *Id.* at 312. See note 35 and Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. Rev. 521, 562 (1982) for a description of Henderson and Twerski's proposal.

Henderson and Twerski would require a plaintiff to prove that the lack of an adequate warning proximately caused her injury. This requirement imposes the difficult burden of proving "that, if an adequate instruction or warning had been supplied, use and consumption would have been altered so as to reduce or eliminate the plaintiff's injury." Henderson and Twerski, 77 *Cornell L. Rev.* at 1522 (cited in note 5).

Neither *Campos* nor *Hubbard-Hall* alone sufficiently stands for the proposition that product sellers have a duty to warn consumers in a language they subjectively understand. These two cases, however, lay important groundwork. Both cases incorporate the concern for consumer status and capability into their reasoning. Both question the adequacy of product warnings based on their inability to keep intended or foreseeable users of the product from harm. Both examine the functions of an adequate warning. Neither, however, squarely addresses the issue of adequately warning non-English-literate consumers.

## 2. *Stanley Industries v. W.M. Barr & Co.*: Non-English Warnings Held Inadequate as Matter of Law

The task of determining the adequacy of English warnings fell to the court in *Stanley Industries v. W.M. Barr & Company*,<sup>99</sup> the first case to hold that English-only warnings are insufficient as a matter of law when a foreseeable plaintiff does not speak English. *Stanley Industries* involved two brothers from Nicaragua who worked for Stanley Industries. After using linseed oil to rub down a table, the men stowed their oil-soaked rags improperly, causing the rags to spontaneously combust, which led to a fire that damaged the Stanley plant.<sup>100</sup> The container in which the linseed oil was stored bore a label warning users of the possibility of spontaneous combustion. The warning, however, was written only in English with no pictograms or symbols.<sup>101</sup> The Nicaraguans could not understand it.<sup>102</sup>

Prior to the fire, both the linseed oil manufacturer and the retail store where the Nicaraguans' employer had purchased the oil had engaged in a joint program<sup>103</sup> to promote certain products, including the linseed oil, to south Florida's sizeable Spanish-speaking popu-

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99. 784 F. Supp. 1570 (S.D. Fla. 1992).

100. *Id.* at 1572.

101. The warning was under a heading that read "KEEP OUT OF REACH OF CHILDREN." *Id.*

102. "One of the brothers cannot read or comprehend English. The other could read words written on the English language label but had difficulty understanding their meaning. Both employees testified they would have sought more information on how to use the product if the label contained warnings in Spanish concerning the flammability of the product." *Id.* at 1573.

103. The campaign included Hispanic advertising and customer-relations services of the retail store, Home Depot. "Home Depot regularly and actively advertised in the Miami market on Hispanic television, on four different Hispanic radio stations and in *Diario Las Americas*, a Spanish language newspaper. . . . Home Depot also employed a translator service to convert English instructions to Spanish for several of its product lines, including between forty and seventy products, which it marketed with bilingual instructions." *Id.* at 1573. In fact, three weeks before the fire at issue in *Stanley Industries*, the store had placed an ad to promote the oil in *Diario Las Americas*. *Id.*

lation.<sup>104</sup> Stanley, the employer, claimed the warning was inadequate for its Spanish-speaking employees; the manufacturer and retailer responded that a warning in English was sufficient as a matter of law and moved for summary judgment. Denying the motion, the district court analogized to both *Hubbard-Hall* and *Campos*.

First, the court noted that, as in *Hubbard-Hall*, the manufacturer should have foreseen its product would be used by non-English-speaking persons because of its marketing efforts to Latino customers and the nature of its product.<sup>105</sup> Second, as in *Campos*, the court concluded that this foresight made English-only warnings inadequate.<sup>106</sup> *Stanley Industries*, therefore, established a new proposition in the law: When a product manufacturer uses non-English-language media to reach non-English-speaking consumers, the manufacturer cannot insist that product warnings in English are sufficient as a matter of law.<sup>107</sup> This rule, of course, is not as strong as finding English-only warnings inadequate as a matter of law when the manufacturer targets non-English-speaking consumers because a jury's determination lies between *Stanley Industries* and strict liability. Thus, *Stanley Industries* raises as many questions as it answers,<sup>108</sup> and represents an important but incomplete step toward striking a proper balance between the interests of non-English-speaking Americans and competing product manufacturers.

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104. More than 38% of the Miami and Fort Lauderdale, Florida, metropolitan area speaks a language other than English at home. 1990 Census at CPH 1990-5-17 (cited in note 2). At 1,239,849 people, that is enough to make Hispanic south Florida the 34th most populous state in the nation. *Id.* at CPH 1990-5-1-2.

105. "In light of defendants' joint advertising in Miami's Hispanic media and the nature of this product, this court likewise finds that it is for the jury to decide whether the defendant could have reasonably foreseen that the boiled linseed oil would be used by persons such as Nicaraguan, Spanish-speaking unskilled laborers." *Stanley Industries*, 784 F. Supp. at 1576 (citing *Hubbard-Hall*, 340 F.2d at 405).

106. "It is uncontested that a large portion of the unskilled or semi-skilled Miami workforce is comprised of foreign nationals whose native tongue is not English. Noting defendants' targeting of the Hispanic population through the Hispanic media, this court believes that is for the jury to decide whether a warning should at least contain universally accepted cautionary symbols." *Stanley Industries*, 784 F. Supp. at 1576 (citing *Campos*, 485 A.2d at 310).

107. *Stanley Industries*, 784 F. Supp. at 1576 (discussing the duty to warn a "pervasive presence of foreign-tongued individuals").

108. For example, what if the community has a "pervasive presence" of non-English-speaking citizens, but no non-English-language media? Is the advertising a necessary—or even sufficient—component of the finding? Slightly more than 27,000 Floridians speak Polish at home, less than two-tenths of one percent of the state's population. 1990 Census of Population and Housing Summary Tape File 3C. Would an advertisement in a Florida-based Polish-language newsletter give rise to the *Stanley Industries* doctrine? The answer is unclear.

### 3. About Face: *Ramirez v. Plough* and the Influence of Federal Regulations

The most recent opinion in this area, *Ramirez v. Plough, Inc.*,<sup>109</sup> comes from the most influential court to consider the question, the California Supreme Court. Through its result, *Ramirez* rejects the approach taken by *Hubbard-Hall, Campos*, and *Stanley Industries* by holding that English-only warnings can be sufficient as a matter of law.<sup>110</sup> *Ramirez*, however, potentially opens new doors to non-English-speaking plaintiffs. Because the scope of *Ramirez* is admittedly narrow, and it employs an analysis normally rejected in tort law, the case demands careful analysis.

Jorge Ramirez, a four-month-old infant, ingested children's aspirin administered by his mother when he had cold symptoms. The aspirin bore a government-mandated warning<sup>111</sup> that Reye's Syndrome, a potentially fatal condition in children, had been linked to the ingestion of aspirin during recovery from flu-like symptoms.<sup>112</sup> Jorge's mother, a Mexican native who was literate only in Spanish, could not read the warnings.<sup>113</sup> After ingesting the children's aspirin, Jorge developed Reye's Syndrome.<sup>114</sup>

In Jorge's suit alleging failure to warn under California's strict products liability doctrine,<sup>115</sup> the trial court granted the manufacturer's motion for summary judgment, holding that the pharmaceutical company had no duty to warn in a foreign language. A state appeals court, however, reversed, citing *Stanley Industries* at length and

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109. 25 Cal. Rptr. 2d 97, 863 P.2d 167 (1993).

110. *Ramirez*, 863 P.2d at 178.

111. See 51 Fed. Reg. 8,180 (March 7, 1986) (ordering Reye's Syndrome warning labels on aspirin bottles for a two-year period). The Food and Drug Administration made the requirement permanent in 1988. 53 Fed. Reg. 21,633 (June 9, 1988). The warning read: "Warning: Reye Syndrome is a rare but serious disease which can follow flu or chicken pox in children and teenagers. While the cause of Reye Syndrome is unknown, some reports claim aspirin may increase the risk of developing this disease. Consult doctor before use in children or teenagers with flu or chicken pox." *Ramirez*, 863 P.2d at 169.

112. *Ramirez*, 863 P.2d at 169.

113. After administering three tablets, Jorge's mother took him to a doctor, who advised her to give Jorge nonaspirin over-the-counter medicines. Nonetheless, she continued to administer the aspirin, which had been recommended by a friend. *Id.* at 169-70. The doctor apparently did not warn her of Reye's Syndrome. Further, Jorge's mother asked no one to translate the English bottle warnings into Spanish. *Id.* at 169.

114. As a result of Reye's Syndrome, Jorge developed "severe neurological damage, including cortical blindness, spastic quadriplegia, and mental retardation." *Id.*

115. See *Anderson v. Owens-Corning Fiberglas Corp.*, 281 Cal. Rptr. 528, 810 P.2d 549, 553-58 (1991).

accepting its rationale, noting the manufacturer's advertisements in local Latino media.<sup>116</sup>

The California Supreme Court reversed the appeals court, limiting *Ramirez* to nonprescription drug labels,<sup>117</sup> a boundary necessitated by the court's analysis. Grounding its holding in self-described judicial restraint,<sup>118</sup> the court relied on state<sup>119</sup> and federal<sup>120</sup> drug regulations to define the standard of adequate warnings under California products liability law.<sup>121</sup> Acknowledging that statutes generally set floors, not standards, for conduct under tort law,<sup>122</sup> the *Ramirez* court did otherwise, reasoning that a statute tailored to address the particular conduct in question could act as a proxy for a judicial assessment of tort duty.<sup>123</sup> The California and federal statutes to which *Ramirez* cited make no mention of English as the *only* language in which a drug manufacturer may have to warn consumers. Furthermore, *Ramirez* did not attempt to demonstrate the statutes even contemplated English-only warnings, except by a kind of ex-

116. *Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423, 426-31 (Cal. App. 1992). The appeals court decision was analyzed and rejected in favor of a complicated, multifactor judicial balancing test proposed in a Note published before the Supreme Court's *Ramirez* decision. Kelly Cox, Note, *The Duty to Warn: Should California Extend the Duty to Include Foreign Language Warnings?*, 1 San Diego Just. J. 517 (1993).

117. *Ramirez*, 863 P.2d at 171 n.3.

118. The same court that imposed strict products liability by judicial fiat 30 years earlier in *Greenman v. Yuba Products*, 59 Cal. 2d 57, 377 P.2d 897 (1963), said that imposing a duty to warn in a language other than English is "a task for which legislative and administrative bodies are particularly well-suited." *Ramirez*, 863 P.2d at 174.

119. Cal. Health and Safety Code § 25900 (West 1984) (requiring English warning labels on "dangerous drugs, poisons, and other harmful substances.").

120. Food, Drug, and Cosmetic Act § 352, codified at 21 U.S.C. § 352 et seq. (requiring adequate labels and directions on nonprescription drugs); 21 C.F.R. § 201.15(c)(1) (1993) (requiring English labels on nonprescription drugs except those drugs "distributed solely in . . . Puerto Rico or in a Territory where the predominant language is one other than English").

121. *Ramirez*, 863 P.2d at 177.

122. "Where a statute, ordinance or regulation is found to define a standard of conduct for the purposes of negligence actions, . . . the standard defined is normally a minimum standard . . . . This legislative or administrative minimum does not prevent a finding that a reasonable [person] would have taken additional precautions where the situation is such as to call for them." Restatement (Second) of Torts § 288C cmt. a (1965).

Not even pro-defendant products liability legislation working its way through Congress agrees with *Ramirez's* use of the federal regulatory scheme to provide liability immunity. Section 203 of the Product Liability Fairness Act, approved by a Senate committee in late 1993, goes no further than limiting punitive damages for makers of drugs regulated by the Food and Drug Administration and aircraft components regulated by the Federal Aviation Administration. *Product Liability Fairness Act S.637: Report of the Senate Committee on Commerce, Science, and Transportation*, [CCH Special 1] Prod. Liab. Rep. (CCH) 39-48 (Dec. 27, 1993).

123. "Where the evidence shows no unusual circumstances, but only the ordinary situation contemplated by the statute or administrative rule, then 'the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the court as a matter of law, as sufficient for the occasion . . . ." *Ramirez*, 863 P.2d at 172 (quoting Restatement (Second) of Torts § 288C cmt. a (1965)).

*pressio unius* argument that followed a list of language-specific statutes in other areas of California law.<sup>124</sup>

*Ramirez's* insistence on drawing these significant inferences from the legislative silence is unpersuasive for three reasons. First, it is shaky statutory interpretation, given the broad range of legislative possibilities, to presume that legislative inaction has any meaning at all, much less the strong signal *Ramirez* says it sends.<sup>125</sup> Second, *Ramirez* virtually admits it mischaracterizes the legislature's silence by predicting legislative response to its holding.<sup>126</sup> If the legislature had chosen deliberately to follow the path *Ramirez* identifies, why would the supreme court presume its holding would generate prompt reaction in the statehouse? Finally, in pledging fealty to judicial restraint, *Ramirez* betrays the law. It ignores the requirement that a product warning be adequate as to the foreseeable user. Although judicial restraint may urge courts to refrain from creating law, it certainly does not contemplate substituting one doctrine for another when its purpose is to avoid a difficult result. That behavior is simply judicial activism.<sup>127</sup>

The California Supreme Court's decision in *Ramirez* also rejects the emphasis on Spanish advertising<sup>128</sup> adopted by both the ap-

124. "These statutes demonstrate that the Legislature is able and willing to define the circumstances in which foreign-language communications should be mandated. . . . [W]e think it reasonable to infer that the Legislature has deliberately chosen not to require that manufacturers also include warnings in foreign languages. The same inference is warranted on the federal level." *Ramirez*, 863 P.2d at 175.

125. "There could hardly be less reputable legislative material than legislative silence." Reed Dickerson, *The Interpretation and Application of Statutes* 181-82 (Little Brown, 1975). Further, given the *Hubbard-Hall/Campos/Stanley Industries* line of cases and the prevailing definition of "adequate warnings" in California, as embodied in California Basic Jury Instructions No. 9.20, an assertion that the California legislature was acquiescing to a policy requiring warnings in languages other than English is equally plausible.

126. "Indeed, we are conscious that our decision here may prompt review of this issue by the California Legislature. That is as it should be. . . ." *Ramirez*, 863 P.2d at 176.

127. The court's transparent activism makes the *Ramirez* conclusion, sounding in remorseful judicial impotence, difficult to read:

We recognize that if a Spanish language warning had accompanied defendant's product, and if plaintiff's mother had read and heeded the warning, the tragic blighting of a young and innocent life that occurred in this case might not have occurred. Yet, as one court has aptly commented, "The extent to which special consideration should be given to persons who have difficulty with the English language is a matter of public policy for consideration by the appropriate legislative bodies and not by the Courts."

*Id.* at 178 (quoting *Carmona v. Sheffield*, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971)).

128. Noting that the California legislature had passed other statutes requiring businesses that advertise in languages other than English to deal with their customers in those same languages, the *Ramirez* court said their presence "only underscores the point that the Legislature . . . [is] able to provide the appropriate forum to consider the arguments for multilingual warnings." *Ramirez*, 863 P.2d at 177. See also *id.* at 174-75 (listing statutes).

peals court and the *Stanley Industries* court.<sup>129</sup> On this narrow point, however, *Ramirez* appears to offer non-English-speaking plaintiffs a new opportunity for relief. The court opened the possibility of tort liability premised on the content of foreign-language advertising when the advertising assumes this information-spreading function of the warning.<sup>130</sup> Justice Mosk stressed the issue in his concurrence, suggesting that the warning function could be served by a variety of media.<sup>131</sup> Under Justice Mosk's view, an absence of warnings in a manufacturer's non-English advertising could amount to misrepresentation of a product's safety.<sup>132</sup> The court's decisions contain no evidence that the entire California Supreme Court would adopt Justice Mosk's view or that any other court would reshape the duty to warn in such a radical fashion.

#### IV. PURPOSEFUL AVAILMENT OF NON-ENGLISH-SPEAKING MARKETS: THE STATUTORY SOLUTION

The risks of developing a standard directly from either *Ramirez* or the *Hubbard-Hall/Campos/Stanley Industries* line of cases are great. Neither approach properly balances the consumer interests advanced by warning requirements against the legitimate economic interests of product manufacturers faced with rapidly changing consumer demographics. This Part outlines the risks of maintaining the current system and demonstrates why a statutory solution based on the jurisdictional doctrine of purposeful availment, a doctrine with its origin in products liability cases, strikes the proper balance.

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129. *Ramirez*, 863 P.2d at 176-77. The court appeared to interpret *Ramirez*'s advertising argument as a contractual claim, sounding in reliance. "[P]laintiff's mother could not have relied upon defendant's advertising because she admittedly did not see it or hear it." *Id.* at 177.

130. *Id.*

131. *Id.* at 179 (Mosk, J., concurring).

132. *Id.*

## A. Risky Business: The Current Approaches

### 1. Effect on Manufacturers

#### a. Lack of Constitutional Safeguards

One of the most interesting common aspects of *Ramirez* and *Stanley Industries* is their similar treatment of their state constitutions' English-language provisions. English is the official language of both California and Florida.<sup>133</sup> Neither *Ramirez* nor *Stanley Industries*, however, even mentioned their state constitutions. The California Appeals Court indirectly addressed this issue in *Ramirez* when it stated that despite legislative or judicial recognition of English as an official language, manufacturers are not necessarily protected from liability if they provide a warning written only in English.<sup>134</sup> These cases suggest that manufacturers are unlikely to find refuge in state or federal English-only provisions.<sup>135</sup> Although some state constitutions specifically authorize lawsuits against the government to enforce the official status of English, no court has held that these provisions provide a defense against a cause of action brought by a private party.<sup>136</sup>

#### b. Unpredictability of Jury Verdicts and Costs of Doing Business

*Stanley Industries*, like much of today's products liability law, poses an even greater problem for manufacturers by exposing product sellers to the vagaries of the jury system. The uncertainty of jury determinations forces manufacturers to insure against the possibility of the most severe injuries.<sup>137</sup> Although many scholars and legislators have debated the extent to which liability insurance cost increases are

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133. Cal. Const. Art. III, § 6(b); Fla. Const. Art. II, § 9.

134. "While the constitutional, statutory, regulatory, and judicial authorities . . . may reflect a public policy recognizing the status of English as an official language, nothing compels the conclusion that a manufacturer of a dangerous or defective product is immunized from liability when an English-only warning does not adequately inform non-English literate persons likely to use the product." *Ramirez*, 12 Cal. Rptr. 2d at 428.

135. See notes 67 and 83 and accompanying text.

136. See, for example, Cal. Const. Art. III, § 6(d). Arizona's provision establishing English as the State's official language prohibited any arm of state government, including the courts, from making or enforcing "any law, order, decree or policy which requires the use of a language other than English." The entire provision was declared unconstitutional, however. See note 67.

137. W. Kip Viscusi, *Reforming Products Liability* 132-156 (Harvard, 1991) (arguing that expansion of warning-defect liability has been one of the primary causes in the increase in products liability-associated costs to manufacturers).

the result of expanded tort liability, the effect on even careful manufacturers is significant as premiums rise across industries.<sup>138</sup> Additionally, a nebulously defined duty to warn in languages other than English may impose significant product-design and packaging costs.<sup>139</sup> The Census Bureau counts 299 different languages spoken by Americans.<sup>140</sup> In how many languages is the manufacturer obligated to warn? An amicus brief filed in *Ramirez* identified the issue, stating that encouraging manufacturers to "protect themselves" by listing warnings in a variety of ways would be not only overly burdensome to the manufacturer but ultimately costly to the consumer.<sup>141</sup>

### c. Ramirez's Inherent Limits

Although *Ramirez* is essentially pro-manufacturer, the court notably limited its holding to nonprescription drugs;<sup>142</sup> absent a similar regulatory scheme, other manufacturers have no reason to believe *Ramirez* will shelter them. These manufacturers find themselves in a position that is just as unpredictable as the positions of product sellers in jurisdictions that have yet to consider the duty-to-warn question. The fact that *Stanley Industries* borrows many of its concepts from the duty-to-warn doctrines accepted in most

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138. See, for example, *Uniform Federal Product Liability Law Hearings on S. 640 Before the Committee on the Judiciary, United States Senate*, 102d Cong., 2d Sess. 21-26 (1992) (containing testimony of Stuart M. Gerson, assistant attorney general); *Product Liability Fairness Act S.687: Report of the Senate Committee on Commerce, Science, and Transportation*, [CCH Special 1] Prod. Liab. Rep. (CCH) 5-6 (Dec. 27, 1993). See also Omer Lee Reed and John L. Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 Neb. L. Rev. 389, 436-46 (1984).

139. Two courts have wrestled with the legal problems posed by warning adequacy requirements and a lack of available product space for a warning. See *Cotton v. Buckeye Gas Products Co.*, 840 F.2d 935, 938 (D.C. Cir. 1988) and *Broussard v. Continental Oil Co.*, 433 S.2d 354, 358 (La. App.), cert. denied, 440 S.2d 726 (La. 1983). Both courts tried to draw a factual distinction between warnings accompanying small and large products without further clarifying what "small" and "large" meant. Professor Jacobs harshly criticizes these courts for only adding to the adequacy confusion. He proposes that juries determine warning adequacy based on the decisionmaking process of the manufacturer, given the manufacturer's knowledge of its products' foreseeable users. Under his theory, a warning would be adequate based on the decisionmaking process a reasonable manufacturer in the position of the defendant would have entertained. Jacobs, 71 N.C. L. Rev. at 143-45 (cited in note 5). By focusing on the process of commercial decision-making, however, Professor Jacobs would devalue consumer safety, one of the principle tenets of products liability law. See Restatement (Second) of Torts § 402A cmt. (1) (1965).

140. 1990 Census, Tape File 3C (cited in note 2).

141. "[A] manufacturer . . . would be obliged to supply a veritable tome of warnings with every box, can or bottle that contained a warning—an enormous, if not impossible task. Sanctioning such liability would place a severe and onerous burden on the manufacturing community, a burden that inevitably would be borne by consumers in the form of higher product costs." Amicus brief of the Cosmetic, Toiletry, and Fragrance Association and the Product Liability Advisory Council, *Ramirez v. Plough, Inc.*, 25 Cal. Rptr. 2d 97, 863 P.2d 167 (1993) (quoted in Mike McKee, *The Liabilities of Language*, *The Recorder* 1 (April 9, 1993)).

142. See text accompanying notes 117-21.

jurisdictions, however, indicates that most manufacturers face *Stanley*-type uncertainty<sup>143</sup> in any state with non-English-speaking citizens, that is, every state.

## 2. Effect on Non-English-Speaking Plaintiffs

### *a. Lack of Remedies for Injuries Due to Failure to Warn Adequately*

*Ramirez*, of course, offers little relief to people who speak languages other than English. Although that opinion is premised on the pervasive regulation of nonprescription drugs, *Ramirez's* general theme of legislative deference in this area could work equally well throughout the products liability regime.<sup>144</sup> Furthermore, *Ramirez* not only deprives non-English-speaking plaintiffs of the opportunity to recover for their injuries,<sup>145</sup> it permits manufacturers to market defective products<sup>146</sup> to the non-English-speaking population, a segment of American society whose rapid growth is reflected in its increased purchasing power.<sup>147</sup>

### *b. Potential for Jury Bias Against Non-English-Speaking Plaintiffs*

*Stanley Industries'* jury-question approach also creates significant difficulties for non-English-speaking plaintiffs. State laws routinely exclude non-English-speaking citizens from jury participation.<sup>148</sup> As a result, many Americans, including those most likely to identify

143. See Jacobs, 71 N.C. L. Rev. at 157-58 (cited in note 5).

144. "Defining the circumstances under which warnings or other information should be provided in a language other than English is a task for which legislative and administrative bodies are particularly well suited." *Ramirez*, 863 P.2d at 174. See also note 127.

145. Following the California Supreme Court's *Ramirez* decision, Rosa Rivera, Jorge's mother, stated, "This is a failure of justice." Claire Cooper, *Drug Firm Not Liable for Lack of Spanish Warning, Court Says*, Sacramento Bee A12 (Dec. 10, 1993).

146. See Restatement (Second) of Torts § 402A cmt. j (1965).

147. Latinos spent \$180 billion on goods and services in 1992. By one estimate, non-Caucasian minorities may account for 30% of the U.S. economy by the year 2000. Thomas McCarroll, *It's a Mass Market No More*, Time, Special Issue: The New Face of America 80, 80-81 (Fall 1993). Latino purchasing power is reported to have doubled in the last decade. Debra Cano, *Culture Cash; Upscale Central Stores Make It Easy for Latinos to Exercise Their Spending Power*, L.A. Times D1 (Feb. 10, 1994).

148. See, for example, Ark. Stat. Ann. § 16-31-102(a)(3) (1993); Ala. Code. § 12-16-59(b)(3) (1993); R.I. Gen. Laws § 9.9-1.1 (Supp. 1992) (English proficiency necessary "to understand and participate in the court proceedings"); *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990) (upholding an English proficiency requirement for jurors).

closely with a non-English-speaking plaintiff, are excluded from jury service.<sup>149</sup>

Further diminishing the opportunity of a non-English-literate plaintiff to have a jury drawn from "a fair cross section of the community,"<sup>150</sup> the Supreme Court held in *Hernandez v. New York*<sup>151</sup> that prosecutors may peremptorily strike bilingual jurors if non-English testimony will be presented during trial. In *Hernandez*, the Court permitted peremptory strikes of two Latino bilingual jurors on the ground that the Latinos could substitute their own understanding of Spanish-language testimony for the official court interpreter's version.<sup>152</sup> Rejecting the argument that language is closely correlated to race in the Latino community,<sup>153</sup> the Court held the Latino strikes were constitutionally race-neutral.<sup>154</sup>

Because of the *Hernandez* case and state-law English-proficiency requirements, a non-English-speaking plaintiff likely must try her duty-to-warn case in front of a jury comprised entirely of persons who speak only English.<sup>155</sup> In a contract dispute or criminal trial, this may be of varying importance to the non-English-speaking party. In a

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149. Recent scholarship argues that juries failing to represent the community undermine public confidence in the judicial process. See Nancy King, *Racial Jurymaning: Cancer or Cure? A Contemporary Review and Analysis of Affirmative Action in Jury Selection*, 69 N.Y.U. L. Rev. 707 (1994) (manuscript on file with author); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 Hofstra L. Rev. 1, 55-58 (1992); Ramirez, 1993 Wis. L. Rev. at 798-801 (cited in note 8).

150. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

151. 111 S. Ct. 1859 (1991).

152. Court interpreters are not rare. In 1986, federal district courts used court interpreters more than 45,000 times. Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* 5 (U. of Chicago, 1990). For a discussion of the problems raised by the use of court interpreters, see generally Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 Vand. L. Rev. 175 (1993).

153. Noting that 75% of Latinos speak Spanish, Professor Ramirez argues that "super-correlated" racial traits merit the same strict constitutional scrutiny as race itself. Ramirez, 1993 Wis. L. Rev. at 762-64 & nn. 5, 8 (cited in note 8). The trial court in *Pemberthy v. Beyer*, 800 F. Supp. 144, 160 (D. N.J. 1992) rev'd, 62 U.S.L.W. 2601 (3rd Cir. 1994), agreed, holding that "Spanish-speaking ability bears such a close relationship to a juror's identity as a Latino that it is a surrogate for race and/or ethnicity." The Third Circuit rejected the super-correlation theory, however, asserting that "linguistic ability is not immutable" and that discrimination against non-English-speaking persons "is not comparable to the history of discrimination based on . . . race or national origin." *Pemberthy*, 62 U.S.L.W. at 2601.

154. *Hernandez*, 111 S. Ct. at 1867. The race-neutral requirement emerged from *Batson v. Kentucky*, 476 U.S. 79 (1986), in which the Court held that peremptory strikes based on the race of the juror violated the Equal Protection Clause of the Fourteenth Amendment.

The Court extended *Batson's* prohibitions to civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). Under *Batson*, once a party makes a prima facie showing that a juror was peremptorily excluded because of the juror's race, the opposing party must come forward with a race-neutral explanation for the strike. *Batson*, 476 U.S. at 97.

155. Ramirez, 1993 Wis. L. Rev. at 801-06 (cited in note 8).

proceeding in which language differences lie at the core of the case, however, a linguistically skewed jury presents a real threat to the non-English-speaking plaintiff's case. Although studies have found conflicting evidence that minority presence on juries alters results,<sup>156</sup> no one reasonably could doubt Justice Thurgood Marshall's warning of the potential for damage to justice when a large and identifiable segment of the community is barred from jury service.<sup>157</sup>

### *B. Purposeful Availment and Non-English-Speaking Markets*

The failure of the law to account properly for the different interests implicated by the duty-to-warn doctrine,<sup>158</sup> the economic concerns of manufacturers, and the growing non-English-speaking consumer population compels a new approach. The challenge is three-fold: satisfy the purposes behind the adequate warning requirement, offer manufacturers greater liability predictability to facilitate economic planning and efficiency, and protect a large and growing segment of the American people from defective products. Fortunately, the answer is already available in products liability law, although it masquerades as a procedural, rather than substantive, guarantee. It is time, however, to replicate the purposeful availment doctrine from the world of civil procedure and place it into the substantive body of duty-to-warn law.

Purposeful availment was applied first to products liability in *World-Wide Volkswagen Corporation v. Woodson*,<sup>159</sup> a 1980 personal jurisdiction case in which the Supreme Court held that the Due Process Clause would not permit a New York resident to bring a products liability action in Oklahoma against a New York automobile distributor for injuries that occurred in Oklahoma. In *World-Wide Volkswagen*, a New York auto distributor with a Northeast market base sold an Audi through a New York dealer to a family who later moved from New York. On the drive to their new home, the family

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156. Richard Lacayo, *Whose Peers?*, Time, Special Issue: The Changing Face of America 60, 60 (Fall 1993).

157. "[T]he effect is to remove from the jury room qualities of human nature and varieties of human experience. . . . It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). See Perea, 21 Hofstra L. Rev. at 58 (cited in note 149).

158. See notes 37-41 and accompanying text.

159. 444 U.S. 286 (1980). In fact, purposeful availment was first elucidated in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (involving the application of state estate trust laws), though some commentators maintain *Hanson* was largely ignored by lower courts. Howard Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. Rev. 729, 745 (1988).

was in a serious accident in Oklahoma and sued several parties, including the dealer and distributor, in rural Oklahoma. Covertly acknowledging that the minimum contacts test of *International Shoe Company v. Washington*<sup>160</sup> would authorize Oklahoma jurisdiction because it might be foreseeable that a car sold in New York could end up in Oklahoma, the Court demanded more. It held that the definition of foreseeability for jurisdictional purposes in a products liability action is whether a defendant reasonably should anticipate being haled into court in that jurisdiction.<sup>161</sup> In language especially relevant to the focus of this Note, the Court added that when a manufacturer or distributor purposefully markets its products in a state, subjecting that manufacturer or distributor to suit in that state is not unreasonable.<sup>162</sup>

Seven years later in *Asahi Metal Industry Company v. Superior Court of California, Solano County*,<sup>163</sup> the Court refined *World-Wide Volkswagen's* purposeful availment requirement to be met only when a defendant purposefully directed its actions toward the forum state.<sup>164</sup> The Court further explained what it meant by "purposefully directed" in a commercial context, defining it as conduct of a party indicating that it has an intent to serve a market in the forum state.<sup>165</sup> This conduct, according to the Court, could include designing a product specifically for the market, advertising in the market, and establishing distribution or customer-service channels for the market.<sup>166</sup>

*World-Wide Volkswagen* and *Asahi*, as well as the lower court decisions following them,<sup>167</sup> are based on the Due Process Clauses of the Fifth and Fourteenth Amendments. A fundamental tenet of these

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160. 326 U.S. 310 (1945).

161. *World-Wide Volkswagen*, 444 U.S. at 297.

162. "Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." *Id.*

163. 480 U.S. 102 (1987).

164. *Id.* at 112.

165. "[C]onduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market, . . . advertising, . . . establishing channels for providing regular advice to customers, . . . or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

166. *Id.*

167. See, for example, *Batton v. Tennessee Farmers Mutual Ins. Co.*, 153 Ariz. 268, 736 P.2d 2, 5 (1987); *Szalay v. Hancock*, 307 Ark. 232, 819 S.W.2d 684, 687 (1991); *Georgia Insurers Insolvency Pool v. Brewer*, 602 S.2d 1264, 1268 (Fla. 1992); *Wiles v. Morita Iron Works Co., Ltd.*, 125 Ill. 2d 144, 530 N.E.2d 1382, 1385 (1988); *Chace v. Dorcy Int'l, Inc.*, 68 Ohio App. 3d 99, 587 N.E.2d 442, 446 (1991).

amendments is that individuals deserve notice of the means by which the state intends to deprive them of life, liberty, or property.<sup>168</sup> While the Due Process Clause does not eliminate all uncertainty and not all law is constitutionally derived, a value sufficiently central to our legal system to merit inclusion in the Constitution—in this case, notice—equally merits a place of prominence in the development of tort and contract law.

The principles of *World-Wide Volkswagen* and *Asahi* should inform the development of products liability warning law for non-English-speaking plaintiffs. A fundamental objection of manufacturers to a multilanguage warning requirement is the fear that anyone who speaks one of the hundreds of languages spoken in America may have a cause of action in strict liability. Manufacturers claim they cannot package their products to guard against this uncertainty.<sup>169</sup> A requirement that a manufacturer face liability only if it has purposefully availed itself of non-English-language markets should alleviate those fears. As in personal jurisdiction, placing this requirement in products liability law would provide more predictability, allowing potential defendants to structure their conduct appropriately.<sup>170</sup>

The *Asahi* plurality's test,<sup>171</sup> which puts a manufacturer on notice that it is open to suit in a foreign jurisdiction, also should put a manufacturer on notice of liability for failure to warn in a foreign language. Under Justice O'Connor's test, manufacturers' product design, advertising,<sup>172</sup> marketing, and distribution decisions would affect their products liability in ways they could reasonably predict.<sup>173</sup>

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168. "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight." *Roller v. Holly*, 176 U.S. 398, 409 (1900). See also *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

169. See notes 138-39 and accompanying text. Professor Jacobs agrees that current products liability law is ill-equipped to handle what he calls "linguistic-adequacy exceptions." Jacobs, 71 N.C. L. Rev. at 155 (cited in note 5). He asserts that requiring manufacturers to gear their warnings to consumers of different race, age, and gender would force the exceptions to overtake the adequacy rule, offering manufacturers arguably less guidance about warning adequacy than they have today. But see cases cited in note 40. Professor Jacobs is justified in his concern. The doctrine advanced in text accompanying notes 167-74 avoids the problems he foresees.

170. See *World-Wide Volkswagen*, 444 U.S. at 297.

171. See note 165.

172. Advertising in languages other than English has become big business in the United States. Procter & Gamble spends about \$100 million annually on "ethnic-oriented ads," including sponsorship of *Hablando*, a half-hour morning program on one of the United States' Spanish-language television networks. AT&T runs U.S. broadcast and print ads in twenty different languages, including Korean, Tagalog, and the West African dialect, Twi. Liquor distillers Rémy Martin and Courvoisier run ads in Chinese-language newspapers and magazines. McCarroll, *Time Special Edition* at 80-81 (cited in note 147).

173. Purposeful availment answers the criticism of Professor Jacobs, who fears that courts are otherwise unable to "halt the momentum . . . short of requiring that manufacturers blanket their products with as many separate warnings as there are 'linguistically significant groups.'"

Manufacturers could choose whether to enter non-English-speaking markets and meet the warning requirements of the law. These kinds of market-sensitive decisions are not foreign to manufacturers, who make them regularly.<sup>174</sup> Purposeful availment simply would allow them to weigh risks and calculate the costs of doing business in non-English-speaking markets more accurately.<sup>175</sup>

By narrowing the set of potentially liable parties, a purposeful availment requirement, standing by itself, may be said to work against the interests of thirty-one million non-English-speaking Americans. An appropriate balance, therefore, is to subject manufacturers to liability, as a matter of law, when they purposefully avail themselves of non-English-speaking markets and then fail to warn in those markets in the language consumers speak. This rule would adequately protect the deterrence and compensation roles of tort law; manufacturers would be deterred from placing unsafe products in commercially desirable non-English-speaking markets, and consumers would be compensated for their injuries in a way that would spread the costs of compensation among only those manufacturers who fail to warn in appropriate languages. Making the determination of a warning's adequacy as to a non-English-literate plaintiff a matter of law, rather than fact, also guards against the jury discrimination issues raised by state English-language laws and the Supreme Court's *Hernandez* holding.<sup>176</sup>

Applying the purposeful availment test to *Stanley Industries* and *Ramirez* illustrates the issues that would arise. In *Stanley*

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Jacobs, 71 N.C. L. Rev. at 153 (cited in note 5). In areas with non-English markets of size sufficiently significant to attract product sellers and to give rise to the purposeful availment doctrine, Jacobs's concerns that multilingual warnings "might intimidate or confuse consumers, causing them to ignore all of the risk information," *id.* at 154, do not ring true. Residents of these communities already live in a multilingual culture. Cathy Booth, *Miami: The Capital of Latin America*, *Time*, Special Issue: The New Face of America 82 (Fall 1993). A change in product packaging requirements would, therefore, produce changes only at the societal margin.

174. Marketers searching for ways to connect with the Spanish-speaking market in the United States employ a variety of tactics. A high-dollar department store in Los Angeles hires Spanish-speaking sales clerks and displays store signs in languages other than English. Cano, *L.A. Times* at D-1 (cited in note 146). A Maryland auto dealership advertises on a local Spanish-language cable channel and has a Spanish-speaking sales staff. Northern Virginia dealerships promote their Spanish-speaking staff in local Spanish-language newspapers. Lisa Loff, *The Art of the Deal—in Spanish; Car Dealerships Using Hispanic Salespeople to Pull in Customers*, *Wash. Post* B1 (Feb. 5, 1994). Latino advertising agencies develop ads specifically for Latino purchasers and help Anglo clients place their ads in non-English media. Pat Baldwin, *Hispanic Ad Agency Expanding in Size and Scope*, *Dallas Morning News* 2F (Jan. 15, 1994).

175. Removing the liability uncertainty in non-English failure-to-warn cases ought to keep insurance rates and legal transaction costs lower for those manufacturers who properly warn their customers of product dangers. See notes 140-42 and accompanying text.

176. See notes 150-157 and accompanying text.

*Industries*, the warnings on the container of linseed oil contained only English-language warnings. The manufacturer and retailer, however, engaged in a joint effort to promote the linseed oil and other products on Spanish radio, television, and newspapers in the south Florida media market. The retailer also printed instructions for many of its products in Spanish and provided Spanish-language customer assistance.<sup>177</sup> Measuring the defendants' actions against the purposeful avilment factors—advertising, establishing channels for providing regular service to customers, and marketing the product through a distributor who has agreed to serve as an agent for the manufacturer to Spanish-speaking customers—indicates that, under purposeful avilment, the linseed oil warnings in *Stanley Industries* clearly would be inadequate as a matter of law.

A similar result would occur under the *Ramirez* facts, given Plough's Spanish-language advertising. A judge may want to know other facts, however, before ruling that the warning is inadequate, including whether Plough had established a toll-free Spanish-language customer service number, or, acting on its marketing findings,<sup>178</sup> entered into agreements with distributors or retail outlets that specialize in reaching Latino markets. In either case, a finding of warning inadequacy still would require a fact-finder to determine whether the inadequate warning actually caused a plaintiff's injuries<sup>179</sup> and what damages resulted. These issues, which are relatively language-neutral, likely would be less susceptible to bias by monolingual panels than the determination of an English warning's adequacy.

*Ramirez* is correct in stating that a change of this magnitude in the law is best made by legislatures.<sup>180</sup> As *Ramirez* noted, state legislatures throughout the country have demonstrated that they are willing and able to determine when manufacturers and sellers must communicate warnings in a foreign language.<sup>181</sup> Given the demographics of legislatures versus state benches,<sup>182</sup> the odds are better

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177. See notes 103-04 and accompanying text.

178. Plough, Inc., found in an internal marketing study that sales of St. Joseph Aspirin for Children, the nonprescription drug at issue in *Ramirez*, were twice as high in predominantly Latino neighborhoods as in Anglo stores. McKee, *The Recorder* at 1 (April 9, 1993) (cited in note 140).

179. Both cases were reported at the summary judgment stage. *Ramirez's* holding settled the California case as a matter of law.

180. *Ramirez*, 863 P.2d at 178.

181. *Id.* at 177. For examples, see notes 68-75 and accompanying text.

182. In Cook County, Illinois, where 9.5% of the population is Latino, only one Latino judge served among 177 judges on the circuit court level in 1990. Richard Saks, Note, *Redemption or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act*, 66 Chi. Kent. L. Rev. 245, 246 n.4 (1990). A 1991 judicial redistricting law was expected to increase that number to twenty-two. David Heckelman, *Cook County Judicial Districts Approved*, Chi. Daily L.

that the proper result will come from the statehouse rather than the state court. Further, although this Note's proposal is rooted in the law and many of its longstanding concerns, the suggested solution represents a series of value judgments traditionally left to electorally responsive bodies.

## V. CONCLUSION

That issues of multilingualism plague American law is not surprising. After all, the common law originated in England. The United States is not and has not been a part of England for well over two hundred years, however. In the spirit of our own immigrant story, American law should reflect its English heritage but should not be mired in it.

As a shared cultural experience, widespread use of English has helped the United States form into a more cohesive nation. Immigrants historically brought few resources more valuable than a gift of languages that enriched our peculiar brand of English with new phrases, ideas, and terms. Generally, they assimilated into this nation by learning English because they had little choice if they were to prosper in the marketplace and join in the "melting pot."

Today, the need to learn English no longer exists. Spanish-speaking communities have developed to the point that, economically speaking, they no longer need to speak English to succeed. Asian communities, created in part by foreign investment and educational opportunities in the United States, have attracted the sort of wealthy immigrants that do not need to speak English to prosper. Additionally, language today is viewed by many non-English-speaking Americans as an expression of their own unique culture.<sup>183</sup> English remains overwhelmingly the language of commerce, government, and the arts. English, however, is no longer the only route to success.

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Bull. 1 (July 2, 1991). As of February 1992, only 1.7 percent of New York State's 1,129 judges were Latino. Shaun Assael, *Only Their Robes Are Black*, N.Y. *Newsday* 37 (Feb. 24, 1992). In December 1993, New York Governor Mario Cuomo named the first Latino to serve on the state's highest court. Gary Spencer, *Ciparick Named to Court of Appeals; Supreme Court Justice Is First Hispanic Nominee*, N.Y. L. J. 1 (Dec. 2, 1993). Only eleven of Florida's 723 state judges are Latino. *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, 19 Fla. St. U. L. Rev. 591, 613. The miniscule number of Latino judges, even in heavily Latino states, creates bias problems similar to those presented by monolingual juries. *Id.* at 611-12. See note 148.

183. See McKay and Wong, eds., *Language Diversity* at 109-292 (cited in note 6) (explaining the "language situation" of several immigrant language minorities in the United States).

Tort law, particularly products liability, is not about immigration policy, foreign relations, or language skills. It is about the promotion of two critical goals: compensation for one's injuries and deterrence of future harm. In the pursuance of those goals, tort law should not allow prejudice and bias to sanction a two-tiered system, in which those who speak the "right" language are compensated for their harms and those who profit from persons who speak the "wrong" language are undeterred from selling them unsafe products.

To paraphrase Judge Cardozo, it is time to put the source of the obligation to non-English-speaking Americans where it ought to be. It is time to put its source in the law.

*Thomas H. Lee\**

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\* Thanks are due Professor Nancy King for sharing her research findings on jury bias and my wife, Laurie Lee, for her careful eye and patient soul. This Note is dedicated to Hayden Turner Lee.