

And Justice for All: Non-Native Speakers in the American Legal System

Leah M. Nodar *

***Abstract.** The American Constitution promises the right to due process of law. However, some groups, including speakers of English as a second language, have historically been denied this right. The 1978 Court Interpreters Act guaranteed interpreters for anyone who ‘speaks only or primarily a language other than the English language.’ Decisions as to who speaks ‘primarily’ a foreign language are left to the presiding judge. Today, this means that non-native speakers in federal courts will generally receive highly qualified interpreters. In state courts, however, judges often rule that these speakers do not need interpreter assistance. In this paper, I analyze three dozen judicial opinions containing choices about language proficiency. These choices can be subjective, and sometimes imply that conversational English and legal English are equally difficult. This is problematic, especially since works by authors such as Lippi-Green and Nguyen have shown that judges sometimes rule that these speakers cannot be understood in educational or media environments.*

***Keywords:** Access to interpreters, non-native speakers, language evaluation, state court.*

American Interpretation Laws

One of the main topics of the recent IAFL conference was Directive 2010/64/EU and the host of changes it will entail for legal interpretation and translation within the EU. The upcoming challenges are multi-faceted, but one area that should not be ignored is who decides whether an interpreter is needed in the courtroom, and how that decision is made.

Oddly, the EU can use America’s example as both a guiding light and a cautionary tale. The American court system is bifurcated into a federal system and a state system. The federal system is generally considered a model of interpretation excellence. The state system is not.

*University of Mississippi

The laws involving interpreters are based around the Fifth and Sixth Amendments to the American Constitution, guaranteeing an impartial trial and due process of law, respectively. Interpreters are guaranteed because without them non-native English speakers cannot understand or respond to the charges against them, the most fundamental aspect of due process (Epstein and Walker, 2010: 517–139, 552–570).

In federal courts, these rights are most specifically enshrined through the FCI (2010: 28 U.S.C. § 1827 and 1828). This act states in part that a qualified interpreter's presence is guaranteed in 'all proceedings... conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court' for 'people who speak only or primarily a language other than the English language.' Further legislation has established criteria for certifying qualified court interpreters, leading to the extremely rigorous Federal Court Interpretation Exam (FCIE). The languages tested by the FCIE have varied over the years, but currently the most common language tested is Spanish, where the pass rate for legal interpreters is 4% (Bussade, 2010). The Act was designed with a specific subsection of cases in mind – federal criminal defense. Other cases, such as civil court cases, are not mentioned and non-native speakers continue to have less access to qualified interpreters in these cases than in criminal cases.

The push for access to interpreters at the state level has been more recent, even though the relevant laws are older. The Civil Rights Act of 1964 prohibits discrimination based on, among other things, national origin (Questions, 2011). The idea that this includes linguistic features such as language and accent has slowly gained strength, and in 2000 Executive Order 13,166 required that any recipient of federal funding – which includes most state and local courts – review and improve access for Limited English Proficiency (LEP) speakers (Executive Order 13,166, Title 3 C.F.R., 2001 comp signed 11 August 2000). Although this was a sweeping order covering a wide variety of funding recipients, the website set up to coordinate the response of these recipients (<http://www.lep.gov>) spells out the specific demands upon the legal system, saying that 'nearly every encounter an LEP person has with a court is of great importance or consequence to the LEP person... [The Department of Justice] emphasizes the need for courts to provide language services free of cost to LEP persons' (Questions, 2011). Since then, many state legislatures have passed statutes concerning court interpretation, most of which state that a judge may appoint an interpreter whenever necessary. Typical is Mississippi's law, saying 'a court interpreter shall be appointed when the judge determines, after an examination of a party or witness, that: (a) the party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or (b) the witness cannot speak English so as to be understood directly by counsel, court and jury. [...] The court should examine a party or witness on the record to determine whether an interpreter is needed if: (a) A party or counsel requests such an examination; (b) It appears to the court that the party or witness may not understand and speak English well enough to participate fully in the proceedings; or (c) If the party or witness requests an interpreter' (Miss. Code Ann. § 9-21-79, 1972, 2010). State laws are interpreted as applying to all cases, including civil cases, though they are not always carried out this way in daily practice. All of these state laws assume that the judge is capable of effectively assessing language ability.

Such laws may suggest to the layman that an interpreter is automatically received whenever a non-native speaker makes a request. However, many outside factors can influence the decision to engage or not engage an interpreter.

One is budgetary. Though many areas have access to interpreters of common languages such as Spanish, a qualified interpreter for a less common language may be hard to come by. The small town of Oxford, Mississippi, recently had a state-level trial-court case involving a Tagalog speaker; unsurprisingly, the court did not have a system in place to deal with the situation. Finding a qualified Tagalog interpreter would require paying not only interpreter fees, but also lodging and transportation (Bussade, 2010). Interpreters for extremely uncommon languages might need to be flown in from New York City or Los Angeles, and such spending in such a small town could create serious difficulties in taking care of other justice needs. For extremely small courts, even common languages can pose a problem. Spanish-speaking attorney Domingo Soto commended the integrity of the judges of the tiny town of Andalusia, AL, for consistently hiring him to drive the two hours from larger Mobile, AL, and translate, despite the cost to them; in some of the other small courts in the region, due process is ignored (Soto, 31 March 2011).

A second problem, sometimes related to the first, is time. The difficulties of securing an interpreter can affect another Constitutional right: the Sixth Amendment right to a speedy trial. This was another aspect of the problem for the small-town judge dealing with a Tagalog speaker – securing and transporting a qualified Tagalog interpreter could take an inordinately long time. In this case, the judge chose to allow an untrained family member to interpret (Bussade, 2010). Unfortunately, the quality of such interpretation ‘is quite poor indeed’ (Berk-Seligson, 2002: 9). One employee of a small Mississippi Justice Court said that, as far as she knew, no interpreters had ever been hired by the court; non-native speakers were expected to bring their own (Lafayette County Justice Court, 2011).

Even with Spanish interpretation, demand can outstrip supply. Judge Michael McMaken, a state district court judge in the larger city of Mobile, Alabama, speaks of the delay and difficulty in getting an interpreter, saying that the interpretation laws were designed for much larger and higher-level courts where single cases last for days or even weeks, and not for the hectic pace of district courts. A federal court that covers a state might have a few thousand cases a year; a municipal court may have tens of thousands, and scheduling problems grow proportionately. To try and balance the competing needs for understanding and speed, Judge McMaken also allows some family interpreting, assigns Spanish-speaking defendants as much as possible to Spanish-speaking attorneys, and has even learned some Spanish himself (2011).

The most qualified interpreters (i.e., those who have passed the FCIE or are otherwise certified) are most easily engaged for federal criminal cases. Federal criminal defense attorney Carlos Williams said that asking a judge for an interpreter is ‘a formality,’ and said they are provided as a matter of course whenever requested (2010). As noted, however, this request can cause difficulties in smaller courts. Moreover, in these small courts interpreters are not only harder to find, but may not be as qualified. Bilingual attorney Soto, for example, refers to a case he saw where the interpreter seemed to catch only every other word to explain why judges may prefer to continue in broken English rather than rely on possibly poor interpretation (15 Feb 2011).

These problems are common in small court systems. They are not, however, considered acceptable by the Department of Justice. United States Assistant Attorney General Thomas Perez addressed some areas where non-native speakers' needs are not being fully met in a letter to the courts:

Some courts only provide competent interpreter assistance in limited categories of cases [i.e., only in criminal cases, not civil]... Many courts... authorize one or more of the persons involved in a case to be charged with the cost of the interpreter... [in order] to discourage parties from requesting or using a competent interpreter. [...] Some states provide language assistance only for courtroom proceedings... DOJ continues to interpret Title VI and the Title VI regulations to prohibit, in most circumstances, the practices described above. (Perez, 2010: 2-3)

Subjective Factors in Language Evaluation

With this understanding of the legal framework of court interpretation and some of the factors that affect it in everyday use, we can move to a discussion of the kinds of linguistic factors that affect a judge's ability to evaluate language. It may seem that a court-ordered judgment of a non-native speaker's English ability should be a simple thing. Many factors, including phonology, prosody, grammar, and lexicon, influence accent, intelligibility, or both. Surely, then, one could judge ability by summing up such factors – lower intelligibility would be caused by less English-like use of speech features, and more English-like usage would cause a more English-like and less foreign-sounding accent with greater intelligibility. However, there is an underlying assumption here that does not stand up to scrutiny: the idea that the native speaker judging the speech is objective.

Research in the field of accent perception has shown that listeners are influenced not just by what they hear, but also by what they expect to hear. This phenomenon has been dubbed Reverse Linguistic Stereotyping (RLS) – when assumptions about a speaker's group affect judgment of that person's speech (Kang and Rubin, 2009: 441–456). In one groundbreaking study of RLS, a female Caucasian native English speaker was audiotaped giving a lecture, as if for a college course. Students were played this audiotape and shown a photograph of either a Caucasian woman or an East Asian woman. Students shown the East Asian photo reported hearing an East Asian accent in the recording and performed significantly worse on tests of the lecture material (Rubin, 1992: 511–531). Repetitions and variations on this experiment have shown similar results, including one with a recording of a male voice with a slight Dutch accent which was marked as having an East-Asian accent by students shown a photo of an East Asian man and as having a Standard North-American accent by students shown a photo of a Caucasian man (Rubin *et al.*, 1999: 1–12).

Other studies have shown other ways in which judgments of accent can be unrelated to reality. Niedzielski (1999: 62–85) played a recording of a native Detroit speaker to Detroit students, telling some the speaker was from Michigan and others that she was from Canada. The speaker, like most in the Detroit area, had an accent with certain vowels (particularly the /aw/ diphthong) affected by Canadian Raising, making them higher and more fronted than in the Standard variety of English. This feature is stigmatized by Detroit residents, who consider it a feature of Canadian, not Detroit, speech. Students given the recording with the Michigan label marked the vowels incorrectly, labeling them as Standard English vowels. However, students given the same recording and told it was

of a Canadian speaker marked the vowels correctly, hearing and noting the effects of Canadian Raising on the vowels.

These two studies show expectations influencing perception in opposite ways. When a speaker is expected to speak with a foreign accent, a foreign accent is heard; when a speaker is expected to speak with a standard accent, a standard accent is heard. This by itself suggests that subjective perception of accent is not reliable. Beyond that, two other major outside influences on language ability assessment deserve recognition – familiarity and motivation.

‘Familiarity’ here can mean familiarity with one particular variety of non-native English, which helps comprehension of that variety. It can also mean familiarity with non-native speakers of English in general. If raters of English-language ability are familiar with non-native speakers (for example, if they have non-native friends) they will tend to give higher ratings of comprehensibility and intelligibility in non-native English speech (Kang, 2008: 181–205). Rubin (nd) puts this into the context of one common college experience when he argues that more contact with non-native teaching assistants (‘sticking with’ their classes) leads to improved listening skills for students over the long term, and thus to better understanding of other non-native teaching assistants. Gass and Varonis (1984: 65–87) found that the single most important aspect of familiarity for facilitating conversation between native and non-native speakers was familiarity with topic; familiarity with the particular speaker, familiarity with the speaker’s variety of English, and familiarity with non-native speech in general all also made communication easier. This understanding, however, is not necessarily two-way. A judge who deals frequently with non-native speakers may grow more familiar with the patterns of non-native speech and find it easier to comprehend, but that doesn’t mean that the speaker is equally familiar with the patterns of English.

Another important non-speech factor in language assessment involves personal attitude towards the ‘communicative burden.’ Lippi-Green argues that

[w]hen speakers are confronted with an accent which is foreign to them, the first decision they make is whether or not they are going to accept their responsibility in the act of communication... [M]embers of the dominant language group feel perfectly empowered to reject their role, and to demand that a person with an accent carry the majority of responsibility in the communicative act. [...] Accent... can sometimes be an impediment to communication [.] In many cases, however, breakdown of communication is due not so much to accent as it is to negative social evaluation of the accent in question, and a rejection of the communicative burden. (Lippi-Green, 1997: 70–71)

This idea has been borne out by studies such as that of Lindemann (2002: 419–441), where native English speaking students were evaluated on their perceptions of Korean students and then set to do a task with native Korean speakers. Students with positive perceptions of Korean students used collaborative conversation strategies; or, to use Lippi-Green’s terminology, they took up their share of the communicative burden. These students completed the task successfully and also regarded themselves as successful. Students with negative perceptions of Korean students sometimes rejected their share of the communicative burden, using conversation strategies that Lindemann labels as problematizing (denigrating the contributions of their partners) and avoidance (using passive-listener strategies, such as leaving out information or failing to ask questions).

Those who used avoidance strategies failed at the task, and all of these students with negative perceptions, regardless of actual success or failure, regarded themselves as unsuccessful. This occurred despite the fact that the Koreans students were the same each time (that is, each Korean student completed the task twice). Motivation – the simple desire to communicate – leads to more successful and more satisfactory communication.

Judgments of language ability are not based purely on objective factors. Expectation, familiarity, and motivation all play a role in affecting assessment of foreign-accented speech. Judging language ability accurately is therefore very difficult, especially for the untrained.

Language Evaluation in American Courtrooms

To look at how judges in American courts evaluate language, I read hundreds of judicial opinions and found 36 that specifically mentioned how the court dealt with language proficiency. These opinions were found using the LexisNexis Academic's 'US & State Legal Cases' search engine to find opinions containing phrases such as 'English second language,' 'non-native speaker,' 'Limited English Proficient,' and 'no interpreter.' In order to make sure results were relevant in light of current legislation, all opinions used were from February 2009 to February 2011.

Of the 36 cases found, twenty-two were federal United States district court (U.S.D.C.) cases, two were U.S. circuit court (federal appeals) cases, ten were state appeals cases, and two were state Supreme Court cases. Most of the judges in these courts were not themselves evaluating a person's language proficiency, but were instead evaluating the evaluation of a lower court. These kinds of opinions are useful because they show not only how the trial court made an opinion, but also whether an appellate judge considers the decision acceptable. There are a few different standards an appeals court might use, but in these cases the appellate judges usually decided whether or not a trial court decision was 'clearly erroneous.' They do not retry the evidence themselves, but rather look to see if the lower court made an obvious error or abused its discretion. If the appellate court finds that a compelling argument can be made for either side of an issue, then the decision is not 'clearly erroneous' and is affirmed.

The higher-level court cases are also important because they may establish precedent. They result in a decision that judges of lower courts within their jurisdiction must abide by in later cases, also known as being binding on those courts. The United States Supreme Court is the highest court in the nation, meaning that its opinions are binding for all other courts in the U.S. Other courts have smaller regional areas where they establish precedent. For example, a state appeals court's decision may be binding for all the trial courts within a state. Of the cases included in this analysis, six establish precedent.

Not every case ends in an opinion. The type of court that tends to have the most difficulty properly using interpreters, state trial courts, is also a type of court that does not lend itself to opinions. For one, there is no lower jurisdiction to explain precedent to; for another, the cases are rarely controversial; for a third, as noted above, the case loads in such courts are far greater than in higher courts, leaving little time for writing. Despite the fact that it would focus my data on other courts, I chose to look at judicial opinions for two reasons. One was simple feasibility – I could not perform a nationwide study of trial court cases with Limited English Proficient speakers. The other was importance. Trial court judges can vary greatly, and a single decision made in a small court may not

make a major difference in the area. Higher court opinions make greater waves. Many lower court judges will read higher court opinions to understand the reading of the law, making sure that they themselves have a correct reading so that fewer of their cases will be overturned. Collections of opinions make up case law (as opposed to statutory law), which is often what lawyers build their cases upon.

Each of these cases involved a non-native English speaker and the question of whether that person spoke English well enough to legally take a particular action. Specific actions varied, and thus the standard used by judges varied as well. The two most relevant and largest groups were cases involving the ability to legally stand trial in English, which requires that the speaker be 'competent,' and the ability to legally waive a right, which requires enough English to make the waiver 'knowing, intelligent and voluntary.' These two kinds of cases were at the core of 24 opinions.

Of the 36 cases, in only 4 did the judge decide in favor of the non-native speaker. Two cases, one state appeals and one federal district case, help show why these cases so frequently go against the non-native speaker. When trial court cases are decided against a defendant, that person will often try to get the conviction overturned on any grounds they can think of, including claiming insufficient English ability.

Thus, for example, in *State v. Nieves* (Court of Appeals of Ohio, 8th District, 2010; binding on Cuyahoga County), the appellate court ruled against a non-native speaker who said he did not understand enough English to make a guilty plea, since it found that the trial court judge had apparently offered him an interpreter and he had refused, saying that 'he learned English after moving from Puerto Rico to New York when he was five years old; he took classes in English since he was seven years old; he went to school through the twelfth grade; he was employed locally in the criminal justice system as a corrections officer; and, he has been in an English-speaking environment for 28 years.'

In *United States v. Nguyen* (U.S.D.C. for the District of Massachusetts, 2009), the non-native speaker had not only told the trial court judge that he did not need an interpreter, but was provided with one anyway, who sat nearby in case he wanted something translated. His ineffective assistance of counsel claim was rejected.

These claims, which the judge in *Nguyen* described as 'disingenuous,' are not uncommon. An interpreter I interviewed said that circumspect attorneys will bring her to meetings and have her translate for non-native speakers who have been in the country for over twenty years and are completely fluent in order to try and stave off such litigation (Bussade, 2010). It is not unusual for people who have been ruled against in court to attempt to have the ruling overturned on any grounds they can think of, and in this analysis that manifests itself as stating a lack of understanding regardless of actual proficiency.

Another point worth making is that many of the criminal case opinions reference clear evidence that the non-native speaker was very likely guilty. In some of the cases involving a non-native speaker giving consent to search, for example, the search turned up damning evidence. The speaker would have a strong motive to exaggerate language troubles in order to get the evidence suppressed.

That said, there are some areas where judges lean on very subjective language evidence when they rule against non-native speakers. Statements of officers, detectives, and other officials that a non-native speaker spoke English well are used to counter state-

ments by the speaker suggesting lack of understanding. However, for much the same reasons that a speaker might want to exaggerate language problems, the police have a strong motivation in these cases to overestimate a speaker's ability, e.g. if a search turned up useful evidence, they would need to make the case that the search was legally consented to by the non-native speaker. To put it another way, one attorney I interviewed said that police tend to decide that a suspect speaks fluent English 'if he knows how to order a beer' (Soto, 2011).

In *Ivanova v. Astrue* (U.S.D.C. for the Northern District of Texas, 2010) and in the precedents cited by some judges, it seems that the level of English proficiency required to receive interpreter assistance must be at or very near zero. *Ivanova* is the only case here where a judge specifically evaluated someone's speech and found she did not speak enough English to take an action – the judges in the other three cases decided in favor of the non-native speaker shied away from such specifics and spoke in broader terms – and the person in question spoke only 'a few words' of English. In the precedent case *Gonzalez*, cited in *United States v. Putrous* (U.S.D.C. for Eastern District of Michigan, 2010), the non-native speaker's English was so poor that he 'initially did not realize he was attending his own trial.' *State v. Sun Yong Kish* (Court of Appeals of Minnesota, 2009) is a notable exception here, since the precedent cited, *Farrah*, was a case where a defendant's 'trouble understanding' and 'problems in communication' overrode an officer's statement that he felt he and the non-native speaker had understood each other.

In several cases, including *Suda v. Stevenson* (U.S.D.C. for the District of South Carolina, 2009), *United States v. Silva-Arzeta* (U.S. Court of Appeals, 10th Circuit, 2010), *State v. Lunacolorado* (Court of Appeals of Oregon, 2010), and *State v. Mohamed* (Court of Appeals of North Carolina, 2010), the judges state that such linguistic showings as answering yes/no questions, having telephone conversations (with no indication of complexity), and responding to simple orders indicate a level of English proficiency that includes the ability to comprehend what it means to waive a right. Similarly, in *Isanan v. Johnson* (U.S.D.C. for the Western District of Virginia, 2009) the judge states that because the non-native speaker was able to get a GED while in jail, '[c]ommon sense dictates [that he had] adequate proficiency in English' to do legal research. These cases show a blind eye to the enormous difference in complexity between conversational and legal English. Such rulings are examined in a concurring opinion of impressive linguistic depth in *Lunacolorado*. The judge writes:

There is a vast difference [...] between being able to carry on a conversation in English and being able to understand and waive constitutional rights. [...] The language used in courts and legal proceedings is much more complex than conversational English. [...]. Moore and Mamiya¹ cite studies finding that 'the difficulty of court language [is] at the 14th grade level for Spanish' and 'court language is at the 12th-grade level plus technical legal language.' [...] Even if defendant was able to carry on a conversation in English, there is no evidence in this record that defendant's understanding of English is at the 12th-grade level that Moore and Mamiya suggest is necessary for defendant to understand the officers' questioning and for defendant's subsequent waiver of his constitutional rights. However, there is...no requirement under Oregon law that a defendant understand English at the 12th-grade level. (*State v. Lunacolorado*, Court of Appeals of Oregon, 2010)

This opinion sums up a troubling aspect of these cases: knowledge of relatively simple English is assumed to imply understanding of legal-level English. In the clear majority of the cases seen here, if the non-native speaker spoke *some* English, then the defendant spoke *enough* English. The concept of familiarity, as discussed above, may be playing a role here in leading judges to underestimate the difficulty for others of a variety of speech they themselves are familiar with. This mingling of conversational and legal English is in stark contrast to the situations shown in the works of Lippi-Green (1997: 259–60, 160) and Nguyen (1993: 1325–1361), whose research involves non-native speakers in Equal Opportunity Employment cases seeking approval of their English ability. In these cases, the courts rarely or never conflate conversational and business English. Speaking conversational English does not lead to an assumption of enough English skills for the workforce, even though (depending on the job) legal English is likely to be much more difficult than English in the workplace and is less likely to be similar to the English learned at school or in daily life. The lack of objective guidelines (Lippi-Green discusses 31 cases where intelligibility ‘was a matter of opinion only’), means it is possible that non-native speakers might be found poor enough at English to bar them from jobs, but good enough to not need an interpreter in court!

The most recent court evaluations may show evidence that these problems are being addressed. The ruling in *Narine v. Holder* (U.S. Court of Appeals, 4th Circuit, 2009) referenced only a ‘non-native English speaker,’ without specific notes of very low proficiency. Even more unusual, in *Ling v. State* (Supreme Court of Georgia, 2010) the court found that conflicting evidence was enough to issue a call for a new trial, even though the dissenting judge listed evidence similar to that in many of the other cases here when he argued that the non-native speaker had been competent to stand trial with no interpreter. These two cases may show signs of a shift away from previous standards, where conflicting evidence generally led to a decision of competency, and towards a new standard requiring more evidence before a non-native speaker is considered capable of taking a legal action without an interpreter present.

Methodology Issues and Further Research

My research was constrained by its use of judicial opinions, and especially by finding them through LexisNexis. There was no way to search for every possible phrase a judge could use to reference language ability. Using ‘key phrases’ to find opinions led to a sizable group of relevant cases, but many other relevant opinions that used different terminology were left out. Even some of the cases given here had further appeals that did not come up in the searches. Most notably, in *Ramos-Martinez v. United States* (U.S.D.C. for the District of Puerto Rico, 2009), the judge stated that he knew and trusted the ‘seasoned’ previous judge and lawyer, and therefore the non-native speaker must have spoken fluent English. This appalling judgment was taken to task, reversed, and remanded for further proceedings in a later appeal which did not show up in my original searches.

Furthermore, while these opinions are useful in a broader view of the law, a better understanding of how language evaluations are made in the courtroom would be gained by traveling to state district courts around the nation and recording such evaluations as they occur.

Finally, this study was hampered by my lack of legal knowledge. In the same way that I have argued that judges are not linguistically nuanced, I am not legally nuanced, and there may be aspects to this problem that I am simply not seeing.

The judge's statement in *Lunacolorado* that non-native speakers need a 12th-grade level of English to understand legal language suggests an area that deserves further consideration: many native speakers of English do not have this level of schooling and may therefore be similarly lost during legal proceedings. Native English speakers may speak dialects completely different from the professional dialect used in the courtroom, and the subjective evaluation of understanding may apply to them as well. Further work on the broader effect of language issues on defendants is merited.

Conclusions

If speakers are waiving rights without knowing why or going through trials without understanding their content, justice is not being served. However, a standardized system of testing or evaluation would face serious problems. In a system where getting an interpreter can be a major time and budget concern, attempting to have trained linguists evaluate every non-native speaker would be impractical. And although the use of objective English tests such as the TSE would help in the employment cases discussed in Nguyen and Lippi-Green, they would be less helpful in the legal context discussed here, where a non-native speaker with a strong motive for showing lack of understanding could purposefully fail. An experienced judge is surely the most straightforward means of separating the fraudulent cases from the meaningful. However, this means that judges must step up their linguistic understanding.

The simplest answer is to educate judges on the issues, for example by presenting at judiciary conferences. This is the approach used by Dr Bussade (2010), who suggests that before deciding if a person needs an interpreter the judge should ask questions requiring more than a yes/no answer – asking ‘Where were you born?’ rather than ‘You were born in Brazil, correct?’, for example, elicits an answer that gives a better indication of English skill (even better is ‘Tell me about your hometown’).

It is also important for judges to realize that legal language is more complex and less commonly taught than conversational English, and that knowledge of the latter does not prove knowledge of the former. Judges are trained in law, and so used to the complexities of legalese that they may not always realize just how bizarre the language can sound to the layman, much less to the foreign layman. Even in cases where judges do make an excellent effort to simplify legal matters, as in *Suda*, the non-native speaker may not understand; simple yes or no answers to complex questions do not by their nature ‘make[] it [...] clear’ that a non-native speaker understands English. Asking the speakers to rephrase their rights in their own words would leave much less doubt.

A basic shift in perspective, pushed along by the Department of Justice and the executive branch, seems to be in its early stages. In *Ling v. State*, a case that caused a great deal of controversy, the Supreme Court of Georgia says that a list of evidence similar to that of many other trials is ‘conflicted’ and does not clearly show English language ability. Greater pressure has been placed on the lower courts to show that a non-native speaker can fully understand and participate in the legal process before denying an interpreter. I welcome this development. Judges are not trained in language evaluation, and attempting to bring trained language evaluators to every case would be nigh-on im-

possible. Thus, a little humility about the high likelihood of subjective factors affecting judgment is necessary. If some evidence gives the impression that a non-native speaker has a high level of English ability and other evidence suggests the opposite, greater weight should be given to the latter; currently, it seems the former is worth more.

A recent development is the rise of the federal Telephone Interpreting Program (TIP), where non-native speakers are given small microphones and earpieces for live interpretation and have their own speech interpreted through a speaker system to the court. These systems are currently more likely to be in place in federal courts, and not in state courts (Soto, 31 March 2011). Many interpreters at the IAFL conference spoke out against telephone interpreting, and it certainly has its flaws. Technical problems remain serious, and such interpretation is not enough for every situation; in trials where many people are speaking, for example, a telephone interpreter with no visual cues may become confused as to who is speaking when (Cruz *et al.*, 2009). However, if more state courts can insert these systems, I believe that they could do great good. The choice currently is not usually between a family interpreter or a certified, competent live interpreter; it is between a family interpreter or none at all. Adding a third option via the TIP has been an important step forward in access to interpreters, and increasing the reach of the program to smaller courts would increase non-native speakers' access to due process.

Redrawing the line between 'some' English ability and 'enough' English ability may lead to fluent speakers receiving interpreters they do not need, but that outcome is surely better than speakers who do need interpreters failing to receive one. The level of English ability required to deal with legal issues should be considered higher than that shown in conversational English. Greater use of qualified interpreters both in person and through the Telephone Interpreting Program will lead to greater access to justice for non-native English speakers.

Notes

¹The judge refers to Mamiya as if he were one of the editors of *Immigrants in Courts*. He is not, but Moore and Mamiya collaborated on the included article "Interpreters in Court Proceedings" (29–45), which contains the reference to 12th-grade level English being required for the courtroom.

Cases cited

All cases were accessed through the LexisNexis database.

Search term 'English second language'

Akhavain v. Argent Mortg. Co. No. 5:09-cv-00634 RMW. U.S.D.C. for the Northern District of California. November 2009. 2009 U.S. Dist. LEXIS 102666.

Fessehazion v. Hudson Group. 08 Civ. 10665 (BSJ) (RLE). U.S.D.C. for the Southern District of New York. August 2009. 2009 U.S. Dist. LEXIS 74443.

Gonzales v. Martel. NO. CV 08-4087-AHS (MAN). U.S.D.C. for the Central District of California. December 2009. 2009 U.S. Dist. LEXIS 126547.

Isanan v. Johnson. Case No.7:09CV00411. U.S.D.C. for the Western District of Virginia. October 2009. 2009 U.S. Dist. LEXIS 101174.

Livsey v. Adventist LaGrange Mem'l. Case No. 09 CV 3129. U.S.D.C. for the Northern District of Illinois. July 2010. 2010 U.S. Dist. LEXIS 69687

People v. Charles. 957/2007. Supreme Court of New York. June 2009. 2009 N.Y. Misc. LEXIS 1835.

People v. Stewart. A121972. Court of Appeals of California, 1st Appellate District. January 2010. 2010 Cal. App. Unpub. LEXIS 321.

State v. Nieves. No. 92797. Court of Appeals of Ohio, 8th Appellate District. February 2010. 2010 Ohio App. LEXIS 448.

State v. Sanjeep Shrestha. A09-1424. Court of Appeals of Minnesota. May 2010. 2010 Minn. App. Unpub. LEXIS 460.

Suda v. Stevenson. Civil Action No. 3:09-1077-MBS-JRM. U.S.D.C. for the District of South Carolina. November 2009. 2009 U.S. Dist. LEXIS 124125.

Tumbaco Chavez v. Belleque. Civil No. 08-287-BR. U.S.D.C. for the District of Oregon. January 2011. 2011 U.S. Dist. LEXIS 8152.

United States v. Diaz. CASE NO.: 1:09cr9-SPM. U.S.D.C. for the Northern District of Florida. October 2009. 2009 U.S. Dist. LEXIS 106600.

United States v. Resendez-Sanchez. No. CR S-05-0323 GEB DAD P. U.S.D.C. for the Eastern District of California July 2010. 2010 U.S. Dist. LEXIS 72164.

Yazzie v. Astrue. CIV 08-8059-PCT-MHB. U.S.D.C. for the District of Arizona. September 2009. 2009 U.S. Dist. LEXIS 90295.

Search term 'non-native English'

State v. Cruz. Appeal No. 2009AP2106. Court of Appeals of Wisconsin, District One. December 2010. 2010 Wisc. App. LEXIS 1035.

Narine v. Holder. No. 08-1299. U.S. Court of Appeals, 4th Circuit. March 2009. 2009 U.S. App. LEXIS 5336.

United States v. Sylla, et al. 08-CR-906(KAM). U.S.D.C. for the Eastern District of New York. February 2010. 2010 U.S. Dist. LEXIS 13056.

Search term 'Limited English Proficient'

Ling v. State. S10G0460. Supreme Court of Georgia. November 2010. 2010 Ga. LEXIS 890.

Lopez v. Bay Shore Union Free Sch. Dist. 09-CV-502 (ADS) (ARL). U.S.D.C. for the Eastern District of New York. November 2009. 2009 U.S. Dist. LEXIS 104894.

United States v. Silva-Arzeta. No. 07-5140. U.S. Court of Appeals, 10th Circuit. April 2010. 2010 U.S. App. LEXIS 8660.

Search term 'no interpreter'

Avichail v. St. John's Mercy Health Sys. Case No. 4:09CV00069 ERW. U.S.D.C. for the Eastern District of Missouri. January 2011. 2011 U.S. Dist. LEXIS 1493.

Bui v. Astrue. Civil No. 08-1279-CL. U.S.D.C. for the District of Oregon. July 2009. 2009 U.S. Dist. LEXIS 80928.

In re I.R.T. NO. COA10-790. Court of Appeals of North Carolina. December 2010. 2010 N.C. App. LEXIS 2322.

Ivanova v. Astrue. Civil Action No. 3:09-CV-2349-K (BH). U.S.D.C. for the Northern District of Texas. May 2010. 2010 U.S. Dist. LEXIS 54588.

Kakal v. State. No. 0-779/09-1422. Court of Appeals of Iowa. February 2011. 2011 Iowa App. LEXIS 90.

- Maldonado v. United States*. No. C 08-4074-MWB, (No. CR 05-4084-MWB). U.S.D.C. for the Northern District of Iowa. January 2010. 2010 U.S. Dist. LEXIS 3676.
- People v. Guevara*. B216485. Court of Appeals of California, 2nd Appellate District. July 2010. 2010 Cal. App. Unpub. LEXIS 5955.
- Ramos-Martinez v. United States*. Civil No. 08-1388(JAF), Crim. No. 01-638. U.S.D.C. for the District of Puerto Rico. May 2009. 2009 U.S. Dist. LEXIS 38774.
- State v. Lunacolorado*. A139805. Court of Appeals of Oregon. November 2010. 2010 Ore. App. LEXIS 1431.
- State v. Mohamed*. NO. COA09-943. Court of Appeals of North Carolina. July 2010. 2010 N.C. App. LEXIS 1270.
- State v. Sun Yong Kish*. A08-1342. Court of Appeals of Minnesota. August 2009. 2009 Minn. App. Unpub. LEXIS 884.
- United States v. Garcia*. CR 05-30128. U.S.D.C. for the District of South Dakota, Central Division. October 2009. 2009 U.S. dist. LEXIS 99919.
- United States v. Nguyen*. CRIMINAL NO. 05-10277-PBS. U.S.D.C. for the District of Massachusetts. March 2009. 2009 U.S. Dist. LEXIS 27604.
- United States v. Putrous*. Criminal No. 03-80743, Civil No. 08-13047. U.S.D.C. for Eastern District of Michigan. September 2010. 2010 U.S. Dist. LEXIS 94507.
- United States v. Thepmontry*. CR 03-30103-01. U.S.D.C. for the District of South Dakota, Central Division. December 2009. 2009 U.S. Dist. LEXIS 116755.
- Zeciri v. Luna*. Case No. 3:08-cv-001-JWS-JDR. U.S.D.C. for the District of Alaska. September 2010. 2010 U.S. Dist. LEXIS 105318.

References

- Berk-Seligson, S. (2002). *The Bilingual Courtroom: Court Interpreters in the Judicial Process*. Chicago: University of Chicago Press, 2nd ed. edition.
- Bussade, J. (2010). Personal Communication. Personal interview.
- Cruz, R., Dann, R., Estill, J., Festinger, N., Feuerle, L., Framer, I., Harpstrite, P., Kaufman, K., Kelly, N., Lindquist, P., Oakes, G., Palacio, M. and Zarenda, N. (2009). NAJIT Position Paper: Telephone Interpreting in Legal Settings.
- Epstein, L. and Walker, T. (2010). *Constitutional Law for a Changing America: Rights, Liberties, and Justice*. Washington, DC: CQ Press.
- Executive Order 13,166, Title 3 C.F.R., (2001 comp., signed 11 August 2000). Improving Access to Services for Persons with Limited English Proficiency.
- FCI, (2010). Federal Court Interpreters Act of 1978, 28 U.S.C. § 1827 and 1828.
- Gass, S. and Varonis, E. M. (1984). The Effect of Familiarity on the Comprehensibility of Non-Native Speech. *Language Learning*, 34(1), 65–87.
- Kang, O. (2008). Ratings of L2 Oral Performance in English: Relative Impact of Rater Characteristics and Acoustic Measures of Accentedness. *Spaan Fellow Working Papers in Second or Foreign Language Assessment*, 6, 181–205.
- Kang, O. and Rubin, D. (2009). Reverse Linguistic Stereotyping: Measuring the Effect of Listener Expectations on Speech Evaluation. *Journal of Language and Social Psychology*, 28(4), 441–456.
- Lafayette County Justice Court, (2011). Personal Communication. Telephone interview.

- Lindemann, S. (2002). Listening with an attitude: A model of native-speaker comprehension of non-native speakers in the United States. *Language in Society*, 31(3), 419–441.
- Lippi-Green, R. (1997). *English with an Accent: Language, ideology, and discrimination in the United States*. New York: Routledge, Inc.
- McMaken, M. (2011). Personal Communication. Telephone interview.
- Miss. Code Ann. § 9-21-79, 1972, (2010). Miss. Code Ann. § 9-21-79, 1972.
- Nguyen, B. B.-D. (1993). Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Non-Native Speakers. *California Law Review*, 81, 1325–1361.
- Niedzielski, N. (1999). The Effect of Social Information on the Perception of Sociolinguistic Variables. *Journal of Language and Social Psychology*, 18(1), 62–85.
- Perez, T. (2010). Language Access Guidance Letter to State Courts.
- Questions, (2011). Questions and Answers.
- Rubin, D. (1992). Nonlanguage factors affecting undergraduates' judgments of nonnative English-speaking teaching assistants. *Research in Higher Education*, 33(4), 511–531.
- Rubin, D. (n/d). Help! My Professor (or Doctor or Boss) Doesn't Talk English.
- Rubin, D., Ainsworth, S., Cho, E., Turk, D. and Winn, L. (1999). Are greek letter social organizations a factor in undergraduates' perceptions of international instructors? *International Journal of Intercultural Relations*, 23(1), 1–12.
- Soto, D. (2011). Personal Communication. Telephone interview.
- Williams, C. (2010). Personal Communication. Personal interview.