And Justice For all: Non-Native English Speakers in the American Legal System

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AND JUSTICE FOR ALL
NON-NATIVE ENGLISH SPEAKERS IN THE AMERICAN LEGAL SYSTEM

by
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of the requirements of the Sally McDonnell Barksdale Honors College

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Abstract

One of the most important rights enshrined in the American Constitution is the right to due process of law. However, the execution of this right has been sporadic, and some groups have been consistently disadvantaged. Speakers of English as a second language make up one such group, especially limited English proficiency (LEP) speakers. LEP speakers’ access to due process took a step forward with the 1978 Court Interpreters Act, which guaranteed interpreters for anyone who “speaks only or primarily a language other than the English language.” However, decisions as to who speaks “primarily” a foreign language and who speaks English were left to the discretion of the presiding judge. Today, this means that non-native English speakers in higher-level federal courts will almost always receive highly qualified interpreters in order to ensure the fairest trial possible. At lower levels, however, judges are likely to rule that LEP speakers know enough English to represent themselves effectively, without interpreter assistance.

How do judges make these decisions? In this paper, I analyze three dozen judicial opinions, looking at what judges say when they make and explain choices about language proficiency. Their choices can be subjective, and sometimes imply that conversational English and legal English are equally difficult and that knowledge of the former implies knowledge of the latter. The common decision that LEP speakers are capable of dealing with the courtroom is worrying when seen in light of the work of Rosina Lippi-Green and Beatrice Bich-Dao Nguyen showing that judges often rule that LEP speakers cannot be understood in educational or media environments.
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List of Abbreviations

LEP -------------- Limited English Proficient
NNS ------------- Non-Native Speaker
FCIE ------------ Federal Court Interpretation Exam
TIP -------------- Telephone Interpreting Program
L1 -------------- First Language
L2 -------------- Second Language
RLS ------------ Reverse Linguistic Stereotyping
TOEFL ---------- Test of English as a Foreign Language
EOE ------------ Equal Opportunity Employment
TSE ------------ Test of Spoken English
U.S.D.C. ------- United States District Court
Section 1: Introduction

Language is the backbone of law. At the beginning of a criminal case, a suspect must understand the *Miranda* rights; at the most common end of such cases, a guilty plea, defendants must understand that they are giving up the right to a jury trial. At these two points and at every point in between, as well as in other types of legal issues, people involved in the justice system must deal with extremely complicated language in a situation where lack of understanding leads to serious problems. For those who do not speak English, these problems are exacerbated.

Census data from 2000 indicated that nearly one in five Americans spoke a language other than English at home. Half of those, one in ten Americans, reported that they spoke English “less than very well” (Shin). For these people, navigating the judicial system is even more fraught with difficulty than it is for English speakers. These difficulties can be mitigated with the help of a skilled interpreter. Not everyone who wants an interpreter, however, gets one. Judges use their discretion to decide who needs an interpreter and who does not.

In this thesis I make the case that although judges are portrayed by society and by themselves as objective evaluators of all things, including language ability, the truth is that judges are subjective evaluators of language because people in general are subjective evaluators of language. The cases I analyze show that although some legal claims made by non-native speakers regarding language capability are disingenuous, some that do
seem meritorious show that judges may evaluate language ability in a way that is not linguistically nuanced, often to the detriment of non-native English speakers.

As will be shown in section 2, judges have an enormous amount of power in situations involving non-native speakers (NNSs) of English. American laws say that a judge can assess the English skills of a NNS. These laws suggest that receiving an interpreter should be de rigueur for a NNS, but there are many outside factors that affect whether a NNS will be given an interpreter or not. The assumption of the judge’s capability to evaluate English language capability is part of the greater conceit of our justice system: judges are expected to be able to assess all courtroom matters knowledgably and impartially. The foibles of the legal system — that human judges make mistakes, misunderstand, and are subjective — are downplayed in communication from the courts, with one prominent example being the rhetorical style of judicial opinions. Giving off such an impression of knowledgeable authority adds weight to a judgment of language that may not fully grasp linguistic subtleties.

Many linguistic factors make up the difficulty of assessing language skill, especially in the courtroom, and some of these are addressed in section 3. First, NNSs’ English will (depending on skill level and age of learning) be affected in phonology, prosody, grammar, and lexicon. Though the first is most important in terms of accent, the other three matter more for intelligibility, and evaluations can go awry if these building-blocks of non-native speech are not understood in the appropriate linguistic contexts. Second, people are subjective in their judgments of language — expectation, familiarity, and motivation all play a role in making evaluations unreliable. Even objective language testing companies, who have spent decades researching better means of evaluation, have
yet to make a test that is entirely useful, entirely objective, and entirely accurate. One group of cases that ties these problems to courts is Equal Opportunity Employment cases, where judges sometimes subjectively evaluate NNS English ability as very poor. For the opposite type of case, such as the ones I analyze, where English ability may be subjectively evaluated as very high, one more point is important: legal language is an extremely complicated variety of English, and not one that English learners are likely to be familiar with.

In section 4, I analyze 36 judicial opinions for cases involving a judge’s evaluation of language. These are grouped according to the legal standard of language ability required – having enough English skill to “knowingly, intelligently, and voluntarily” waive the *Miranda* rights, for example, or having language difficulties amount to an “extraordinary circumstance” that merits extra leeway for legal deadlines.

Section 5 notes first that some of these cases stem from highly questionable claims of English language difficulty on the part of the NNS. In some others, however, judges use very subjective means to assess language ability and equate knowledge of conversational English with knowledge of legal English. This section also looks at the weak points of this thesis, discusses areas for further research, and considers ways of dealing with the judicial problems found in the analysis.
Section 2: The Law

2.1 Rules and Regulations

Laws involving court interpreters have their basis in Constitutional rights. Without an interpreter, Limited English Proficient (LEP) speakers are denied their rights under the Fifth and Sixth Amendments to an impartial trial and due process of law, respectively, because they cannot understand or respond to the charges against them, the most fundamental aspect of due process.

In federal courts, these rights are most specifically enshrined in law through the Federal Court Interpreters Act of 1978 (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 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 is 4% (Bussade). 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 NNSs continue to have less access to qualified interpreters in these cases than in criminal cases.

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1 These two amendments apply directly to federal courts, and are incorporated and apply to the state courts through the Fourteenth Amendment.
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\(^2\) ("Questions"). 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 LEP speakers (Executive). Although this was a sweeping order covering a wide variety of funding recipients, the website set up to coordinate the response of these recipients\(^3\) 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"). 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

\(^2\) This thesis discusses only purely linguistic questions; the separate question of cultural differences, a major problem for immigrants, is not addressed. As an example, in America, if two motorists collide and one apologizes to the other, that apology would likely be taken as evidence of guilt in court and could result in a higher sentence; the person would have been better off remaining silent. In Japan, however, \textit{failing} to apologize can be considered a sign of lack of repentance and result in stricter punishment. Such issues underscore the importance of understanding the right to the guidance of counsel.

\(^3\) www.lep.gov
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). 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 laws assume that the judge is capable of effectively assessing language ability. Alabama’s court interpreter law is notable for referencing the possibility of differing opinions on the part of the judge and the LEP speaker: “If the court has reason to believe that the defendant, juvenile, or witness requesting an interpreter is capable of speaking and understanding the English language, the court may require that the requestor provide reasonable proof to the court of his or her inability to speak or understand the English language” (2000 Ala. Acts 277). Exactly what kind of proof this might be, however, has yet to be seen; one attorney said he could not imagine how this statute would come up in the courtroom, and referred to it as “nonsensical” (Soto (2)).

Such laws may suggest to the layman that an interpreter is automatically received whenever a NNS makes a request. However, our system does not provide an interpreter for all speakers who believe they need one. 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
Figure 1.1: The American Court System

place to deal with the situation. Finding a qualified Tagalog interpreter would require paying not only interpreter fees, but also lodging and transportation (Bussade).

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 (2)).

This problem is being mitigated, though not entirely solved, with the rise of the federal Telephone Interpreting Program (TIP), where LEP speakers are given small microphones and earpieces for live interpretation and have their own speech interpreted.
through a speaker system to the court. 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.). These systems are also currently more likely to be in place in federal courts, and not always in state courts (Soto (2)). On the whole, however, 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.

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, even though the quality of such interpretation “is quite poor indeed” (Berk-Seligson 9; Bussade). One employee of a small Mississippi Justice Court said that, as far as she knew, no interpreters had ever been hired by the court; NNSs were expected to bring their own (Lafayette).

Even with Spanish interpretation, demand can outstrip supply. Judge Michael McMaken, a state district court judge in the larger city of Mobile, Alabama, speaks similarly 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.

The fact that different types of courts have different needs was repeated by every person I spoke with. 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. As noted previously, 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 (Soto (1)).

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 NNS needs are not being fully met in a 2010 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.

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 analysis of the role these laws give judges, how this is related to the overall image of judges in the legal system, and what kinds of linguistic factors affect a judge’s ability to evaluate language.

2.2 The Expert in Court

The mission statement of the Department of Justice is “to ensure fair and impartial administration of justice for all Americans” (“About DOJ”). Such application of justice in law rests on the idea that the judge can make fair and impartial decisions, no matter what is being judged. However, a judge’s main area of expertise is the law itself, and judges cannot be expected to become experts in every possible area that may surface in a case, such as English language ability evaluation. They are expected to rely on expert witnesses in areas outside their purview, but they are also expected to be able to evaluate those same experts. Their evaluations, however, can be flawed or incorrect, and the results can be miscarriages of justice.

Decisions about who needs an interpreter and who does not are left entirely in the hands of the presiding judge. Considering the difficulties outlined above for getting a translator, this allocation of authority seems reasonable; attempting to have a language evaluator come in for every non-native speaker in the courtroom would lead to similar time and budget problems, whereas the judge is already on hand. And sometimes the
decision is simple – a person may speak no English at all, or may be completely fluent. But these two possibilities constitute two ends of a spectrum, and more commonly a speaker will fall somewhere between the two. Many LEP speakers can speak and understand some English. Judges must then decide if the speaker understands enough English to legally take an action, for example to stand trial with no interpreter. Judges are assumed to be able to effectively evaluate language proficiency, a task that, as Berk-Seligson says, “probably only a trained linguist could properly make” (35).

Linguistics in its modern form began developing in 1950s and 1960s, making it a relatively young science. Expert linguists have only in recent years begun appearing in court with any regularity. Since all people use speech, we tend to take our understanding of it for granted; showing that the knowledge of the expert linguist goes beyond an everyday understanding and brings new information to the court is imperative. Linguists are frequently called on for cases in trademark law, for example to debate whether similarities in words or phrases are enough to cause copyright infringement. In criminal cases, linguists may assist in evaluating recordings of interrogations or undercover police work. Linguists are sometimes even called upon to evaluate foreign language or English as foreign language speaking ability, usually in cases of employment discrimination^4 (Solan and Tiersma 26-32).

Judges are assumed to be able to act as objective evaluators of language ability. There is a general assumption of the judge as objective – a fair and just judge is one of the foundations of the legal system. Judges are, however, human, and their impartial image is cultivated by the judicial system and by judges themselves despite their

^4 Though in such cases the linguist's evidence may be ignored – see Lippi-Green, 160, for judges discounting linguistic testimony. This will be explored further in section 3.
fallibility. Judges may make mistakes or be subjective in their decisions, but such foibles are sharply downplayed in, for example, judicial opinions\(^5\). A judge’s opinion, when written,\(^6\) comes at the end of a case and explains the facts laid out and how the judge analyzed them and came to a conclusion. It is based around what linguists refer to as a speech act.

Speech act theory is an area of linguistics dealing with words that accomplish something. This can be done directly using a class of verbs known as performatives. For example, saying “I promise to bring you an orange” creates a promise, and the verb “to promise” is a performative. Speech acts can also be made indirectly: “I will bring you an orange” contains no performative verbs, but is understood as a promise nonetheless (Searle).

The conditions that affect whether or not a speech act is done properly are called felicity conditions. For example, if a promise is made, but the speaker has no intent to fulfill the promise, that promise is infelicitous. If a promise is not of a positive action, it is also infelicitous – saying “I promise to break your kneecaps” is an infelicitous promise, but a felicitous threat (Searle).\(^7\)

A judge’s opinion often contains several explicit performative speech acts, including “affirm,” “uphold,” “deny,” “dismiss,” “find,” and “grant.” I use here *decrees* as

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\(^5\) The legal system differentiates between memorandum decisions, memorandum opinions, and opinions, based on their ability to be used as precedent. I use “opinion” or “judicial opinion” to refer to all of these.

\(^6\) Not every case ends with an opinion. They are more common in higher courts than in lower, and are more likely if there is controversy about the ruling. Even the U.S. Supreme Court has been known to simply hand down a decision without explanation from time to time. See section 4 for further discussion.

\(^7\) This definition of speech acts is based on Searle’s *Speech Acts*, a groundbreaking work but one which is now considered to be an oversimplification. For our purposes here, however, it is a satisfactory account.
a term encompassing these several speech acts to mean the speech act found at the end of
a given opinion. The felicity conditions associated with a legal decree include:

1) A social structure (the legal system) has invested the Speaker with the power
to decree after deeming the Speaker worthy

2) The decree takes place in the environment and with the procedure deemed
correct by the social structure

3) An Event has taken place in the past that at least some Hearers consider
negative

4) Two Hearers (or groups of Hearers) present their positions on an Event
(usually, one considers the Event negative and the other considers it neutral or
positive, or there is contention over whether the Event occurred)

5) The Speaker’s decree is based on a full understanding of the Hearers’
positions

6) The Speaker’s decree is made neutrally, by objectively judging these positions
and the laws and precedents related to them

The first point is important in that it distinguishes a decree from the more common order.
An order is given to a person or group of people who then have the possibility of
disobedience; people follow an order based on their own will. A judge’s decree is given
not just to the people it affects, but to the institution that will execute it and (to a lesser
degree) to the community at large. The social structure enforces the decrees the judge
gives, and the people’s following is not necessarily based on their own will.

8 I use decree because terms such as sentence have specific connotations (one sentences punishment to
be meted out, but does not sentence whether something is upheld) and pronounce is used as the
general term for a wider variety of authoritative speech than I am covering here.
Points 5 and 6 are important for our understanding of the problems arising with language issues — a decree should only be given if the judge has a full understanding of the problems and has neutrally decided between them. The writing of an opinion implies that such is the case. Because judges are human, perfect understanding and perfect neutrality are not possible. The law works, however, by assuming these two things are as perfect as can be, and opinions are set up to convey an impression of objective authority to the reader.

Opinions are based around the decree, which is found in the last few sentences. The opinion is set up to show that the decree satisfies its felicity conditions, and usually has at least four parts:

1) Heading: the names of the plaintiff(s) and defendant(s), case number, court, the dates, the names of any attorneys, and the name of the judge (conditions 1 and 2)

2) Background: a description of the proceedings of the court and of the evidence and statements of the two parties (conditions 3, 4, and 5)

3) Analysis: the judge’s consideration of the statements made and of applicable law (condition 6)

4) Decree

Judges can supplement these sections, for example by subdividing the analysis into multiple parts or by adding a section with quotations from law.

Judges use a variety of grammatical and stylistic choices to help give the impression that they have fulfilled the felicity conditions thoroughly (for example, to give the impression that they have accurately evaluated language ability). In particular, they
use forms that add to the sense of authority and neutrality in the opinion. One example of this, discussed in Tiersma, is the use of “The Court” rather than “I,” which brings up images of the full legal institution, rather than a single person (68). A similar feeling is created through use of performatives in the passive, as in “[...] a certificate of appealability is denied” (*Suda v. Stevenson*), which suggests a force of nature rather than a person’s decision. Far less common are active performatives, such as “[...] the Court will dismiss the complaint” (*Rimal v. Gunawan Kuntho Wibisono*). Completely lacking are hedges such as “I think...” (or “The Court thinks...”). Together, these aspects create a powerful air of impartial authority, and add greatly to the sense of neutrality and knowledgeable ness, regardless of the actual content of the opinion.

Authority is also shown stylistically in the format of the decree itself. The decree is usually separate from the rest of the opinion, marked with a separate heading, and formatted to stand out. One decree, from *Pourkay v. City of Philadelphia*, reads:

ORDER

AND NOW this 23rd day of June 2009, upon consideration of Defendant’s motion for summary judgement (doc. no. 36) it is hereby ORDERED that the motion shall be GRANTED

IT IS FURTHER ORDERED that the case shall be marked CLOSED

AND IT IS SO ORDERED.

Though most of the opinions do not have quite this level of capitalization and bolding, they do often have at least one of the two. The effect is dramatic, though such ornate style seems to be confined to lower courts – the Supreme Court of the United States tends to

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9. This discussion is based on a preliminary study of the language of 12 judicial opinions (listed in the Cases Cited section). In the opinions used for the main analysis, one of the judges does write in the first person singular.
give its decrees in a single italicized phrase, often one word. In either case, the point is clearly that the decree is serious and felicitous. The opinion as a text is built around proving that the felicity conditions have been fulfilled and the decree is thus unimpeachable.

These judges can, however, be mistaken. In her analysis of Equal Opportunity Employment cases, for example, Lippi-Green discusses a trial where the judge stated that a speaker of Hawai’ian Creole could reasonably be passed over for promotion because he believed “there is no race or physiological reason why [the man] could not have used standard English pronunciations” (quote from case at Lippi-Green 166). This is simply an incorrect statement about language, as will be seen in section 3.2. Other cases of this type are discussed in section 3.5.

These judges can also be subjective. The analysis of this work, in section 4, finds that there is great variety in what judges consider acceptable evidence of English language ability or lack thereof. Some judges have solid proof of language skills; others make decisions based on questionable evidence and subjective opinion.
Section 3: The Linguistics

3.1 Definitions

Having looked at one way in which judges establish their authority to judge language (as well as other courtroom matters), we move on to the nuances of linguistics that affect how language is and should be evaluated. These are nuances judges may not be aware of because they are not trained in linguistic language assessment. In everyday speech, words like “accent,” “dialect” and even “language” itself are usually tossed around without much delineation. Even in linguistics, these words can be rather vague, but for our purposes a dialect is a version of a language that marks a particular group, whether by region, social status, profession, age, or any other marker. But what is a language? In everyday speech, “language” is often used to mark the standard version, with “dialect” referring to supposedly incorrect offshoots. Linguistically, however, this is not true – all dialects, including stigmatized ones, operate according to their own logical rules and grammars. To the linguist, all dialects are created equal, including the standard. Because “dialect” has negative connotations, linguists will often use the more neutral term “variety” instead to mean all versions of a language, standard or not. “Language” is then an umbrella term for a group of varieties – for example, the German language includes varieties like Moselle Franconian, Berliner German, Swiss German, and High German (Russ). In everyday speech, the exact boundary between language and dialect is often drawn more by political, cultural, and social factors than by linguistic ones.
Dialects and languages are defined by a full range of semantic, syntactic, morphological, lexical, and phonological features, and to some extent cultural, historical, orthographic and literary features as well. Accent is based more exclusively on phonological features – how and where in the mouth vowels and consonants are articulated, rules for placing sounds within words, and intonation patterns, for example (Lippi-Green 42-43). These features can be used to describe the accent of someone’s native variety of a language (their L1), as in a “Southern accent” or a “Boston accent” or a “Standard accent,” or to describe accented speech within a learned second language (L2). Such L2 accents are caused in large part by interference from the L1 – a person’s native phonology affects speech produced in the second language.

3.2 Accent and Intelligibility

Because phonology is used largely unconsciously, it is one of the most difficult aspects of speech to change. After the critical period has passed, the odds of learning a new language’s phonology so well as to have no accent at all are very slim. Even the most fluent adult learner usually has some accent. Possibly for this reason, phonological differences are what, for the average person, most immediately come to mind as an indicator that a speaker is not native. This does not, however, automatically make a speaker unintelligible – though often conflated, intelligibility and accent are different.

10 The /ŋ/ sound, for example, can only be used at the end of a syllable in English, as the “-ng” of “running” or “dancing.” In other languages, such as Vietnamese, /ŋ/ can be used at the onset of a syllable, including at the beginning of a word.

11 It is debated among language acquisition linguists exactly how much influence the L1 has, and whether some errors are more like the learning process of a child (who has no interference). For more on this debate, see Vivian Cook, Linguistics and Second Language Acquisition.

12 The critical period is the time in childhood and early adolescence when languages can be easily picked up from the surrounding world, as when children learn their L1. Children who move to new countries at a young age can often easily learn the new language along with their old one: adults find the task much more difficult.
things. Basing a judgment of speech entirely on accent, then, would lead to an incorrect assessment of language ability. Munro and Derwing’s work shows that non-native speakers rated “highly accented” can nonetheless be well understood, as seen in transcription tests of Korean non-native speakers’ (NNSs’) speech. Other factors besides phonological ones seem to be more important to intelligibility.

An adult speaker has already learned the entire phonology of their L1 and this affects the learning of the phonology of the L2, a problem known as interference. The learner tries to use the phonology of the L1 when speaking the L2, which causes problems. For one, the L2 may have sounds that do not exist in the speaker’s L1. When faced with such sounds, speakers tend to substitute sounds from their first languages. For example, Japanese speakers of English are unfamiliar with sounds such as /θ/ and /ð/ (the two sounds written as <th> in English orthography) and may insert sounds more familiar to them, such as /z/, when the sounds are called for. These kinds of insertions have an effect on accent.

A different aspect of interference is seen when different languages have different rules for the same sounds, as when one language uses two sounds as allophones and another uses them as separate phonemes (that is, as two aspects of the same sound or as two different sounds). English uses [k] and [kʰ] as two varieties of the same sound /k/. Aspirated [kʰ] (pronounced with the release of a puff of air) is used word-initially, as in “kite,” and unaspirated [k] is used after consonants, as in “skate.” Because the two are considered to be parts of the same sound, most English speakers use this rule intuitively, and do not even realize that they use two different k’s in everyday speech. Other languages, such as Hindi, use /k/ and /kʰ/ as two different phonemes. A native English
speaker learning Hindi will likely have trouble learning to use these two sounds separately, and is likely to try to use the English rule when speaking Hindi.

These and other phonological difficulties not only affect accent, but are also likely what we think of when we think about foreign accent. However, noticing such features does not help much in assessing either how comprehensible a speaker is or how much they comprehend. More important is prosody, which linguists include within the word “accent” but which the everyday speaker may not. Prosody involves speaking patterns on a slightly higher scale – the use of intonation, pitch, and pausing, for example. Using prosody when learning English as a second language involves learning to use intonation to delineate clauses, using pitch to emphasize new information, and making pauses regular (Kang, Rubin and Pickering).

Other, non-accent aspects of speaking an L2 that affect intelligibility include grammar and lexicon. Learning and using grammar points is one of the most basic aspects of learning a new language, and can go awry in a number of ways. Sometimes the ingrained L1 grammar directly interferes with the use of grammar of the L2, as when speakers of German and English have trouble placing the verbs in a sentence when speaking the other language. Other grammar difficulties arise from within the learning of the L2 itself, and are sometimes similar to L1 learning. Learners of English often overgeneralize the past tense, for example, and add \textit{-ed} to verbs that do not use that ending, an error also common among young native speakers of English. This is also common with prepositions – when a learner finds one preposition/verb combination (“she said to me”), that person will often try to use the same preposition with similar verbs (“she asked to me”) (Richards 11). NNSs may also become more familiar with some
grammar points than others; if a NNS can use a few grammar points well, it may give the inaccurate impression that she or he can understand different or more complex grammar points equally well.

Learning the lexicon (words, phrases, and idioms) of a new language is not necessarily the simple memorization task it may at first seem to be. The boundaries of words—what exactly they mean, their connotations, and where and how they can be used—rarely overlap between languages. The German word “Glück” is usually taught to English-speaking learners as “luck,” but in some cases “Glück” is used where “luck” never would be in English, and must be translated as “happiness” instead. Similarly, the English speaker will not be able to use “Glück” in every sentence that would take “luck” in English, and must use other German words when their connotations are more correct to the German ear. A new speaker must feel out the parameters of even very simple words, such as color words—the Japanese word for “blue,” “aoi,” includes some shades that English-speakers would refer to as green, and Russian splits blue into two colors, a lighter blue and a darker blue. Speakers who have not grasped a foreign language’s lexicon will not only be likely to misuse words, but will also have trouble understanding the connotations of what is said to them.

Conflating accent and intelligibility can cause problems when evaluating a person’s language ability, and such problems can work their way into the courts. A person with an accent, as mentioned, can still be very intelligible, but judges sometimes rule that accented speakers are unfit for jobs in media or education without addressing their intelligibility (see section 3.5). On the other hand, many NNSs have a few phrases that they use often (“How are you?” “Excuse me, where is the ___?” “I speak a little bit
of English, etc.) and have learned to pronounce in a manner very similar to that of a
native speaker. Assuming based on the English-like accent in such phrases that a person
has a great deal of language ability is unwise without further probing into understanding
of grammar and lexicon.

3.3 Accent and Perception

Overall, it seems that a court-ordered judgment of NNSs’ 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
recently been dubbed Reverse Linguistic Stereotyping (RLS) – when assumptions about a
speaker’s group affect judgment of that person’s speech (Kang and Rubin “Reverse
Linguistic Stereotyping”)\(^\text{13}\). 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

\(^{13}\) The “reverse” here has a very different meaning from the word “reverse” in, for example, “reverse
discrimination,” meaning discrimination against white people. Reverse Linguistic Stereotyping is
reversal of a process – language, often a cause of stereotyping, becomes instead the target. Phrases
such as “reverse discrimination” and “reverse racism” have themselves been criticized as
discriminatory, since they suggest that “normal” discrimination is discrimination against non-whites.
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 “Nonlanguage factors”). 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. “Greek letter”).

Other studies have shown other ways in which judgments of accent can be unrelated to reality. Niedzieski 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.

In another intriguing study, Hu and Lindemann played a recording of an English native speakers to two groups of Cantonese students learning English. These students had shown in a previous survey that one aspect of English accent they were concerned about overcoming was the Cantonese tendency to not fully release final stops. When told the

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Rubin states that he used a Dutch accent because it is not easily recognized by native English speakers as a marker of any particular nationality (Rubin et al. “Greek letter”).
recording was of a Cantonese speaker, the students tended to judge her final stops correctly – sometimes they were fully realized, and sometimes they were not, as shown in a computer-assisted analysis of the recording. When students were told the recording was of an American native English speaker, however, they marked a disproportionate number of her stops as fully released – they idealized her speech into not having a feature they considered part of an imperfect Cantonese accent, even though that feature is sometimes present in native English speech.

These three studies clearly show that expectations influence perception in three very different 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; and when a speaker is expected to have an idealized accent, that idealized accent is heard, despite its lack of relation to even standard English accents. This alone is enough to suggest 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 NNS English, which helps comprehension of that variety. It can also mean familiarity with NNS English in general. If raters of English-language ability are familiar with non-native speakers in general (for example, if they have NNS friends) they will tend to give higher ratings of comprehensibility and intelligibility in NNS speech (Kang “Rating of L2 Oral Performance”). Rubin (“Help! My Professor”) puts this into the context of one common college experience when he argues that more contact with NNS teaching assistants (“sticking with” their classes) leads to improved listening skills for students over the long
term, and thus to better understanding of other NNS teaching assistants. Gass and Varonis 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 NNS speaker, familiarity with the speaker's kind of NNS English, and familiarity with NNS speech in general all also made communication easier.

Another important non-speech factor in language assessment involves personal attitude towards the "communicative burden." Lippi-Green argues that when 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... Members 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. (70-71)

This idea has been borne out by studies such as that of Lindemann, 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.

3.4 Objective Testing

Exactly how difficult is it to evaluate language ability effectively? A look at the language testing industry is illustrative. Language testing’s long history can be seen as a conflict between two different desires: the desire for usefulness and the desire for objectivity. Tests that clearly judge language skill, such as essay tests and interviews, are difficult to judge reliably and objectively. Tests that are clearly objective, such as multiple-choice questions about grammar, are not necessarily good predictors of ability to actually use language in the real world. Tests of both types attempt to compensate for such problems. (Spolsky 349-359). Neither type of test-maker considers the grade given complete or perfect – the company that produces the Test of English as a Foreign
Language (TOEFL) recommends considering the grades they given within a 30-point range to either side. Despite such disclaimers, however, those who use such scores continue to act "as though there is a real difference between a student who scores 597 and one who scores 601" (Spolsky 355).\(^5\)

Other difficulties exist as well. Spolsky sums them into three categories: reliability, feasibility, and usability. Rater bias is subsumed into the reliability category, along with other ability-irrelevant factors such as the test-taker's state of health or happenstance knowledge of test question subject matter.\(^6\) Feasibility involves time and money constraints – the testing of what can be easily or cheaply tested, rather than everything needed to create a more accurate score. Usability is the need for confidence in a test on the part of the taker, the person or institution who uses the score, and the public (354-357).

Considering these and the previously mentioned difficulties, the question, then, becomes this: do we as a society and especially within the legal system, recognize human subjectivity's effect on language assessment and strive for objectivity when judging intelligibility and accent?

3.5 In the Courtroom

In normal day-to-day interaction, the degree of accentedness or intelligibility a native English speaker perceives in NNS speech is probably not terribly important.

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\(^5\) The TOEFL has been re-formatted since Spolsky's work came out, and is currently judged on a scale of 0-120. The website still states that important decisions, such as whether or not to admit an international student to a university, "should never be based on TOEFL scores alone" ("How TOEFL Test Scores Are Used").

\(^6\) For example, I myself once took a test of German language ability where heavy weighting was given to a reading comprehension passage that happened to be about linguistics. I likely scored better than I would have had the passage been on, say, biology.
Problems occur when native speakers have power over non-native speakers. For example, native English-speaking teachers evaluate native and non-native speakers' compositions differently (Rubin “Impact of Writer Nationality”); native speaker undergraduates evaluate NNS teaching assistants as less competent, stating that these evaluations are based on comprehensibility when they have actually been shown to relate more to expected grades (Orth); and, of course, native English speakers rate NNSs on English ability tests.

What are the difficulties within the legal system? There are two ways that language assessment skill can be a problem: a judge can decide that a speaker's English is not good enough to deal with the situation at hand when the speaker thinks it is, or a judge can decide that a speaker's English is good enough to deal with the situation when the speaker thinks it is not. The second possibility, the one this paper focuses on, is uncommon outside the very particular environment of wanting an interpreter – I have never heard of conflict because a NNS teaching assistant was judged too comprehensible, for example. Because this is unusual, we will look first at what has been written about the first scenario, where a judge considers a speaker's English less comprehensible than the speaker does.

Lippi-Green analyzes several such cases. Like many involving non-native speakers, these were Equal Opportunity Employment suits, leveling the charge of job discrimination based on accent. This section of EOE law is the most difficult, rendered more complex by the fact that employers can have a legitimate and legal reason for refusing a NNS a job or a promotion (if language ability is genuinely poor enough to interfere with performing the job) or can be discriminating against a race or ethnicity (and
hiding that beneath the veneer of language troubles) (Nguyen). Lippi-Green argues that, although judges may acknowledge these problems, they tend to defer to the subjective language assessments of employers despite the evidence of bias in the workplace (155-157) or they assume their own assessments are objective (160-161). Her own interviews with Sulochana Mandhare, plaintiff of Mandhare v. W. S. LaFargue Elementary School, found that Mandhare speaks “in a clear and completely comprehensible accented English” (152). This is worrying, since Mandhare was fired from her job at the school for “heavy accent, speech patterns and grammar problems” (quote from Mandhare case at Lippi-Green 153). The idea that Mandhare’s accent interfered with her work “was never questioned. The court took this claim on faith [...] [N]o effort was made to make an objective assessment of the communication skills required for the job, the Plaintiff’s speech... or her intelligibility” (164, emphasis in original). Furthermore, this lack of objective assessment was also the rule for “every other case discussed” (ibid.), for a total of 31 cases where intelligibility “was a matter of opinion only” (259-60, 160).

This issue is taken up further in Nguyen, which also analyzes court cases involving NNSs. Her work argues that “[t]rial courts currently lack an objective method” for “determining which accents actually impede job performance. [...] Such assessments are almost unavoidably tainted with the biases and prejudices that make accent discrimination an accepted phenomenon.” Nguyen calls for the Test of Spoken English (TSE) to be commonly taken and entered into evidence in cases involving NNSs.

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17 There is some overlap between the two studies – both, for example, discuss Fragante v. City and County of Honolulu, with Nguyen stating that “[t]he court emphasized not whether Fragante was intelligible, but rather... [the public’s] unwillingness to deal with an accented individual. [...] Both courts [district and appeals] deferred to the subjective assessments of the interviewers who spoke to Mr. Fragante... [who] had no formal training in interviewing.” Lippi-Green refers to this case as an example of how “the courts are willing to depend upon their own factually incorrect understanding of language issues” (160).
questions of language ability. She notes that it can play as useful a role for employers in such cases (if scores show low intelligibility) as for employees (if scores show high intelligibility) and argues it would reduce the problems associated with purely subjective language ability assessment.

Of the three non-speech-based assessment factors discussed in the previous section, the one most likely to influence assessment in cases such as these is expectation. A judge’s expectations for language ability could be set up by an employer’s negative evaluations, by the knowledge that conflict has arisen around a NNS’s speech, or just by the knowledge of foreignness. Recall that in Rubin (“Nonlanguage factors”), simply seeing an Asian face was enough to cause listeners to perceive an accent in and have lower comprehension of a recording of Standard American English speech. The other two factors are more idiosyncratic – a particular judge may or may not be familiar with NNS speech, and may be more or less motivated to understand it.

The analysis in section 4 deals with the opposite difficulty. This occurs when, rather than finding a speaker incompetent, a judge finds a speaker too competent. In such cases a NNS in the courtroom, usually a defendant, will be found not to need an interpreter when in fact one is needed. Under American law, the judge has full discretion in such matters, and if the judge believes that the speaker is able to understand, then the speaker does not receive an interpreter.

3.6 Legalese

What is it that the NNS needs to be able to understand? The language used in the courtroom and in judicial opinions are varieties of legal language, sometimes called
Legal language is the professional dialect of the law world, especially as expressed in writing: statutes, contracts, intra-lawyer correspondence, briefs, affidavits, and so on (Tiersma). Spoken legal language can range from very similar to the written languages (jury instructions and change-of-plea hearings, for example) to formal or even informal English (a lawyer may speak less formally when cross-examining an expert witness, to portray to the jury the idea that the expert is pompous or snobbish). Normally the majority of a trial is conducted in formal Standard English (Berk-Seligson).

Legalese is notoriously complex. Drawing from Tiersma (51-69, 203-210), reasons that the structure of legal language is difficult for anyone not trained in it include:

1) Peculiar vocabulary. Legal language uses archaic words, Law Latin and Law French terms, words in common use but with specific legal meanings, and very formal words ("initiate" and "terminate" instead of "begin" and "end").

2) Wordiness. When using legal language, lawyers tend to use phrases instead of adverbs or even conjunctions ("at slow speed" is chosen over "slowly," "in the event that" is chosen over "if").

3) Lengthy, complex sentences. While long sentences are not always difficult to understand (in conversation a whole anecdote can be told in one sentence using "and... and... and..."), in legal language sentences often have many clauses embedded within each other.

4) Negation. Legal language includes sentences with three or four negatives cancelling, un-cancelling, and re-cancelling each other. It is also made more difficult by sentences involving things like exceptions to exceptions.
These four aspects of legal language are likely to be present in spoken discourse. In jury instructions, for example, legal vocabulary and complex sentences lead to confusion among jurors (Tiersma 231-240). There are many other aspects of written legal language that make it even more difficult to comprehend (use of nominalizations and impersonal constructions, for example, can make contracts impenetrably dense), but these are not relevant to our discussion of courtroom language.

The important distinction between a NNS being understood by the court and a NNS understanding the court is not always made. Being able to express oneself does not always mean that one can understand everything going on, especially if the proceedings are in legalese. This distinction can be seen in the history of court interpreters, who in the 1960s were used only to interpret witness testimony into English for the court to understand, and not to interpret English-language testimony into the language of the defendant. The goal was to make sure that the judge and jury received as much information as possible, not to protect the defendant's right to understand the charges or to confront opposition witnesses (Berk-Seligson 29-31). One judge at the time called such trials “empty and meaningless ritual” and referred to “the confusion, the despair, and the cynicism suffered by those who in intellectual isolation must stand by as their possessions and dignity are stripped from them” (quoted in Berk-Seligson 30). The rights of the NNS are now better protected, but judges' evaluations of language ability seem to focus on whether the speaker can be understood by the court or the police, not always on whether the speaker can understand the proceedings. Most linguistic research, as has been seen in this section, also tends to focus on how well NNSs are understood by others.
Section 4: Analysis

4.1 Basis of the Study

What standards are typically used to evaluate language in the court room? That is, what is commonly accepted as an indicator that a person speaks (enough) English? What shows that a person does not? To answer these questions 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 the legislation discussed in section 1, all opinions used were from the last two years, from February 2009 to February 2011.

Of the 36 cases found, the majority (22) 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. These last three groups are all appellate courts, as opposed to trial courts. That is, the judges in these courts were not themselves evaluating a person’s language proficiency; they were 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

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18 I searched for and read the opinions found with several other phrases as well, but all opinions used here (all cases I found that specifically discussed what indicated language ability) were found with the four phrases given. Cases are listed by search term in Cases Cited.
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.

These 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, and they will be noted in their respective sections.

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, the case loads in such courts are far greater than in higher courts (as noted in section 2), 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 (as opposed to requiring an interpreter at the proceedings) and the ability to legally waive a right (as opposed to requiring that an interpreter be there to translate that right). These two kinds of cases were at the core of 24 opinions.

4.2 The Cases

4.2.1 Waiving a Right

Seventeen cases discuss whether particular NNSs had enough English ability to legally waive a right such as the right to a jury trial or the right to have a lawyer present during questioning. Being able to consent to a search and understanding what it means to plead guilty were also common right-related linguistic issues. The standard for these cases was usually specified as making a waiver that was “knowing, intelligent and voluntary” (there was some variation on this theme, such as “knowing and voluntary,” “understand[ing],” and “comprehend[ing] the consequences”).

Ten of these cases took place in a higher court, including five of the six cases binding on lower courts. Five of the remaining seven federal district court cases referenced a language evaluation made in an earlier case (usually this manifested itself as
“ineffective assistance of counsel” claims, where NNSs sued attorneys who previously represented them, thus starting a new district-level case where an old language evaluation was relevant. Thus only two of the seventeen cases involve a judge making a contemporaneous language evaluation. Seven of these cases revolved around change-of-plea hearings, noteworthy because, as Berk-Seligson mentions, these proceedings use more formal and complex legalese than other parts of a trial (jury selection, for example, is often conducted in only semi-formal English) (19-20). Also important is that the reading of Miranda rights varies among police departments. Many use the familiar but complicated phrases found in the Supreme Court opinion that established these readings ("You have the right to remain silent. Anything you say can be used against you in a court of law," etc.). Many others have simplified the language used when giving these rights.

In two of these cases the judges agreed that the NNS did not speak enough English to legally waive a right; in the remaining fifteen they concluded that the person did speak enough English for the waiver to be legal.

Three cases, two state appeals and one federal district case, help show why these cases so frequently go against the NNS. 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 NNS 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 NNS 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. And in State v. Sanjeep Shrestha (Court of Appeals of Minnesota, 2010), the NNS had passed “advanced level” English training, had trained to be a nursing assistant, and was taking college-level nursing classes.

Such 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 NNSs who have been in the country for over twenty years and are completely fluent in order to try and stave off such litigation (Bussade).

The opposite end of the spectrum also provides for relatively clear legal decisions, as seen in the two cases where NNSs were ruled not to have legally waived their rights. In Ivanova v. Astrue (U.S.D.C. for the Northern District of Texas, 2010), a NNS who spoke only “a few words” of English and who could write only her name was ruled not to have waived her right to counsel, since this right had been fully explained only in notices written in English. In Narine v. Holder (U.S. Court of Appeals, 4th Circuit, 2009; binding on North Carolina, South Carolina, West Virginia, Virginia, and Maryland), the court ruled that the phrase “final decision” was “a term of art” and that without further
explanation the NNS could not be expected to know that agreeing to a “final decision” meant giving up the right to appeal. Of interest here is that the court did not seriously attempt to judge the proficiency of the NNS beyond being a “legally unsophisticated, unrepresented non-native English speaker.” Instead, the opinion focuses on the vagueness and difficulty of the legal language for NNSs as a whole.

The second U.S. appeals case (10th Circuit, binding on Oklahoma, Kansas, New Mexico, Colorado, Wyoming, Utah, and parts of Idaho and Montana) sets the tone for the remaining cases. In United States v. Silva-Arzeta (2010), the appellate court decided that the NNS made “good arguments that he could not have understood the officer’s request for consent [to a search],” largely based on the testimony of his boss that they had to speak to one another through a bilingual employee. However, the trial court had enough counter-evidence in “the internally consistent testimony of officers” to the effect that he had understood them that the decision was not clearly erroneous. Similarly, in the next eleven cases, there seems to have been no overwhelming evidence (to the extent seen above) for either proficiency or lack thereof. All of these cases were decided against the NNS.

In People v. Charles (Supreme Court of New York, 2009), the indicators that to the judge showed the plea had been made knowingly were: that a former attorney said that the NNS understood English; that the trial court record did not show that the NNS had difficulty understanding; that no interpreter was requested for the NNS; and that the NNS did not say what his first language was.

In United States v. Diaz (U.S.D.C. for Northern District of Florida, 2009), the judge states that there is no “specific allegation” that being a NNS led to lack of
explanation the NNS could not be expected to know that agreeing to a “final decision” meant giving up the right to appeal. Of interest here is that the court did not seriously attempt to judge the proficiency of the NNS beyond being a “legally unsophisticated, unrepresented non-native English speaker.” Instead, the opinion focuses on the vagueness and difficulty of the legal language for NNSs as a whole.

The second U.S. appeals case (10th Circuit, binding on Oklahoma, Kansas, New Mexico, Colorado, Wyoming, Utah, and parts of Idaho and Montana) sets the tone for the remaining cases. In United States v. Silva-Arzeta (2010), the appellate court decided that the NNS made “good arguments that he could not have understood the officer’s request for consent [to a search],” largely based on the testimony of his boss that they had to speak to one another through a bilingual employee. However, the trial court had enough counter-evidence in “the internally consistent testimony of officers” to the effect that he had understood them that the decision was not clearly erroneous. Similarly, in the next eleven cases, there seems to have been no overwhelming evidence (to the extent seen above) for either proficiency or lack thereof. All of these cases were decided against the NNS.

In People v. Charles (Supreme Court of New York, 2009), the indicators that to the judge showed the plea had been made knowingly were: that a former attorney said that the NNS understood English; that the trial court record did not show that the NNS had difficulty understanding; that no interpreter was requested for the NNS; and that the NNS did not say what his first language was.

In United States v. Diaz (U.S.D.C. for Northern District of Florida, 2009), the judge states that there is no “specific allegation” that being a NNS led to lack of
understanding and also that the NNS’ court testimony showed a good understanding of English.

In *Suda v. Stevenson* (U.S.D.C. for the District of South Carolina, 2009), the judge says that the "transcript of the guilty plea shows that Suda had some difficulty understanding and communicating. However, when viewed in its entirety, the transcript shows that Suda adequately responded to the court’s questions and fully understood the process." The entire transcript is not given, but it is quoted at length. In the quote given, the NNS responds to long (though notably non-legalese) statements and questions by the trial court judge with "Yes sir," "No sir," and "Okay." He attempts to say something further and is cut off:¹⁹

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<th>The Court:</th>
<th>All right. Nobody's put anything on this sentence sheet. Usually,</th>
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<td>It's gonna be at least ten years, because the law provides that.</td>
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19 This quote was taken as formatted in the opinion.
Mr. Suda: Yes, Sir. Can I say something?

The Court: Yes, Sir, You can - if you want.

Mr. Suda: Yes, Sir, I - -

The Court: I'm gonna give you a chance to say all you want to say a little bit later on.

Mr. Suda: Okay.

The Court: But I'm asking you now about the sentence. Has anybody – has anybody promised you anything or threatened you in any way to get you to plead guilty to this?

Mr. Suda: No, Sir.

The Court: All right. Basically, what I'm really getting at is about the sentence. Most of the time people will come back later on - a lot of times people will come back later on and say, Oh, no, my lawyer told me I was only gonna get five years or I was only gonna get ten years and that mean judge gave me thirty years. I want to make sure nobody's told you anything or promised you anything about a sentence. Now, has anybody promised you anything About a sentence?
Mr. Suda: No, Sir.

According to the opinion, this quote “makes it [...] clear that Suda understood” that he was pleading guilty and not taking a plea bargain, despite another quote from an earlier part of the transcript where the NNS says he “was advised to take – take the – the plea bargain.”

In *Tumbaco Chavez v. Belleque* (U.S.D.C. for the District of Oregon, 2011), the judge quotes the trial court judge’s statement that the NNS “at the time this interview was conducted... had a reasonably good command of the English language.”

In *United States v. Sylla* (U.S.D.C. for the Eastern District of New York, 2010), the judge finds that the NNS understood a search consent form read aloud to him because a detective testified that agents had “no trouble communicating”; the NNS did not indicate confusion; the NNS did not request an interpreter; the defense counsel for the NNS agreed that the NNS speaks English, and contested only whether he could read and write English; and the NNS signed a statement that he had understood the affidavit when the attorney read it aloud to him.

In *State v. Mohamed* (Court of Appeals of North Carolina, 2010; binding on North Carolina), the judge agreed that the lower court’s decision was not clearly erroneous, because the officers testified that they “didn’t have any trouble communicating” with the NNS; the NNS responded to police orders; the NNS testified mostly in English, and said his proficiency was about sixty-five percent; and the NNS’s written confession was “easily comprehensible” (though “not a model of English composition”). The NNS in this case had been in the U.S. for six months and did request an interpreter before waiving his rights, but did not receive one.
In *Ramos-Martinez v. United States* (U.S.D.C. for the District of Puerto Rico, 2009), the judge notes that the NNS answered some questions with full sentences and did not indicate lack of understanding at the trial court, but bases his decision mainly on his certainty that “as seasoned a judge” as the previous trial court judge “would not have proceeded to take a plea from a defendant that could not communicate in English. Similarly, [the] Defendant’s lawyer[ ] would not have allowed a non-English-speaking defendant to stand before [the judge] without understanding the language of the colloquy. ...[T]herefore, [the NNS] was either able to speak English or was assisted by an interpreter.”

In *People v. Stewart* (Court of Appeals of California, 1st Appellate District, 2010), the appellate judge confirmed that the trial court judge’s decision was not clearly erroneous, because the NNS stated that she was comfortable testifying in English and her trial court attorneys testified that she had understood.

In *State v. Sun Yong Kish* (Court of Appeals of Minnesota, 2009), the appellate judge similarly confirmed the trial court judge’s decision as to the NNS’s waiver of *Miranda* rights was not clearly erroneous, for a variety of reasons. The arresting officer testified that they were able to communicate (and that any communication problem was due solely to the NNS’s intoxication, not NNS status); the NNS did not request an interpreter and did not indicate a lack of understanding; the record and testimony shows an understanding of English; and there was no specific testimony on the NNS’s language skills. The NNS’s counter-evidence of “substantial confusion” during the explanation of her rights and the later request for and provision of an interpreter during the trial “do not
compel the legal conclusion that appellant did not understand English...” and were not enough to make the trial court judge’s decision clearly erroneous.

In *People v. Guevara* (Court of Appeals of California, 2nd Appellate District, 2010), the appellate court found that the NNS had legally pled guilty because he had answered questions appropriately (“albeit with ‘yes’ or ‘no’ answers”) and because the record does not indicate that an interpreter would have been required. Also, the claim of language problems was not part of the NNS’s original motion.

Finally, in *State v. Lunacolorado* (Court of Appeals of Oregon, 2010; binding on Oregon) the appellate judges agreed that the NNS spoke enough English to waive his Miranda rights because a detective testified he felt they had “communicated very effectively” and an ex-girlfriend of the NNS testified that when they had lived together, if an English-speaker called she would give the phone to the NNS. This NNS had also requested but not received an interpreter before waiving his rights. This case has a notable concurring opinion, to which we will return later.

4.2.2 Competent to Stand Trial

Seven cases deal with whether a NNS was able to understand not the proceedings around the waiver of a specific right (such as understanding guilty plea proceedings) but the proceedings of the entire trial. The standard for these cases tended to involve the word “competent.”

These cases include one state appeals cases, five federal district cases, and one state supreme court case, which is the sole remaining case that establishes binding precedent on lower courts. In one case the judge ruled that the NNS had not been
competent to understand proceedings in English. In the other six cases the judges ruled
that the NNSs were competent. None of the language evaluations were contemporaneous;
that is, all were (re-)judgments of previous judgments of language ability.

In Kakal v. State (Court of Appeals of Iowa, 2011), the NNS was found able to
stand trial with no interpreter because the trial court judge found the NNS able to
understand and answer English questions; the record of a previous trial did not suggest
lack of understanding; he had not asked for an interpreter at the previous trial and his
attorney had not thought he required one; and he did not indicate lack of understanding at
a hearing.

In United States v. Garcia (U.S.D.C. for the District of South Dakota, 2009), the
court denied an ineffective assistance of counsel claim because the NNS had told the
judge he “had no difficulty” with English; the NNS answered all questions “appropriately
without hesitation”; no interpreter was requested; and at some hearings an interpreter was
used but the NNS “answered many… questions without the interpreter’s assistance” or
“even before the interpreter repeated the question.”

In United States v. Thepmontry (U.S.D.C. for the District of South Dakota, 2009),
the judge found the NNS able to stand trial because a doctor who conducted an
examination of the NNS with no interpreter knew “matters that could only have been
discerned from an interview with the defendant” and said that the NNS “claimed to
understand 90% of what his attorney was telling him.”

In United States v. Putrous (U.S.D.C. for the Eastern District of Michigan, 2010),
an ineffective assistance of counsel claim was denied because the NNS stated he
understood English; he communicated “freely” at the trial; no one reported difficulties
communicating with him; the NNS did not request an interpreter and did not show lack of understanding; and the NNS had been prosecuted for two prior criminal convictions, and no interpreter was requested at either of those times.

In Zeciri v. Luna (U.S.D.C. for the District of Alaska, 2010) too an ineffective assistance of counsel claim was denied. The judge found that the NNS had lived in the U.S. for some 30 years and worked as a taxi driver, which required English language communication; three legal professionals who had dealt with the NNS in the past on different cases stated that they used interpreters whenever necessary and did not find it necessary with this speaker; and the NNS did not ask for an interpreter and indicated understanding at the trial. The counter-evidence that interpreters were called for an arraignment and two hearings was considered unpersuasive.

Avichail v. St. John’s Mercy Health Sys (U.S.D.C. for the Eastern District of Missouri, 2011) is a peculiar case, in that the NNS was not the person bringing the suit. Instead, the plaintiff argued that not having an interpreter for a NNS witness entailed a miscarriage of justice. The court found that the NNS had been competent to testify because an interpreter was present, whom the judge was ready to call upon if it seemed necessary.

The final case in this category is the state supreme court case, Ling v. State (Supreme Court of Georgia, 2010; binding on Georgia), which was ruled in favor of the NNS. In a very different turn of events, the judges in the majority did not go into the evidence in great detail, noting only that it was “conflicting but sufficient to cast doubt on [the NNS’s] competency to be tried without an interpreter.” The majority also mentions
the Civil Rights Act, as discussed in section 1, and the necessity of providing LEP people with “meaningful access to the courts.”

It is only in a dissenting opinion that a judge speaks of the specifics of the case, saying he would have ruled that the NNS was legally able to stand trial because she had been observed by the trial court in a hearing about her abilities, and was presumably found competent; she had begun learning English upon moving to the U.S., eight years prior to the trial; her counsel stated that they had “communicated effectively”; other witnesses, such as caseworkers and officers, testified that she could communicate in English; and she “acknowledged that [...] she understood ‘a little bit’ what her lawyer was telling her” at a plea hearing. This case will be discussed further in section 5.1.

4.2.3 Missed Deadlines and Extraordinary Circumstance

Four cases involved NNSs who did not perform a legal action (such as filing an appeal) in a timely manner. They argued that their status as NNSs constituted “extraordinary circumstance” and thus their actions should be accepted despite the missed deadlines. The judges found in all four cases that the NNSs spoke English well enough that they did not merit the extraordinary circumstance leeway. Three of these cases were U.S. federal district court cases, and the remaining case was a state appeal.

The state appeals case, *State v. Cruz* (Court of Appeals of Wisconsin, 1st Appellate District, 2010), involved a failure to bring up arguments at the proper time. The judge determined that the record, specifically the court transcripts and the NNS’s prior filings, showed enough English ability to “meaningfully participate,” and showed that he communicated with a bilingual speaker “in both English and Spanish with ease.”
In the remaining three cases, the NNSs failed to file a motion on time (one habeas petition and two other relief petitions) from jail. The judges ruled that the NNSs' circumstances would not be considered extraordinary if they were found able to do legal research in jail in English; if they were able to do such research, they would have no reason for not knowing when the deadlines were. In *United States v. Resendez-Sanchez* (U.S.D.C. for the Eastern District of California, 2010), the judge ruled that the NNS did not “assert that he lacked any proficiency, but state[d] only that English is his second language.” The judge also notes that a fellow prisoner advised the NNS to submit the motion, meaning that “diligent effort” should have led to being able to “procure either legal materials in his native language or translation assistance [...].”

In *Gonzales v. Martel* (U.S.D.C. for the Central District of California, 2009), the judge similarly states that the NNS “does not actually claim an inability to speak or read English” but only “asserts that English is his second language.” Previous filings and written communication with an attorney were in English (and, if they were done with assistance, the petition in question could have had assistance as well). Most importantly to this judge, the NNS had previously claimed that his delay was based on “lack of education and legal knowledge,” not mentioning language difficulties.

In the final case in this category, *Isanan v. Johnson* (U.S.D.C. for the Western District of Virginia, 2009), the judge found that the record showed the NNS spoke English “fairly well” at the time of his arrest, and that “[h]is claims that he was not proficient enough in English to do legal research are belied by the fact that even while he was still housed in the local jail, he obtained his GED certificate. Common sense dictates that this accomplishment requires adequate proficiency in English.”
4.2.4 Presenting and Prosecuting Claims

Two cases involved NNSs prosecuting civil claims. The standard used by these two judges was whether the NNSs were prevented by language problems from effectively presenting and prosecuting their claims. These were both federal district cases, and the judge in each case ruled that the NNS was able to prosecute claims. These two evaluations were contemporaneous.

In Livsey v. Adventist LaGrange Mem'l (U.S.D.C. for the Northern District of Illinois, 2010), the judge found that the NNS was “competent to litigate the case herself” because there was no record that she had required help completing legal forms; she did not seem to have trouble understanding the court; she did not state her first language; and the defendant testified that the deposition was conducted in English “without any difficulty” and that the NNS was a full-time student at an English-speaking university.

In Fessehazion v. Hudson Group (U.S.D.C. for the Southern District of New York), which took place in 2009, the judge ruled that “[g]enerally, pro se civil litigants have no entitlement to an interpreter.” This statement would be contradicted the next year in a letter to the courts written by United States Assistant Attorney General Thomas Perez (see section 2.2). The judge decided that although the NNS’s proficiency “may be limited,” she had been “clear and coneise [sic]” in her communication and did not seem to lack understanding, and was able to “effectively litigate her claims.”

4.2.5 Literacy Accurately Described

Two cases involved NNSs attempting to collect Social Security. This involves, among other things, speaking to a commissioner who will speak to a vocational expert
about whether jobs that could feasibly be performed by the NNS exist. These two cases both revolved around whether the commissioner had accurately described the NNS's language ability to the vocational expert. The standards used by the two judges seem to be very different. These were both U.S. federal district court cases. In one case the judge ruled the NNS had been accurately described, and in the other not.

In *Yazzie v. Astrue* (U.S.D.C. for the District of Arizona, 2009), the judge stated that the commissioner was to note if NNSs were “unable to speak, read, or understand English, not whether they have difficulty […]”. The judge decided that the commissioner had not erred by finding that the NNS spoke English adequately because the NNS had begun speaking English in boarding school; testified that he could understand newspaper articles and write letters; testified at a hearing for an hour with no interpreter without causing difficulty for those listening; and circled “Yes” (rather than “No” or “A Little Bit”) on a form that asked whether he understood English.

In *Bui v. Astrue* (U.S.D.C. for the District of Oregon, 2009), the commissioner's decision was reversed and sent back for further review because the statement to the vocational expert did not “accurately describe [the NNS’s] abilities” and did not “utilize one of the categories the regulations established to describe education.” This was because the NNS testified he had gone to school only through sixth grade in his home country, taken “some English classes” upon arrival in the United States, and had welder training, which was found to be not “the equivalent of a high school education” (the level of education the commissioner had portrayed to the vocational expert) and not fully described in the phrase the commissioner used, “limited English skills.” This case was decided on those facts, and the judge does not attempt to judge the NNS's current English
proficiency, which was "unclear from the record" because the NNS had had an interpreter at some hearings but not others.

4.2.6 Fraud

One federal district case, Akhavein v. Argent Mortg. Co. (U.S.D.C. for the Northern District of California, 2009), involves whether a company showed intent to defraud by failing to provide two NNSs with translated documents. The judge ruled against the NNSs, saying that they had stated only that they speak English as a second language, and had "fail[ed] to claim they do not understand English." The NNSs' language claim, without showing that they were "prevented by the agent from reading… or w[ere] otherwise tricked into signing the document without reading" was not enough to state a fraud claim.

4.2.7 Ability to Comply

A state appeals case, In re I.R.T. (Court of Appeals of North Carolina, 2010), dealt with whether a NNS spoke enough English to be able to comply with previous court orders. The judge ruled that the NNS did have such English ability because a social worker testified that she had spoken with him in English and he seemed to understand, she had heard him speaking English with his children, and he left several English voicemails on her answering machine; and he did not indicate a lack of understanding in court.
4.2.8 Impaired Participation

The federal district case of *Lopez v. Bay Shore Union Free Sch. Dist* (U.S.D.C. for the Eastern District of New York, 2009) had the question of whether a NNS family was impaired in its ability to deal with charges made by a high school against the son. The judge ruled that they were not, because when sent an English-language letter explaining the charges, the NNSs responded with a letter asking for a translation, but also for "more specific" charges, indicating they could understand the charges even in English.

4.2.9 Previous and Current Charges

The case of *Maldonado v. United States* (U.S.D.C. for the Northern District of Iowa, 2010) involves an ineffective assistance of counsel charge with an interesting double layer of language evaluation. The NNS argued that his sentence should not have been augmented by a prior misdemeanor conviction some years before, since at the earlier trial he had not understood enough English to legally waive his rights. The judge agreed based on his testimony of his lack of English skills at that time (including not knowing what the word "guilty" meant) and the lack of a useful interpreter (someone explained to him in Spanish what boxes to initial on a form, but not what initialing them meant); the court record showing that the trial judge did not ask the NNS if he would like an interpreter and that the trial judge responded to the NNS's statement that he spoke English "a little bit" as if it meant he understood English well, though it "provide[d] virtually no insight into [the NNS's] actual ability to speak or understand English"; and the lack of an interpreter's signature at the bottom of the form to indicate the NNS's comprehension. Due to these factors, the court found that the NNS had not known
“English sufficient to understand the proceedings or the waiver of rights form” at the misdemeanor trial.

However, by the time of the trial on which the ineffective assistance of counsel claim was based, the NNS’s English had improved to the point where he declined an interpreter in his change of plea hearing and told the court he understood English. Because of this, the judge ruled that the counsel could not “be faulted for not guessing that [the NNS] might have needed an interpreter in prior state proceedings […].”
Section 5: Conclusion

5.1 Discussion

The judge in the Maldonado case made in reference to a different issue the following point: “[The NNS] seems to contend that counsel should have tried harder to twist his arm to get him to plead guilty. Considering the number of times that this court has entertained the converse argument, that counsel did twist an unwilling defendant's arm until he pleaded guilty, raised as a claim of ineffective assistance of counsel, the irony of the present argument... is not lost on the court. A defendant generally should not be able to dictate a trial strategy, then complain that counsel followed it.”

This kind of case, and the kinds of claims the judge in Nguyen referred to as “disingenuous,” seem to be very common. 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 NNS was very likely guilty. In some of the cases involving an NNS giving consent to search, for example, the search turned up damning evidence. The NNS 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 NNSs. In several cases, including Suda, Silva-Arzeta,
Lunacolorado, and Mohamed, 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. Such statements, as well as the ruling in Isanan that having a GED certificate meant a NNS was “proficient enough in English to do legal research,” are questionable. 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 Mamiya [the authors of Immigrants in Courts] 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.

This opinions 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 NNS spoke some English, then the defendant spoke enough English. The skills of conversational and legal English are mingled, in stark contrast to the situations shown the works of Lippi-Green and Nguyen, where 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 concept of familiarity, as discussed in section 3.2, 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 is seen from a different angle in Ivanova and in the precedents cited by some judges. Ivanova is the only case here where a judge specifically evaluated a NNS’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 NNS shied away from such specifics and spoke in broader terms – and the NNS in question spoke only “a few words” of English. In the precedent case Gonzalez, cited in Putrous, the NNS’s English was so poor that he “initially did not realize he was attending his own trial.” Such cases suggest that the level of English proficiency required to receive interpreter assistance must be at or very near zero. (Sun Yong Kish is a notable exception here, since the precedent cited, Farrah, was a case where a NNS’s “trouble understanding” and “problems in communication” overrode an officer’s statement that he felt he and the NNS had understood each other.)

Judges also show a willingness to lean on the subjective evaluations of others. Statements of officers, detectives, and other officials that a NNS spoke English well are
used to counter statements by the NNS 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 need to make the case that the search was legally consented to by the NNS. To put it more colloquially, one attorney I interviewed said that police tend to decide that a suspect speaks English “if he knows how to order a beer” (Soto (2)).

The most recent court evaluations may show evidence that this is changing. The ruling in *Narine* referenced only a “non-native English speaker,” without specific notes of very low proficiency. Even more unusual, in *Ling* 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 NNS 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 NNS is considered capable of taking a legal action without an interpreter present.

### 5.2 Further Research

There are many areas noted in this thesis where further research could be done. Most of the linguistic research in second language evaluation has focused on the possibility of underestimating language skills; more empirical work on overestimation of language skills might prove fruitful. Similarly, much more linguistic work has been done on how well NNSs are understood in their second language than on how well they
themselves can understand, and again taking the opposite tack would add to linguistic knowledge. Finally, the factors affecting linguistic evaluation discussed in section 3.3 are all long-term, especially expectations and familiarity. Research into how more immediate, fluctuating factors affect language evaluations on a day-by-day or case-by-case basis (for example, how personal motivation can vary over the course of a day) would be a boon to works such as this one.

Several aspects of this thesis, such as the statement by the judge in *Lunacolorado* that NNSs need a 12th-grade level of English to understand legal language, suggest 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.

5.3 Problems in Methodology

My thesis 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. The “key phrases” methodology was helpful in narrowing the cases found a sizable group with relevant results, 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, the incredible ruling in *Ramos-Martinez v. United States*, where the judge stated that he
trusted the “seasoned” previous judge and lawyer and therefore the NNS must have spoken English, was taken to task, reversed, and remanded for further proceedings in a later appeal.

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 travelling to state district courts around the nation and recording such evaluations as they occur. Such an endeavor, however, would require a great deal of time and funding.

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.

5.4 Final Thoughts

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 incredibly impractical. And although the use of such tests as the TSE would add to the objectivity of the employment cases discussed in Nguyen and Lippi-Green, they would be less helpful in the legal context discussed here, where an NNS with a strong motive for showing lack of understanding could easily 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, 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 seen in the quote from Suda, the NNS may not understand; simple yes or no answers (and one aborted attempt to make a statement) do not by their nature “make[ ] it […] clear” that an NNS understands English. Asking the NNS to rephrase the rights he has in his 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 on this list is “conflicted” and does not clearly show
English language ability. Greater pressure has been placed on the lower courts to show that a NNS 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 impossible. Thus, a little humility about the high likelihood of subjective factors affecting judgment is necessary. If some evidence gives the impression that a NNS 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.

Redrawing the line between “some” English ability and “enough” English ability may lead to fluent NNSs receiving interpreters they do not need, but that outcome is surely better than NNSs 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.
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Preliminary study:


Fessehazion v. Hudson Group. See below.

Isanan v. Johnson. See below.


Livsey v. Adventist LaGrange Mem’l. See below.


Suda v. Stevenson. See below.


United States v. Resendez-Sanchez. See below.

Main analysis:

Search term “English second language”


Search term “non-native English”


Search term “Limited English Proficient”


Search term "no interpreter"


