Babel Fish: Court interpreters in America (1790-1921)

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ABSTRACT

BABEL FISH: COURT INTERPRETERS IN AMERICA (1790-1921)

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Northern Illinois University, 2022
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This dissertation examines court interpretation and English language fluency in US law from the Revolution to the Progressive Era. From its inception, the United States has operated with an Anglophone legal system that presumes English fluency embedded in a society that has contained an ever-evolving population of non-English speakers. Using legal records from cases with non-English speakers, I study how court interpretation evolved over the course of the long nineteenth century. The major themes that emerge from my research tell the story of how the American legal system discovered interpreters as the tool for communication with non-English speakers in the legal system before the Civil War Era, how they perfected that tool in the Gilded Age era, and how they realized the power of the interpreters was changing the legal system and society by the Progressive Era. Between the Early Republic and the Progressive Era, most jurisdictions relied on untrained and unreliable interpreters who were deployed only at the pleasure of judges. By the latter part of the nineteenth century, I show, new linguistic circumstances forced things to change, even if some judges clarified their discontent with those changes and tried to control the interpreters. I also explore the effects of poor translations and the negation of translation services in the fairness of the legal proceedings.

This project contributes to several larger scholarly concerns, one of which is the study of the social power of whiteness. Particularly in the later sections, this dissertation examines the importance of linguistic performance as a way of understanding what it means to be white
against the backdrop of shifting racial conventions. In addition to whiteness studies, this
dissertation adds to our knowledge of immigration history by exploring what happens when
immigrants who followed the cultural and legal norms of their own homelands experienced the
consequences of a cultural collision inside the courtroom. On the broadest level, the project
speaks to students of legal pluralism and legal imperialism.
BABEL FISH: COURT INTERPRETERS IN AMERICA (1790-1921)

BY

JOHN ALCALDE
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A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE
DOCTOR OF PHILOSOPHY

DEPARTMENT OF HISTORY

Doctoral Director:
James D. Schmidt
ACKNOWLEDGEMENTS

I greatly appreciate all the people who helped me accomplish my goals and finally complete this project. First and foremost, I need to thank my dissertation director, Dr. Jim Schmidt, for all the hours he spent providing insightful feedback and constantly guiding my project. I am most grateful that he always believed in me, even when I did not. Without him, I would have never been able to finish this project.

I would also like to express my deepest gratitude to the other members of my committee and my field directors, including Professors Sean Farrell, Michael Gonzales, Barbara Posadas, and Eric Jones. They provided sagacious theoretical insights and asked those questions that helped me produce a much better project.

I am grateful that the Department of History at Northern Illinois University, through their Large Grant and Earl W. Hayter and Alfred F. Young Endowments, helped fund my travel to various archives.

I am particularly grateful to Dr. Andrea Smalley, who read, commented, and made helpful suggestions that made this whole process more manageable.

Finally, I have to thank my family for their support and encouragement over the years.
DEDICATION

To my wife, Gemma, and my three children, John, Grace, and Michael, without you, I would have finished much earlier. However, without you, I would not have a reason to wake up each morning to love and be loved by the only people that make me feel at home.
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INTRODUCTION

In 1867, the Supreme Court of California reviewed *People v. Arceo*, a murder case in which the district court had “excused six jurors … on the ground that the jurors were ignorant of the language in which the proceedings were held.”\(^1\) The first issue the court had to consider arose from the statutory provisions that established that a juror needed to be someone “who ha[d] sufficient knowledge of the language in which the proceedings of the Courts are had; provided, that the requirements of this third subdivision of section one shall not apply to the Counties of Monterey”\(^2\) and others. As the case originated in Monterey County, following the strict interpretation of the previous act, not knowing English did not absolutely disqualify a potential juror.

Complicating matters, an 1863 statute created doubts about the right of the lower court to reject jurors on the ground of their linguistic competence. The upper court saw that a strict reading of the Act would create problems and limit the autonomy of the lower court. The justices admitted that the jurors might not be technically disqualified, yet they noted that “it does not follow that the Court, to avoid the inconvenience which would arise from having several different jurors speaking as many different languages, but not understanding the language in

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\(^1\) *People v. Arceo*, 32 Cal. 40 (1867).

\(^2\) *The Statutes of California: Passed at the Fourteenth Session of the Legislature, 1863: Begun on Monday, the Fifth Day of January, and Ended on Monday, the Twenty-Seventh Day of April* (Sacramento: Benjamin Parke Avery, State printer, 1863), 630.
which the proceedings are had, might not properly, in the exercise of a sound discretion, reject those ignorant of the latter language.” The superior court saw interpreters as being acceptable as a last recourse but not necessary if the court had a better option, so long as the right to an impartial jury was protected. The justices recognized the necessity of the act because in some areas of the state, “a large portion of the population are ignorant of the English language, in which the proceedings of the Courts are ordinarily had, although in some of them the proceedings are authorized to be had in either the Spanish or English language.” Additionally, they were concerned that imposing an English fluency requirement to obtain jurors would impose “the burden of jury duty on a small portion of the citizens only.”

At the same time, the Supreme Court of California did not want to remove the judge’s final authority, clarifying that even if lack of English fluency was not an absolute general disqualification, the courts were not obligated to accept non-English-speaking jurors even if they possessed all the other qualifications. “Such a construction would certainly lead to absurd consequences,” they declared. To justify that decision, the superior court pointed to statutory language that stipulated that “every written proceeding in a Court of Justice shall be in the English language … and in no case shall any charge or instructions be given to the jury otherwise than in writing, unless by mutual consent of the parties.” Following those Acts, any written proceeding should be in the English language. To affirm this point, the courted noted that “no person shall be suffered to speak to the jury on any subject connected with the trial,” and when considering the verdict, “the officers shall be sworn to suffer no person to speak to them

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3 Ibid.
4 Statutes of California, 345.
5 Ibid, 491.
[the jurors,] nor speak to them themselves, on any subject connected with the trial.” Here, the opinion seemed to contradict the previous assertion, as all those requirements precluded the use of interpreters to assist non-English-speaking juries.

Beyond the statutory requirements and allowances, the court also considers the practical difficulties in using interpreters. Surveying the jurors’ names, the superior court deduced that “it is quite evident that five of them speak the Spanish, and one the German, language.” The court observed that those jurors represented the diversity of the population of California, a state that could produce jurors who had Spanish, German, French, Italian, or Russian as their first and, in some cases, only language. The opinion expressed the concern that having jurors speaking two or three languages besides English would make legal proceedings a nightmare because having as many interpreters as languages represented in the jury would require that “the testimony of each witness would have to be interpreted as many times as the number of languages represented … It might be difficult, and even impossible, to find interpreters. At all events, it would be a great obstruction to the proceedings of the Court and open the door to errors and misunderstandings innumerable.” Thinking through the complications, the court envisioned an impossible situation.

The opinion recognized that the law “provides for interpreters of the testimony of witnesses.” The problems arose in the actual process of jury deliberation. “When the testimony is closed and the cause submitted to the jury, how are the jurors, each speaking a different language, to compare views in the jury room?” the court asked. The State did not have legislation.

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6 Ibid., 393.
7 Ibid.
that authorized interpreters. Hence, it might be impossible to hold jury trials under a strict construction of the statute. “Such a construction of the Act would lead to absurd consequences,” the court opined. Still, they acknowledged, “this view would not necessarily deprive the Act of all operation.” In the named counties, selecting jurors who all spoke the same language might be possible. It was up to the sitting judge to decide how such matters would proceed: “At one time a jury speaking the Spanish language might more readily be made up, and at another time one speaking English, German, or French, and the Court, in the exercise of a sound discretion, under the circumstances of each case, would determine which language the juror must understand.”

The Arceo case illustrates how the American legal system tried to negotiate the different languages spoken in territory that previously belonged to Mexico. On a broader level, it points to a little-studied aspect of American law and culture. From the earliest English settlements in British North America through the post-Revolutionary era and into the twentieth century, the United States has operated with an Anglophone legal system that presumes English fluency embedded in a society that has contained an ever-evolving population of non-English speakers. Yet, as we can see in Arceo, the complexity of the interpretation process was an impediment to

8 Ibid.

9 David G. Gutiérrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* (Berkeley: University of California Press, 1995), 38. In 1848, the Treaty of Guadalupe Hidalgo granted *de jure* American citizenship to those Mexicans who would remain on the territory conquered and guaranteed that they would keep their properties. However, American policies after the war opposed real citizenship for the Mexican community and started a practice of land expropriation that “planted the seeds of continuing ethnic discord in the region.” This case makes clear that the fact that Mexicans, even if they started with more rights than many other groups, were losing their political influence and demographic majority, and saw that the erosion of their citizenship rights made Spanish gradually become a secondary language behind English in all aspects including the legal system.
providing those services. Moreover, the more languages involved, the more difficult it became to provide equitable services for all the languages.

Although non-English speakers have been present in US courts throughout the nation’s history, legal scholars have taken almost no notice of this important fact. Neither have immigration historians paid much attention to the difficulties of a legal system that expected compliance with the law but carried forward proceedings in a language the parties often did not read or speak.\textsuperscript{10} The only scholars who seem to pay attention to court interpretation issues are lawyers writing in law reviews\textsuperscript{11} or interpreters writing in interpreting or translating journals.\textsuperscript{12} In both cases, even when using historical sources, those scholars address questions about their professions today. One of the few exceptions, if not the only one, is Ruth Morris, an interpreter,

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and lecturer in the Department of Translation and Interpreting Studies at Bar-Ilan University in Israel. In a couple of her papers, she has studied the historical context of court interpretation.\(^\text{13}\)

To investigate the dynamics of court interpretation in a historical context, this study takes a close look at translation in US courts between the Revolution and the Progressive Era. The legal history of court interpretation across this long nineteenth century differs dramatically from what has occurred since the 1970s, when the Second Circuit of the US Court of Appeals declared in the landmark case *Negron v. New York* that “particularly inappropriate in this nation where many languages are spoken is callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.”\(^\text{14}\) Between the Early Republic and the Progressive Era, this idea had yet to take hold. Indeed, appellate cases during that time frame show that non-English speakers were usually at a clear disadvantage compared to English speakers. Unable to communicate directly with the jury or judge or to fully understand the whole legal process, non-English-speaking witnesses and parties had to rely on courtroom interpreters, who many times were unable to provide culturally and linguistically appropriate translations. The deficiencies of courtroom translation were considerable. Misinterpretation and cross-cultural miscommunication were common, and they had an impact on the court cases of people who were often at the bottom of society. As


contemporary legal research has shown, the competence to determine credibility decreases and
the prejudices increase when the speaker is from a different culture. \(^\text{15}\)

This dissertation explores the relationships between among American legal culture, and
immigrant populations, and people from different legal cultures. It shows how these parties
reacted to “direct legal experiences” in the adversarial-based American legal culture. Using
appellate and lower court archival records dealing with legal cases where non-English speakers
were present, I study the ways in which the importance of English fluency, or a lack of English
fluency, in discourses of whiteness and citizenship changed over the course of the late nineteenth
century and early twentieth century. I am using the term “non-English speaker” in an expansive
way to include a wide spectrum of people, from those who lacked any kind of English language
linguistic skill to people who only “spoke with an accent.” Between the Early Republic and the
Progressive Era, American jurisprudence did not place translation or interpreters in a central
place. Most jurisdictions relied on untrained and unreliable interpreters who were only deployed
at the pleasure of the judges, but importantly, I demonstrate that changing linguistic
circumstances forced things to change, even if some judges made their discontentment at those
changes clear and tried to control the interpreters. I also explore the effects of bad translations
and the negation of translation services in the fairness of the legal proceedings.

These matters point to the broader link between whiteness, English fluency, and
citizenship. They show that English fluency has been central to constructions of American legal
identity since the foundation of the Republic. The emergence of one language ideology, that of

\(^{15}\) Miguel A. Méndez, “Lawyers, Linguists, Story-Tellers, and Limited English-Speaking
English as the one and only language of American national identity, shaped how European immigrants would absorb Anglo-Saxon cultural traditions and created considerable pressure to speak only English to become loyal Americans. “Legally white” non-English speakers, I will argue, challenged prevailing white, old-stock notions regarding whiteness and citizenship. Those legal actors changed racial ideas by serving as a threat to an idea of whiteness, and the English fluency supposedly associated with it, as the representation of a set of moral and cultural principles required to exercise full citizenship.

Such a singular linguistic focus in the legal system sets the US apart from many other places. Not all nations accord similar importance to language in the construction of national identity as America does. Some countries focus on ethnicity or religion as the common denominator to define national identity. However, the US, and by extension, the US legal system, has placed great importance on linguistic performance. As a result, English language proficiency has become the key to social acceptance. English fluency has represented how groups of outsiders embraced the set of moral and cultural norms required to exercise full citizenship. Many actors in the legal system believed that the only option for those people was to learn the rules of the game and jump into the new set of identities in their new society. One of the most important rules to learn was that English was king in America.16

This project contributes to several larger scholarly concerns, one of which is the study of the social power of whiteness. Particularly in the later sections, this dissertation examines the importance of linguistic performance as a way of understanding what it means to be white against the backdrop of shifting racial conventions. By exploring the ways in which legally white legal actors adopted and adapted the whiteness discourse, this work will demonstrate that English language proficiency, as the national language, was the key to society accepting that a group of whites were part of whiteness. Through an examination of the ways in which legally white immigrants socially constructed new discourses of whiteness that challenged, at least temporarily, preexistent notions of race, this project seeks to study the evolving strategies those groups had to use to make sense of a new legal system radically different from what they were used to in their homelands.”

In addition to whiteness studies, this project adds to our knowledge of immigration history by exploring what happens when immigrants who followed the cultural and legal norms of their own homelands experienced the consequences of a cultural collision inside the courtroom. A clash of legal cultures arose, and immigrants were forced to forge new paths in their legal culture to avoid the harsh consequences of being an alien in the courtroom. The United States legal system moved from Daniel Webster’s 1851 opinion that “every foreigner born residing in a country owes to that country allegiance and obedience so long as he remains in it, as

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a duty upon him by the mere fact of his residence,”¹⁸ to the many instances in which judges accepted cultural differences as a mitigating circumstance for some crimes.¹⁹ On the one hand, I will examine the importance of the law as America’s assimilating justification and investigate the law’s function in maintaining the status quo between immigrants’ communities and society at large. On the other, I look at how the nature of hybrid legal structures born of legal cross-fertilization created a sense of hope for the possibility of justice in immigrant communities.

On the broadest level, the project speaks to students of legal pluralism and legal imperialism. Following the example of Lauren Benton’s influential 2001 book, *Law and Colonial Cultures*,²⁰ I argue that the law is one culturally specific way of knowing and ordering experience inherently implicated in relations of power. Law is inseparable from sovereignty, nation, and a framework of conflict that created contradictory effects for both the natives and the immigrants. Similar to Benton, I explore the interactions of law, cultures, relations of power and subordination, economies, and ideologies to understand the role of law both within and between communities in contact. To illustrate this point, Benton creates a narrative that describes the cultural bridge role indigenous interpreters had as translators of imperial law for native peoples and native law for imperial agents. In a similar fashion, court interpreters took the cultural bridge role to transition immigrants from a constantly evolving trajectory of a multipolar legal regime to the unipolar American legal system. For example, the late nineteen and early twentieth-century

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¹⁹ In criminal law, mitigating circumstances are factors that are considered in determining the degree of culpability of the defendant. Mitigating circumstances do not justify or excuse a criminal action.

immigrants came from a legal reality where different legal regimes, based on ethno-local-religious jurisdictions, competed for supremacy inside a polycentric community. At arrival, those immigrants found a monocentric American legal system representative of a dominant and dominating legal regime that looks for legal uniformity.

Like some British Empire legal scholars’ arguments that British imperialists saw British law as a blessing to previously uncivilized societies, I show how legal actors believed that the introduction of proper American laws would bring civilization to immigrants in America. In fact, that reasoning was used to perpetuate notions of white American cultural superiority and the necessity of using the state’s legal structure to maintain order. For example, in many courts, the rights granted to whites under the law were contested for legally white non-English speakers. Nativist judges justified themselves ideologically by the spread of an allegedly superior legal system with better laws than those used by the immigrants. The American legal culture as an allegedly superior legal system was an ideology that was experimented with in Hawaii since the 1820s, where American colonialists used “the cultural power of law” to assimilate to the new order, and those who refused were systematically “marginalized and stereotyped as ignorant and lacking morality.”

The major themes that emerged from my research tell the story of how the American legal jurists discovered interpreters as the tool for communication with non-English speakers in

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23 Ibid., 86.
the legal system before the Civil War Era, how they perfected that tool until the Gilded Age era, and how they realized the power of the interpreters was changing the legal system and society by the Progressive Era. As such, the chapters are organized to illustrate the evolution of the relationship between the interpreters and the legal system.

Chapter 1, “He Was Merely an Interpreter,” shows how Anglo-American common law interacted with other legal customs and languages. Those interactions created something new that was influenced and, at the same time, influenced the American common-law legal system. This chapter shows that court interpretation was at the center of how the American legal system had to deal with a more diverse society by granting some accommodations to non-English speakers, even if the place of English in the American legal system was never at risk, as all proceedings were still conducted in English.

Chapter 2, “For an Adequate Compensation,” shows how American courts in the latter part of the nineteenth century came to informally accept the right to interpretation for non-English speakers. That acceptance created the need for bodies of legislation that would help courts navigate the inclusion of interpreters in the legal process. The legislation created to define who would be a court interpreter prompted a movement towards the professionalization of court interpreting services. After the Civil War, court interpreters were becoming an indispensable part of the legal process, and the courts were concerned that the lack of norms for interpretation made interpreters unreliable to provide the evidence for the court and ensure fair legal proceedings. Those professionalization efforts made interpreters start to feel proud of their craft and consider themselves similar to expert witnesses, deserving fair compensation for their job.
Chapter 3, “A Babble of Voices,” shows how even if the different courts agreed on the importance of the interpreters in legal proceedings, that did not mean that those interpreters did not face obstacles when doing their job. Interpreters had to fight the prevalent feeling that English was the natural language of the courts and that any modification of that principle was a nuisance, at best, and a disruption of the system, at worst. The court had to accept interpreters only if the judge saw fit to provide that accommodation. Confused non-English speakers in the American legal system were at the mercy of the judges, even if it was clear that their rights were in danger. Concerns about providing fair conditions to non-English speakers forced the courts to modify their procedures to include interpreters as witnesses and translations as evidence.

Chapter 4, “A Stranger in a Strange Land, and in a Strange City,” explores the last decade of the nineteenth century and the first two of the twentieth. It reveals a tense dynamic between expanding rights and burgeoning resistance to those rights. Even as the US legal system continued to professionalize and integrate interpreters and translations into the courts, nativist sentiment outside of the courts moved against providing any accommodation to those strangers. The massive waves of the New Immigration, which brought millions of migrants from southern and eastern Europe, influenced and transformed courtrooms, presenting interpretation as something negative. Nonetheless, many jurisdictions had established strong precedents to guarantee the right to court interpretation reinforced by an unstoppable movement to standardize court interpretation.

This exploration of court interpretation and English language fluency from the Revolution to the Progressive Era is a response to the Populist Right’s highly restrictive views about immigrants’ rights policy and how any concession to immigrants will ultimately destroy
America by ensuring that they will never integrate into the fabric of the American society. It also responds to the progressive discourse that sees the past as a gloomy time when a virulent anti-immigrant movement curtailed immigrants’ rights and groups classified as “the other” never had a fair chance. Of course, both groups see the past as a primarily black-and-white reality where things were one way or another, but the evidence presented in this work suggests a more nuanced story, a story full of people with the best intentions and people with the worst impulses. It is a story where some people never had a fair chance and others had the law as their last refuge, a story where people overwhelmed by a foreign legal system shared the courtrooms with savvy immigrants who took advantage of that same legal system to advance their interests. In conclusion, the evidence presents a very complex picture that does not fit into any of those two sides previously described that dominate most of our popular discourse about immigration.
CHAPTER I
“HE WAS MERELY AN INTERPRETER”:
COURT INTERPRETATION BEFORE THE CIVIL WAR

This chapter shows how the American legal system during the Early Republic and Antebellum eras navigated diverse scenarios in which common-law legal traditions interacted with other legal customs. The interaction of different legal cultures across America created hybrid legal structures born of legal cross-fertilization. It is difficult to know whether these hybrid legal structures represent American law being transported to diverse scenarios or, if not, what kind of new laws came to be applied to those new situations.

Whatever the final answer to that question, the new hybrid legal systems brought new conceptions to the center of the legal-political discussion. The idea of the hybrid legal structures appears in Mary Sarah Bilder’s *Transatlantic Constitution*.¹ Bilder argues that as the American judges had to do in the new American territories, the imperial state adapted colonial laws to the different realities of the colonial settings, but, due to the repugnancy principle, colonial law remained consistent with underlying English legal principles: a legal system based not on a set of

laws but on an accepted legal culture that debates about when and how the laws should apply in the different situations instead of the more traditional “imperial constitution” system.²

The American legal system recognized that a “one size fits all” principle was inapplicable in the colonies because the law had to respond to diverse circumstances. Judges had to balance the traditional forms and procedures of the legal system with the appropriate response to local circumstances. If the laws were too inflexible, they would not properly respond to local conditions. If they were too divergent from the original versions, they would not conform to common law and therefore would be outside of the accepted boundaries of American identity. In much the same way as Bilder shows, how although the Privy Council needed to maintain some degree of legal consistency in governing the Empire, the physical distance of the colonies made the divergences less threatening, American judges in the new territories or those dealing with foreigners saw local divergences as a minor risk for legal uniformity.

However, the existence of an Anglo-American legal tradition in the United States, similar to those Anglo-influenced common-law legal systems in many of the former British colonies, was a mechanism to control local differences still inside the American legal system. For example, the new American republic adopted the principle of legal repugnancy as a foundation for the legal relationship between the federal government and the states. Any local legislation had to endure a legal review against federal law, and any law deemed repugnant to the federal government had to be abolished or amended. Those common legal institutions and practices

provided a legacy of hybrid legalities in many former British colonies that defined the American legal system in the Early Republican and Antebellum eras. To be sure, Americans saw American law as a blessing to previously uncivilized societies. By the introduction of proper American laws, America would bring “civilization” to such societies. In fact, that reasoning was used to perpetuate notions of American cultural superiority and reinforced the necessity of using the state’s legal structure to ensure the maintenance of the American order. American judges felt justified ideologically by the spread of an allegedly superior legal system with better laws than those used by native peoples. Those principles represented American legal scholars’ basic understandings about law and nation. America was a nation articulated by a legal framework that included a universal set of principles derived from the laws of England. The idea of America as a nation of laws was a very important aspect of the American enterprise.3

Similar to the arguments in Ann Stoler’s *Carnal Knowledge*,4 we can see how the American legal system created and defended the categories and boundaries of the concepts of order, identity, purpose, and the various means by which the American state shaped the self-understanding of the American community and its civilizing mission. Those ideals were not the daily reality. In some cases, the American state saw the disconnection between ideology and praxis as an attack against the order brought by Americans with their superior civilization.

The following cases show how the daily realities and practices of the diverse contexts frequently compromised the legal forms of the American legal system in a supposed defense of diverse

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cultural practices and as a justification to impose a foreign legal system against the defenseless. And yet, those people adopted and used those same legal principles to fight the injustices of the system. In a savvy use of the law, many legal actors used legal pluralism to their advantage. A close reading of legal trials and disputes can reveal the hope that some people had in the possibility of justice by the legal structure, hope represented by those legal actors who rejected the imperfect legal system and the subordinate social status that many times the legal order attached to them. Many argued for their rights in front of courts of law even when social prejudices, legal precedent, and their positions as subordinate elements of society might have made their causes appear hopeless.

However, all those hybrid legal structures were not always moving forward in defense of the defenseless. As Christopher Tomlins explains, the early American legal system was heavily defined by racial slavery that was “not as a temporary and essentially contained legal hierarchy but as an expansive polarity of freedom and its absence.” Additionally, Mary Turner shows how new legal realities made some former slaves less free to set the terms of their employment during the post-abolition period than had been the case during slavery. Race and slavery issues were complicated by the differences between Roman and common law. Decades ago, Frank Tannenbaum’s *Slave and Citizen* argued that Spanish law made the slave a legal person with some legal rights, whereas American law gave slave owners absolute power over their slaves.

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5 For more about legal pluralism, see Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, UK: Cambridge University Press, 2002).
Before falling under the American dominion, slaves used the colonial legal system as a tool to achieve their specific aims, creating in the process “a corpus of case law.”7

Another issue involved different understandings of race. In her comparative study of Louisiana and Cuba,8 Rebecca Scott questions the traditional view that Cuba’s racial system was closer to that of the binary American model as defined by other scholars such as Aline Helg.9 Scott explains the complex interracial dynamics through micro-historical research.10 As a result of the differences in race relations, both societies adopted different approaches to the legal rights of blacks, either free or slave. There is a clear contrast between the Iberian versus northern-European-American race relations.

Another approach to investigating slavery and race relations across the American legal system is the study of legal transplants.11 This approach argues that legal development in America can be attributed to the transplantation of legal provisions and structures from other societies. The most recent work on transplantation focuses on the local implementation and transformation of codes transported from one jurisdiction to another. For example, different slave societies transplanted local innovations from other slave societies. The transplantation of the

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10 Scott, Degrees of Freedom, 248.
11 For more about legal transplants, see Alan Watson, Legal Transplants: An Approach to Comparative Law (Charlottesville: University Press of Virginia, 1974).
most effective and successful local innovations created regional commonalities that evolved into slave codes that could explain the development of slave law in America.¹²

Latin American racial classifications were more complex than the United States’ binary system of white and black. In Latin America, racial mixing frequently occurred and was recognized in intermediate racial categories. Roman law approached race as a social and legal construction where the law had a central role in the creation of racial identities and knowledge. This can be seen in the arguments from trial records of lawsuits litigating *limpieza de sangre*¹³ that show how different historical actors negotiated their racial and legal identities. Ann Twinam’s *Public Lives, Private Secrets* uses 244 gracias al sacar sets of documents to show the potential for racial and social flexibility in the Spanish colonial legal system. The gracias al sacar petitions asked royal authorities to secure papers of legitimation, change of birth status, or even verification of purity of blood. Those papers were used to secure citizenship, a title of nobility, or even a change racial status. Birth status was not fixed in the Spanish colonial legal system but could be changed. It even allowed individuals to purchase whiteness. The fluid nature of race and class in Latin America was a reality that the American legal system did not have to address.

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¹³ Those trials established racial identity.
How to Use Interpreters?

One thing is clear: judges have a hard time having interpreters in their courts, and they would prefer that they were unnecessary in the cases where they preside. Most judges complain when they are unable to directly address all the actors of the legal process (lawyers, witnesses, defendants, clerks, and many other people necessary in their courts) because it disrupts the standard proceedings that are the norm in their other cases. However, when they have non-English-speaking parties in their courts, in pursuit of justice, they tend to be flexible and adapt to the linguistic necessities of those actors of the legal process. In the years between the Revolution and the Civil War, some judges made clear their displeasure with the use of interpreters. For example, they were adamant that the interpreters should do their best to interpret as closely as possible from the non-English speaker’s words instead of interpreting their meaning.

Many judges expressed their concerns about courtroom interpretation in their opinions. The most common concerns came from the poor quality of the translation services offered by the American legal system. The judges, who in most cases lacked a professional body of interpreters, were forced to use people who knew, in different degrees, both languages but lacked any training in formal interpretation or, in most cases, the law. The judicial interpretation offered by those courts showed the diversity of standards tied to the area of the country and the abundance, or thereof, speakers of a specific language. That situation produced a great sense of injustice to the judges who saw themselves as the last wall of protection for innocent people. However, the lack of knowledge of the required languages made them unable to identify and correct any intended
or unintended injustice. To be fair, most of those judges tried to improve the quality of the interpreting services provided by their courts of law, even though in some cases the improvements were very modest.

The interpreters’ criminal liability for carrying out their duties was an issue of contention. In a 1795 Circuit Court of the Pennsylvania District case, a French national was accused of fitting out and arming a ship to fight Great Britain. One of the main points of contention in this case was whether the defendant, as the interpreter of the owner of the vessel, was “knowingly concerned” about the arming of the ship and was therefore legally responsible or if he lacked any legal responsibility because he was just doing his job. The prosecution argued that, “as an interpreter was the necessary instrument on the occasion,” that would be enough to convict him. However, the defense argued that “he was merely an interpreter; and if, in fact, he had appeared in that character alone, we should not have thought it a sufficient ground for conviction.” The defendant was declared guilty.14

American judges had a hard time trying to conciliate foreign practices with the usual American court procedures. In some court cases, the analysis of foreign law was important when litigants claimed to be subject to conflicting requirements under both US and foreign law. The analysis of foreign law was especially important when discussing claims in the Louisiana Territory or in other places where Spanish and US laws were different or even contradictory. In an 1809 Supreme Court of Massachusetts case, for example, the will of a former Bostonian resident in Cuba at the time of his death was in dispute. One of the main points of contention in this case was the validity of the testimony of two witnesses because they did not understand

14 United States v. Guinet, 2 U.S. 321, 2 Dall. 321 (1795).
English, and “no authority was given by the commission to swear an interpreter, and no person
was sworn to interpret truly between the witnesses and the commissioners.” The tribunal
acknowledged that although it was a common occurrence because “this point may often arise in
practice,” they nevertheless refused to admit the testimonies as acceptable evidence “unless there
[was] regular evidence that it was given on oath duly administered.” The tribunal found no
evidence that the affidavits of the witnesses were given on oath, making the evidence a
declaration of the interpreter. The tribunal had no issue with the commissioner’s authority to use
a sworn interpreter, even if it was not in the commission, making clear that the use of interpreters
was a common procedure.15

The opinion stated that the interpreter was sworn by the commissioners and that “he acted
in the character of a public sworn interpreter of the place.” The tribunal gave normalcy to the
interpreter’s practice by saying that “sworn interpreters are frequently appointed in foreign ports,
to facilitate commercial intercourse between strangers and the inhabitants.” However, the
justices had some misgivings because they were unaware of the “nature or extent of the oath
under which they act and are satisfied that the employment of a person as a public sworn
interpreter, is not sufficient; but he ought to have been sworn by the commissioners, truly to
interpret between them and the witnesses.” Moreover, the justices were uneasy because the
depositions “are silent as to this point,” and they felt that the language of the deposition was
unclear because it said that the interpreter was sworn without clarifying if he “was sworn to
interpret, as included in his oath of a public interpreter, or whether he was then sworn by the
commissioners.” The tribunal explained that the “commissioners ought to have returned this fact,

15 Amory v. Fellowes, 5 Mass. 219, 4 Tyng 219 (1809).
and the omission cannot be supplied by the affidavit of one commissioner taken afterwards,” so the defect of form could be solved by a subsequent affidavit. As a result, a new trial was granted.16

In an 1825 Supreme Court of the State of Louisiana, Eastern District, case, the tribunal had to decide the validity of “a rule of the Spanish law, which requires, that in case the testator does not speak, nor understand the language of the notary, the public interpreter shall be called in; and in case there is no public interpreter in the place, some other person who understands the language shall be required to assist at the making of the will, and that such person shall be duly sworn to faithfully explain the declarations of the person desirous to make his will.” The problem was that it was unclear if the person acting as interpreter was duly sworn according to the law. Another problem was that the will was made in 1799, a few years before Louisiana became part of the United States in 1803, and as the opinion explained, the Spanish law did not require “that all the formalities necessary to give effect to a will, previous to the signature of the testator and the witnesses, had been complied with.” The tribunal admitted that proof of those formalities “could be received, when the testament was admitted to probate, and the execution ordered. This we are bound to presume was furnished, when the competent authority directed the will, under which the heirs claim, to be carried into effect.” The judgment was reversed.17

In an 1831 Supreme Court of the State of Louisiana, Eastern District, case, a disputed marriage contract and will were evaluated under common law and Spanish law. The tribunal studied the case under “our old code or the laws of Spain.” One of the precedents used by the

16 Amory v. Fellowes, 5 Mass. 219, 4 Tyng 219 (1809).
17 Bonne v. Powers, 3 Mart. (n.s.) 458 (1825).
tribunal was the “Leyes de Toro,” dealing with hereditary debt, promulgated by Queen Joanna of Castile in 1505. The tribunal saw Spanish law as “the laws of that country transferred to us as purchasers of Louisiana.” This case shows the problems when the Spanish law’s provisions were different from those of the Code of 1808.18

The role of the court interpreter in the United States has been defined in many different court cases. A judge in the Virginia Supreme Court studied an 1814 property case involving slaves and had to decide if the translators interpreting between the client and his attorney were included in the privileged communications protections. The court decided that it was settled law that “the privilege equally applied to interpreters acting as the organ of communication between the client and his attorney.”19

The legal concept of privileged communication is at the foundation of the legal system, but the place of the interpreter in that legal system was not always clear. In an 1829 Supreme Court of Judicature of New York case, the ownership of a piece of land was under discussion. One of the points of debate was, again, if it was necessary to include the interpreters under the umbrella of privileged communications. In the opinion, Judge Savage clearly stated that the protections under privileged communications were “confined to counsel, to an interpreter, and perhaps to the clerks of an attorney or counsel, though as to the latter the cases differ.”20 This opinion did not make any reference to the 1814 Supreme Court of Virginia case that discussed

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the same issue fifteen years earlier.\textsuperscript{21} This case shows the existence of a precedent previous to the 1814 case.

Needless to say, the American legal system was often cautious when allowing any third party to provide legal interpretation. Yet many times it was a necessity. In an 1834 Circuit Court of the District of Massachusetts case, the defendants were trying to overturn a conviction for robbery on the high seas, a capital offense. One of the points of contention was that “interpreters were permitted to interpret a part of the testimony of said Jose Perez, without being previously sworn to interpret truly and faithfully.” The tribunal recognized that the prisoners were “all foreigners and strangers to our institutions, and do not, as far as we know, speak or understand the English language, and with whom the court could communicate only by an interpreter.” They were informed that they were entitled to copies of the indictment, but there was no clear reference that their copy of the indictment was offered in their language. The tribunal accepted testimony given to the captain of an English brig because the ship had “a Portuguese interpreter, who spoke English and Portuguese.” However, it seems that the prisoners spoke Spanish and not Portuguese. Even if the similarities of both Romance languages allowed some degree of comprehension, it is very difficult to believe that the level of understanding between both parties was enough to provide acceptable evidence in a court of law.\textsuperscript{22}

The tribunal accepted that interpreters interpreted some testimonies “without being previously sworn to interpret truly and faithfully.” During the previous trial, one of the lawyers for the prisoners, who was somewhat familiar with the Spanish language, “objected to some of

\textsuperscript{21} Parker v. Carter, 18 Va. 273, 4 Munf. 273 (1814).
\textsuperscript{22} United States v. Gibert, 25 F. Cas. 1287, 2 Sumn. 19 (1834).
the interpretations as incorrect, and requested that two other gentlemen, whom he had selected, might be sworn as interpreters.” The district attorney argued that he had the right to use any interpreter he wanted, opening the door for the defense “to swear other interpreters in their own employ in the cause.” The lower court allowed the extra interpreters to sit near the prosecution interpreter to express any complaint to him and “for him to consider and rectify.” As such the situation sounds like a two-tier system of interpreters, with one with full power and two others just advising. The prosecution’s interpreter even acknowledged that he was not “well acquainted with Spanish nautical terms,” the kind of vocabulary that was key in a robbery on the high seas case. It seems that the prosecution’s interpreter accepted the counsel of the other two interpreters most of the time. Finally, the tribunal had sworn both of these interpreters and, afterwards, one of them was used as the exclusive interpreter. One of the disputes revolving around translation issues was whether any of the “interpretation of the language of the witnesses” heard by the jury was incorrect. The tribunal was confident that any mistaken translation could have been corrected in a moment and the interpretations could be taken as acceptable evidence. The tribunal recognized the right of any sworn interpreter to “use the knowledge of others to assist his own judgment in any case of doubt, giving his own interpretation finally to the court.” The judge addressed the prisoners “in as brief terms as possible, being conscious of the difficulty of addressing [them] through the medium of an interpreter only.” The sentence was interpreted to the prisoners by a sworn interpreter. The bill of exceptions was not allowed.23

Getting the right interpreter for the job was a constant concern for the judges. In an 1841 New Jersey Supreme Court case, the justices had to decide, among other issues, to accept or

23 Ibid.
refuse the defendant’s objections about the validity of the testimony of a witness who did not understand English, or as the opinion describes, “our language,” on the ground of interest. The lower court accepted this person who was sworn in as an interpreter. The lower court judge failed to justify why he accepted the interpreter and dismissed the objection. The tribunal guessed that “in the Justice’s opinion, the witness had upon his voire dire satisfied him”\textsuperscript{24} that he was not interested in the suit. Still, he failed to enter this information on his record, and the judgment was reversed.\textsuperscript{25}

Interpreters were considered officers of the court in some instances and agents of the parties in others. In an 1856 Supreme Court of Wisconsin case, the tribunal examined a land dispute case involving a German-speaking father and son. The lower court case accepted as evidence a few translated exhibits that a witness compared with each other and testified “that exhibit C contains a literal translation of the contents of exhibit B.” After that, the lawyer was allowed to present both exhibits as evidence. When the defendant’s counsel objected to the admission of those exhibits as evidence, the witness testified that “exhibit B is in the German language, and he is acquainted with both German and English,” and the tribunal accepted the evidence. A point made abundantly clear in the lower court was that the complainant did not speak English and that he used Mr. Bade and Captain George to act as interpreters. At the same time, both acted as “agents, interpreters and friends of the complainant.” Mr. Bade testified, “I have given his own words in English; he spoke them in German,” and that “Mr. Diener said he

\textsuperscript{24} “Voir Dire is the process by which attorneys select, or perhaps more appropriately reject, certain jurors to hear a case.” (John A. Tarantino, Gordon P. Cleary, and James R. Nanko, \textit{Trial Evidence Foundations} (Santa Ana, CA: James Publishing, 1986), Section 201.)

\textsuperscript{25} \textit{Saumiere v. Wode}, 18 N.J.L. 296 (1841).
would pay me for my time in so doing, as an interpreter.” The circuit court felt the need to specify that “Mr. Diener (the complainant) did not need an interpreter to talk with Mr. Bade.” The circuit judge decided that some evidence would not be accepted “unless accompanied by proof, that the interpreter correctly interpreted the language of the complainant to them.” The Supreme Court opinion stated that “an interpreter is not necessarily an agent of the parties, so that what he says may be given in evidence if the party sought to be charged by his declarations had no knowledge of the language in which they were made, unless accompanied by proof that the interpreter correctly interpreted the language of the party.” The tribunal accepted that one of the parties could use an interpreter as his agent, “but the mere fact of his contracting with another party whose language he does not understand, through an interpreter, does not constitute the latter an agent so as to bind him by a false translation.” The opinion clarified that the “mere fact that a person contracts with another, whose language he does not understand, by means of an interpreter, does not constitute the latter an agent, so as to bind him by a false translation of the language of the parties. It would be most dangerous to hold such to be the law, as such a doctrine would hold out great inducements to persons to commit the grossest fraud upon the unwary and unsuspecting.” The judgment was reversed.26

Judicial authorities were willing to pay as much as needed to ensure the quality of the interpretation services. In an 1856 United States Court of Claims case, the tribunal decided on the monetary compensation for the interpreter in an 1828 murder case in the Territory of Michigan, where nine Native Americans were charged with the murder of a group of white men. In the original 1828 case, the judge decided “it was necessary that someone should be found who

26 Diener v. Schley, 5 Wis. 483 (1856).
could interpret the Winnebago language both into French and English.” The matter became
t further complicated when the only people able to do the translations could do it only into the
French language. The 1828 tribunal examined several persons, and they were found incompetent.
Finally, the judge was able to find and accept the claimant as an interpreter. The 1856 tribunal
asserted that the claimant “performed the duty well, and to the entire satisfaction of Mr. Scott,
and also of Mr. Hempstead, who appeared as counsel for the Indians, and of the court.” The
interpreter had to travel “five hundred miles from Missouri, at his own expense, through an
almost unbroken wilderness, exposed to many dangers and hardships, in a country filled with
hostile Indians, and which could be traversed only on horseback or in keel or pirogue boats.”
The opinion emphasized the importance of the case by pointing out that both sides’ counsel “was
employed to come five hundred miles…, and both … were paid one thousand dollars.”
Moreover, the 1856 tribunal argued that “without the services of a skillful interpreter the cases
could not have been tried, as more than half of the jurors were Frenchmen, and did not
understand English.” The court accepted that, in order for the evidence to be properly laid before
the jury, it was necessary to employ an interpreter. Moreover, counsel did not exceed his
authority, “for if he had not done so he could not have fulfilled the trust reposed in him.” In the
end, the interpreter received one thousand dollars for his services.27

Who had the authority to decide who was a good, or at least acceptable, interpreter was a
contentious point in many instances. In an 1857 Supreme Court of Michigan case, a land dispute
between a husband and a wife over a tract of land granted by the 1819 treaty with the Chippewa
Indians, the tribunal considered whether to accept “a deed where the acknowledging officer is

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27 John Shaw v. The United States, 1 Ct. Cl. 17 (1856).
unacquainted with grantor’s vernacular language, to be taken through a sworn interpreter.” The tribunal had an issue with the fact that the officer only certified what the wife stated, using the interpreter, but had not acknowledged the deed as required by statute. However, the tribunal found that the worst error of the case was that the notary abused his powers because “there is no law authorizing the notary to swear an interpreter,” making the whole interpretation “mere hearsay.” The justices explained that “if the circumstance that the notary did not understand the vernacular language of the squaw would justify the intervention of an interpreter, no man would feel safe in any property, a claim to which might be supported by proof so easily obtained.” To make it even more clear, the opinion finished with this last sentence: “Such a practice would lead to endless frauds and cannot be sanctioned.” The tribunal granted a new trial.28

The right of interpreters’ privileged conversations with a witness was clearly accepted by the late 1850s. In an 1859 Supreme Court of Iowa case, the court refused to extend the right of privileged conversations to a witness. That right was reserved for “an attorney, or one who at the time was acting, so to speak, as the medium between the client and attorney, as an interpreter; or for the attorney, as a clerk or the like.” The tribunal defended its opinion by using some precedents: “In Foster v. Hall, 12 Pick. 89, it is held to be settled by the cases, that the rule ‘is confined strictly to communications to members of the legal profession, as barristers, and counselors, attorneys and solicitors, (Wilson v. Rastall, 4 Term. R. 759,) and those whose intervention is necessary to facilitate the communication between attorney and client, as

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An 1859 Supreme Court of Errors of Connecticut case involving a commercial dispute reinforced the idea that “the interests of justice cannot be upheld, and the administration of justice cannot go on, without the assistance of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subjects of all judicial proceedings,” the rule that communications made to attorneys were protected from disclosure in court extended to interpreters. As “this protection [was] the privilege of the client, the client [was] the only one who can renounce or waive this protection. The special position of the interpreter in the legal process awards him the right to be the only witness present at a consultation between the client and his attorney that will be covered by the protections that will forbid him to disclose the content of those conversations to the court.” A new trial was granted. Even if most of the cases sided with trying to help all parties in the legal process by providing translation services, some judges thought that some actors tried to hide behind their culture when in reality they wanted to use language or cultural barriers to manipulate the situation to their advantage.

In an 1859 Supreme Court of California case, a mortgage dispute where the plaintiff’s wife claimed that she was ignorant of the English language, the justices had to pass judgment on the lower court’s decision that there was no need for an interpreter. The upper court decided to accept the lower court’s decision because they were “satisfied that the wife understood English.”

29 Sample v. Frost, 10 Iowa 266 (1859).
30 Goddard v. Gardner, 28 Conn. 172 (1859).
The court ratified the previous judgment. This case is a clear example of the suspicions that permeated the American legal system about people who claimed not to understand English, pretending to lack linguistic competence to gain some advantage.\(^{31}\)

These cases show that judges who were used to being masters in their own courtrooms had a hard time being forced to allow another group of people – interpreters – to do their job, a job that was often controlled by rules imposed by other judges’ opinions. That reality constrained the usual unlimited control the judges had in their own courtrooms and complicated the central question that every tribunal had to answer in the presence of non-English-speaking parties: How do we properly use interpreters in the courtroom to protect the non-English-speaking litigants while administering justice in a fair way?

When answering how to use those interpreters, the judges had already asked the first question: Do litigants really need interpreters, or are they, in fact, feigning such need? Once the legal system decided that an interpreter was needed, the second issue was how to use those interpreters in a way that did not negatively affect the roles of the other legal actors (lawyers, witnesses, defendants, clerks, and many other people necessary in their courts). In the Early Republic, that process was complicated by the lack of specific standards to differentiate between good interpretations, which could be used as evidence in the case, and bad interpretations, which would corrupt the legal process.

One of the main concerns voiced by the judges in their opinions was the fear that the limitations of the day-to-day realities in the court, far removed from ideal situations, would not allow the legal system to work effectively when it had to make use of the courtroom interpreters.

\(^{31}\) *Pfeiffer v. Riehn & Scannell*, 13 Cal. 643 (Cal. 1859).
Those comments were not necessarily nativist attacks against immigrant or foreign cultures but concerns that were taken seriously because, even if sometimes too focused on the interpreters’ behavior, they had philosophical validity for those judges. Sometimes, the legal system tried to remedy most of the problems by requiring “verbatim translation” from the interpreters, instead of more nuanced interpretations that would provide better insight into the testimonies and bridge the cultural gap between the judge and the witness.

Another main concern was how to reconcile common-law-based American law with Roman law in the former French and Spanish territories. As Charles Cutter argues, the far northern border of New Spain had a civil and criminal procedure based on the functionaries’ knowledge of received law and custom, modified to adapt to the community norms. The inhabitants of those areas were accustomed to judicial functionaries that had the guidance of several fonts of jurisprudence such as the “Derecho Indiano,” local custom, and equity or a “defined sense of fairness” as equally valid sources of the law. An important aspect of Cutter’s study is the composition of the judicial personnel. He presents the formal standards and depicts the complex procedure necessary to be a member of the judicial system, a system that most of the time required previous administrative as well as practical experience and familiarity with the written law.

The American legal system had formal standards and required complex procedures to be a member of the judicial system, a system that most of the time required previous administrative

33 Spanish colonial law.
34 Cutter, Legal Culture of Northern New Spain, 34.
as well as practical experience and familiarity with the Roman written law. Moreover, the implementation and function of law in these peripheral areas safeguarded the proper administration of justice. However, those regions had a long procedural history of continual interaction between royal law and local customs and values, as Cutter claims that the law was a tool of negotiation and cultural formation for the colonial authorities, which allowed for an easier transition and negotiation between both legal systems.

Mistakes in Translation and the Right to Understand Charges

Concerns about mistakes in translation and the right to understand charges have been present since at least 1682 when Lord Chief Justice North evaluated the merits of one of the first recorded translated legal proceedings in the Anglo-American legal tradition.35 In this case of political murder, a Polish worker, two foreign gentlemen, and a Swedish count stood accused. Between them, they spoke French, German, Dutch, and English with varying degrees of fluency. When the count expressed concerns about his life because of his poor English and demanded to have multiple interpreters, North accepted the idea that there should be several interpreters to check on each other’s competence. Even those precautions did not preclude some of the translators from behaving in ways modern observers would see as unprofessional: one of them was an interpreter in the case, a witness, and an advocate for the count.

The following cases present some examples of how interpreters were an indispensable part of the legal process. While it must be acknowledged that the people engaged in interpreting

35 Count Coningsmark and Others, 9 State Trials 1 (1682).
were not always skilled, experienced, or fully competent, these legal actors played a central role in court proceedings. The law often seems strange and forbidding due to legal language, but for non-English-speaking parties, comprehension problems can go far deeper than language difficulty alone. The following cases reveal instances where non-English speakers’ misunderstandings of the legal system and their cultural and linguistic differences put them at a disadvantage and unfairly penalized them due to the lack of interpreting services, a biased interpreter, or the lack of quality control. The lack of protections against those issues was magnified by the absence of any statutory instrument governing the practice of court interpreting. Non-English speakers had to wait on the judge’s ruling on the matter to know whether “individual courts’ decisions on interpreter issues [were] binding on other courts.”

The issue went beyond national tongues to include other forms of communication. The American courts recognized that Sign Language was a complete, complex language that required interpreters to break down the barriers between the hearing and deaf communities and the legal system. Most courts accepted early on that providing deaf people with the appropriate language services would effectively and accurately facilitate communication to include deaf people in the legal system and allow them to be treated with fairness while complying with the spirit of the law of the land. In an 1817 Supreme Court of Massachusetts case, the tribunal granted Timothy Hill, who had been previously identified as deaf and dumb by the Solicitor-General, the right to an interpreter in the person of “one Nelson,” sworn to interpret the indictment to him. Nelson

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explained the indictment to the defendant by “making signs with his fingers, &c.” After that, the court ordered the trial to proceed.37

In an 1830 Connecticut Supreme Court of Errors case, Thaddeus K. De Wolf had been tried for attempted rape. One of the peculiarities of this case is that the victim, Celestia Bull, was “deaf and dumb from her infancy,” and she had to testify by signs. That circumstance required the services of an interpreter, and in this case, the interpreter was William W. Turner, a teacher in the American Asylum for the Education of the Deaf and Dumb. The interpreter was also sworn as a witness because he testified about the victim’s competence with the language of signs and reading and writing communication. The defense objected to Bull testifying using the language of signs and as an interpreter. The judge overruled the objections, and the defendant was declared guilty.38

The defendant objected to testimony offered by the victim’s use of a signing interpreter and gave his objections about the trial court rule that signing was a proper mode for examination as one of the grounds for a new trial. He contended that Celestia Bull could communicate her ideas to the jury in writing without the use of an interpreter. Justice Daggett’s opinion argued that to accommodate the needs of a “deaf and dumb” victim, the use of “certain signs adopted as a medium of communication, by that class of persons” in the Asylum for the Deaf and Dumb was acceptable and that the previous judge had “very properly overruled the objection.” The opinion posited that courts should always err to use the “most perfect mode of ascertaining the

38 State v. De Wolf, 8 Conn. 93 (1830).
truth” and, in this case, the use of sign language was the “next best mode to an oral examination.” The justice did not see grounds for this objection.39

This case shows how in some instances the American legal systems tried to use the most effective way to serve justice. Overall, the place of a mode to testify other than oral testimony in the American legal system was and remains secondary, as most proceedings still use traditional oral testimony. As this case shows, the American legal system was capable of granting some additional accommodations to minority groups such as the “deaf and dumb” because they were perceived as a group in need of protection and therefore deemed worthy of special privilege. However, even with those accommodations, usually those groups were at a clear disadvantage, unable to clearly communicate with the jury or judge or to fully understand the whole legal process.

In an 1840 Supreme Court of Judicature of Indiana case, the plaintiff wanted to use a deaf and mute person as a witness, but the defendant objected to the witness’s competency. The court decided that the use of a sworn interpreter to communicate with the witness by means of signs to know “the extent of his knowledge of the nature of an oath [where] it appeared he understood that perjury was punishable by law,” was enough for the court to admit the testimony of this person. This case shows that courts would accept a witness who can communicate by signs with an interpreter as a competent witness.40

American judges understood that the defendants had the right to understand the proceedings against them because if they were incapable of understanding, they were denied

39 Ibid.
40 Snyder v. Nations, 5 Blackf. 295 (1840).
their right to a fair trial. The determination of whether a defendant was able to understand the proceedings and take part in his or her defense was left to the judge. When the defendant’s behavior indicated a lack of understanding, the judges had to decide whether courts violated the basic standards of procedural communication upheld by the legal system. In an 1835 Supreme Court of Mississippi case, Serpentine, possibly a slave and previously convicted of murder, got the court to reverse the previous conviction. The defendant confessed to a murder after he was whipped, and an interpreter told him “that their object in whipping him, was to make him confess what he knew about the murder of Dubois.” The people who whipped him were present when he testified before the magistrate who took the prisoner’s confession. The tribunal had to decide if the defendant, who spoke a foreign language, was able to understand the interpreter, who (from his imperfect knowledge of the language in which the prisoner spoke) translated to Serpentine. The key question was whether a testimony in those circumstances should be admissible to charge him with murder.41

The opinion of the court pointed out that it was unclear whether the defendant was able to draw a line between the whipping and his alleged guilt as a murderer. Justice Smith stated that he did not believe in the validity of the confession because the defendant “did not speak the English language, to convey, not an admission of his guilt, but a knowledge of the fact of Dubois’s murder, and the weapon used in the perpetration of the crime.” The justice argued that the testimony should be excluded because of its vagueness and because the person who acted as the

41 Serpentine v. State, 2 Miss. 256, 1 Howard 256 (1835).
This case, in which the judgment was reversed and the defendant discharged, shows how the American legal systems tended to give the defendants the required protections to avoid misunderstandings that could violate their rights. At the same time, it reveals instances where non-English speakers’ misunderstandings of the legal system and their cultural and linguistic differences put them at a disadvantage. Such litigants incurred legal penalties due to the unavailability of proper interpreting services, interpreter bias, or poor quality control.

In an 1861 Supreme Court of the Territory of Washington case, the court recognized the right of anyone charged with a crime who was unfamiliar with the English language to have the charge made known to him through a sworn interpreter. The same person would enter his plea in front of the court and would make the evidence known to the defendant. In this case, “an Indian not familiar with the English language” did not get “the indictment made known to him by a sworn interpreter, and his plea entered by the same means, and as the trial progresses, the evidence made known to him through the interpreter.” The associate justice thought that under those circumstances, the defendant’s attendance at the proceedings was “a meaningless ceremony, and the prisoner tried in violation of the laws and constitution of the land.” The court argued that anyone accused in a criminal case had some basic rights, and those rights “know no race.” Associate Justice Wyche saw those rights as “the rich inheritance of all, and under its

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42 Ibid.
provisions in the courts of the country, on a trial for life, the savage of the forest is the peer of the President.” The judgment was reversed and a new trial was granted to the defendant.43

Another concern the legal system had to deal with was inaccurate interpretation where interpreters might misinterpret the testimony of a criminal defendant or other witnesses who did not speak English. The cases below show examples of non-English-speaking defendants or witnesses getting their answers erroneously interpreted or interpreters making inaccurate word choices that changed the meaning of the testimonies. The problem was exacerbated when courts did not have proper interpreters and they had to resort to people accepted as competent interpreters chosen by the judges. Those same judges were unable to tell whether an interpretation was accurate unless they were bilingual and could monitor the interpreter’s performance.

The quality of interpretation was a big concern because most courtroom actors were unable to know whether the interpretation was accurate or not, and the detection of interpretation errors was unlikely to occur. The most common solution of requiring the interpreter to take an oath to interpret correctly did not magically transform a bad interpreter into a good one. In an 1842 Supreme Court of Judicature of Indiana case, the tribunal took up a slander action against a French-speaking couple for words in French that were understood by the plaintiff and other people. Justice Blackford argued that it was not enough that “the words spoken were understood by those who heard them” because the declaration of understanding was insufficient, as the translation of the offending words was accurate. The plaintiff needed to do more than state that he understood the meaning in English of the French words; he needed to prove that a sworn

43 Elick v. Washington Territory, 1 Wash. Terr. 136 (1861).
interpreter who spoke French could certify that the translation was correct. The judgment was reversed with costs. This case shows how the different courts tried their best to ensure a level of professionalism in the translations used as evidence inside the courtrooms.44

In an 1846 District Court case from the Eastern District of Louisiana, District Judge McCaleb had to decide the fate of the cargo in the ship Telégrafo. The main question to decide was whether the cargo was Mexican, and a prize of war to the captors, or Spanish and thus should be returned. In claiming the cargo, the owner, Antonio Gual, contended that “he is a subject of the queen of Spain, and a resident of Havana.” Gual presented an affidavit claiming that “he was misunderstood by the prize commissioner when he gave his answers to the standing interrogatories.”45

Judge McCaleb had difficulty believing the level of misunderstanding between the prize commissioner and the sworn interpreter of the court. The interpreter certified that “the witness having declared that he could not speak the English language, and that the Spanish was his vernacular, the oath was administered, questions propounded, and answers received, and afterwards read over to him in the latter language.” The main discrepancy between the early testimony and the later affidavit was referring to his place of birth and residence that changed from being born in Spain and residing in Campeachy (Campeche) to being “a subject of the queen of Spain, a native of Catalonia, in Spain, and a resident of the city of Havana, in the island of Cuba, one of the colonies of Spain.” Once the tribunal pointed out the conflict between both sets of answers, Gual “presented another affidavit, declaring, not that he misunderstood the

44 Hickley v. Grosjean, 6 Blackf. 351 (1842).
questions propounded to him in the Spanish language by the interpreter, but that the interpreter must have misunderstood his answers.” The judge stated that “it is extremely improbable that any such misunderstanding on the part of the claimant existed. There is no similarity in the sound of the names of Campeachy and Havana which will justify the belief that the interpreter could have mistaken the latter for the former.” The court rejected the claim of Antonio Gual and condemned the cargo of the Telégrafo as a prize of war. This case shows how actors of the American legal system tried to use interpretation and the lack of certainty to their advantage. At the same time, it shows the difficulties of the translator’s job.46

In an 1855 Supreme Court of Illinois case, the defendant appealed a judgment that convicted him of murder. The justices had to decide whether a dying declaration given through an interpreter was acceptable as evidence to be given to the jury. The witness, “who was a German and spoke through an interpreter, said [the] deceased told him he had a dangerous wound and must die for it; the witness understood English imperfectly.” Another witness, a German who could not speak English, testified through an interpreter that he had a conversation with the deceased before he died. Those testimonies were given through interpreters who sometimes differed in the words used by the witnesses and yet were told by the court to give the exact words of the conversation with the deceased or the substance of what he said.47

The defendant challenged the decision of the circuit court in permitting witnesses to state the substance of what the deceased said as to his apprehensions of death and in admitting the same through interpreters who sometimes differed in their rendition of German words into

46 Ibid.
47 Starkey v. People, 17 Ill. 17 (1855).
English. The court rejected that challenge because refusing to accept the testimony of some witnesses because they used an interpreter and because there were some minor differences of opinion between interpreters “would often be equivalent to a denial of justice.” Moreover, the tribunal understood that the realities of the American legal system and the facts in the field created an imperfect situation that forced the tribunal to be flexible because it would not assume perfection in the administration of justice unattainable by human tribunals.48

This case shows how the tribunal had to be flexible and accept that the realities of particular cases were different from the perfect forms that were explained and expected in the law books. Courts had to deal with the issue of the quality of translation that brought many appeals based on the right to obtain an accurate translation of the proceedings. The provision of interpretation without any guarantee of its competence was not enough to guarantee a safe and fair trial. As this case shows, some judges were worried that the application of justice was put in jeopardy in cases where interpretation was needed. Their concern was that even under the best possible conditions and with the best interpreters the courts could afford, it was not unreasonable for mistakes to happen.

In an 1859 Supreme Court of Illinois case, the principal witness to a murder could not speak English. His testimony was given through an interpreter, and there was some dispute over the proper translation of some words. The justices demanded that when evidence was presented by an interpreter and there was some controversy about the meaning of any word in the foreign language, the tribunal should require the interpreters to provide all the possible options and meanings of all the words connected with the controversial word to allow the jury to decide the

48 Ibid.
correct meaning of that word. At the same time, the tribunal would accept that “other witnesses versed in the language may also testify as to the meaning of an important word.” In reversing the judgment, the tribunal reminded all the participants that when the language used by any party was other than English (the primary language of all legal proceedings) because that party did not understand and speak the language in which the trial was conducted, then the only way for the jury to know the facts and get the evidence presented was through an interpreter, who needed to understand and speak both languages. However, if the interpreter was not well versed in both languages and did not provide a literal translation that preserved the precise meaning of the original, the interpreter would be unable to provide the jury with the necessary facts and circumstances to produce a fair and just verdict. The opinion warned about an interpreter who was “not capable of correctly translating the evidence, or from bias or partiality renders it incorrectly.” In such a case, the parties would be “bound by it, although it may affect their most vital and important rights.”

This case shows how interpreters were an indispensable part of the legal process. Unfortunately, these cultural mediators were often treated with suspicion, distrust, and a lack of respect by some members of the court. While it must be acknowledged that the people engaged in interpreting were not always skilled, experienced, or fully competent, these legal actors played a central role in court proceedings, especially in times of increased migration across national borders.

The previous cases present a group of judges who, most of the time, began to work on a different path than their East Coast counterparts, similar to the examples presented in John H.

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49 Schnier v. People, 23 Ill. 17 (1859).
Langbein’s study of eighteenth-century English criminal justice administration at the county level.\footnote{John Beattie, \textit{Crime and the Courts in England, 1660-1800} (Princeton, NJ: Princeton University Press, 1986).} This group of judges, and by extension the American legal system in the borderlands, focused on the use of the law in the protection of non-elite victims, instead of how to help the elites use the law to perpetuate their power.\footnote{For this approach, see Douglas Hay, eds., \textit{Albion's Fatal Tree: Crime and Society in Eighteenth-Century England} (New York, NY: Pantheon Books, 1975).} By emphasizing the search for alternatives to established procedures that did not work well in multilingual cases, we can see the limitations of the Anglo-American legal system and the role of the different legal actors in mitigating the worst excesses. Those legal actors worked to close the gap between the intention and the application of the law. In “Albion’s Fatal Flaws,”\footnote{John H. Langbein, “Albion's Fatal Flaws,” \textit{Past and Present} 98 (1983): 96-120.} Langbein argues that the “law and its procedures existed to serve and protect the interests of the people who suffered as victims of crime, people who were overwhelmingly non-elite.”\footnote{Langbein, “Albion's Fatal Flaws,” 97.} The same can be said in this case, where the inequalities of the system were fundamental failings in the institutions of justice, such as the lack of a professionalized body of interpreters and acceptable alternatives to the new legal situations in the culturally diverse American territories.

Moreover, some of the changes, the fluidity of the legal realities, and the flexibility of some judges can only be understood in the context of the Anglo-American legal system’s creation of modern common-law criminal trial procedures in the eighteenth century. Langbein’s \textit{The Origins of Adversary Criminal Trial} is the story of that transformation.\footnote{John H. Langbein, \textit{The Origins of Adversary Criminal Trial} (Oxford, UK: Oxford University Press, 2003).} Based on his study
of the *Old Bailey Sessions Papers*, Langbein argues that the modern criminal trial “developed quite rapidly” in the eighteenth century and that the most important development was the creation and consolidation of the professional adversarial contest by the entry of lawyers into criminal proceedings. This change, which was rapidly adopted by all the countries under the Anglo-American legal tradition, facilitated a further professionalization of the legal process that before 1700 was lawyer-free but by 1780 was lawyer dominated. These changes and accommodations in the American legal system were connected with the fact that more people were moving under the umbrella of the American legal system, and the population of the courthouses was changing. As social mores changed, the legal system had to adapt to meet different social needs. Enlightenment-influenced judges coalesced around criticism of the limitations of the legal system to address the new realities, and they saw the trial professionalization and marginalization of laypeople, as much as possible, as a way to prevent convictions based on inaccurate or insufficient evidence.

Langbein maintains that this change was a mistake, that the new adversarial system had “two striking defects ... the combat defect and the wealth defect.” The combat defect produced lawyers who, if necessary, could block or falsify the evidence, preventing the truth-seeking function of the law. The wealth defect gave an unfair advantage to wealthy litigants who could hire better representation. Those arguments were even more important in the cases where social, gender, racial, and ethnic bias was present, and most judges agreed that eliminating such bias and

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55 The Old Bailey was the central criminal court of England and Wales, which evolved from the sessions of the Lord Mayor and Sheriffs of the City of London and County of Middlesex. Its function was to judge felony cases on its circumscription.
ensuring its absence was necessary to create a fair legal system. Unbiased justice involved not just changing systems or procedures but included some affirmative steps, such as accepting the use of interpreters, and commitment of resources as well, to pay for those interpreters. The judges in the previous cases saw eliminating bias from the courts as critical because the rights and obligations of Americans are defined by the law, and ensuring equality in front of the law was seen as something of fundamental and structural importance to the viability of the American experiment.

The Costs of Interpretation

The Early Republic and Antebellum American legal system had to create new structures and pay for those structures to extend the right to enjoy the legal protections afforded by the American Constitution. Similar to what the Spanish scholar Rafael Altamira said about the Spanish colonial legal system, the American legal system was a collection of rules emanating from above that reflected the moral and ethical concerns of the new republic. The judges had to go beyond the traditional points of view that legal doctrine was based only on the Anglo-American legal tradition. According to Altamira, local usage and long-standing practice carried the weight of authority in the colonial Spanish system. In a similar fashion, the new American-made legal structures created to integrate non-English speakers in America’s newly acquired territories by the Louisiana Purchase of 1803, the acquisition of Florida in 1821, the annexation

58 Legal doctrine is the body of inter-related rules associated with a legal concept or principle.
of Texas in 1845, and the Treaty of Guadalupe Hidalgo of 1848 that added all or parts of present-day Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, also carried the weight of authority under the American legal system. As Charles R. Cutter argues in his book about northern New Spain’s legal culture, “This respect for local particularism, even when contra legem,\(^{60}\) has been perhaps the most overlooked dimension of the Spanish colonial legal system.”\(^{61}\) The American legislation drew from the Anglo-American legal tradition, but it was adapted to deal with specific local needs in the new territories.

Frank Tannenbaum’s *Slave and Citizen*\(^{62}\) and Lewis Hanke’s *The Spanish Struggle for Justice in the Conquest of America* assume that the Spanish laws and court system reflected practices on the ground in society and politics.\(^{63}\) Similarly, the newly imposed American legal system had to negotiate how to integrate already-established practices in those newly acquired territories while preserving common-law procedures and concerns about just laws. The changes resulting from that negotiation would be implemented through the legal system to make sure that the population would accept the new legal system as the source of justice. Some laws and procedures were changed to protect non-English speakers from abuse, such as making the State pay for the interpreters.

Historian Silvio Zavala foregrounded in Mexican history the interaction of cultures on the frontier or borderlands. Likewise, we need to focus on the frontier-like nature of the

\(^{60}\) Latin phrase that means “against the law.”

\(^{61}\) Cutter, *The Legal Culture of Northern New Spain, 1700–1810*, 35.


environment of most of the cases involving non-English speakers in the period before the Civil
War. Zavala argued that “the frontier was not a safety valve, but it was a land of opportunity.” Zavala believed in the existence of similar frontier types across the American continent represented by traders, soldiers, and ranchers. According to Zavala, the natural and geographical conditions of the Americas influenced all newcomers in comparable ways, as they confronted parallel problems within the New World’s wilderness, whether the Argentine pampa, the United States prairie, or the Canadian forest. Zavala used an expansive concept of frontier institutions to include towns, ranches, and farms. Those frontier institutions were the source of many of the procedural changes that allowed a diverse group of people to be interpreters and forced the American state to pay for those services.

In this era, neither courts nor legislatures recognized the right to a court-appointed interpreter. When the law was clear, the judges followed the precedent, but if it was unclear, they used other personal, ideological, or social reasoning. The importance of judge-made law in the court-centered American society that created additional rights was the key to deciding on interpreters’ compensation. In an 1833 United States District Court in the Eastern District of Pennsylvania case, the court was studying the petition of the district attorney for a new trial because, among other reasons, the lower court jury “allowed the claim of the defendants for three hundred dollars, for disbursements made by the said Edward W. Duval to an interpreter at Washington, although the defendants were not entitled by law, to such allowance; although there

64 Silvio Arturo Zavala, The Frontiers of Hispanic America (Madison, WI: The University of Wisconsin, 1957), 45.
was evidence, that the said interpreter was not entitled to the same for any services rendered by him, that the allowance was not claimed by the said Edward W. Duval in his life time, and that it was not paid till after his death; and although the court charged the jury unfavorably to such allowance.” The main objection to that allowance, for the services of an interpreter to the Indian delegation, was the presence of “a regular interpreter to the delegation who was paid by the United States.”

In an 1851 Supreme Court of Wisconsin case, an interpreter by the name of Le Clerc sued the Board of Supervisors of Crawford County for $230 because he was appointed by and worked for the circuit and county courts. The defendant was able to present evidence that he had attended different trials as an interpreter. The lower court concluded that the circuit and county courts had the authority to employ an interpreter and the interpreter deserved compensation for his work measured at $116. The interpreter sued for the whole quantity. The Supreme Court concluded that “county courts have no power to employ interpreters of foreign languages, at the expense of the county, to interpret testimony in such courts; but the circuit courts of the state, being charged with the execution of the criminal law, may employ interpreters in criminal cases, and their action in employing or appointing such interpreters is binding on the county.”

The opinion of the court clearly differentiated between courts of limited jurisdiction and courts of general jurisdiction. The courts of limited jurisdiction, such as county courts, do not have criminal jurisdiction, and in civil cases, the litigants paid for the interpreter, not the State. However, if a criminal case appeared in limited jurisdiction courts, they had the power to appoint an interpreter. The courts of general jurisdiction, such as circuit courts that took care of most

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criminal cases, could appoint an interpreter at the expense of the State. The same purse used to pay the costs of grand juries and criminal prosecutions paid for the interpreter. This case shows how even when court interpreters became more common in the legal system, judicial attitudes towards interpreters and those needing interpreting services still varied widely. It is almost as if every time a situation requiring interpreters arose, the system was taken by surprise and had to improvise.67

In an 1858 Supreme Judicial Court of Maine case,68 the court had to decide the right amount of interpreter’s fees, among other charges, the owners of a vessel had to pay. The trip was supposed to be “from Bangor to Palermo and Messina, in the island of Sicily, and back to Boston or New York.” Due to some changes, the voyage was from Bangor to Messina, without calling at Palermo. The court decided that “such charges were required to be paid in Messina, but none such, for an American vessel, in New York.” This case can be an example of the refusal of some legal actors to accept a multilingual situation in America. In an 1862 Supreme Court of Wisconsin case,69 an interpreter was arguing for fair compensation for his work. The court agreed with the interpreter that “the interpreter’s fees were taxable as a necessary and proper disbursement.” The judgment was affirmed. This case shows that some jurists had little or no understanding of interpreting and its complexities and did not respect the skills which interpreters brought to the job.

American jurisprudence generally did not accord translation a meaningful place in this era. Most jurisdictions relied on untrained and unreliable interpreters. Some cases illustrate the

67 Supervisors of Crawford County v. Le Clerc, 3 Pin. 325, 4 Chand. 56 (1851).
68 Stewart v. Reed, 46 Me. 321 (1858).
69 Meyer v. Foster, 16 Wis. 294 (1862).
resistance of some judges to having interpreters in their courts. Those judges preferred to
maintain the standard setup inside their courts and be able to address everybody directly.
However, other cases show that changing linguistic circumstances forced things to change. Most
judges had to struggle with the difficulties and limitations of the translation process by making
clear their discontentment in those situations, and they tried to control the interpreters to ensure
the utmost quality of the process. Another aspect of great concern to those judges trying to be
fair was the effects of bad translations and negation of translation services in the fairness of the
legal proceedings. In an 1830 Supreme Court of the State of Louisiana, Eastern District, case, the
plaintiffs objected to the introduction of documents in French and Spanish, causing the tribunal
to ponder if a court had the discretion to admit as evidence documents in languages other than
English without appointing an official sworn interpreter. The lower court was using a Louisiana
statute that left to the discretion of the court the power “to appoint an interpreter to the court, and
in the absence of such an officer, any person who is qualified by his knowledge, may discharge
the duty.” In his opinion, Judge Porter stated that objections arose because “there was no
interpreter to the court, by which the contents of said papers could be known, either to the jury,
or the counsel for the plaintiff.” These objections were not valid, he opined, because the law did
not “make it compulsory on the judge, to appoint an interpreter to the court.” Moreover, the
statute “leaves it discretionary with the tribunals of the state, to do so, and in the absence of such
an officer, any person who is qualified by his knowledge, may discharge the duty.” The
judgment of the lower court was affirmed with costs.\(^\text{70}\)

\(^{70}\) *Heirs of Farar v. Warfield*, 8 Mart. (n.s.) 695 (1830).
This case shows the importance of the issue of the quality of translation based on the right to obtain an accurate translation of the evidence. The provision of interpretation without any assurances of its competence was not enough to guarantee a fair trial. In this case, Judge Porter was not worried that the application of justice was put in jeopardy when the tribunal lacked the best possible conditions or the best interpreters the legal system could pay for.

In an 1849 Supreme Court of Georgia case, the court considered the possible undue influence exerted “by a negro woman Charity” over a white male that was “unable to articulate any sentence so distinctly as to be understood by the person who wrote said writing, and that said negro woman, Charity, pretended to interpret for him, and directed the items of said paper purporting to be a will.” The will stated that “Charity and her two children were bequeathed to the propounder, Alonzo P. House; and by the second item, Lucy, the mother of Charity, was manumitted or set free, as far as the laws of the State would permit.” In the testimony of some of the subscribing witnesses it was made clear that it was difficult, if not impossible, to “understand the testator distinctly” and that he “relied entirely on the interpretation of the negro woman, Charity, and James Potts, jr., who alternately interpreted for him.” The caveators argued that “it has not been shown that the paper writing propounded in this case, is the dictation of James Potts, senior, the testator, but that so far as appears, it is the dictation of a negro woman named Charity, and of others who interpreted for the scrivener.” However, the lower court decided “that it is not necessary that the testator should convey to the scrivener his wishes in words, but that he may do so by motions and signs, provided they be not misunderstood, or even through an interpreter, for a man is not debarred the privilege of making his will because he has lost his speech.” The lower court argued that the form the testator used to make clear his will was not
important nor who the interpreter was; the important matter was “if the witnesses attesting the
will are not, (in the opinion of the Jury,) mistaken in the expressed wishes of the testator, and the
Jury also believe, from the consistency of the instrument with common sense and with
previously expressed determinations of the testator, founded on sensible reasons for his conduct,
such instrument may be set up as a will, without the oath of the interpreter.” The lower court
instructed the jury that:

if you believe that old man Potts conveyed his wishes by signs and motions, and through
this negro woman and others who understood him, honestly interpreting to the scrivener,
then, in the opinion of the Court, it is sufficient evidence that it is the act of the testator.
To illustrate what I mean, I will analogize this case to that of a foreigner. I will suppose a
German in our place, who cannot speak English, and who wishes to make a will. Now,
we have a citizen who speaks both languages, (Mr. Kener,) and it would be perfectly
competent for this foreign gentleman to convey his wishes to the scrivener, and the
witnesses to the will, through the medium of Mr. Kener, as interpreter, though Mr. Kener
himself should not become a witness to the will, nor be called to testify on admitting it to
probate. If then, in this case, you believe that these interpreters understood the testator,
and interpreted honestly, (keeping in mind the testimony of House,) it was competent for
the witnesses to receive his wishes, and this portion of the case would be sufficiently
made out, (provided you be of opinion there was no misapprehension.) This is either the
will of [the] deceased, or of the negro, or of the negro and James Potts together, which
you will judge.

The court pondered whether a witness to a will who did not understand the language in
which the will was dictated was incompetent to attest it because it is “impossible that he could
compare what was written by the notary with that which was spoken by the testator.” At the
same time, what evidence did the court have if the only evidence of the testator's knowledge of
the will’s contents was Charity, who was incapable by law of being sworn? Moreover, the court
argued that “Negro slaves are incompetent in law, to testify in any issue between white persons;
nor can their acts and sayings be received indirectly, or through a white person. The Jury can

consider no evidence for which a slave is relied on as authority. A will made by the interpretation of a slave is void.” If the interpreter was a white person, a will, made through the medium of an interpreter, might have been established without the oath of the interpreter. The court was struggling between the right to make a will, even if there was a loss of speech, and the right to “prescribe the ceremonies and requisites which are necessary to make a will or testament completely valid; and as they derive their force and effect from the provisions of the law, they must strictly conform to its requirements.”

In an 1852 Supreme Court of California case, the court studied a libel case related to the disputed ownership of a tract of land. In this case, the defendant argued that the plaintiff took advantage of the fact that he did not understand English, nor could read in any language, to take his land by deceit and fraud. The court, among other things, had to decide to accept or refuse the testimony of “one of the plaintiff’s witnesses, who acted as interpreter and attorney for Baca, [and who] states that he read the deed to Baca.” This same witness received a transfer of land for the plaintiff. The justices decided to reject that testimony because, “one who had acted as interpreter and attorney, in relation to the execution of a deed by the grantor and defendant in the action, on being called by the plaintiff as a witness, testified that he had read the deed to the grantor, and what passed at the time of the execution; and who subsequently received a conveyance of a part of the land from the plaintiff,” lacked presumption of neutrality. The judgment was reversed and sent for a new trial, with the plaintiff paying the costs.

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72 Ibid.
This case is a clear example of some of the worst practices in interpreting for a court of law where the lower court is at fault for asking the interpreter to contribute material that clearly lay outside the limit of an interpreter’s duties. At the same time, the protests of the defense reflected the frustration of the legal profession with unprofessional behavior by some interpreters that jeopardized the entire profession or, at least, the practice of interpreting in the court of law.

**Conclusion**

These brief examples drawn from cases where court interpreting was at the center of the case illustrate how the different legal systems had to shift towards multilingualism to accommodate the new demographic realities such as the influx of immigrants. Overall, the place of a language other than English in the American legal system was and remains secondary, as all proceedings are conducted in English. As some cases show, however, the American legal system was capable of granting some additional rights to non-English speakers because they were perceived as a minority group in need of protection and therefore worthy of special privilege. Usually, non-English speakers were at a clear disadvantage, unable to clearly communicate with the jury or judge or to fully understand the whole legal process. Misinterpretation and cross-cultural communication were common. These examples demonstrate that English fluency in the legal system was a key to the acquisition and preservation of many of the legal safeguards that are just a given for English speakers.
Borah’s study of the special court set up to deal with the legal affairs of the natives of central Mexico, *Justice by Insurance*,\(^\text{74}\) argues that after the conquest, the Spanish failed to understand or retain Indian law, but at the same time the Crown awarded natives special protections. Similarly, the American legal system failed to understand or retain Roman law while changing common-law procedures and paying for those changes to make justice available cheaply and quickly as a means for settling disputes. Allowing and paying for interpreters “placed a potent weapon at the disposal of the conquered,”\(^\text{75}\) and so those accommodations were widely used by non-English speakers and functioned with minor changes for more than two centuries.

As recently argued by Lauren Benton,\(^\text{76}\) natives saw the colonizers’ institutions “as another opportunity in a complicated game of redress and even offense.”\(^\text{77}\) Benton’s book examines religion, settler incursions, racial definitions, the rule of law, legal pluralism, land, nation, and gender, and international law among its subjects, the same subjects that impacted the American legal system in the previous cases. As Benton argues, the law is one culturally specific way of knowing and ordering experience, inherently implicated in relations of power. Law is inseparable from sovereignty, nation, and a framework of conflict that created contradictory effects for both the American legal system and the people coming from different legal traditions.

One interesting aspect is how the American state articulated the different legal systems in particular areas, how different international legal regimes interacted with each other in America,

\(^{75}\) Borah, *Justice by Insurance*, 40.
\(^{76}\) Benton, *Law and Colonial Cultures*.
\(^{77}\) Borah, *Justice by Insurance*, 308.
as well as how the American legal system interacted with the indigenous legal regimes they
encountered. One clear example is the cultural bridge role interpreters had as translators of
American law for native peoples and native law for American agents. What we can see is what
becomes a familiar narrative that describes a constantly evolving trajectory from fluid, personal,
immensely diversified yet mutually recognizing legal regimes based on local jurisdictions inside
a polycentric legal system to the beginnings of the creation of a new monocentric national legal
system once the State is strong enough to impose its will. The American system is one of a
dominant and dominating legal regime that looks for legal uniformity in the nation.

The adaptability and capability to create hybrid legal structures inside the American legal
system is clear in this era. The conflicts between the ideal of a universal system of law based on
an Anglo-American legal tradition and the need to maintain law and order are similar to what
appears in Martin Wiener’s *An Empire on Trial: Race, Murder and Justice Under British Rule
1870–1935*. The tensions between the ideals of the American legal system, such as equality
under the law and the realities of the new nation, are represented by the many instances of racial
inequality and competing legal systems. Many of the previous cases illustrate the tensions
between liberalism and authoritarianism and the clashes between state officers and local actors.
In the struggles between state officers and local actors, the state officers sometimes won out but
sometimes, for the sake of governance, the local actor’s interests prevailed. The previous case

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78 This is an old question in legal history; for different approaches to the same question, see M.B
Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford, UK:
Clarendon Press, 1975); Alan Watson, *Legal Transplants: An Approach to Comparative Law*
79 Martin J. Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870–1935*
studies supply instructive examples of the legal dichotomy between the coercive power of the law to enforce the traditional Anglo-American legal order and the spread of a superior legal system in the name of progress.

This era was characterized by a diverse legal system, a system where the actors of American justice were influenced by economic and geographical imperatives, as well as by a complex web of interactions between individuals. In showing how these factors persuaded justice to choose between groups, I argue that the legal system was constantly renegotiated when circumstances altered conditions. Many of the case studies examined above contradict claims made by Subaltern Studies scholars such as Ranajit Guha80 or the New Left theorists such as E.P. Thompson,81 that the law was a tool used by the elites to maintain their class or imperial exploitation. The Early Republican legal system was a complex reality because it was “a site of many simultaneous ‘projects,’ both worthy of celebration and indictment.”82

This story underlines the importance of understanding the cultural diversity and dynamism of borderlands and their impact on the peoples of the United States and Latin America, especially during an era in which the United States-Mexico border was constantly moving. The annexation of the northern half of Mexico in 1848 brought some 75,000 Mexican citizens inside the redrawn borders of the US. They were not immigrants or Americans but something in between and inside the history of Mexican transnational migration histories. The legal pluralities of the US-Mexican borderland need to be fully studied with a focus on the

82 Wiener, *An Empire on Trial*, 231.
ongoing influence of legal, political, and cultural factors in both the sending and receiving nations. For example, Anglos used the law to dispossess Mexican landowners and then created a Mexican identity based on their lack of assimilation into mainstream society as proved by their lack of land ownership. Transnational migration scholarship can be helpful to explain flexible family strategies to deal with new legal realities in the receiving countries or the changing gender and social relationships in both receiving and sending nations.

A final conclusion is that the American State had many difficulties adapting to the new legal hybrid reality. For example, the American legal system tried to implement a stable legal/illegal dichotomy based on “imagined communities.” Unfortunately for the legal agents, the rules were inadequate to represent a messier reality of constantly shifting categories. Typically, legal authorities tried to use all possible strategies to preserve the Anglo-American legal tradition identity and privileges, but the fluidity of the local circumstances made those strategies fail many times.

CHAPTER II
“FOR AN ADEQUATE COMPENSATION”:
TOWARD RIGHTS AND PROFESSIONALISM IN THE GILDED AGE

Between the Civil War and the start of the Progressive Era, American courts outlined a right to interpretation for non-English speakers. The next three chapters will trace how that right arose out of the complicated legal culture created by an increasingly multilingual society. In these decades, the number of people in America who primarily spoke a language other than English was steadily growing. Those people with limited English proficiency (LEP) had difficulties communicating in English. Those difficulties created even bigger problems when non-English speakers interacted with the judicial system. LEP persons required court interpreters to understand judicial proceedings and to participate in the judicial process.

In the previous era, most court systems in the United States saw having an interpreter as a grace from the court instead of a right. If the courts granted that grace, LEP actors were entitled to court-appointed interpreters that, many times, lacked experience or education in court interpreting. That policy led LEP defendants and other legal actors to rely on inadequate substitutes for proper court interpretation. Consequently, LEP defendants were penalized by the legal system’s failure to provide a genuine trial. At worst, they were improperly convicted due to their inability to properly communicate with their attorneys prior to the proceedings.
The late nineteenth century saw the genesis of the right to have an interpreter. A formal right to interpretation did not appear until the 1970 case of *Rogelio Nieves Negron vs. The State of New York*. Before that, neither courts nor legislatures recognized the formal right to a court-appointed interpreter and instead waited on the judge’s discretion and the availability of a willing and able interpreter. Even though there was no clear legal right to interpretation on paper in the nineteenth century, the situation in courtrooms was far from clear. To better explain the confusion in the legal system, I am using Laura F. Edwards’s idea of “localism,” a legal system that aligned local rulings and the criminal justice system with a broader objective of “keeping the peace,” which coexisted with centralized efforts to create a statewide or nationwide legal structure. Localism influenced the legal culture in areas with LEP persons because it accommodated diverse legal traditions, allowing people without clear linguistic rights, such as LEP persons, to effectively influence legal proceedings in a long struggle for equality. The prevalence of localism allowed many judges to recognize and use the traditions from previous eras to create a system of consuetudinary law that tended to informally grant the right to have an interpreter to LEP persons.

These changes during the latter decades of the nineteenth century were the first steps on a path that LEP persons are still walking. Even now, LEP persons do not have the absolute right to have an interpreter for out-of-court, attorney-client interactions. Moreover, the Supreme Court has yet to acknowledge the constitutional basis of the right to an appointed court interpreter. That right was created by Congress and various state legislatures, fostering a variety of state court

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interpreter systems and a great difference between the state and federal court interpreter systems—a situation not that different from the prevalent localism at the end of the nineteenth century. Such a turn of events suggests that localism never died out in the American legal system. Rather, it just continues “keeping the peace” while making us believe that we are living in a centralized legal system. Viewed this way, persistent localism raises a question: Was full centralization possible or even desirable?

A second main theme in the late nineteenth century, very much related to the first one, is the professionalization of court interpreting services. The previous era had many examples of judges who both realized that court interpreters were an indispensable part of the legal process in some cases and, at the same time, viewed those cultural mediators with suspicion and distrust. Part of the problem was the lack of professionalization and the random selection of interpreters from the available local pool of bilingual people. Consequently, some of the people engaged in interpreting were not always skilled, experienced, or fully competent. Poor quality control tainted the opinions of many legal authorities against court interpreters, who were called to play an increasingly central role in court proceedings, especially in times of increased migration across national borders.

Professionalization was one important concern for the judges of the era because the lack of norms for interpretation generated confusion about the standards of quality and expectations of what the interpreter was allowed to do. That confusion placed interpreters in an inferior position to all the other legal actors in court. Court interpreters were not professionals because they lacked scholarly training, professional knowledge, or any kind of examination. The lack of a clear and established field of expertise governed by standards of performance and behavior to
which practitioners complied did not give all judges a sense of trust in those mediators in their courts. Without professional standards for interpretation, jurists could not be sure that people with limited English language proficiency had equal access to justice or that the language barrier between LEP persons and other legal actors was eliminated.

One of the main issues was to decide on the role of interpreters. Were they only supposed to ensure a LEP person’s actual comprehension of the procedure by explaining everything, or were they supposed to ensure the LEP person’s right to a fair trial by overcoming the language barrier with the court? Another issue was the perception by some judges that court interpreters were taking over some of the professional functions of judges, such as interpreting the law, or those of counsel, such as presenting evidence in court. Legal authorities often perceived court interpreters’ actions as attacks on the monopoly of the knowledge required for practicing law by the legal profession. Moreover, some legal actors were concerned that the lack of precise understanding of legal concepts and failure to express them properly could disqualify many court interpreters. That is why some judges insisted that court interpreters should render the speaker’s words literally, instead of interpreting the speaker’s words or trying to bridge social and cultural gaps in the courtroom, because interpretation was something that needed to be reserved for legal professionals.

The growing importance of court interpretation, however, moved judges and state legislatures towards the professionalization of court interpreting by requiring the adoption of standards to govern the selection and conduct of interpreters in the courtroom setting. An increasing number of judges realized that reliable standards of communication across languages were essential to deal effectively with the increasing number of cases where LEP persons were
involved and unable to communicate with authorities. Those nascent standards varied from court to court, but most were characterized by a few common features. Those features were to provide a *faithful interpretation* of the speaker’s words, *confidentiality* by protecting the communications between the interpreter and other legal actors, and *impartiality* by making sure that the interpreter did not have a personal interest in the case. A final feature, *professional conduct*, made the court interpreter into an expert witness. Court interpreters benefited from the rising trust in expert witnesses as part of the American legal system.

All those debates over translation services happened at the same time that scholars trace the beginnings of American legal history. Following Robert Gordon’s lead,² we can place the genesis of professional legal historiography in America with the publication of *Essays in Anglo-Saxon Law* by Henry Adams and his students in 1876,³ and the Langdellian revolution in legal education.⁴ The 1870s was a time of change marked by “the growth of markets of sectional or national reach … [which] gave impetus to [the] expanded roles of national law.”⁵ The predecessors to this generation of legal scholars, influenced by changes coming from Germany,⁶

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⁴ The Langdellian revolution advocated that American law schools should be concerned with training practicing lawyers. Langdell's idea was to give students a “scientific” view of the body of law with the use of casebooks and the case method of teaching. This pedagogical system proved so popular that it remains the dominant mode of instruction at every law school in America to this day. For more on the Langdellian revolution, see Carrie Menkel-Meadow “Taking Law and ... Really Seriously: Before, During and After the Law” *Vanderbilt Law Review* 60, no. 2 (2007): 560-563.
⁶ For more information see, Bonnie Gene Smith, *The Gender of History: Men, Women, and Historical Practice* (Cambridge, MA: Harvard University Press, 1998); Hayden V. White,
were Herbert Baxter Adams and John W. Burgess, followed by Henry Adams and Oliver Wendell Holmes. They saw legal history everywhere in the past, and they were concerned with the origins of their society’s political and legal forms.

Evolutionary legal history, based on the evolutionary ideas of the times, burgeoned in the 1880s and 1890s, especially at Harvard with scholars such as Melville Madison Bigelow. The second generation of scholars, such as Charles McLean Andrews, the leader of the “Imperial School” of historians, rejected the evolutionary ideas of the previous generation to accord more importance to the local conditions that created legal diversities. Those two schools of legal history influenced many of the opinions and judges’ decisions in the following cases, as they were the practical day-to-day reflection and implementation of the new ideas dominating the legal profession in America.

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7 For some examples of their works, see Herbert Baxter Adams, *Norman Constables in America Read Before the New England Historical Society, February 1, 1882* (Baltimore: Johns Hopkins University, 1883); John W. Burgess, *Political Science and Comparative Constitutional Law* (Boston: Ginn & Company, 1893).


Legislating Interpretation

Before the arrival of the Europeans, more than 300 indigenous languages were spoken in North America, presenting a very difficult linguistic situation for the European settlers trying to communicate with their neighbors.\textsuperscript{12} For example, the first Europeans in Virginia discovered that they were surrounded by numerous tribes with many distinct languages from three major linguistic groups: Algonquian, Siouan, and Iroquoian.\textsuperscript{13} Sometimes even the communication between two tribes within the same linguistic group was difficult because each tribe had its own distinct language and they would most definitely need an interpreter to communicate with each other. As a consequence, Native American interpreters played a key role and exerted tremendous influence in Indian affairs.

The services of interpreters were needed in various areas of colonial life and lasted as long as the different groups of people maintained close contact and continued to speak their own languages. Usually, we imagine those interpreters’ mediations primarily in the disputes and treaties between Native Americans and Europeans, with each making sure to translate what the

\textsuperscript{12} To learn more of the linguistic diversity of the US, see Lyle Campbell, \textit{American Indian Languages: The Historical Linguistics of Native America} (New York, NY: Oxford University Press, 2000).

different groups were saying to each other. Even if it is true that interpreters were significant in establishing political relationships between Native Americans and European colonizers, they had many more roles in mundane daily conflicts. For example, at courtroom trials involving the natives, indigenous interpreters were regularly employed and even some Native American jurors were asked to act as interpreters when necessary.

The linguistic realities in America forced the new colonial authorities to start thinking about how to take care of their interpretation needs. At first, traders interested in exchanges with surrounding tribes and clergymen charged with bringing Christianity to native peoples were at the vanguard of Europeans learning native languages to communicate with their neighbors. Nevertheless, most interpreters were Native Americans fluent in English because Europeans who learned native languages faced the stigma of being too familiar with the natives.

However, those informal interpreters were soon not enough, and colonial authorities sought to create more formal structures to make sure they had an interpreter at hand when needed. For example, the General Assembly of the Colony of Virginia created an act on August 21, 1633, to ensure the funding for an interpreter “who shall be resident with the Governor.”

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14 For more on the role of interpreters and native European relations, see J. Frederick Fausz, “Middlemen in Peace and War: Virginia's Earliest Indian Interpreters, 1608-1632,” The Virginia Magazine of History and Biography 95, no. 1 (January 1987): pp. 41-64.
Thirteen years later, the Grand Assembly of the Colony of Virginia held at James City on October 5, 1646,\textsuperscript{18} enacted to make Captain John Flood the Official Ambassador and Interpreter to the Native Americans for the colony, a post that would be inherited by his son Thomas in 1658-9.\textsuperscript{19} That marks the first time when contacts between native peoples and the English settlements were institutionalized by having individuals appointed and paid by the colonial government to visit the Indians, report on their activities, and act as interpreters.\textsuperscript{20} Those interpreters were in charge of communicating new laws and policies enacted by the colonial government to the natives. At the same time, the official colonial interpreter acted as a representative of the colonial government in front of the natives.\textsuperscript{21}

By 1734, however, Virginia’s statutes stated that the interpreters were of little use because most of the natives were already able to speak English.\textsuperscript{22} In 1757 and 1765, two different Acts acknowledged the possibility of hiring temporary interpreters if needed to conduct trade or diplomacy.\textsuperscript{23} In 1788, Virginia established the principle that “interpreters may be sworn

\textsuperscript{18} Ibid., 328.
\textsuperscript{19} Ibid., 521.
\textsuperscript{22} William Waller Hening, \textit{The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619: Published Pursuant to an Act of the General Assembly of Virginia, Passed on the Fifth Day of February One Thousand Eight Hundred and Eight ..., vol. 4} (New York, NY: Printed for the editor by R. & W. & G. Bartow, 1823), 461.
\textsuperscript{23} Ibid., vol. 7, 117 and vol. 8, 116.
truly to interpret when necessary,” a legal tenet that would become one of the most common required procedures for court interpreters in the American legal system.24

Before the Civil War, other states had different needs, and therefore different legislative developments explain the lack of legislative uniformity regarding interpreters in America. For example, in the Missouri statutes of 1854, we can find a reference to the use of interpreters to help with the establishment of boundaries only, but not a general stipulation for court interpreters or interpreters in any other situation.25 Not until the 1889 Revised Missouri Statutes was there any reference to the use of interpreters outside the establishment of boundaries. Section 3245 allowed the courts to “from time to time, appoint interpreters and translators to interpret the testimony of witnesses, and to translate any writing necessary to be translated in such court, or any cause therein.”26 In Texas, no mention of interpreters appears in the statutes until the 1879 Code of Criminal Procedure of the State of Texas, even though it was clearly a bilingual state, with people speaking English or Spanish among other languages. In the evidence of criminal actions, that code stated that “when a witness does not understand and speak the English

25 Laws of the State of Missouri: Passed at the First Session of the Eighteenth General Assembly, Begun and Held at the City of Jefferson on Monday, the 25th Day of December, A.D., 1854, by Authority (Jefferson City, MO: James Lusk, 1855), 169.
language, an interpreter must be sworn to interpret for him. Any person to interpret, may be subpoenaed, attached, or recognized in any criminal action or proceeding to appear before the proper judge or court to act as interpreter in such criminal action or proceeding, under the same rules and penalties as are provided in the case of the witnesses.”

These different legislative histories were reflected in the diversity of opinions in the cases below.

In 1871, the Supreme Court of Pennsylvania considered Joseph Sanson’s credentials as an “interpreter of foreign languages in Courts of Common Pleas, &c., &c., in Philadelphia.” Sanson testified that “he was entitled to exercise the rights, &c., of interpreter of foreign languages in the said courts for five years from the 8th of February 1869, by appointment made by the Court of Common Pleas of Philadelphia, in pursuance of the Act of Assembly of March 27th, 1865.” In what might have been the first case to consider professional interpreters, the court reviewed an 1865 state statute. The Act of March 27, 1865, that authorized the appointment of interpreters in the city of Philadelphia has two different clauses. The first clause provided “for the appointment by the governor of a competent interpreter, whose duty it is to make verbal or written translations of foreign invoices, manifests and other documents, which translation shall be duly certified.” Such a provision drew on the antebellum notion that legal interpretation was necessary for international trade more than anything else. The second clause authorized “the Court of Common Pleas to appoint a competent interpreter of foreign languages for the court, and from time to time to fill vacancies as they occur.” Interpreters’ appointments came from

different sources, and they “exercise[d] different functions.” This action leaned toward accepting that interpreters were important actors in the legal system, predicting that they would become even more important with one-quarter of the population being foreign-born.

In February 1869, state lawmakers updated the 1865 law. This new Act provided for “the establishment of the office of interpreter of foreign languages for the city.” The upper court noticed that while the 1865 Act provided for “the appointment of interpreters (in the plural) in the city of Philadelphia,” the Act of 1869 provided for the establishment of “the office of interpreter (in the singular) for the city of Philadelphia.” The Act of 1869 made “no reference whatever to the interpreter for the court.” The interpreter’s duties were “confined to making translations of written papers and documents, to be certified when required under his seal of office and made evidence in courts of justice.” More significant was the lack of reference to the office’s duty of engaging in the oral translations of different legal actors inside the courtroom. However, the court found no evidence that the Act of 1869 repealed “that part of the Act of 1865, authorizing the appointment of a court interpreter.” Moreover, the opinion found “not a shadow of inconsistency between the Act of 1869 and the second clause of the Act of 1865, or an intimation of an intention to repeal the latter.”

The third section of the Act of 1869 stated: “no witness shall be produced, sworn or examined, in any court of justice of said city of Philadelphia, to interpret the testimony of any witness who testifies in a foreign language, or to translate any written paper, instrument of

writing or document in a foreign language, who shall not produce the certificate of said officer as to his fitness and competency for that purpose, bearing date of the day of his examination.” That section can be seen as a State attempt to professionalize the interpreting services in the court by eliminating amateurs and only allowing a professional body of interpreters who were examined and sworn upon entering into the office of interpreter.32

However, the Supreme Court of Pennsylvania was uneasy about eliminating the possibility that the courts could use “an interpreting witness called to the stand pro hac vice,33 and then sworn and examined.” The court thought that a strict application of the Act “would produce consequences so monstrous and destructive of the due administration of justice, as would cause it to infringe directly on the bill of rights declaring that ‘the courts shall be open’ and ‘right and justice administered without sale, denial or delay.’” The superior court was concerned that all judicial proceedings involving non-English speakers would be delayed “until the parties called on the city interpreter and paid him for a certificate, a sale of justice totally uncalled for and unnecessary.”34

Moreover, the justices argued that the rigidity of the proposed system to organize court interpretation was “the denial and delay of justice.” They were troubled about the possible unintended consequences of the law when they asked, “What is to be done if the city interpreter be absent on business, or out of the state, or on a bed of sickness, and cannot be found, or is unable to give his certificate of the fitness of the interpreting witness, ‘bearing date the day of his

32 Ibid.
33 Pro hac vice is a legal term that describes a practice in Anglo-American law that allows someone, usually a lawyer, to take part in a case in which that person is not licensed and, by extension, not allowed to participate.
34 Commonwealth ex rel. Girard v. Sanson, 67 Pa. 322 (1871).
examination.’ Or how will it be if the city interpreter cannot speak the language of the witness to be examined?” Many of those concerns were based on the idea that the limitations of the court interpretation services, such as not being able to find interpreters for all the languages, should not be a reason to postpone and delay court proceedings. The superior court clearly stated that “a trial once begun might never end by reason of the absence or inability of the city official to certify on the day of the examination. Courts of justice cannot be balked by such legislation.”

The justices agreed that “the legislature never could have intended consequences so monstrous and injurious.” In an act of defense of judicial independence, the justices decided that “the 3d section of the Act of 1869 does not apply to the official interpreter appointed by the court when he comes to the stand to interpret in the ordinary course of his duty as interpreter. The utmost applicability it possibly might have to him is when he appears to be sworn and examined in order to be inducted into office, and even this we do not decide.” Moreover, the section was “the product of some private scheme never understood or intended by the legislators to be adopted, and ought to be forthwith repealed.”

In the postbellum era, the ever-increasing number of precedents helped the different courts to decide on cases involving testimony. For example, in 1880 the Supreme Court of California allowed the prosecution “to read on the trial the notes of the phonographic reporter” in a perjury case. The original testimony of the defendant was taken by shorthand notes, written in longhand, and read as evidence for the court. Moreover, the defense argued that “such notes were not evidence in this particular case, because the evidence given by Lee Fat on the

35 Ibid.
36 Ibid.
preliminary examination was taken through an interpreter, and therefore the reporter’s notes are merely hearsay evidence.”  

The court used Francis Wharton’s *A Commentary on the Law of Evidence in Civil Issues* to support its opinion. Wharton said that “to constitute hearsay testimony, it must be separated by the interposition of some appreciable time from its reception from the party from whom it is obtained. A., a witness in court, for instance, speaks in so low a tone that what he says has to be repeated to the judge; or a foreigner when examined, has to be interpreted by an interpreter. In this case, the transmission of the witness’ evidence is instantaneous, though through the medium of another person, and it is sometimes argued that because such evidence is instantaneous it is not hearsay. But a sounder reason for the distinction is, that in cases of repetition or interpretation, the inaudible or foreign witness is examined in court, and is therefore responsible; whereas the extra-judicial witness, whose utterances are reported by another, is not examined in court, and is therefore not responsible.”  

Moreover, to reinforce their opinions, they cited *Greenleaf on Evidence*, as follows: “The interpreter, in the trial of the cause before the Justice, we may assume, was duly sworn, because the law required that he should be sworn. He translated what the appellant testified to in the German language into English, and in the latter language delivered it to the Justice and the jury. To this extent, the interpreter was a witness, and

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37 People v. Lee Fat, 54 Cal. 527 (1880).
the case falls clearly within the rule that regulates the introduction of what a witness testified to on a former trial, which is as above stated.”

Other precedents used in the cause were a Michigan case “in which it was simply held that the next friend of an infant plaintiff might act as an interpreter on the trial.” The next case used by the court was a previous Supreme Court of California case where the court decided “that a conversation between a person indicted for murder and his victim while alive, held partly in Chinese and partly in English, maybe proved – that part of it held in English by persons present who understood English only, and that part of it held in Chinese by persons present who understood Chinese, provided that both the accused and his victim understood both languages.”

The third and last case referred to was an Indiana case where the court stated that “evidence of what an interpreter testified as received by him in a foreign language from a witness on a former trial, cannot be given by one who heard the evidence, unless the interpreter be dead, or insane, out of the jurisdiction, or sick, or unable to testify, or, having been summoned, appears to have been kept away by the adverse party.”

Going back to the California case, the opinion stated that the notes were not acceptable evidence because “either the interpreter nor the reporter was offered as a witness, nor was their absence accounted for, and it was the right and privilege of the accused to comfort and cross-examine the witnesses in the case.” The justices ruled that “the interpreter, or some other witness to the facts, should have been called on the part of the prosecution to prove what the defendant

40 People v. Lee Fat, 54 Cal. 527 (1880).
42 People v. Ah Wee, 48 Cal. 236 (1874).
43 Schearer v. Harber, 36 Ind. 536 (1871).
swore to on the preliminary examination.” The judgment was reversed. This case is interesting because it involved a kind of double interpretation rarely discussed: the linguistic interpretation and the shorthand to longhand interpretation. Moreover, it shows how previous cases and legal literature formed an imaginarium surrounding what court interpretation should be and how it should look inside of any courtroom. Cases like this one start showing how by the end of this era many legal actors had a shared idea about court interpretation that would be the basis for many of the legislative developments in the coming decades.44

In many instances, not following the strict legislative rules and procedures that regulated court interpretation placed those interpreters in a precarious situation where even their compensation was in dispute. In an 1890 Superior Court of New York, General Term, case, an interpreter sued the city of New York for the salary “earned for his services as interpreter to the court of general sessions of the peace of the city and county of New York.” The city argued that the appointment had not been “in compliance with certain rules established for the regulation of the civil service of the state of New York.” The court clarified that “the right to appoint an interpreter to the general sessions of the peace in the city of New York is vested in the recorder, city judge, and judge in the court of general sessions. … “Moreover, the court recognized that the appointment was “made under authority of law.” He received his salary. This case shows how the different legal actors, and especially the judges, were more accepting or understanding of what it meant to be an interpreter based on their functions rather than being tied to the ideas of procedure alone.45

44 People v. Lee Fat, 54 Cal. 527 (1880).
45 Cutugno v. Mayor of New York, 9 N.Y.S. 729 (1890).
In an 1895 New York Court of Appeals case, two people tried to get restored to the payroll of the County of Kings and to get paid as interpreters for the Courts of Record in Kings County. One of the persons trying to get reinstated, Lorenzo Criscolla, was appointed on June 14, 1883, and the second one, Andrew Johnson, was appointed on July 11, 1892. Both people were removed as interpreters of the Courts of Record by a January 28, 1895, Board of Supervisors resolution. Both contended that as neither of these removals was for misconduct, they should keep their appointments because “interpreters appointed by the board of supervisors are entitled to hold office during good behavior.”

The Courts of Record in Kings County had a long history of employing interpreters since they appointed on May 27, 1869, John Smith as the interpreter of Courts of Record in said County, replaced by Bernard Midas on November 11, 1886, who was replaced by Frank Mann on December 12, 1889. The first law regarding the appointment of interpreters in Kings County was enacted in 1864. It stated: “The board of supervisors of the County of Kings are authorized and empowered to designate and appoint some suitable person as interpreter, whose duty it shall be to attend the Courts of Record in said county, at which witnesses are sworn and testify, and who shall be paid three dollars for each day’s attendance in any such Courts of Record, on the certificate of the Clerk thereof, in the same manner as officers attending therein are now paid.” That law was amended in 1869 to read: “The board of supervisors of the county of Kings are authorized and empowered to designate and appoint some suitable person as interpreter, whose duty it shall be to attend the courts of record in said county, at which witnesses are sworn and

testify, and who shall be paid the sum of twelve hundred dollars per annum, during the good
behavior of the said interpreter.”\textsuperscript{48} The code was reaffirmed in 1876 and allowed the board of 
supervisors the authority to appoint a second interpreter: “The board of supervisors of the county
of Kings may appoint an interpreter to attend the terms of the courts of record held in that county
at which issues of fact are triable, who shall hold his office during good behavior.”\textsuperscript{49} Amended in
1877, the code stipulated: “The board of supervisors of the county of Kings may appoint an
interpreter to attend the terms of the courts of record, except the county court held in that county,
at which issues of fact are triable, who shall hold his office during good behavior.”\textsuperscript{50}

One of the main points of contention in the 1895 case involving two interpreters was that
Criscolla and Johnson contended that the Kings County code authorized the appointment of more
than one interpreter—an understanding that the board seems to have applied. The judge,
however, was unconvinced of that reading of the law because it was difficult for him “to
perceive how language could be used which would make it clearer that the appointment of one
officer, and only one, was contemplated by the enactment of this particular section.” For the
judge, the 1869 Act provided for the appointment of one interpreter, and under that statute and
the laws of 1877, “the extent of the power of the supervisors in this matter is the appointment of

\textsuperscript{48} Laws of the State of New York: Passed at the Ninety-Second Session of the Legislature, Begun
January Fifth and Ended May Tenth 1869 in the City of Albany, vol. 1 (Albany, NY: Printed by
C. Van Benthuysen and Co., 1869), 462.
\textsuperscript{49} Laws of the State of New York: Passed at the Ninety-Ninth Session of the Legislature; Begun
January Fourth and Ended May Third 1876 in the City of Albany (Albany, NY: Printed by C.
Van Benthuysen and Co., 1876), 321.
\textsuperscript{50} Laws of the State of New York: Passed at the One Hundredth [sic] Session of the Legislature
two interpreters, —one, by virtue of chapter 249 of the Laws of 1869; the other, by virtue of section 94 of the Code of Civil Procedure.⁵¹

This case shows how in some circumstances, such as in Kings County, there was more sophistication in the laws regarding legal translators than in other areas, probably due to a greater need for court interpreters. The county always had a German interpreter; an Italian, French, and Spanish interpreter; and a Scandinavian languages interpreter. It is clear that in regions with larger numbers of non-English speakers, the greater need for interpreters by the court system produced a more extensive legislative record that needed constant updating to keep up with ever-changing circumstances.

Another example of the increased sophistication in the legislation regarding court interpreters is a 1912 New York Supreme Court, Appellate Division, case, where Antonio M. Caridi lodged a complaint against the Municipal Civil Service Commission of the City of New York. The core of the case was the application process initiated on June 20, 1911, to enter an examination for the position of Italian interpreter with knowledge of the Sicilian, Calabrian, and Neapolitan dialects. Caridi filed an application, and he was called to appear for the examination on August 10, 1911. He successfully passed the examination with a 75.40%, exceeding the minimum required 70%, and was placed in the 36th position on the list of eligible interpreters. Caridi complained that during the process, previous experience in Italian interpretation was not part of the score, even if all the candidates had to include all their previous relevant experiences in the applications for the examination. The examination consisted of an oral examination, for 40% of the score, and translations of English into Italian, Italian into English, and English

composition, each counting for 20% of the total score. The Municipal Civil Service Commission of the City of New York, instead of using their regular examiners, employed three experts as special examiners, two of whom were in the employ of the Board of Education at the College of the City of New York, as “experts in the Italian language and in the dialects above mentioned.”

It is clear that the special examiners prepared the exercise to prove the candidates’ skills in translating from Italian into English. However, Caridi claimed that those experts did not score that exercise and that the people in charge of grading those papers were “not familiar with the Italian language, or competent to examine and mark the papers.” To prove this point, Caridi argued that many of the applicants who were not selected for the positions were people native to the areas of Italy where the Sicilian, Calabrian, and Neapolitan dialects were spoken. Instead, those people were “not placed on the eligible list, or they were rated so low that their names appeared very low on it,” even if they had “long and varied” experience interpreting in those dialects in many of the courts of New York City. The court, however, did not find clear evidence that “the papers that were not marked by the special examiners were improperly marked by others.”

Another complaint Caridi leveled against the application process was that “after certain of the candidates had completed their oral examination, they informed other candidates who were called later in said examination of the matter upon which they were examined, and that said candidates, coming later as aforesaid, were asked the same questions as those who had preceded them, and were given the same subject-matter to translate which they had been informed in

52 People ex rel. Caridi v. Creelman, 150 A.D. 746 (1912).
53 Ibid.
advance was being asked by the said examiners, so that certain persons in said examination had
the advantage of knowing the questions which were asked before they entered said examination,
and were thereby given an undue advantage over those who participated in said examination and
who had not such previous knowledge.” This charge was the only ground of complaint that the
court took more seriously, but it was dismissed because the Municipal Civil Service
Commissioners were not aware of this situation, and there was no evidence that Caridi’s place on
the list was affected by this event.54

Caridi considered the whole examination process unfair and claimed “that it was
congucted contrary to law and contrary to the rules of the Municipal Civil Service Commission.”
He asked the tribunal to cancel and set aside the examination and the interpreters list approved
by the Municipal Civil Service Commission to avoid an action that “will impair, impede, and
injure the rights of the relator.” However, the New York Supreme Court, Appellate Division,
stated that they did not have the power to “neither conduct nor supervise civil service
examinations” because “the official acts of the commissioners are not judicial, in the technical
sense, but are executive, ministerial, or administrative.”55

When the court was considering the merits of invalidating the examination held by the
Municipal Civil Service Commission to select Italian language interpreters “upon the ground of
irregularity in the manner in which they conducted the examination,” they decided that the
commissioners had the right, and even the duty, to employ experts to conduct this technical
examination. Moreover, the court did not find any evidence that “they were guilty of any

54 Ibid.
55 Ibid.
misconduct in selecting the special examiners, or even that the special examiners were not
entirely competent, and in fact the most competent that could have been obtained.” Another
objection against those experts was that they were already employed by a different department of
the city government (College of the City of New York) and that “their selection was prohibited
by a civil service rule.” The court stated that “[m]embers of the teaching staff of the public
schools or College of The City of New York are employees embraced within the general
educational system of the State and are not part of the City government” and therefore were not
part of the Civil Service Law that precluded their employment in this case. The court concluded
that most of the allegations were “conclusions of law rather than statements of facts,” and they
provided no basis to annul the examination and its results.56

This case is a clear example of the process of professionalization and sophistication of
court interpretation in the Progressive-Era American legal system, even if it was far from perfect.
However, many times some of the concessions made by some local legal systems that had the
effect of diminishing the quality of their court interpretation services were more reflective of
their local challenges than an established policy to attack those services in their courts. For
example, at the same time that we see how the legal system was trying to deal with the
complexity of court translation by requiring an Italian interpreter with a knowledge of the
Sicilian, Calabrian, and Neapolitan dialects, the court opinion asserted that “English speaking
persons not familiar with the Italian language might be perfectly competent to rate translations
from Italian into English with the use of a dictionary and several independent standard
translations.” The court also admitted that “it may be difficult to obtain the services of Italian

56 Ibid.
Examiners with a thorough knowledge of idiomatic English” and that “the Civil Service Commission may have thought that better results could be obtained by securing standard translations and furnishing these to their American Examiners.”

This process of professionalization and the growing sophistication of the law was not unique to court interpretation. Similar to Morton J. Horwitz’s *The Transformation of American Law,* a book that studies the relationship between private law and economic change to provide a more accurate definition of laissez-faire in relationship with public policies, the previous cases show how the synergies between law, society, and economy explain the effects of governmental activity on and the legal evolution of the role of court interpreters. Horwitz’s approach to the law and society relationship is comparable to *The Americanization of the Common Law.* In both studies, the authors argue for the transformation of a static law that defended the social consensus into a legal system that tried to solve disputes created by different systems of values. The same can be said about the evolving roles of court interpreters where the choices made by the judges were designed to promote the adoption of the American legal system by the people outside of the dominant culture. For example, judges modified or adapted many legal procedures to allow non-English speakers fair access to the legal system.

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57 Ibid.
59 Ibid., 1.
Akin to what we can see in Michael Grossberg’s *Governing the Hearth*, interpretation rules as family law were a state matter at best, or more often decided on a case-by-case basis. Grossberg’s *A Judgment for Solomon* is a perfect example of how court cases explain changes, evolution, and trends in American law in the nineteenth century. The previous cases show how the different legal actors dealt with the legal system from different social and cultural contexts, becoming good representatives of the relationships between law and society. The cases show how the legal actors experienced the law directly and indirectly. For example, an individual going to court with interpretation services is a direct experience of the law while statutes, precedents, or highly publicized trials involving interpreters are examples of indirect legal experience. Those trials educated the general public and legal participants about the law. At first glance, legal development in this era appears as a linear evolution, where legal ideas move forward from worse to better because increased judicial activity and authority turned “ad hoc” interpretation services into something that could be recognized in any court of law. However, as seen in Horwitz’s sequel, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, the ideological foundations and workings of classical legal thought underwent a crisis of legitimacy produced by attacks from the school of progressive legal thought. A similar crisis appeared in the legal interpretation as a result of a failure to adapt the legal system to the

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changing American society at the turn of the twentieth century, a new society that was becoming more nativist with the First World War.

**Professionalizing Interpretation**

As discussed in the previous section, European settlers initially found a new multilingual land inhabited by people unable to speak any European language. The need to communicate with their neighbors gave interpreters a very important role in those early colonial societies in America. For example, in Virginia by 1633, when the Assembly decided to enact a levy of 64 pounds of tobacco from each planter in the colony for the maintenance of the Fort Point Comfort, 1000 pounds of tobacco were destined to pay the interpreter that was assisting the governor and the colonial government. To understand the importance of that assignment, it is worth mentioning that the captain of the fort received 200 pounds of tobacco and the people in charge of the guns got the same compensation as the interpreter. By 1646, the interpreter’s compensation was 4000 pounds of tobacco, showing how important the role of the interpreter was for the colonial government.65

However, by 1734 the golden era of the interpreters in Virginia was over, when the Assembly passed an Act that stated that “the salaries allowed to the Indian interpreters, are very

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65 Ibid., 328.
burthensome, and their service of little use.” The change of policy was produced because the colonial government saw that most of the natives were capable of understanding and speaking English well enough to no longer require translation. However, that was not true in all the cases as the same Act had a provision giving the governor or commander in chief of the colony the power to hire “any person skilled in the Indian language” to interpret whenever was necessary. Those interpreters did not have an established salary but just the guarantee that “a reasonable allowance” would be made from the public treasury. Another mention of interpreters was introduced in 1757 when Virginia decided to create the Indian Factory of Virginia to keep the Cherokee under their economic and political influence. In the Act that created that company, the Assembly gave the trustees the right “to employ one or more Indian interpreter or interpreters, to reside at the said fortress, for the better enabling the said factors to transact business with the Indians.” The same powers were reaffirmed in 1765. After those examples of legislation, there was a long silence of almost a hundred years before legal interpreters reappeared in the

historical record, fighting for their right to fair compensation and professional recognition of their trade.

The growing importance of the interpreters and interpretation services in the American legal system helped to create a professional pride among the people providing interpretation services for the courts, a professional pride that called for recognition of their importance and proper remuneration for their services. That was a great departure from the previous era when anyone could be an interpreter. A murder case before the Supreme Court of Alabama in 1875 presented the question of whether the lower court was right to fine Dr. J. J. Dement, an expert witness for the State, who refused to testify because “he had not been remunerated for his professional opinion, nor had compensation for his professional opinion been promised or secured.” The court relied on a US District Court case from Massachusetts where Roelker, a German, who was supposed to interpret some German-speaking witnesses, did not attend the proceedings. The case had prompted Judge Sprague to proclaim that “to compel a person to attend merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved. The case of an interpreter is analogous to that of an expert. It is not necessary to say what they could do, if it appeared that no other interpreter could be obtained by reasonable effort. Such a case is not made as the foundation of this motion. It is well known that there are in Boston many native Germans and others skilled in both the German and English languages, some of whom, it may be presumed, might without difficulty be induced to attend for an adequate compensation.” The head notes clarified that “the court will not compel the attendance of an interpreter, or expert, who has neglected to obey a subpoena, unless in case
of necessity.” Only when “no other can be obtained to perform that office” could a person “be
cmpelled to attend as an interpreter.”

This case reinforces the idea that interpreters were experts entitled to “compensation for
their loss of time.” Expert witnesses should provide the required evidence not with “the intent to
take the part of either contestant in the suit, but with a strict regard to the truth, in order to aid the
court to pronounce a correct judgment.” The Alabama opinion stated that expert witnesses would
be used to help the court understand evidence “just as an interpreter would be called in to
translate writings in a foreign language.” This case shows how perceptions of interpreters were
changing and how some of the modern attributes of court interpreters were making their
appearance in the courts. The courts recognized that the professional knowledge, skills, and
abilities required of a court interpreter were highly complex and required expertise. Another
point that was getting settled was that court interpreters, even in the American adversarial system
of justice, were there to preserve the record by interpreting everything they heard. They were not
to take either side. The court argued that interpreters should be considered neutral and impartial
and that all parties should forget the notion that somehow a defendant or witness was the
interpreter’s client. Cases like this one helped to clarify the interpreter’s role in the criminal
justice system.

For their part, court interpreters wanted the same rights and benefits that people in other
workplaces received. The interpreters complained that the benefits and considerations that the
courts gave to other legal actors were the same ones that those same courts refused to give them.

An 1876 United States District Court, District of Oregon, case involved the schooner \textit{Ocean}

\cite{Ex_parte_Dement}
Spray that had a crew of twenty-four Indians and two interpreters. Charles F. Wilkins and Caspeo W. Lindsey were “employed and shipped at the same time as interpreters, the former at $55 per month, and the latter, together with the Indians, at $30 per month.” The crew was under “the control of the officers of the schooner, but communication with them was generally had through the medium of the interpreters. The smaller portion of them could understand and speak English enough for ordinary conversation.”

By the end of this era, we see how even other professional witnesses used previous cases involving interpreters to defend their rights to a just compensation. For example, in an 1877 Supreme Court of Indiana case, a defendant, an expert medical witness, “refused to answer the questions, arguing that he would not testify without compensation.” The court held him in contempt and committed him. Most of the precedents used in the subsequent appellate case came from English law, but one of the few American cases used involved interpreters as an example of expert witnesses who needed to be paid. In that case, the district attorney wanted to arrest a witness who had been subpoenaed to testify as an interpreter without any compensation. But the judge said “that a similar question had heretofore arisen as to experts, and he had declined to issue process to arrest, in such cases. When a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend, as a witness. In this all stand upon equal ground.” Moreover, the judge argued that interpreters were like any other expert witness. They could only be compelled to testify if no other expert could be located. This case was very

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70 The Ocean Spray, 18 F. Cas. 558, 4 Sawy. 105; 3 Cent. Law J. 773 (1876).
71 Buchman v. State, 59 Ind. 1 (1877).
72 Ex parte Roelker, 20 F. Cas. 1092, 1 Spr. 276 (1854).
influential and was the basis for some states to make statutory changes to recognize the right of the experts to be paid. Cases like this one over interpreter compensation established that translators were more than simply community members who could be recruited to serve. Rather, they were to be considered professional experts.

Disputes about fair compensation for interpreters were not only local or state issues. In 1883, the United States Court of Claims had the tribunal consider the working conditions of the interpreters working for the federal Indian Agency. Those interpreters claimed that Congress appropriated insufficient funds to pay their complete salaries and wanted to recover the rest, a sum of money in each case insufficient to pay the full amount of the salary. That sum was paid by a disbursing officer to each claimant, who gave him a receipt in full. The interpreters sought to recover the difference between the statute salary and the amount appropriated and paid. The claimants argued that under the federal law “the compensation is fixed at $ 500 a year in Utah, Oregon, and New Mexico, and $ 400 for all employed elsewhere.” 73 Another argument was that “the office of interpreter is a regular public office, and claimant’s appointment to it by the Secretary of the Interior was valid and constitutional.” 74

The court found that all the claimants served as interpreters and were “duly appointed and commissioned, by the President and the United States Indian agent at the Santee Indian Agency, in the State of Nebraska” and “their appointment was approved by the Department of the Interior” in accordance with the provisions of the relevant federal statute. 75 The court’s opinion

74 Mitchell v. United States, 18 Ct. Cl. 281 (1883)
75 Ibid.
used the argument expressed by the chief justice, speaking for the court, in Patton's case that said:

All questions of salary are questions of contract. Whether the salary be fixed by law, or by the order of a Department under authority of law, the Government contracts to pay the officer his salary, and, failing to do so, is liable to be sued therefor. The United States can no more discharge its contracts by part performance than can an individual person do so. Congress may fail to appropriate, in whole or in part, the money required for payment of a public creditor, and thus leave the public officers without authority to draw the money from the Treasury for that purpose, but the indebtedness and the liability to pay remain in force.

The Court of Claims’s opinion stated that “in the present cases Congress saw fit to allow the statutes fixing the claimants’ salaries to remain unrepealed until after the periods of time during which they held office.” Moreover, the repeal of the provisions “affects only salaries from and after the passage of the acts and does not take away the claimants’ accrued rights.” Finally, the court has “repeatedly held that salaried officers may recover in this court the balance due them under general laws, over and above what Congress has neglected to appropriate for that purpose, and we reaffirm the doctrine in these cases.” The Court of Claims gave interpreters $353.33 per annum. As this case shows, judges were willing to agree that interpreters deserved their fair salary, especially if they started working for the federal government under some specific conditions that were not respected by the employer.76

One of the federal interpreters, Charles Mitchell, was not happy with the previous verdict from the Court of Claims giving Mitchell $353.33 per annum, and he decided to appeal to the Supreme Court of the United States. The tribunal had to decide again on the point of discrepancy between Mitchell and the government of the United States, which was that “instead of the salary

76 Ibid.
of $400 per annum, as provided in section 2070, he was paid only at the rate of $300 per annum, for which he gave a receipt in full for his services.” The United States appealed using the argument that Congress’s appropriation for the annual pay of interpreters was $300 each, expressing that Congress’s intention suspended section 2070. That suspension brought the Indian appropriation Act of March 3, 1877, 19 Stat. 271, which appropriated $300 per annum, into effect again. In the court’s opinion, Justice Woods argued that “Congress expressed its purpose to suspend the operation of section 2070 of the Revised Statutes, and to reduce for that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum.”

This was well established:

The law fixing the salaries of interpreters, as found in section 2070 of the Revised Statutes, was first passed in the Indian appropriation act of February 27, 1851, 9 Stat. 587. That act appropriated a gross sum for the pay of interpreters authorized by the act of June 30, 1834, 9 Stat. 735, and declared that the salaries of interpreters employed in certain named Territories should be $500, and in all others $400 per annum. From the passage of that act down to the passage of the Indian appropriation act of March 3, 1877, 19 Stat. 271, the appropriations for the salaries of interpreters were made at those rates. The act last mentioned specifically appropriated for the pay of Indian interpreters the uniform sum of $300 each. This course of legislation was continued for five consecutive years, until the passage of the Indian appropriation act of May 17, 1882, 22 Stat. 68, which appropriated the gross sum of $20,000 for the payment of necessary interpreters, to be distributed in the discretion of the Secretary of the Interior and repealed section 2070 of the Revised Statutes. A like appropriation was made in the same terms by the Indian appropriation act of March 1, 1883. 22 Stat. 433.

The Act of March 3, 1877, had the provision “for the pay of seventy-six interpreters, as follows: . . . Seven for the tribes in Nebraska, to be assigned to such agencies as the Secretary of the Interior may direct at three hundred dollars per annum, two thousand one hundred dollars,” and “for additional pay of said interpreters, to be distributed in the discretion of the Secretary of

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the Interior, six thousand dollars.” The justice argued that all the subsequent appropriations had the same language for salaries and additional compensations. The Revised Statutes fixed the salaries of interpreters, “some at $400, and some at $500 per annum, with a provision that such compensation should be in full of all emoluments and allowances whatsoever.” The base salary was $300, “and a large sum was set apart for their additional compensation, to be distributed by the Secretary of the Interior at his discretion.”

The opinion of the court clearly stated that the legislative body in charge of making the decisions about the interpreters’ salaries had a change of heart about how to pay those people:

This court of legislation, which was persisted in for five years, distinctly reveals a change in the policy of Congress on this subject, namely, that instead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowance, Congress intended to reduce the salaries and place a fund at the disposal of the Secretary of the Interior, from which, at his discretion, additional emoluments and allowances might be given to the interpreters. The purpose of Congress to suspend the law fixing the salaries of interpreters in Nebraska at $400 per annum, is just as clear as its purpose to suspend the section forbidding any further emoluments and allowance. Our opinion is, therefore, that the intention of Congress to fix, by the appropriation acts to which we have called attention, the annual salaries of interpreters for the time covered by those acts at $300 each, is plain upon the face of the statute.

For Justice Woods, the whole question depended on the intention of Congress when they failed to appropriate enough money “to pay the salary of an officer fixed by previous law.” Whether the failure itself was “an expression of purpose by Congress to reduce the salary, we do not now decide.” However, the court found that this was not the case in this instance because “Congress has in other ways expressed its purpose to reduce, for the time being, the salaries of the interpreters.” The court ordered to reverse the Court of Claims judgment because “the

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78 Ibid.
appellee has been paid in full his salary, as fixed by the later acts which were in force before and
during and continued in force after his term of service, he has no cause of action against the
United States.” This case was very influential and was used in other disputes as a clear precedent
of what to do in similar situations.79

The following cases are examples of how one case could influence the opinion of
different courts and how each judge took a slightly different approach or reading of these
interpreter salary cases. When the United States Court of Claims had to decide on the claims of a
public servant for a complete salary in 1888, they used Mitchell’s case by stating that “a specific
provision for Indian interpreters' salaries, first found in an appropriation act of 1851, became in
1874 part of the Revised Statutes. From 1851 to 1877 the interpreters were paid at the rates so
prescribed, but in 1877 an appropriation act, followed during five years by similar acts, reduced
their pay until another appropriation act expressly repealed the provision contained in the
Revised Statutes, and gave the Secretary of the Interior a sum in gross to be used in his discretion
for interpreters’ pay. This course of legislation, the Supreme Court said, distinctly revealed a
change in the policy of Congress, an intention to reduce the salaries, an intention to fix those
salaries by the appropriation acts for the time covered by those acts, and the court added that ‘the
whole question depends upon the intention of Congress as expressed in the statute,’ hence they
were of the opinion that the provisions of the Revised Statutes on the subject must be held to
have been suspended until finally repealed.”80

79 Ibid.
80 Dunwoody v. United States, 27 Ct. Cl. 562 (1892).
In another 1899 United States Court of Claims case, the presiding judge also used Mitchell’s case. The judge was surprised by the fact that “the Mitchell case was not decided by the Supreme Court upon the point argued and determined by this court.” Moreover, he complained that “the Supreme Court found language in the appropriation acts, not referred to by counsel on either side at the trial in this court,” and that neither side considered the conclusion of that case which stated “that instead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowances, Congress intended to reduce the salaries and place a fund at the disposal of the Secretary of the Interior, from which, at his discretion, additional emoluments and allowances might be given to the interpreters.” The judge argued that the language of the appropriation Acts used by the Supreme Court to decide Mitchell’s case did not apply to the claimant because he was not an interpreter, but an Indian agent. Moreover, he explained that “no similar language is found in any of the appropriation acts in relation to the latter offices.” As this case demonstrates, interpreter compensation cases became part of the legal mainstream and helped to create an image of professional interpreters and their duties.81

In some instances, it was not the salary that was under discussion but the right to some of the benefits given to other professionals. These cases indirectly indicate the ways in which interpreters were becoming a common presence in American courtrooms. In 1886, the Supreme Court of Nevada sought to determine whether a trial juror present in the courthouse was entitled to a per diem plus mileage even if he was not sworn and did not serve at a trial. The case of Phillips v. Eureka County discussed an 1883 Nevada Act that stipulated who had the right to be compensated for official and other services in the state of Nevada. The Act named the clerk of

81 Belknap v. United States, 29 Ct. Cl. 557 (1893).
the supreme court, county clerks, recorders, sheriffs, coroners, constables, witnesses, jurors, county auditors, judges and clerks of elections, persons carrying poll-books to clerk’s office, justices of the peace, interpreters and translators, surveyors, and notaries. The statute of 1883 prescribed those people as the only ones to get paid for their services, specifically, “the fourteenth section provides that interpreters and translators shall receive such fees as the court by whom they are employed shall certify to be just, and until the services are rendered the court cannot know what is just.” A previous Act specified that “the persons who are not officers, but whose fees are regulated, are jurors, witnesses, judges, clerks and inspectors of election, persons carrying poll-books to clerk’s office, and interpreters and translators.”82 In another 1898 case, the Court of Common Pleas of Hamilton County, Ohio, examined various accounts and in one found payments to outside parties such as “the sheriff, witness, sundries, old sundries, advance divorce costs, civil deposits, transportation, coroner and printing, amounting to $ 19,169.34, and the county’s portion, to-wit, clerk, criminal costs, stenographer of Hamilton County, criminal stenographer’s costs, stenographer’s fees and interpreter’s amount to $ 36,139.24.”83 Again, those two cases show how interpreters were becoming recognized as integral parts of the legal process. Interpreter professionalization lessened the resistance many different legislative bodies previously had to including interpretation services in their budgets.

By the last decades of the nineteenth century, interpreters were becoming more accepted as expert witnesses in the courtrooms. That is a great contrast with the “ad hoc” interpretation services more prevalent in the previous era. Nonetheless, experts appeared sparingly in American

82 Phillips v. Eureka County, 19 Nev. 348 (1886)
83 State v. Hobson, 5 Ohio N.P. 321 (1898)
and English court records, and the use of experts to testify in US court cases did not become widespread until the twentieth century.

In Republic of Debtors, Bruce Mann explores how changing social mores affected the law. In this book, Mann tells the story of how debt relief laws grew from a basic shift in societal understandings of debt – from a moral failing to a simple economic one. The same thing can be said about how the change in social values and legal needs transformed the traditional idea of what a trial should be into a more flexible acceptance of new legal realities that required court interpreters and, by extension, proper compensation for those professionals. The legal system, and the law afterwards, had to adapt to a new social reality in America, where linguistic complexity was an inescapable reality of daily life. Remediing the lack of professional respect interpreters labored under earlier in the nineteenth century was necessary for the proper functioning of the American legal system. Much in the same way as Mann argues a state interferes in economic matters to better regulate and help society, the previous cases illustrate a legal system that changed in procedural matters to better regulate and help all legal actors.

John Fabian Witt’s The Accidental Republic tells the story of how society and its politicians used the law to solve the early twentieth-century national crisis of industrial accidents. Witt presents the interactions of the law, social policy, and ideology in the Progressive Era to show the different tactics tried by managers and workers to solve the problem. The same strategy of changing the law to reflect the social and economic evolution of America is

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evident in the previous cases where different administrations tried to solve the issue of interpreters’ compensation by the enactment or revision of different local and state statutes. Those new laws were the result of a complex process defined by varied experimentation by all actors to address this situation.

**Translating Testimony**

In the American legal system, one of the most important pieces of evidence in any trial is the testimony of witnesses. However, when those witnesses do not speak English the whole trial and, by extension, the legal rights of all the legal actors are at the mercy of the interpreters and the quality of their interpretation. That is even more important for non-English-speaking defendants because all their interactions with the court and even their attorneys are filtered through translation. Because of this, the court interpreter’s job is key to ensuring a fair trial. Interpreters were supposed to provide quality interpretation to avoid the misunderstandings that were fairly common in state and local courts without a professional corps of interpreters. That situation was a concern for many judges who had to deal with a multitude of appeals based on the lack of an accurate translation of the proceedings. Judicial authorities were concerned that offering interpretation services was not enough if those services lacked some measure of quality that would ensure a fair trial for all parties involved. Another concern was that those possible errors of interpretation were difficult to police since, usually, no one else other than the interpreter had the linguistic abilities to detect any possible error that could have devastating consequences to life, liberty, family, and property interests.
Some judges gave more leeway to the interpreters in their courts to make sure that the interpretations were the best possible and helped all the parties involved in the trial. In 1874, the Supreme Court of Texas had to decide on a murder case where one of the objections was that the interpreter stated that a witness, who had to be examined using the said interpreter, was misunderstood, so he was reintroduced again. The justice’s opinion conceded that it was “within the discretion of the District Court to permit a witness who had been under the rule, and who had been discharged and had been at large, to be recalled to explain his testimony,” unless it was a clear case of abuse or removal of legal protections. The superior court used “the suggestion of the interpreter, that the witness had failed to make himself understood,” as the main evidence to allow the reintroduction of the witness. The judgment was affirmed. This case shows a court that had a greater degree of deference towards the interpreter and his professional opinion.86

In some cases, the conflicting interpretations or errors of interpretation were clear and made for an easy appeal to send to the superior court. In an 1880 Supreme Court of California case, the defendant wanted a review of his conviction and denial of a new trial. One of the issues debated by the court was that the arresting police officer “took a Chinese woman and four Chinamen, together with a Chinese interpreter, to the jail, ‘for the purpose of identifying the defendant as the man who did the killing.’” The officer testified that the Chinese woman “went up to him and identified him.” The interpreting conflict happened because the woman testified that the defendant’s response was, “Mother, I hope you won’t prosecute me,” and the interpreter testified that the response was, “Mamma, don’t say it was I killed him.”87

86 Daniel Goins v. The State, 41 Tex. 334 (1874).
87 People v. Ah Yute, 54 Cal. 89 (1880).
After interviewing the woman, the officer took the other four men “and told them, through the interpreter, to go and put their hands on the man, if they knew him, who did the shooting; and that three of the four identified the defendant and went up and put their hands on him.” When asked if the defendant said something to those four men, the officer testified, that “Whatever he said, he said in very low tone; he told me once it was not him that done it; but mostly all of his conversation to the Chinamen was in Chinese, which I do not understand.” The opinion stated that “the prosecution did not prove or attempt to prove what it was that the defendant said when thus accused by the Chinamen, and counsel for the defendant thereupon moved the Court to strike out the testimony of the officer as to the identification of defendant by the Chinamen, on the ground that it was hearsay and incompetent.” The superior court declared those testimonies hearsay because they lacked “any proof whatever as to the conduct of the defendant in response to those accusations.” Moreover, “the statements of third persons are admitted only as preliminary to the inquiry, and for the purpose of showing his conduct.” It can be evidence only “to the extent it was admitted by the defendant to be correct,” as stated in *People v. Estrada*. The judgment was reversed and a new trial was ordered. In this case, it is clear that the conflicted translations were key in the judge’s opinion. The superior court found enough evidence of poor translation to be unsure of what was said. Further, the interpreter’s testimony about the defendant and the conversation was not enough evidence for the court. This attitude can be interpreted as the court not trusting the professional opinion of the interpreter above other people who were fluent in the language.

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88 *People v. Estrada*, 53 Cal. 600 (1879).
89 *People v. Ah Yute*, 54 Cal. 89 (1880).
Another category of cases that ended up in court was that in which an interpretation was in dispute not in a legal setting but in everyday life. Those cases were common because if the quality expectations of court interpretation services were limited, then in other places, like a notary, interpretations could be even less reliable. One such case was an 1881 property dispute evaluated by the Supreme Court of California, Department One, where a husband gave his wife’s property to a creditor. One of the main issues in dispute was that the wife’s “acknowledgment to the deed was taken through an interpreter, who did not correctly interpret the contents of the instrument but told her it was a mortgage.” The counsel for the appellants argued two important points. The first one was that “there is no provision of the statute authorizing a Notary to take the acknowledgment of a person to an instrument whose language the Notary cannot read, speak, or understand, and they are only authorized to employ and swear interpreters upon taking the proof of instruments. No authority can be found sustaining the position that the certificate of the Notary is conclusive.” The second one was that “the statements of the interpreter of what the party says are treated as identical with those of the party himself; and therefore, may be proved by any person who heard them, without calling the interpreter.”

The justices’ opinion stated that “neither the pleadings nor the findings, in this case, are what they ought to be,” in part because “the notary failed to make known to her the contents of the deed; that the acknowledgment was taken through an interpreter, who did not correctly interpret the contents of the instrument, but told her it was a mortgage to secure the payment of the sum of three thousand dollars, with interest; and the Court below so finds.” However, “it is not alleged, found, or claimed that the plaintiff had any notice of those facts. It is clear, therefore,

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90 de Arnaz v. Escandon, 59 Cal. 486 (1881).
that the notary’s certificate is conclusive as to the facts stated in it.” The opinion did not protect the wife against the husband since it insisted that failing to accept the transaction was impossible “without allowing a fraud to be practiced against the grantee.” In essence, the judge appeared to suggest that the couple were using the lack of interpretation as a way to play the system.91

In a similar 1881 litigation in front of the Supreme Court of Iowa, the tribunal had to decide on a fraud case where a Bohemian, of whom we do not know in what languages was fluent, argued that the cognovit note used against him was procured by fraud. The opinion accepted that the “plaintiff signed the paper under the mistaken belief that he was bound for the claim as a surety of the principal debtor.” However, the defendants were not responsible for this mistake even if the “communication was held with him through an interpreter. This interpreter was not the agent of [the defendant] Easton and made no representations to him under the direction or with the knowledge of Easton. If this interpreter made any incorrect statements in regard to the business, Easton is not responsible for them.” This case brings to attention that in a situation like this one it was unclear who was supposed to be responsible for a mistake. Another issue was that it seemed there was no legal right to have a correct interpretation to protect rights under contract law.92

Some courts had to use interpreters to be able to judge the evidence when that evidence was based in a language other than English. That was one of the main concerns judges had because they were called to apply the law based on the interpreters’ translations alone. This was particularly tricky when disputes involved specific words and meanings. In an 1884 slander case

91 Ibid.
92 Jarosh v. Easton, 57 Iowa 569 (1881).
in the Supreme Court of Minnesota, the tribunal had to decide on the appeal of a case where the speaker accused the claimant of adultery. Due to the fact that the offending words were spoken in German and needed to be translated for the jury, the lower court had “to prove that the words had a certain meaning in common parlance among those who spoke the language that differed from the definition thereof by lexicographers and was thus commonly understood by them in common speech.” Moreover, the upper court reaffirmed the notion that when “the slanderous words contain a phrase or word in a foreign language, which, in common parlance among the people who speak that language, has a meaning somewhat different from its definition by lexicographers, it is competent to prove that it is commonly used and understood by them in that sense.”

The offending words told to witness Kock were, “Mein Sohn hat sie nicht verführt; das ist dem da üüber.” Those words were translated into the English language as, “My son did not get her pregnant; it is from that one [meaning George Recher] there.” The witness did not speak English, so he testified and was examined using an interpreter. A more literal translation would be that “his son had not seduced (verführt) her; that it was opposite,” while the speaker was pointing in the direction where George Recher lived. The dispute was mainly over the word “verführt,” which the interpreter translated as “seduced” but literally means “to mislead, or lead astray.” The court had to decide between using the most literal meaning of the word or accepting that the word was “used in common parlance among Germans, and [was] so understood by them, in the sense of ‘getting in the family way by another man.’”

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93 *Blakeman v. Blakeman*, 31 Minn. 396 (1884).
94 Ibid.
The opinion stated that “there was no error in admitting evidence to prove the sense in which the word ‘verfuehrt’ was used and understood in common parlance among Germans, (witness Kock was German,) as applied to a married woman.” In the same opinion, the justices, in a very paternalistic tone, declared that “witness Kock was evidently an ignorant woman, who could not speak the English language, and therefore had, as already stated, to be examined through an interpreter.” However, they complained that “this mode of examination was accompanied with some difficulty,” so they accepted that the lower court “allowed one or two questions to be put to her in leading form.” This case shows that the courts were willing to be flexible with the regular procedures to help “ignorant” people who did not speak English and needed extra protections. This case also shows how by the end of this era some courts seemed more comfortable using interpreters to help them better understand the evidence presented in front of the court.95

Sometimes having more than one interpreter was not helpful, especially when the interpreters did not agree on the interpretation and both were convinced that they were in the right. In an 1888 District Court, Eastern District of New York, case, the tribunal was considering suppressing some depositions due to a difference of opinion over the accuracy of the interpreter’s translations. As the witnesses were unable to speak English, the lower court allowed the depositions to be taken through an interpreter. The problem occurred when the proctors of the two sides disagreed on the accuracy of those translations and “the proctor for the claimant announced that the stenographer would take down the answers of the witnesses as translated by him.” The stenographer, who was employed by the claimant’s proctor, felt bound to follow his

95 Ibid.
instructions. The other side withdrew, but the depositions were continued. The court found the method of taking the depositions improper because “the libelant’s proctor was entitled to have the answers of the witnesses as interpreted by the sworn interpreter taken down by the stenographer.” This example demonstrates the need for an official, impartial, and court-appointed group of interpreters who could intervene in disputes like this one and make sure that the evidence was presented correctly.96

During this era, the American legal system was in the process of expanding the legal record to include the non-English testimony of the defendant or witness testifying on his or her behalf. Instances of having evidence removed from a case because it was in a language other than English became less prevalent. At the same time, the courts were trying to be more careful with the errors in translation by reviewing them to try to make sure any errors were harmless beyond a reasonable doubt. There was a greater effort to make sure that the errors in interpretation were remedied on direct appeal rather than allowing those errors to stand through post-conviction motions. This would permit criminal defendants to impact those cases. However, the courts were still deciding what the appropriate standard of review for errors in interpretation or conflicting interpretations should be.

Conclusion

Before the Civil War, court interpreting was characterized by the lack of the necessary level of professionalization and translation norms. That created a chaotic situation where the

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96 Euberweg v. La Compagnie Generale Transatlantique, 35 F. 530 (1888).
different legal actors held different and competing expectations for standards of quality. In this atmosphere of confusion, the interpreter was in a position of inferiority in front of all the other legal actors invested with the power of the court.

During the years between the Civil War and the Progressive Era, we find court interpreters fighting to be recognized as a profession by being identified as “non-manual full-time occupations which presuppose a long specialized and tendentiously scholarly training which imparts specific, generalizable and theoretical professional knowledge, often proven by examination.” The first steps in those professionalization efforts were to establish a practice of court interpreting guided by a set of standards accepted by all the parties in the courtroom, plus a set of behaviors to which all court interpreters complied in order to be accepted as professionals. During those years we see how the different administrations started to create an accepted body of knowledge and skills required to be deemed a professional court interpreter. That knowledge had to be tested by a common mechanism that would determine who would be qualified to act as an official court interpreter. Additionally, those tools had to be refined at a time when the profession lacked any mechanism to reflect on the practice of court interpreting or exchange opinions between the members of the profession or even share or disseminate information about the profession with the different practitioners.

Even if the legal system, in general, agreed that court interpreting was key to ensuring equal access to justice for people with limited language proficiency by eliminating the linguistic difficulties that non-English speakers had in the relationship with the legal system, there were

still many legal practitioners who resisted or resented court interpreters. The main reason to resist court interpreters was fear that those newcomers would usurp the roles of judges to interpret the law or the roles of lawyers to present their evidence in front of the court. That was especially important in the legal profession that was characterized by the tight control they exercised over the body of knowledge required for practicing law. Another issue was that the lawyers felt that interpreters would jeopardize their role because their oratory skills, necessary to use and manipulate the language to their advantage, would be limited by the quality of the interpreter’s translation, and they would be relegated to a secondary position behind the court interpreter’s linguistic expertise. Those misgivings about the quality of interpretation made many legal authorities want to limit court interpreters to literal translations rather than to true or idiomatic translations because non-legal professionals could not be trusted to actually interpret anything in court.98

Interpreters played a critical role in the legal system, and they exercised a far-reaching influence on legal proceedings. The translations of these men were an important means by which the different stakeholders in the American legal system were able to comprehend each other. The rules and procedures inside courtrooms made the translator's job extremely difficult.

The American justice system maintained its nativism and English language hegemony, and access to interpretation services was a lottery prize depending on the willingness of the judge. English language hegemony was, and still is, one of the main characteristics of the American legal system. Proceedings were usually required to be conducted in English inside a courthouse where the overwhelming majority of judges and lawyers were monolingual in English only.

We can only imagine how frightening must have been any kind of interaction by non-English speakers with the American English-only judicial apparatus. Even in today’s judicial system, non-English-fluent legal actors do not have the same advantages as their English-fluent counterparts, and in some cases, a fair trial is denied to them because they are unable to tell their story or understand what is going on inside the courthouse, a feat difficult even for many
English-fluent legal actors without legal education. Some non-English speakers have described their trials as “a babble of voices.”¹

Even to the judges in this era, it was clear that many of the conditions non-English speakers had to deal with inside the courts were a violation of their rights. The solution to many of those issues was obvious: quality interpretation services. However, it was not an easy path to accomplish that goal. This chapter starts with discussions and opinions about the right to have an interpreter. The first thing to remember is that in the late nineteenth century, as in the Gilded Age era and up to a point in today’s judicial system, the final decision about the right to get an interpreter was up to the trial judge. Once granted, the right to an interpreter was seldom overturned on appeal. Judges had the ultimate power to decide if the different legal actors were fluent enough in English. That explains the many different opinions and approaches to that subject. The main concern expressed by jurists was the desire to make sure trials were fair for all parties involved without adding elements to the trial that would be contrary to the Anglo-American legal tradition.

I think it would be fair to say that in the latter decades of the nineteenth century, as we saw in the previous one and probably is true even nowadays, judges did not like to have interpreters in their courts. Having an interpreter in a trial was a disruption of the regular, familiar system and procedures. Moreover, the need for interpreters meant that those judges were unable to directly speak to all the legal actors as they were used to in trials without interpreters. However, even if the judges did not want to have interpreters at their trials, the realities of the

day-to-day court’s needs forced them to accept those new actors and start thinking about how to better integrate them into their trials.

The chapter then moves to the questions of how to use the interpreters and who could be an interpreter once the judge decided to authorize their use at a trial. Again, it was the prerogative of the judge to decide those two questions for the most part, even if the judge lacked the linguistic competence to decide on the need for an interpreter, the qualifications of such an interpreter, or the best use of that interpreter. For example, some judges tried to exert their authority over interpreters by asking them to interpret everything word by word, without understanding that those instructions would produce a worse interpretation of a testimony than an idiomatic one. Plus, they had to make their decisions with lawyers voicing their objections to interpreters, many times on the grounds that the supposed non-English speakers in need of those services were in fact trying to take advantage of those protections even though they were fluent enough in English.

To help answer those questions and provide guidance and a sense of fairness to the whole process, this era shows how the legal system worked to create a set of procedures that would make access to interpretation services more of a right than a capricious decision by the judge. The final goal of that standardization was to create objective standards that would mitigate the randomness of judicial discretion without undermining judges’ control over trials. Creating a system of checks and balances would ensure that all the different legal actors would have their rights respected and be treated fairly. Similar attempts were happening in other legal systems, as
evidenced by a 1744 English case.\(^2\) In that case, the English magistrate had to decide whether the depositions of Hindu witnesses, taken in India, could be admitted as testimony in an English court. Another example is the 1889 British amendment relating to the administration of oaths that extended the right of affirmation\(^3\) and by extension allowed people who conscientiously objected to taking an oath to testify by affirmation instead of by oath.\(^4\)

The final question explored in this chapter is how the legal system tried to include the new realities brought by the use of interpreters and translations into evidence law. The issue of using interpretation as evidence was not a straightforward one. The failure to provide correct interpretations and translations is at the core of being able to use those as evidence. Moreover, judges expressed in their opinions that interpretation without competent interpreters would produce unfair results. Even when those services were provided, it could be problematic to accept those as evidence if the interpreter did not speak the language which that specific legal actor was best able to understand.

Many concerns outlined in this section come from the quality issue when the legal system failed to regulate the interpretation services used by the courts. Another issue that concerned the legal system was the neutrality of the interpreters when the interpreter was provided by one of

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\(^3\) The right of affirmation is defined by the *Encyclopaedia Britannica* as “a promise by a witness concerning testimony allowed in place of an oath to those who cannot, because of conscience, swear an oath. For example, members of the Society of Friends (Quakers), Jehovah’s Witnesses, and other persons who have objections against taking an oath are allowed to make affirmation in any manner they may declare to be binding upon their consciences in confirmation of the truth of their testimony.” (“Affirmation, law,” *Encyclopaedia Britannica*, accessed May 1, 2022, https://www.britannica.com/topic/affirmation.)

\(^4\) Commissioners for Oaths Act 1889, Regnal. 52_and_53_Vict (1889).
the parties instead of the court. However, as those were decisions made by the judges, again, we go to the difficult position where the judges were when they had to decide whether something was admissible as evidence even if they lacked the skills to judge the quality of those pieces of evidence, with the exception of the most egregious cases. As one Kenyan judge said more than half a century later in a Kenyan courthouse, “The interpretation at this point was bad and I cannot put any weight on this.”

The Language of the Courts

English language hegemony was and still is the norm in the American legal system. The proceedings are required to be conducted in English and most of the legal actors involved in any legal proceeding have been and still are monolingual in English only. The hegemony of the English language inside courtrooms creates a situation of disadvantage for all the non-English-speaking immigrants who come into contact with that English-only justice system. The language barrier puts all those non-English-speaking actors in a position of a disadvantage because “to this day, limited- or non-English speakers who come before the courts have no guarantee that their stories will be told or that they will understand what the court is telling them.”

To remedy that situation, from the beginning of the American legal system, many judges mandated the appointment of a court interpreter to secure the defendant’s constitutional

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guarantees, as they saw the discriminatory situation against non-English-speaking legal actors as a violation of the Sixth Amendment rights. Some states even adopted constitutional provisions to ensure the right to interpretation services. In most cases, interpreters had three main roles in legal proceedings. First, the interpreters made it possible for non-English-speaking defendants to communicate with their defense team. Second, interpreters allowed all non-English-speaking legal actors, especially defendants, to understand the legal proceedings. Third, interpreters made possible the examination of non-English-speaking witnesses available to the court.

The right of citizens to participate on a jury despite their inability to speak the English language was under discussion in the late nineteenth century. In an 1867 Supreme Court of Wisconsin case, the court had to decide if it needed to grant a defendant another trial because two of the jurors “did not understand the English language.” The court received some affidavits that showed “that the jurors did not have sufficient knowledge of the English language to enable them to understand the witnesses, the court, and the attorneys for the respective parties, and to act as jurors intelligently.” The affidavit of one the jurors stated that he did not “understand English well enough to understand and act intelligently upon a jury; and that he could not upon said trial understand fully what the witnesses swore to, and that he had to have an interpreter in the jury room to explain to him some of the material points of the testimony.” The court accepted that the affidavits were enough “to prove that the two jurors had not such knowledge of the English language as would qualify them to act as jurors” and agreed to a new trial “on the ground that two of the jurors did not understand the English language.”

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7 Shaw v. Fisk, 21 Wis. 368 (1867).
The courts had to decide on a growing diversity of situations that involved languages other than English, both inside and outside of the court, that affected legal proceedings. In an 1873 Supreme Court of Massachusetts case, the superior court agreed that “the narration, in English, of the defendant's admissions, made out of court, in German, was covered by his oath as a witness in a money forgery case. “It is only when testimony given in a foreign tongue,” the court continued, “requires translation in court, that an interpreter is sworn specially for that purpose.” The court accepted that “a witness may narrate in English, without the intervention of an interpreter, admissions made to him in pais8 in a foreign language.” This case makes a clear distinction between the different sets of standards applied when something happened outside of court instead of inside the courtroom.9

In some cases, the judges voiced their concerns about the lack of equality for all the people involved in the trial due to their different linguistic abilities. An injury case against a railroad company was heard before the Supreme Court of Wisconsin in 1875; in this case, “some of the witnesses were Germans, whose testimony, given in their own language, was translated by an interpreter; and some of the jurors were also Germans.” The court had to consider different questions about the diversity of linguistic abilities represented by different participants in the legal proceedings. The judge said, “Many of you understand the language in which the testimony was given; the jury will have no difficulty in calling to mind what the testimony was in regard to it; and, having examined the location, you are better prepared to understand all the evidence, both on the part of the plaintiff and defendant, than I am.” Moreover, the superior court saw no

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8 *In pais* refers to something that happened out of court.
evidence whatsoever “that the testimony was not correctly translated, or that all of the jurors did not understand it alike.” To reinforce their opinion, the justices argued that “the jury would have no difficulty in calling to mind the testimony because many of them understood the language in which it was given.” The jury, therefore, was “better able than the judge to understand the evidence.” This case shows a very enlightened approach to the use of other languages and a lack of preoccupation that non-German-speaking jurors would get a different degree of evidence than the German-speaking jurors. It is a clear example that some judges were more accepting of linguistic diversity in the courtroom in that this opinion directly argued against the concerns expressed in many other legal decisions.\(^\text{10}\)

Some cases used the legal structure created to include interpreters for non-English speakers to include other kinds of interpretation. At the same time, those examples reinforced the legal precedents that would guide future judicial decisions about interpreters for non-English speakers. In an 1876 Supreme Court of Georgia case, a contract dispute case, the lower court allowed a witness to interpret a cipher telegram. The justices accepted the interpretation as evidence because “unless such communications are to be translated by those who understand the signs and characters in which they are expressed, courts and juries would never be able to arrive at their meaning. If they are to come into court at all, they must speak through an interpreter.”\(^\text{11}\) This case reinforced the right to have an interpreter because it removed the question from the issue of immigrants’ rights and the biased treatment that those individuals commonly endured in the legal system. Similar cases involved translation for deaf and mute people.

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\(^{10}\) *Grasse v. Milwaukee, Lake Shore & Western Railroad*, 36 Wis. 582 (1875).

\(^{11}\) *Wilson v. Frisbie, Roberts & Co.*, 57 Ga. 269 (1876)
Interpreters were becoming a more accepted part of the legal proceedings by the latter part of the nineteenth century. In an 1877 labor dispute heard before the Supreme Court of Georgia, objections were raised because the defendant was a German with very bad English, and “the judge allowed an interpreter to be sworn to translate into English what he said, when sworn as a witness.” The superior court’s response was that as far as they understood the law, “this has always been the law; it is re-enacted in the Code, founded in common sense, and absolutely necessary for the administration of justice.” The “always” in the superior court opinion implies the sense that interpreters were a given in court because they had always been there as a part of the common law. Moreover, there were objections against using an accounting book as evidence because it was in German and a “translated copy thereof was admitted as original evidence.” The opinion considered that this book was not the kind of evidence “which the law allows to go to the jury, either in the original German, or by a translated copy,” so they did not have to answer the translating evidence question. The judge clearly stated that “whenever, from the witness speaking broken English, or otherwise, so as to make his testimony unintelligible to the jury, the presiding judge thinks it necessary, he may have an interpreter shown to translate the evidence into intelligible English.”

The American legal system’s legal actors were becoming more aware of the difficulties to be fair to non-English speakers in an English-dominated legal system. However, that sensibility was more pronounced in the upper courts than in the lower courts. In an 1883 Supreme Court of Illinois case, a murder case where the defendant, “a young man of between 19

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12 Schall v. Eisner, 58 Ga. 190 (1877).
and 20 who had recently arrived in the United States and understood little English, was accused of killing his uncle’s wife. At his arraignment, an attorney roughly translated the charges into German. Defendant told the attorney that he understood the charges and pleaded guilty.” The defendant’s counsel argued that “[u]nder the circumstances of this case, the defendant being wholly ignorant of our language and institutions, and not comprehending the jeopardy in which he was placed, the admissions extorted from him cannot be accepted or regarded as a confession to support a plea of guilty.” The counsel used as precedent the “trial of a deaf and dumb person,” in Massachusetts where the defendant was “arraigned through a sworn interpreter, his incapacity having been first suggested to the court, and the trial thereupon proceeded on a plea of not guilty.” Moreover, the counsel argued that “after the interpreter had partially explained the indictment he said he was guilty, but the interpreter said he had not fully explained the same. This was the only time the prisoner pled guilty. It is true he afterwards said he killed Mary Welter, but at no time did he say he was guilty as charged in the indictment.” After a proper counsel was appointed and the defendant informed of his rights and the consequences of his plea, he “asked to withdraw his plea.”

The counsel for the people argued that “the prisoner entered the plea of guilty after having the indictment explained to him, and receiving a copy in German, and after being admonished by the court of the consequences of such plea.” The justices’ opinion agreed that “the prisoner had but a short time before come over from Germany to this country and was unable to speak or understand the English language.” Moreover, “the accused seems to have

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13 Hill v. Commonwealth, 4 Va. 61, 2 Va. Cas. 61 (1817).
14 Gardner v. People, 106 Ill. 76 (1883).
been without counsel, or any one to consult or advise with as to what he should do under the trying circumstances.” Later, he “made application for leave to withdraw the plea of guilty, which was overruled by the then presiding judge, on the ground he had not tried the case.” The justices of the superior court believed that “had the accused been a man of mature age, familiar with our language and institutions, and nothing in the record to create a doubt as to whether he fully understood the nature of the charge against him, and the perilous situation in which he was placed, quite a different question would be presented.” As this case suggests, legal authorities generally agreed that insufficient knowledge of the language or substandard interpretation services made a guilty declaration invalid.¹⁵

This case illustrates the many ways in which a defendant could be put into legal jeopardy because of the limited capabilities of the court-assigned interpreter. For example, when asked by the court, “You may read to the prisoner the indictment translated into German,” the sworn interpreter stated, “Do not know that I can readily read to the prisoner the indictment translated in German, on account of the technical phrases and law terms, but I can give him the substance of it.” That was accepted by the court and after explaining the indictment to the prisoner, the interpreter affirmed, “I have explained, as best I could, the three counts in the indictment; he says he understands the charge.” Finally, when the interpreter was asked to copy and translate into German the indictment, he said to the court that it was not a literal copy of the indictment and that he “made it up as best [he] could.” Moreover, he was very concerned about the rights of the defendant because he did not believe he understood the situation and the legal ramifications of

¹⁵ Ibid.
his acts. He stated, “I am satisfied he does not understand the relation of things, is wholly unacquainted with our institutions, and does not understand enough to act intelligently during the proceeding.”16

The justices had many doubts about the whole proceedings because “under these circumstances, notwithstanding the killing was confessed, we are of [the] opinion it was the duty of the court to at least have appointed the prisoner counsel, and not have entered the plea of guilty without his concurrence. But the more proper course would have been to have entered the plea of not guilty for him, as in the case of one whose sanity is questionable, or of one standing mute, and to have appointed counsel to take charge of his defence.” The opinion reiterated that the questioning “to which the prisoner was subjected was irregular and unwarranted” and that the plea cannot be accepted if “the court has doubts as to whether the accused understands the nature of the charge.” In this case, the judgment was reversed, and a new trial granted. Such misunderstandings were surprisingly common in state and local courts. This case is a clear example of how unprofessional court interpreters put people with limited English skills in situations where they were unable to navigate the complex legal system, jeopardizing their constitutional rights.17

The courts had to adjudicate on circumstances where the linguistic competence of one of the parties was the main issue of contention. In an 1885 Supreme Court of Michigan property dispute case, two Native American women were examined through an interpreter. In this case, the justices used *Dewey v. Campau* as a precedent because that case determined that “a notary

16 Ibid.
17 Ibid.
cannot take an acknowledgment through an interpreter.” In this property dispute case, “the absence of proof that this deed was fully explained to Martha in her own language, and that the notary understood Indian and conversed with her in it,” meant that the notary’s “action [could not] be credited.” Again, we see another example where the legal system sided with the non-English speaker because they recognized that lack of English proficiency impeded the defendant’s ability to act “intelligently” in legal matters.

Another case that shows that even if the legal stakeholders were more aware of the linguistic complexities of a legal system working with a diverse population, they were still not doing the right thing for the defendants. In an 1886 Court of Appeals of New York case, a defendant in a murder case “was an ignorant Italian laborer who was unfamiliar with English.” In this case, the superior court debated the “admissibility in evidence, upon the trial of the prisoner, of statements alleged to have been made by him on his examination under oath at the coroner's inquest.” At the time, “he was unattended by counsel, and it does not appear that he was in any manner informed of his rights, or that he was not bound to answer questions tending to incriminate him.” During the questioning, the coroner wrote down the answers of the defendant and “then read the evidence over to him, line by line, and asked him if he understood it and if it was the truth, and he said it was, and the coroner then re-snowed him to the deposition.”

In the original trial, the coroner testified that “he came to the conclusion that the defendant did not understand English well enough to be examined; that on taking the evidence,

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which was signed by him, no interpreter was used; that the interpreter was used on a subsequent day.” Moreover, he said “that the defendant made no corrections or suggestions while the deposition was being read to him; that he (the coroner) became satisfied, after taking defendant's testimony on the first day, that it ought to be taken through an interpreter, and thought they might get it a little better and a little fuller.” In the justices’ opinion, the defendant “stood in the attitude of an accused person,” but they failed to produce more details about what standing in that attitude means or what the signs were. It may be a case of cultural misunderstanding where the defendant tried to seem deferential to the court by not looking at the judge’s eyes, an act that may be misunderstood as defiance in Italy, that the judge interpreted as a sign of culpability.21

There was some discussion about the appropriateness of the coroner “acting substantially in the place of an examining magistrate” and the prisoner being arrested without a warrant, as a suspected murderer. Answering those questions, the superior court decided that “to take a prisoner before a magistrate, swear him, subject him to a minute interrogation as to the circumstances relied upon as evidence of his guilt, and then use such an examination on his trial, would be a departure from our system of criminal jurisprudence which should not be tolerated.” Moreover, the fact that the investigation was conducted with the presence of the magistrate or the coroner's jury made “no substantial difference, provided it appeared that a homicide had been committed, and the prisoner was brought before the inquest as an accused person, and the object of the inquisition was to ascertain his guilt.” However, the opinion failed to address the questions about the lack of interpretation for a defendant who clearly, as the coroner’s testimony proved,

21 Ibid.
was unable to follow the proceedings in English. The judgment was reversed, and a new trial was
ordered. This case shows that even though the superior court was more sympathetic to the
defendant’s plea, it was very far removed from a modern idea of equality, as they agreed that the
defendant was ignorant for being unable to speak English. The jurists also failed to understand
that what could be perceived in one way for their culture was perceived in a different way in a
different culture. Moreover, their main argument to refuse the lower court judgment seems to be
more procedural, about the coroner taking a role that did not belong to him, rather than focusing
on the systemic unfairness of an English-only legal system without proper interpretation services
for non-English speakers.22

In an 1887 Supreme Court of Missouri murder case, justices recognized the difficulties
for non-English speakers by saying that the defendant, who was sworn and testified using an
interpreter, “was a stranger in a strange land.” They further pointed out that the “records were
kept in unknown characters, its sentences were pronounced in unknown sounds.” The justices
agreed that English-speaking defendants had many advantages because they were surrounded by
people who spoke in a familiar language, with familiar customs, institutions, and laws. However,
non-English speakers lacked “all such immense advantages,” and they “had peculiar claims to
protection.” They were “in some sense, the ward of the court.”23

Another interesting aspect of this opinion was the concern about making the interpreter’s
oath truly binding by interpreters who had “any peculiar mode of swearing, connected with, or in
addition to, the usual form of administering oaths, which is, to him, of more solemn and binding

22 Ibid.
23 State v. Chyo Chiagk, 92 Mo. 395 (1887).
obligation.” This opened the door to allow those interpreters to “adopt that mode which shall appear to be most binding on the conscience of the person to be sworn.” The justices made clear that “every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion,24 if there be any such ceremonies.”

In this case, the interpreter was “sworn in the ordinary way,” but there were some doubts about the importance of the oath for the interpreter. It was stated that “the oath administered was not binding on his conscience; that there was a form of oath which the witness did regard as binding, one according to the forms of his religion.” The interpreter defended himself saying that “he had always taken the Christian oath, because he believed in the Christian God, but he did not deny that he still retained the religion of his country, nor state that he regarded the form of oath taken as binding. Indeed, he stated that ‘the josh-stick burning is the true oath among the Chinese; they take the josh-stick in their hand and swear to it.’ The justices agreed that even when a court was not supposed to ask about the religious opinions of any witness, it was acceptable to ask “whether the form of administering the oath is such as will be binding upon his conscience is previous” to the administration of the oath.26

The opinion clarified that the defendant should have been given the opportunity “to show that the interpreter was incompetent, and that he was not impartial.” The opinion explained that it was “obvious that both these questions, the latter especially, [were] preliminary to an interpreter

25 State v. Chyo Chiagk, 92 Mo. 395 (1887).
26 Ibid.
entering upon the discharge of his duties. The defendant was entitled to an interpreter at once capable and impartial; one who could and would be the medium and conduit of an accurate and colorless transmission of questions to, and answers from, the witnesses.” Finally, the opinion clarified that it was the duty of the court to make sure that “all the precautions necessary to attain this end should have been taken; for otherwise, an interpreter might do the defendant incalculable mischief, mischief which no subsequent testimony could entirely eradicate from the minds of the jury.” Different objections made about the form in which the oaths were administered to other Chinese speakers were likewise overruled. The judgment was reversed. This case shows the difficulties to reconcile the importance of the oath in the American legal system with the multicultural society where that legal system had to work.27

The lack of interpretation services (or even better, a ready-to-act interpretation corps) was an issue that affected the legal system on many occasions and in some cases affected the evidence available to the court. In an 1887 District Court, Eastern District of South Carolina, case, a witness who was the master of a ship needed an interpreter “whose services had become necessary because of the ignorance of the English language on the part of the witness.” The witness, however, “lost his temper and left the clerk's office. The cross-examination could not be resumed or continued from the impossibility of obtaining another interpreter. The vessel left port the next day, (Sunday,) and witness went in her.” The testimony was not admitted.28

Another issue that had an impact on the quality of the interpretation services in the legal system was the lack of knowledge or familiarity with the linguistic realities in Europe at the

27 Ibid.
28 Schiaffino v. The Jacob Brandow, 39 F. 831 (1889).
time. Many times, the lack of understanding of those realities provided the wrong interpreter for the situation. An 1888 Supreme Court of Pennsylvania case involved a property dispute where one of the parties who signed a mortgage, Mrs. Weber, “could not read, nor speak, nor understand English.” In this transaction, Mrs. Weber, her husband, and the witness (their son) were German, but the public notary, Mr. Yetter, was unable to speak or understand German. The notary “communicated with Mrs. Weaver through her husband, who could understand English and speak the German language.” Mrs. Weber could not understand the notary, “and then the husband and son told her in Dutch.” Was this case an example of language or nationality confusion? It is possible that some German nationals could use Dutch, even if were strange. Maybe they were part of the German Frisian minority and the court did not know about that little-spoken European language and assumed it was Dutch. However, I think that the most probable case is that they were Dutch and they more or less understood German, as they are very similar languages. This case is a great example of the many times when the lack of knowledge by the court could affect not the right to have an interpreter but the right to get the right interpreter.29

The opinion made clear that the husband was acting as the interpreter and that the notary “could not, without the agency of an interpreter, interrogate Mrs. Weaver as to whether she acknowledged that she signed, sealed and delivered the deed, as her voluntary act and deed freely, without fear, threat or compulsion of her husband.” Moreover, “it appears that the husband was the interpreter for the scrivener, as far as there was communication between him,

29 *Lewars v. Weaver*, 121 Pa. 268 (1888).
the scrivener, and Mrs. Weaver.” The son and witness of the transaction testified in the lower court that his mother was told some things in German and some in Dutch, increasing the linguistic confusion of this case and the possible lack of legal protection for his mother. The defense wanted Mrs. Weaver to testify “as a witness to prove that she cannot read English.” That demand is yet another example of a lack of understanding of how languages work. There are many ways to demonstrate language proficiency but none to prove a lack of language proficiency other than to testify that you do not understand that language. Would that be enough evidence for the court?\(^{30}\)

The lower court opinion established that the notary “could not without an interpreter interrogate Mrs. Weaver as to her acknowledgment and that she could not read the acknowledgment.” The decision then added that it appeared “the husband was the interpreter and that all that was said and done was in the presence of the husband.” Moreover, the superior court found that it was “not at all certain that any fraud was practiced upon the defendant. She signed the mortgage in the presence of her husband, her son, and the notary, and without objection.”

This case is a clear example of the lack of protections any non-English speaker was exposed to due to the lack of official and impartial interpretation services. Mrs. Weber was at the mercy of her husband.\(^{31}\)

In some cases, judges’ perceptions that they were knowledgeable enough to decide about the linguistic competence of the different court actors could deny legal protections to those same actors. In an 1889 Supreme Court of Nebraska rape case, the victim (prosecuting witness)

\(^{30}\) Ibid.

\(^{31}\) Ibid.
testified “through the aid of an interpreter.” The lower court decided that the interpretation, “while it may be true in its principal features,” was “conducted in such a manner as practically to put words in the witness’s mouth.” The court argued that even if “no objection seems to have been made to this mode of conducting the examination and it is not ground of error, but as there must be a new trial and it is evident that the witness has a considerable knowledge of the English language, an effort should be made to take her testimony without the intervention of an interpreter and as far as possible require her to narrate the facts.” This case brings to mind the question of what qualifications the judge had to decide what constituted a considerable knowledge of the English language. Is this another example of confusing conversational English, which is the simple, informal, everyday use of English we use when talking face to face with family members and friends in daily conversations, with formal English, which has more sophisticated vocabulary and expressions to be used in professional environments and which is more demanding and complex. Formal English would be required to understand the intricacies of the American legal system and to provide a better testimony. This point was not addressed in the opinion because, “as there must be a new trial[,] we will not discuss the testimony in the case.”

Cases where the lack of a group of professional and impartial court interpreters put the non-English-speaking participant at a disadvantage were not uncommon. In an 1890 Supreme Court of Illinois case, a property dispute between a farmer and a railroad company included a witness who was a native of Poland. The witness, “who could understand or speak only the Polish language,” was offered an interpreter who, “as the evidence shows, understood the Polish

32 Reynolds v. State, 27 Neb. 90 (1889).
language, and was able to translate the questions to the witness into that language and his answers into English.” The admission of the interpreter “was objected to by the plaintiff on the sole ground that he had testified as a witness for the defendant, and upon that ground alone the court rejected him.” In short, because there were no other Polish interpreters available, the court decided not to use that testimony. The defendant lost the right to examine and use to his advantage that testimony, removing his right to use all possible evidence to reinforce his arguments. The lower court made that decision even though the interpreter “stated that he had no feeling that would interfere with his acting as an interpreter.”

The lower court rejected the use of the interpreter and the superior court saw that “the decision of the court rejecting said interpreter was clearly erroneous.” The justices tried to balance the fact that they were not “attempting to lay down any general rules defining the qualifications of interpreters,” but at the same time they “confidently stated, that where the person offered to serve in that capacity is otherwise qualified, and there is no objection to be urged against him except that he has been called and examined as a witness by the party offering him, he should not be rejected.” Moreover, the superior court argued that “there [was] no legal presumption that because a person [was] called as a witness by one of the parties to a suit and has testified on his behalf, he [was] thereby so far biased or prejudiced in favor of the party calling him, as not to be trusted to fairly and impartially interpret between the court and another witness called by the same party.” However, the opinion still reinforced the idea that “some degree of discretion must be vested in the trial court as to the person who shall be employed as

33 Chicago & Alton Railroad v. Shenk, 131 Ill. 283 (1890).
an interpreter,” but not at the expense of denying legal rights to one party. Moreover, the justices agreed that if there was only one interpreter available, “it is difficult to see how there can be any discretion.”

The opinion clarified that, if “there had been some other qualified and unobjectionable person at hand to serve as an interpreter, the court would have been justified in employing him instead of the witness.” In this case, there was not another qualified interpreter in the area, so, “in the absence of all proof or even suggestion to the contrary, it must be inferred that [the interpreter] was at the time the only person who could be obtained or who was available as an interpreter.” The court asserted that “the competency of the interpreter in no way depended upon the materiality of the testimony to be interpreted, and that, as the interpreter tendered was, in the judgment of the court, incompetent because he had testified as a witness for the defendant, the materiality of the testimony to be interpreted was in no way involved. It was therefore held to be improper for the defendant’s counsel to make any representation or showing on that subject.” The judgment was reversed. This case presents interesting questions about the competency and impartiality of the interpreters. The case further shows the problems of professionalization in small localities and the increasingly diverse realities of American society. In 1889 it was clearly more difficult to get access to the mostly accepted right to have an interpreter in the countryside than it was in the big cities where most linguistic groups had a big pool of possible candidates to interpret for the courts.

34 Ibid.
35 Ibid.
Even if during this era it was becoming the norm that courts felt compelled to provide interpreter services, when the lack of English proficiency interfered with the legal rights of some of the legal actors, decisions about the English proficiency level of all parties involved rested on the trial judge only. Once the original trial judge decided whether the interpretation services would benefit the specific case, that opinion was hardly ever modified on appeal because of the corporative defense of judicial discretion.

Bouvier's *Law Dictionary* defines judicial discretion as: “The discretion of a judge is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion, to which human nature is liable.”36 However, in 1824, Chief Justice John Marshall had a very different view of the subject when he wrote the following: “Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”37

The dependence on the judicial decision made the right to an interpreter less of a right and more of a grace granted by a superior authority that could decide to ignore those rights by an

English-only justice system. However, the growing consensus on the importance of interpreters for the correct functioning of the legal system was moving this grace to a legal right that should be granted on demand rather than determined by the exercise of judicial discretion.

**Interpreters and Judicial Authority**

It would be naïve to see the legal relationships between the different legal actors as the expansion of immutable principles because legal realities in America changed as well. Even if the previous era’s focus was on how American legal principles spread to different settings, this era will show how the previous era’s experiments affected and changed attitudes in the whole American legal system. Martin Wiener argues a similar point in his book, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England*. Wiener examines new Victorian legal realities created in the metropole by studying changing attitudes toward male violence (especially against women) in Victorian England. The following cases can help explain in detail the law, cultural meanings, and social practices that engendered justice. As Victorian society agreed on the male propensity for violent crime and on the need to protect women from predatory men, the American legal system agreed that the linguistic diversity in American society had to be addressed inside the courtrooms. The changing attitudes about using

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39 Especially on the era after the abolition of the “Bloody Code,” a time of less concern on property crimes but more concern on violent crimes.
interpreters produced the need for uniform policies, especially in cases in areas where English
speakers were a minority.

The judges presiding over the following cases were influenced by the ideologies of their
times and they saw the law as a tool to shape America and its society. Much in the same way as
Leon Radzinowicz’s *A History of English Criminal Law* shows the efforts of English
parliamentarians to introduce reason and humanity into a brutal and capricious eighteenth-
century criminal law by dismantling the eighteenth-century “Bloody Code,” the following
cases show how the ideas of the Enlightenment influenced American judges and other legal
authorities to follow the trail of the previous era’s judges, who prepared the public and legal
system for reform. The following cases show a few instances of the struggle to pass reforms in
the legal system and illuminate the details of how the reformed system worked. Those reforms
were the genesis of the new Progressive Era mainstream. This was an accomplishment only
made possible by the constant efforts of jurists to reform criminal justice administration
specifically, and the whole American legal system in general, with the implementation of many
new innovations in policing, prosecution, adjudication, and punishment. This evolution of the

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40 Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*
41 For more on some of these changes, see John Beattie, “Sir John Fielding and Public Justice:
The Bow Street Magistrates’ Court, 1754-1780,” *Law and History Review* 25 (2007): 61-100;
Simon Devereaux, “Imposing the Royal Pardon: Execution, Transportation, and Convict
Dodsworth, “Civic’ Police and the Condition of Liberty: The Rationality of Governance in
Eighteenth-Century England,” *Social History* 29, no. 2 (2004): 199-216; Markus Dirk Dubber,
*The Police Power* (New York: Columbia University Press, 2005); Markus Dirk Dubber and
Press, 2007), 151-174; Valentin Gatrell, *The Hanging Tree: Execution and the English People,
1770-1868* (Oxford, UK: Oxford University Press, 1994); Peter King, *Crime and Law in
law was the result of a conflict of interests and ideologies among American elites with different possible outcomes.

The place of interpretation in relationship with hearsay rules was a difficult one to decide for the different courts because traditionally statements made by a person other than a witness testifying in court were considered inadmissible hearsay. However, fluid linguistic realities forced judges to decide if specific cases were an exception to the hearsay rule and if statements made by an interpreter were admissible. In an 1871 Supreme Court of Indiana property dispute, the court had to decide if it was lawful to accept the testimony of a witness based on an interpretation instead of the original words of the other person. In the original lower court case, the plaintiff testified in German, and a translation was given to the jurors by an interpreter. One witness, Jacob Smith, testified that he did “not understand or speak German; the only knowledge I have of what he [the plaintiff] said is what the interpreter told us.” The plaintiff wanted to strike out Smith’s testimony because it was mere hearsay and the interpreter had not been produced. The lower court “held that the evidence objected to was competent as offered; that it was not necessary before or after offering the same to offer, or account for the absence of the said interpreter, and thereupon overruled the plaintiff's objection to the said evidence.”

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42 Schearer v. Harber, 36 Ind. 536 (1871).

The upper court had to decide if Jacob Smith’s testimony was competent or not. The first point mentioned in the opinion was that “Smith neither spoke nor understood that language. All he professed to know of the plaintiff’s testimony on the trial before the justice, was from the interpretation of that testimony, rendered to the jury on that trial.” The justices wanted to answer a few questions to clarify the case: “In what relation does an interpreter, appointed by the court to interpret the testimony of a party or other witness in a cause, stand to the party whose testimony is to be interpreted? Is the interpreter to be deemed the agent of the party interpreted? The statute provides simply, that ‘interpreters may be sworn to interpret truly whenever necessary.’”

Answering their own questions, the justices decided that “it is quite clear that an interpreter so appointed is not thereby made the agent of the party whose testimony is to be interpreted. The court may swear any fit person as an interpreter without the consent of the party whose testimony is to be interpreted, or against his wishes.” The superior court explains that in this case “it does not appear that the interpreter appointed to interpret the appellant's testimony before the justice of the peace, was appointed at his instance [sic], or even with his consent.” Due to those specific circumstances, the court decided that the case did “not come within the principle that where one party has referred another to a third person for information, or where one party has made statements to another through an interpreter of his own selection, the statements of the person so referred to, or of the interpreter so chosen, are competent evidence against the party, in the same manner as if he had made the statements himself.”

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43 Ibid.
44 Ibid.
The interpreter, who the court assumed was duly sworn, “because the law required that he should be sworn,” did his job by translating “what the appellant testified to in the German language into English, and in the latter language delivered it to the justice and the jury. To this extent the interpreter was a witness, and the case falls clearly within the rule that regulated the introduction of evidence of what a witness testified to on a former trial.” Moreover, the opinion clarified that “the rule is, that such evidence is inadmissible unless the witness be dead, out of the jurisdiction, or is insane or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party.” The upper court refused to accept Jacob Smith’s testimony as valid because “there was no reason whatever shown why the interpreter could not be produced, and, therefore, there was no foundation laid for the introduction of evidence of what he swore to on the former trial; in other words, of the interpretation he gave of the plaintiff’s evidence on that trial.” Furthermore, when answering questions about the admissibility of the testimony as evidence, the justices resolved that it “was incompetent, and should have been stricken out on the motion of the appellant, which seems to have been made as soon as it was ascertained that the witness Smith was testifying to what the interpreter said, instead of what the appellant said.” The judgment was reversed. In this case, the upper court decided to strike the testimony as hearsay because they did not have enough evidence that it was a competent testimony.45

The courts not only had to decide how to use interpreters inside their courts, but they had to decide on the validity of the use of interpreters in other areas. In an 1882 Supreme Court of

45 Ibid.
Texas fraud case, Annie Waltee, a French woman, who testified through an interpreter because she did not understand English, claimed that her husband sold her property without her consent. Waltee testified that she “could only understand a few words of English” and that “the deed was not explained to her in French.” The buyer testified that “Mrs. Waltee brought Frank Delimere and represented him as competent to interpret between them; that she also brought Delimere with her when she signed the deed, and that the officer explained the deed to her through Delimere as interpreter, and she assented to it.” This testimony was confirmed by the notary who testified that he “asked the questions required by law, told Delimere what he wanted, and she gave her answers back to him and he to witness. He said she understood it and was satisfied; told him to explain to her that she was making an absolute conveyance of her homestead and had a right to refuse. Delimere read, or at least went through the form of reading, the deed to Annie, and explaining it to her word by word and sentence by sentence.” The court had to decide if “the interpreter spoke the French language” because it was not proved that “the interpreter was sworn to interpret truly.” The opinion accepted that the testimonies proved “the deed was carefully explained to her by the officer who took her acknowledgment, through an interpreter of her own selection; that she stated he spoke her language, and she cannot be heard to say that he was incompetent or corrupt, nor that he failed to correctly interpret. The opinion clarified that “the court would have preferred if the interpreter had been sworn by the notary as it is the proper practice and would have made the process more regular.” However, the upper court made clear that the notary had the “express power to do.” Judgment was affirmed. This case shows how the legal system was more comfortable with the idea of having interpreters in different areas of the citizen’s daily life. Moreover, we can see that the idea of a good interpreter was someone who
followed a set of administrative rules instead of any other consideration. The main point of contention for the court was that the interpreter was not sworn instead of the quality of the interpretation.46

One of the most repeated concerns with interpreters in court proceedings was the quality of those interpreters and their translations. The problem was increased by the fact that no one else was able to check the quality of an interpretation because they were not familiar with that other language. Sometimes the solution to that problem was to appoint a second interpreter, a solution not always viable due to lack of interpreters or economic considerations. In an 1886 Supreme Court of Indiana rape case, the victim was “deaf and dumb.” The victim testified using an interpreter, Charles W. Wright, who “did not understand the deaf and dumb or sign language and was not a competent interpreter.” The interpreter claimed “that he so far understood the language that he could well and truly interpret as well the questions that might be propounded to the deaf and dumb witness, as her answers thereunto.” The lack of a proper and professional interpretation service meant that there was “nothing in the record to show that Wright could not do all that he claimed he could do, and, certainly, nothing to show that appellant was in anywise injured by the action of the court in permitting Wright to act as an interpreter in the examination of the prosecuting witness.” The justices stated in their opinion that the relevant section of the state code provided that “interpreters may be sworn to interpret truly whenever necessary.” The court consulted existing legal authorities about the importance of interpretation services. For example, *Wharton's Criminal Evidence* stated that “sworn interpreters, in criminal as well as in

46 *Waltee v. Weaver*, 57 Tex. 569 (1882).
civil cases, are to be appointed by the court where the witnesses do not understand the English language. It may be added that the accuracy of the interpretation of the sworn interpreter may be impeached and is ultimately to be determined by the jury.” This opinion shows how by 1886 it was becoming an established legal precedent that court interpretation was necessary and important. The court decided that the proceedings had been an error of law and cause for a new trial.47

A second issue presented in this case was that the lower court appointed “Miss Coons, a deaf and dumb person, as an additional interpreter, to assist Wright in the interpretation of the examination of the prosecuting witness,” allowing the questions “to be interpreted by Wright to Miss Coons, and by her to the witness, and in permitting her answers to be interpreted by Miss Coons to Wright, and by him to be given orally to the court and jury.” The opinion did not dispute the appointment of an additional interpreter because “the court had the power, undoubtedly, to appoint as many interpreters as to it seemed necessary to the accomplishment of that object.” The problem was stated thus: “The manner in which such examination should be conducted was a matter to be regulated and controlled by the trial court, in its discretion, and will not be reviewed by this court in the absence of a showing that appellant was in some way injured thereby.” At one point, the victim was shocked in “her innate modesty, and she fled precipitately from the presence of the court and jury into an adjoining room; that she was followed thither by Miss Coons without any direction from the court and without any objection on the part of the appellant.” Then, in that separated room, “Miss Coons speedily succeeded in pacifying her and

in getting her answer to the shocking question, and, in about one minute, they returned together into the court room.” Once the victim and the interpreter were again in the courtroom and “in the presence of the court and jury, and of the witness and appellant, Miss Coons, without having repeated the question to the witness, communicated her answer thereto, obtained from her in such seclusion, to the interpreter Wright, who gave such answer orally to the court and jury.” The opinion clearly stated that “this proceeding was erroneous, intolerable in a court of justice, and a palpable violation of his constitutional right to be brought face to face with the witness testifying against him.” The superior court had many issues with the way interpretation services were provided by the lower court. This case shows how jurists accepted the use of interpreters, but they were still trying to find the best way to implement interpretation services while preserving all the legal rights and procedures in the courts. One repeated concern was that the incorrect implementation of the interpretation services would delegitimize the American legal system.48

In some instances, the lack of interpreters, or an institutionalized system of court interpreters, made the courts decide between excluding some witnesses or using unorthodox solutions to the interpretation issue. A property dispute in an 1888 Court of Appeals of Illinois, Second District, called on the superior court to decide if the lower court was right to disqualify a witness to act as an interpreter. The superior court decided whether it was “discretionary with the trial court whether to allow a witness to act as an interpreter of another witness, both appearing in behalf of the same party, where it does not appear that the testimony was competent, or, if

48 Ibid.
material, that it could not be shown by other evidence.” In this case, the trial court refused a witness for the appellant to act as interpreter for another witness who “was a native of Poland, and unable to speak in the English language.” Part of the reasoning was based on the idea that the testimony was not relevant, or “if material, could not have been fully established by other evidence in appellant’s power to produce on the hearing.” The opinion argued that “the court below asked for an allowance of time to procure another person to act as such interpreter, nor did it appear that, by the use of reasonable diligence, an acceptable interpreter could not have been procured at the trial below.” The court of appeals reaffirmed that “fitness and competency of the person offered to act as such interpreter rested largely in the sound discretion of the trial court.” However, the dissenting opinion stated that “the court erred in refusing to allow an interpreter to be secured for the Polish witness. I am unable to comprehend the ground of this refusal.” The judgment was affirmed. This case shows how the principle that the courts were the only ones with the final authority to decide who can be a court interpreter, even if there was no procedure to guarantee quality and professional interpretation, was firmly established as a legal precedent. That legal precedent was considered important enough to impede the hearing of testimony because of the lack of interpretation services. There was no discussion about the right of the lower court to consider the other witness an unacceptable interpreter for that case in that court. However, the superior court opinion dissented, protesting that the lower court had not done more to ensure an interpreter who would allow the witness to testify.49

In the late 1880s, there was still some discussion about the correct procedure that made someone a proper court interpreter in the eyes of the American legal system. In an 1888 Supreme Court of Michigan rape case, the superior court had to decide whether the interpreter “was sworn to interpret truly.” The superior court accepted the interpretation as acceptable evidence because even if “the deposition did not, upon its face, show that any interpreter was employed, but, from the oral proof resorted to, it appeared the interpreter was properly sworn, taking the usual oath of an interpreter.” This case shows how, as it had been in the previous era, formalism was a prevalent school of thought governing decisions about who was allowed to be an interpreter, while considerations about quality services were of secondary importance. In this case, the court decided that the interpretation was acceptable evidence because the interpreter took an oath.

A bastardy case before the Supreme Court of Iowa in 1889 reaffirmed that the use of interpreters was at the discretion of the court. “Where the testimony of a witness discloses a very imperfect knowledge of the English language on his part, it is within the discretion of the court to allow him to testify through an interpreter,” the opinion stated. In this case, a witness “gave part of his testimony in English, after which an interpreter was used, and the witness gave testimony in the Norwegian language. Of this, the defendant complains. The testimony discloses a very imperfect knowledge of the English language by the witness; and, again, it was a matter wholly

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50 Formalism represented a legal doctrine focused on traditional legal history that emphasized the separation between law and society. Formalist judges embraced the idea that justice means the strict and mechanical application of the rules without considering whether the results are just. Even if a common-law rule collides with the changing needs of society, the judges should only apply those rules. For more on formalism, see Thomas C. Grey, *Formalism and Pragmatism in American Law* (Leiden: Brill Academic, 2014).
within the discretion of the court.” The witness was a boy of twelve who “did not comprehend questions in the English language, and while thus examined his answers were unsatisfactory; but with the interpreter his answers seemed satisfactory to the court and evidenced a fair understanding.” The judgment was affirmed. This case reinforces the idea that the courts were the only ones with the final authority to decide if there was a need for a court interpreter. However, in contrast with earlier cases, even if it were a court prerogative to deny the use of an interpreter, it was clear that the court had the duty to provide an interpreter for the case that would allow the witness to testify.52

The right of some residents to serve as jurors had long been under discussion due to the procedural doubts about requiring jurors to speak, read, and write in English. This continued into the last decades of the nineteenth century. In an 1889 Supreme Court of Michigan negligence case against a railroad company, the court was deliberating about the need for interpreters and when to use them in legal proceedings. The court admitted that the demographic realities of Michigan, where “the numbers are large of persons not familiar enough with our language to speak or comprehend what others say to them,” forced the different courts to use “the help of those who are supposed to understand both languages, and to be capable of transmitting correctly from each to the other all that is said by either person dealing with another.” The “supposed” reference may indicate a distrust of the people who were working as interpreters in the courts.53

The need for those interpreters produced many situations where “the conflict of testimony is such as to indicate either more perjury than seems possible, or more likely incorrect renderings

52 State v. Severson, 78 Iowa 653 (1889).
53 Rajnowski v. Detroit, Bay City & Alpena Railroad, 74 Mich. 15 (1889).
of testimony.” The court had experience with many cases where “great mischief has followed from incorrect interpretation.” The risk of mistakes in legal proceedings led courts to limit the use of interpreters to cases where the “practical necessity can justify the intervention of an interpreter between counsel and witness or witness and jury, although it is well settled that on a proper occasion it is allowable, and the occasion must usually be judged of by the trial court.” Like the previous case, the whole authority to decide to use or deny interpretation resided with the judge.54

To avoid any mistakes in the translation process that would break the rules of law regarding what questions to exclude, what was inadmissible, and all the other legal procedures, “the interpreter shall give to the witness the precise form and tenor of each question propounded, and no more or less, and that he shall in like manner translate the precise expressions of the witness.” Here is another example of a court thinking that literal translation would resolve problems. The court was concerned about the inability of the other legal actors to control any inappropriate behavior, “as is too often done,” such as “to expound things to the witness in his own fashion, or to have any conversation with him beyond strict translation, no one can tell how far the testimony is reliably genuine, or how far it consists of what is admissible.”55

The court blamed many of those problems on a selection process that often forced judges to pick people not prepared to interpret and those who took “liberties with both questions and answers.” The problems with the “system of chance and temporary appointments” made courts “powerless to prevent mischief, intended or unintended.” The possible solutions presented by the

54 Ibid.
55 Ibid.
court were to have multilingual stenographers who would act as a second set of translators to test the accuracy of the translation. Another solution suggested was to do what was done in “other countries, and possibly in some parts of our own country,” where they had “competent official interpreters of known ability and integrity attached to the court itself, or assignable where needed.” The legal system should expand the “same policy which provides official short-hand reporters” to be “supplemented by competent and permanent translators and interpreters.” This opinion reflected the concerns of many actors in the American legal system who realized that, “while it [was] beyond [their] power to correct the evil, [they deemed] it proper to advert to the occasion for having it corrected, if possible.” The opinion was a strong cry for the professionalization of interpreting services in the legal system.56

The previous cases show some ways judicial elites in the post-Civil War legal system used new legal tools, or refined old ones, to control the working class and other groups outside the dominant culture and as a means of hearing the “people from below.”57 Those cases show the legal system had to respond to the new economic realities brought by modern capitalism and the growth of industrialization, or the realities of expanding American society outside of its Anglo-Saxon core.

The judicial system had to compromise by accepting or modifying procedures that were not part of the traditional Anglo-American legal system, but which non-English speakers did not perceive as wrong. As E. P. Thompson argues in *Whigs and Hunters*, a work that examined the

56 Ibid.
origins and implementation of the Black Act of 1723, the law is created within a social context that influences all the actors in the legal system.58 These cases allow us to see true cultural change by presenting a clearer picture of the social context, one that shows the evolving nature of the American legal system.

The Authority of Interpreters

Before the Civil War, many courts decided that being bilingual was enough to be proficient in the skill of interpretation and translation. That idea was still prevalent in the late nineteenth century and was facilitated by the fact that many bilingual people were available for the courts. However, growing up in another country, speaking another language with other people, or even sounding like a native in either language does not make a successful interpreter.

The bilingual people acting as translators had many levels of proficiency, but at least they had some capacity to speak, write, or read a second language. When choosing who would be able to interpret in their courts, some judges were happy to have someone who could merely understand or had basic competency in the required language to express themselves across multiple languages. Few were tested in those skills to prove it. In many cases, those interpreters were not highly specialized in the legal field, as was required for other experts. For example, a medical expert was required to have some kind of relevant degree and professional experience.

58 Thompson, Whigs and Hunters, 250-251.
Legal authorities had long been aware that the ability to communicate between language barriers was essential for the workings of the legal system. Clear communication was necessary to ensure that all the legal principles were applied and benefited all the people in America, regardless of their level of English language proficiency.

The idea that interpreters should be impartial and unbiased was accepted by the courts. However, in some cases, the lack of interpreters forced the courts to allow situations where interpreters were more than mere officers of the court. In an 1867 Supreme Court of Texas property case, the court had to determine the correction of a lower court that used a German-speaking witness who was fluent in English to “read letters and receipts which he wrote in German, and which a party signed, to the jury, the witness improvising a translation, and telling the jury what the letters would be in English, without the witness having been sworn as an interpreter.” The witness had to testify to the substance of the evidence, to which the defense objected because he had “not been sworn as interpreter, and no written translation was produced.” The lower court accepted the evidence when the “witness testified that he had written the letter and had correctly translated it.” The superior court allowed that a witness could be permitted to read some evidence to the jury from one non-English language as if the evidence “had been written in English” because “it was sufficient if the witness was sworn in the usual form.” The tribunal considered that this system of “testifying secures the defendant every right that a translation of the paper, written out, could possibly secure.” However, the court warned that to authorize this kind of translation, the witness “must understand the two languages,” and if the translator read to the jury a translation that instead of a true translation “was false and fabricated by him for the occasion, he would be guilty of perjury.” The tribunal decided that “it
is not perceived that the defendant is deprived of any legal right by the witness translating, and reading the letter as translated to the jury.” This case shows that early in the period, courts often did not expect to have professional translators available and accepted their circumstances. It was difficult in those cases to ensure that interpreters would avoid any conduct or behavior that presented the appearance of favoritism toward any of the parties. This case shows how the court procedures could be flexible if needed, as the superior court accepted the oath as a witness to allow the use of the interpreter, instead of insisting that interpreters should be specifically sworn in for translations. However, the opinion stated some basic rules and requirements for interpreters and the punishments if those expectations were not fulfilled.59

Some courts had to decide how close was too close for a relationship between the interpreter and testifier. In an 1871 Supreme Court of Michigan case, the court had to decide whether the “next friend of an infant plaintiff was allowed to act as interpreter for a witness who did not speak the English language.”60 The court decided that it could only be allowed for “very peculiar and satisfactory reasons,” but the final decision about any particular case resided in the judge. The tribunal could not say that it was against the law but concluded it should be avoided in any case “where the temptation to fraud might be great and the difficulty of detection greater.” The court should be “relied upon to call in a disinterested and impartial person for that office, wherever he shall find it practicable.” In the end, the superior court reiterated the legal principle that it was up to the judge to decide whether the circumstances allowed for those kinds of

59 Kuhlman v. Medlinka, 29 Tex. 385 (1867).
60 “Next friend” in common law is a person who represents another person who is under disability or otherwise unable to maintain a suit on his or her own behalf and who does not have a legal guardian.
peculiar solutions. However, it was not a blank check, as judges were asked to only take those measures if necessary. This case is a clear example of the legal system having a set of expectations about court interpretation but providing a way out if those expectations were impossible to meet.61

Sometimes, a case can provide a glimpse of interpretation in other aspects of the legal system besides courtrooms. Interpreting for the police was one of the most important aspects of legal interpreting, even if it tended to be less visible than the more public court interpreting. Police interpreting raised some similar issues to court interpreting, but it also presented many different challenges. For example, interpretation in a police investigation involved more than just linguistic pressure on the interpreter. The question was whether those differences made a police officer unable to be a court interpreter. In an 1880 Supreme Court of California murder case, the court had to decide whether the arresting officer could be used as an interpreter. The defendant, who had been judged and convicted before a grand jury, argued that the deputy sheriff who had arrested and testified against him should not be allowed to be the interpreter used in the examination of the witnesses who testified against him before the grand jury. In their opinion, the justices of the Supreme Court first established that, in this case, the grand jury was in need of an interpreter and that the law allowed it. When addressing the appropriateness of a prosecution witness who testified against the defendant to be the court interpreter, the justices agreed that they did not know of any “reason why a person who is a witness in a case should be disqualified from acting as an interpreter at the examination of other witnesses in the case.” The opinion

presumed that the court acted under the statute by selecting someone who was capable to act as a court interpreter. Moreover, “the fact that the person summoned was a witness in the case, or had arrested the defendant, was immaterial.”

In the same opinion, the justices pondered the nature, needs, and limitations of court interpreting. For example, they recognized that many external circumstances affected the decisions courts took when selecting a particular interpreter. In this case, the justices wondered whether the interpreter selected by the lower court “was the only one whose services were available, and that but for him it would have been necessary to postpone the examination of witnesses, to their inconvenience, the public detriment, and the delay of justice.” Nevertheless, they argued that the many circumstances influencing a court decision regarding the selection of an interpreter made the lower courts the “most competent to judge.” An upper court “should not interfere with the action of those who make the selection; unless it appears there has been a gross abuse of discretion, or that injustice has been done to the defendant.” The judgment was affirmed.

The opinion took a position far away from the idea of a professional body of interpreters, but it was a position that made practical sense in a place that was still seen as a frontier society. The superior court accepted that interpreting for the police in multicultural communities such as those in California was one of several settings in legal interpreting. They decided that taking advantage of people already working as translators in other legal settings was not only allowable but also could be a benefit to the defendant. For the justices, in this case, there was no

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62 *People v. Ramirez*, 56 Cal. 533 (1880).
63 Ibid.
differentiation between the different interpretation settings, as many saw interpretation as a mechanical process. They did not consider that police interpretation was centered on investigating and solving crimes instead of ensuring the application of the spirit and forms of the law above all. Additionally, the opinion did not consider the implications of using the arresting officer as the court interpreter instead of just using the bilingual officers to conduct interviews or interrogations. The court failed to take into account the issue of impartiality, as court interpreters were to remain an unbiased neutral party that served as a conduit of information. Police officers, conversely, were looking for evidence to allow the prosecution to obtain a conviction.

In some instances, the courts were willing to bend the procedures to provide fast interpretation for the case. In 1886, the Supreme Court of Oregon had to decide if it was acceptable to allow a witness to translate a document offered in evidence without being sworn in as an interpreter. The opinion stated that if the witness wrote the document, was present when it was signed, and was able to understand the language of the document (in German), the witness should be allowed to act as an interpreter. Departing from the opinion of most courts, the justices clarified that the whole proceeding was “beyond [the court’s] comprehension” because “something was suggested about the necessity of swearing the witness as an interpreter, in order to render him competent to translate the instrument. I do not think that was necessary. A general oath that the evidence he gave would be the truth, etc., was amply sufficient. I do not think there is anything in that point worthy of consideration.” The judgment was affirmed. The main point of contention, in this case, was whether the interpretation was acceptable without the proper oath. In this case, as in some other previous cases, the courts decided that the oath administered to the case witnesses was sufficient to make the interpretation valid. As usual, the final decision
rested with the judge, but this case demonstrated that there was still a division between more formalist judges and more expedient judges. 64

The effect of interpretation on jurors was a subject in an 1889 Supreme Court of Michigan case concerning a death in the workplace. At issue was the admissibility of a juror acting as an interpreter of the witnesses. The original case was described as difficult, with witnesses evading questions, answering other things, and stubbornly refusing to follow directions. To try to solve some of those difficulties, the lower court allowed jurors to act as interpreters in order to get some translations. The upper court later decided that those interpretations by members of the jury were unacceptable because they created two different tiers of jurors, one with more information than the others. Moreover, the opinion stated that “jurors cannot be allowed to intervene as interpreters of witnesses, and whatever goes to the jury must go to all through the same medium.” 65 The judgment was reversed. Clearly, the upper court concluded that the jurors who could understand the original language testimony had more insight into the case than the ones that only got the translation. What they did not consider was whether that situation would also occur in other cases, where some jurors knew the language of the witness and others did not, even if an official translator participated in the proceedings. One point not often considered in these opinions was the fact that the courts needed translators because of the multilingual reality of American society, a reality that was reflected in all the aspects of the legal system. This case presents a clear example of how the multilingual context affected jurors whether an official interpreter participated in the proceedings or not. However,

64 Krewson & Co. v. Purdom, 13 Or. 563 (1886).
65 Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84 (1889).
the opinion failed to offer a solution to that problem. Would the legal system need to only have bilingual jurors or no English-speaking only jurors with an interpreter? The whole idea that having different tiers of jurors is unacceptable is very difficult to understand, as it is the reality for any group of jurors, as some would be more familiar than others with the different aspects of any case.

This section shows that even in the latter decades of the nineteenth century, jurists still held a variety of positions about who could be an interpreter. Conflicting rulings were common among judges who were concerned by the problems resulting from the absence of a system of competent and qualified interpreters. At the same time, judges and lawyers pressed their concerns about the power of interpreters over a court that had to accept their interpretations, the accuracy of which was open to question.

**Interpretation and Evidence**

The American legal system was embracing the idea that interpreters had specialized knowledge and could be used as expert witnesses in court proceedings to help the court to understand the evidence or to determine facts. That was a very relevant change because an expert witness is someone “who is qualified as an expert by knowledge, skill, experience, training, or education [and] may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or
to determine a fact in issue." That role stands in sharp contrast to a regular witness who has their testimony limited to the form of an opinion rationally based on the witness’s perception and not based on scientific, technical, or other specialized knowledge.\textsuperscript{67}

The use of interpreters as expert witnesses was even more important when no court-certified interpreters were available or in cases of less commonly used languages. In the late nineteenth century, judges were starting to accept that words spoken and written in other languages could be tricky to understand due to cultural differences. Interpreters were key in the many issues raised by broken contractual agreements, the lion’s share of the cases in this section, where comprehension of the contract verbiage was at the core of the dispute, and the courts had to establish the degree of understanding possessed by all involved parties. For those reasons, more translators and interpreters were called in to provide evidence as expert witnesses in legal proceedings.

Early on, some jurists struggled to work out the details of how to include interpreters into the law of evidence as they began to realize that interpreters would be a permanent fixture in the American legal system. In an 1869 Supreme Court of Errors of Connecticut, New London and Windham, case, Frank Frazio, a prosecution witness, was unable to speak or understand the English language and in the lower court he was examined through an interpreter. The defense provided a witness to refute part of Franzio’s testimony. That witness “had an interview with Frazio, by means of an interpreter.” The attorney for the State objected to that witness because,

\textsuperscript{67} As explained in more detail in the Federal Rules of Evidence, Article VII: Opinions and Expert Testimony, Rule 701: Opinion Testimony by Lay Witnesses.
as the communication happened “through an interpreter, the interpreter must be produced and sworn as to the declarations of Frazio.” The lower court rejected the testimony.⁶⁸

Later, the superior court took up the issue of the rejected testimony. The superior court agreed with the previous ruling because the testimony was open “to the objection of being hearsay merely.” The defense tried to use a precedent to claim that “the case of an interpreter who states what is said to him for the purpose of being communicated to another forms an exception to the general rule in respect to hearsay testimony.”⁶⁹ The opinion argued that the current case under review was different because “the interpreter was the accredited agent of the parties themselves and was acting within the scope of his authority, and only on that ground.” The witness, however, “was the sole agent of the defendant, acting, it would seem, for the purpose of drawing out admissions from the witness to be used against his testimony on the trial of the defendant.” In conclusion, the superior court decided that “the testimony of such witnesses, volunteers for the purpose of drawing out admissions from witnesses, is suspicious enough at the best, and ought not to be encouraged by any modification of the rule in respect to hearsay evidence.” The opinion stated that the interpreter was needed in the trial to testify what Frazio told him instead of having to rely on someone else’s interpretation of his words. This case shows the increasing importance and acceptance of interpretation in many aspects of the daily lives of many Americans, an acceptance that was influencing procedures in the American legal system.⁷⁰

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⁶⁸ State v. Noyes, 36 Conn. 80 (1869).
⁶⁹ Fabrigas v. Mostyn, 20 Howell’s State Trials, 123 (1775).
⁷⁰ State v. Noyes, 36 Conn. 80 (1869).
The conflicts between the law of evidence and the incorporation of interpreters in the daily proceedings of the courts were a constant concern of a legal system that was creating rules to respond to the new multilingual reality. One example comes from an 1869 Supreme Court of Louisiana case, a property dispute where the court had to decide if the “dying declarations of a party who acted as interpreter for the vendor at the passage of a notarial act of sale” were admissible as evidence. The defense argued that the notarial act was fraudulent due to the “machinations of the plaintiff and the person who acted as interpreter between the defendant and the notary.” However, the court decided that the dying declarations of the interpreter were hearsay evidence. This case shows that the court could only accept the translation as evidence if the interpreter were testifying, but not if the interpreter told someone else.71

During the second half of the nineteenth century, legal authorities began to bring some uniformity to the hearsay rules as they applied to both official and non-official interpreters. In a counterfeit case heard in 1869 in the Supreme Court of New York, a Spanish-speaking defendant faced off against a plaintiff who could not understand Spanish. A third party, the friend and banker of the defendant, could speak English and during a conversation “repeatedly talked with the defendant in some foreign language, appearing to translate to him the plaintiff's remarks, and professing to speak for the defendant in reply.”72 The court needed to decide whether that conversation (not accepted by the lower court) was admissible as evidence against the defendant.

The counsel for the appellant argued that there was “not a particle of evidence to show that the defendant did not understand the English language.” Moreover, he argued that he did

72 Wright v. Maseras, 56 Barb. 521 (1869).
understand because “the conversation he had with his Spanish friends shows he understood well enough.” The counsel for the respondent argued that the evidence of conversation should be removed because “of his ignorance of the language used,” and there was not “the slightest evidence that a word of it was communicated to him.” For the counsel, “the evidence was clearly hearsay, and should have been stricken out.”  

The court’s opinion tried to determine whether the conversation was acceptable evidence. The justices decided that it “should be determined, not as a question of law, but as a question of fact.” Did the defendant, through an interpreter, understand the English part of the conversation? If so, the conversation would have “the same effect as if the plaintiff had addressed him in Spanish, or any other language that he did understand.” The opinion argued that it was reasonable to infer that the defendant understood the conversation because the friend/interpreter “spoke to the defendant in language that he understood,” and immediately the defendant behaved in a way that demonstrated understanding. Moreover, the defendant “could have been sworn, and through an interpreter could have acquitted himself of all wrong intent, if his transaction was honest,” but he did not. The county court judgment was reversed. This case shows the difficulties judges had in determining the level of language fluency. This case represents one more example of a possible bias against non-English speakers’ actions that were perceived by authorities as suspect. Feigning ignorance of a language was a way to take advantage of the protections the system provided to non-English speakers.  

73 Ibid.  
74 Ibid.
Another example of the conflicts between the hearsay rules and the participation of interpreters in the legal system is an 1875 Supreme Court of Illinois case, a contract case where a seller changed the terms of a written contract knowing that the purchaser was illiterate. The opinion stated that the defendant “was illiterate, could not read writing, and could not speak English; that the business was done through an interpreter.” The defendant’s brother testified in her favor, but “on further questioning, his means of knowledge was what the interpreter told him.” It is not specified but we can assume that his testimony was dismissed as hearsay. Like the previous case, the court would only use the translation as evidence if the interpreter were testifying in court, but not if the interpretation came through a third party. Another interesting aspect of this opinion is that the court considered the defendant illiterate because she was unable to read and write in English without considering whether she was able to read or write in any other language. Simply put, English was the only relevant language in the courts.75

Some courts had to decide about how to use instances of interpretation that happened outside the courts but had a direct impact on court proceedings. An 1881 property dispute heard in the Supreme Court of Iowa involved an agreement made by two agents of the plaintiffs. As the owner of the property did not speak English and the primary agent did not speak his language, the secondary agent, who spoke both languages, acted as an interpreter in the negotiation. The circuit court allowed the primary agent, “against defendants’ objections, to testify as to the conversation, through the interpreter, between himself and Haave (the seller).” The defense argued that the primary agent “did not understand Haave’s words and depended upon the

75 *Mix v. Balduc*, 78 Ill. 215 (1875).
interpreter in order to acquire a knowledge of their meaning,” making his evidence mere hearsay. The superior court refused that objection because the “evidence was intended to show a contract between plaintiffs and Haave, and the interpreter was chosen by the parties as a medium of communication through which both could speak.” The Supreme Court found this evidence admissible because the testimony of the witness was in “accord with the testimony of Haave and the interpreter, as to the purport of the contract.” This case shows how judges had become more accepting of interpreted evidence in the courtrooms. This was a far cry from the previous era when many judges had misgivings about the role, or even validity, of interpreters in the legal process. In a similar 1887 Supreme Court of California case, the lower court permitted the plaintiff, “over defendant's objection, to introduce the stenographer's transcript of evidence given by defendant in a different action.” To support the decision, the court again used some cases with interpreters as precedents.76 Interpretation was thus employed in an expansive way to include many forms of communication, not only those impeded by linguistic barriers.77

While the legal system was adapting to the idea that interpreters were important and trustworthy parts of court proceedings, some jurists still expressed reservations about interpreted evidence. In 1884, the Supreme Court of Iowa agreed with the lower court about a property dispute in which a mistake in the contract was made because the seller “did not understand its scope and effect, because of his inability to understand our language. He [was] a Bohemian, and an interpreter was called to explain what was desired, and the contents of the conveyance were

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76 See People v. Lee Fat, 54 Cal. 527 (1880); People v. Ah Yute, 54 Cal. 89 (1880); People v. Chung Ah Chue, 57 Cal. 567 (1881); People v. Qurise, 59 Cal. 343 (1881).
77 McCormicks v. Fuller, 56 Iowa 43 (1881).
made known to Krall by the interpreter. It is not, therefore, strange that the mistake occurred.”

Judges clearly believed that the fault lay with the translator, demonstrating that suspicions against interpreters were still prevalent despite the increasing professionalization and standardization of the legal translation services. Some legal authorities continued to see a direct relationship between interpreters and mistakes that potentially tainted the legal process.

The courts were more open to using interpreters to make sure they respected the rights of non-English speakers in their courts, and more jurists began to recognize the limitations of their cultural understandings of the different groups present and appearing in the courts. In an 1884 Supreme Court of Pennsylvania case, an accused murderer was indicted under the name of Sabato Alexander, and he claimed a procedural error in the lower court needed to be corrected with new proceedings. The error involved his name. He had been “baptized by the name of Sabato D'Allessandro” and he had “never been called or known by the name of Sabato Alexander.” Even when “several witnesses testified that the prisoner was known among his countrymen as Sabato D'Alessandro or Sabato Alexander,” the lower court felt compelled to request the opinion of an expert witness, an interpreter. The lower court “asked the interpreter. ‘What is the Italian for Alexander?’ the interpreter was called and sworn, and without objection to the form of the oath or to his testimony, he said that the Italian word D'Allessandro is the same as the English word Alexander.” The superior court concurred with the lower court’s ruling, stating that “a foreigner resident in this country may be indicted under a name which is the English equivalent of his name in his native tongue, to which he had assented.” Based on the

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78 Zack v. Krall, 64 Iowa 88 (1884).
interpreter’s expert opinion and other testimonies, the superior court refused the argument of mixed identity. This case is one more indication of the central place interpreters had acquired in the legal system. As this case shows, the judge was not satisfied with the many witnesses who testified on this subject. He instead requested the appearance of an expert witness—an interpreter—to clarify the linguistic issues relevant to this case. This is a far cry from those earlier cases where interpreters seemed to be little more than nuisances to the judges.  

Some cases show how including interpreters in different court proceedings affected and created precedents for other cases where no interpreters were present. In an 1885 Court of Appeals of Kentucky case, a property dispute case where one part communicated with the other by phone, the court had to decide if the phone operator’s testimony was a piece of acceptable evidence. The court considered that the phone operator was an agent of the caller, much in the same way an interpreter was an agent of a non-English speaker. The court, using many precedents drawn from cases involving language translation, stated that “it is a well settled rule that where one, through an interpreter, makes statements to another, the interpreter's statement, made at the time, of what was so said, is competent evidence against the party. The interpreter need not be called to prove it, but the interpreter's statement, made at the time, may be proven by third persons, who were present and heard it.” The court was satisfied that the phone operator was acting as the agent of both parties even if they were unable to see each other due to the nature of a phone conversation. This was no different than using “an interpreter between blind

persons” as if they were sharing the same space. The court reversed the previous decision and accepted the evidence.81

In the dissent to the Kentucky case, however, another judge argued that “the operator is not an interpreter in a legal sense. Where persons of different nationalities are unable to understand each other, they call on an interpreter, and he speaks for them, in their presence; those present hear his statements.” The dissenting opinion saw the testimony as valid because it was as “if the same witnesses were present and heard the parties themselves conversing with each other. There is no analogy between the case of an interpreter and that of a telephone operator.” This case may have been the first, or at least one of the first, to address the importance of the new telephonic technology in the law. Without precedents involving telephone conversations, interpretation seemed to some to be a relevant substitute. The majority opinion offered an expansive view of interpretation much in the same way as earlier cases involving the deaf. Others, as the dissenting opinion shows, took a narrower view of interpretation that was limited to the more typical translation between two spoken languages. The expansive view in the majority opinion offers clear evidence of the increasing importance of interpretation for many Americans at the end of the nineteenth century, a framework of understanding that was becoming so familiar that it was easy to use to explain other new realities and forms of communication that were appearing at the time.82

The courts had to ponder the communication between the parties and the importance of the interpreter to decide what would be admissible evidence. An 1886 Supreme Court of

81 Sullivan v. Kuykendall, 82 Ky. 483 (1885).
82 Ibid.
Michigan case addressed a dispute over a property sale that was made through an interpreter. The opinion stated that when one of the parties provided the interpreter, that interpreter was an agent of that party. Therefore, it would not be necessary to prove that statements communicated to the interpreter “were communicated by the interpreter”83 to that party. That rule, however, did not apply to any third party who did not supply the interpreter. This case shows that interpreters could be divided into two categories. The first was a group of more professionalized legal interpreters who worked for the court and were expected to be neutral. The second group of interpreters was those brought to the court by the different parties to a dispute who were, by definition, more partisan than neutral. In an 1886 property case in the Supreme Court of Arizona, an “agent, friend and interpreter” of the seller was hired by the buyers “to get the property as low as possible.”84 The court refused to accept the contract in this case because the interpreter was not neutral.

Even if most cases were tending toward an acceptance of interpreted evidence as admissible in court, we can still find cases that used older precedents to disallow interpretation as hearsay. In an 1889 Supreme Court of Nebraska case, the court had to decide whether the testimony based on what an interpreter told a third party was admissible as evidence. The higher court agreed with the lower court to exclude the testimony, using an English case as precedent rather than an American case even though many were available.85 The 1774 English precedent used was a suit against the governor of Minorca. The counsel argued: “I would not interrupt this

84 Jacobs v. George, 2 Ariz. 93, 11 P. 110 (1886).
85 Fabrigas v. Mostyn, 20 Howell’s State Trials, 123 (1775).
evidence, as it does not appear to be of great consequence to us, but I submit to your lordship whether this is properly evidence, the answer being conveyed through an interpreter? and whether the interpreter should not be produced who knows what answers were given?” Another counsel agreed by saying: “We are now to take the answer from a man that does not know what the questions were, in a language the witness does not understand, and consequently cannot report if there were any, or what answers given; whereas there is a man living in the world who could report the answers that were given. I should not object to it, if that gentleman could himself understand the answers that were given.” The presiding judge in the Nebraska Supreme Court stated that the “ruling [was] referred to both in Phillip's [sic] and Greenleaf's treatises on Evidence, and being the only case cited by either, I do not think that authorities on this point are abundant.” As this case demonstrates, there continued an internal struggle within the American legal system to reconcile interpretation with the rules of hearsay.86

In an 1889 Supreme Court of Wisconsin work injury case,87 the plaintiff was hired through an interpreter, and a witness was allowed to testify to what the interpreter said to the plaintiff. That testimony was accepted by the court because:

What is said to a person who acts as an interpreter between the person speaking and other third parties will be repeated to such other parties in the language which they understand. The person speaking through an interpreter virtually says to such other person, ‘You listen to what the interpreter says, and he will tell you what I say;’ and what the interpreter says is to be taken as the language of the person speaking through him, and may therefore be admitted in evidence against him, under the rule that the statement of a third person is receivable in evidence against a party who has expressly referred another to him for information as to any matter.

87 Nadau v. White River Lumber Co., 76 Wis. 120 (1890).
This case illustrates the position of this interpreter, and interpretation in general, by clarifying how the interpretation process worked. The court considered the interpreter a neutral party, no matter the relationship between the interpreter and the person speaking through them. An interpreter was merely a tool to facilitate communication without any agenda.

In a similar 1890 Supreme Court of Wisconsin case, a plaintiff's counsel in a personal injury case wanted to dismiss as hearsay the testimony of a witness who did not understand English. The court, however, accepted the testimony because the plaintiff talked to the witness through an interpreter, and the justices considered that “when so translated, the plaintiff tacitly assented to its correctness. It was no more hearsay than any evidence given through an interpreter.”88 This case is one more piece of evidence of the increasing normalization of the role of interpreters, and interpretation in general, in American courtrooms at the end of the nineteenth century. Interpretation was increasingly seen as admissible evidence, especially when provided by professionalized legal interpreters.

One issue that was of great concern for legal authorities was the realization that the testimony of witnesses, perhaps the most important pieces of evidence in any court proceeding, relied upon accuracy. Non-English-speaking defendants and other legal actors were only able to testify by using interpretation. Judges realized that they were entirely dependent on the interpreters to communicate with those non-English speakers to find evidence and to explain the allegations and evidence presented. Because of this, the courts for the most part accepted that the interpreter’s job was critical for the correct and fair functioning of the legal system.

88 Blazinski v. Perkins, 77 Wis. 9 (1890).
At the same time, those judges reflected their concerns in their opinions about interpreters mistranslating some testimony and their inability to correct mistakes. The suspicion some legal actors had against interpreters was, in part, based on the idea that errors in interpretation were very difficult to prove as the court reporter usually did not record the exchange in the foreign language; only the English version of testimony was preserved in writing. There was no system of checks and balances because no one was responsible or capable of checking the quality and accuracy of the interpreter’s work.

Those realities forced judges, and by extension the whole legal system, to construct a set of procedures to include interpreters and accept their interpretations as evidence in the different court proceedings. Those protocols were created to be used in cases where interpreters and document translation were involved. Designed to facilitate the process of using interpreters, these procedures were meant to solve in advance interpretation-related issues and provide a framework for all the legal actors involved. These new processes had the side effect of educating the court on the needs of non-English speakers by focusing on the language-related challenges in some cases. At the end of the nineteenth century, we can see the courts moving from an initially reluctant attitude about interpreters to an expansive understanding of interpretation that was also applied to non-interpreter cases.
Conclusion

In the decades after the Civil War, there was a gradual recognition of the right of different legal actors to the assistance of qualified interpreters. The courts realized that they had to address this issue in the context of an increasing presence in the legal system of a population who spoke little to no English. Earlier in the era, a more traditional approach to interpretation was common in American courtrooms. That approach had characteristics of what today we could identify as natural law.89 The judges espousing those views for the most part agreed on a few basic tenets of the law, such as universal principles; immutability; a nondispensational, clear distinction between right and wrong; and no historical context. These jurists were also influenced by legal formalism and supported some of its basic tenets, such as judges should apply the law and not make it, legal rules constrain the law, cases must be decided with the text of the law, and rules are derived from authoritative legal texts.90

As the nineteenth century drew to a close, however, changes in the legal system took a more critical approach to the situation of non-English speakers similar to some Critical Legal Studies (CLS) ideas.91 The legal actors espousing those reformist ideas saw the interpretation services offered by the courts as a sick man, and they tried to diagnose what was wrong with

him. They wanted to decode and translate the law according to their own distinctive, reformist understanding of the law as an important central player in the changing social realities, convinced that law and society could not be separated. Judges supporting those ideas criticized the traditional structures of legal thought and practice, convinced that those conceptions perpetuated patterns of injustice and dominance. They argued that traditional legal practice only pretended to be neutral and objective when in reality it was tilted to favor English-speaking legal actors against non-English speakers.

The late nineteenth-century opinions based on those ideas show the discomfort of judges with the indeterminacy of the law and its contradictory results. They tried to identify who benefitted from the law and how. They sought to expose how the law confuses outsiders to seem legitimate, and they tried to create new legal tools to help previously disadvantaged legal actors.

Legal scholars and judicial authorities of this era were moving toward a position that admitted that the law was not autonomous. Culture, economy, politics, tradition, and social norms influenced the way the law worked. Many, however, would disagree about the degree of

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the law’s autonomy. 95 The opponents of that approach argued that the reformist approach made
people lose respect for the law.

Many of the opinions analyzed in this chapter focused, even if in an indirect way, on the
whole issue of the law’s impact on society and society’s impact on the law. This was the case
whether legal authorities were talking about using a translated document as evidence or the
constitutional right to have an interpreter. The impact of any form of legal behavior depended on
the context from society itself, such as levels of enforcement or compliance, or the specific
realities of the jurisdiction that facilitated or impeded the courts to apply the required
remediations to have a fair legal system for non-English speakers. Judges in this era had to
consider how seismic changes in society, such as the exponential increase of immigration and its
diversity, initiated a variety of legal responses. 96 At the same time, jurists had to balance changes
against the practicality of the law, which quickly removed any aspect that did not have a present
usefulness for the specific circumstances of that legal system. But this did not mean that the law
always worked, for the law in any given society is the product of a historical context that
transforms the legal system. So, if the society had structural problems, the legal system was
likely to have the same, as argued by Inga Markovits about Lüritz and East Germany. 97

The cases examined in this chapter show the importance of human behavior in relation to
the substance, procedures, structures, and culture of the legal order. For example, we see some

95 For more on the debate, see Christopher L. Tomlins, “How Autonomous Is Law?,” Annual
Review of Law & Social Science 3 (December 2007): 45-68.
96 Steven Robert Wilf, Law’s Imagined Republic: Popular Politics and Criminal Justice in
97 Inga Markovits, Justice in Lüritz: Experiencing Socialist Law in East Germany (Princeton, NJ:
Princeton University Press, 2010).
instances of lawyers and judges becoming more comfortable using interpreters or bringing their own interpreters. Legal authorities were embracing the interpreter’s role as a middleman between the law and non-English-speaking people. As these cases reveal, the legal profession as an organization was restructuring its practices and even its culture to reflect the changing and modernizing society in which it was situated.
In April 1917, as millions of young Europeans were fighting and dying in the First World War, an opinion was filed at the Circuit Court of Stephenson County by the Honorable Richard S. Farrand. The decision was made in response to a case in which an employee was injured. The employer refused to pay the employee’s workmen’s compensation and the employee sued his employer for negligence in employing laborers of a foreign nationality unable to speak the English language. The jury found in favor of the employee, and the employer appealed the decision of Judge Farrand’s court. The employee called two Greek workers as witnesses, but the reporter complained that he could not understand them. The court asked the employee’s attorney to call an interpreter because the court did not think the reporter or jury understood what they heard. The employee’s attorney refused, and the court instructed the jury not to consider the testimony of those witnesses. This case presents two interesting examples of the social construction of race. On one side, we have an employer declared negligent because he was using non-English-speaking workers. On the other side, we have two “legally white” Greek immigrants

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being denied certain white privileges because they were not fluent in English. This case raised an important question in the Progressive Era: What is the importance of English fluency to legal and social citizenship?

In the early twentieth century, the answer to that question was by no means certain, but much had changed since the days of the Early Republic. A hundred years earlier, court interpretation had been ad hoc and entirely up to judicial discretion, leaving non-English speakers at the mercy of judges. A century later, most states had established some kind of right or obligation to court interpretation, and they had moved towards regularizing and professionalizing the task. The massive upswing in immigration that began in the late nineteenth century and peaked in the early twentieth, however, created a new set of conditions. Outside of the courts, anti-immigrant sentiment flourished as social commentators raised the specter of “race suicide” in the face of huge numbers of newcomers, especially those from southern and eastern Europe. For nativist Americans, “whiteness” itself seemed to be in danger. At the same time, new theories of scientific racism brought the notion of genetic degeneracy to the forefront.2

Across the Progressive Era, these two cultural tropes – whiteness and degeneracy – found their

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way into judicial opinions. But at the same time, the movement towards regularized, professional court interpretation continued.

“Whiteness typifies the majesty of Justice in the ermine of the Judge,” 3 Captain Ahab eulogized in *Moby-Dick*, signaling that the word “white” implied more than a chromatic description. 4 “White” is an untenable perfection that has haunted the American psyche since colonial times. The idea of “white spiritual superiority” is closely related to the twin idea of English language proficiency. As Captain Ahab disregarded the safety of his craft and crew in his mad search for the white whale, the American legal system sometimes disregarded its procedural fairness, 5 such as bias suppression and representativeness, 6 in the mad search for a “White Republic.” 7

The link between whiteness, English fluency, and citizenship has been central to constructions of American identity. Whiteness, and the English fluency supposedly associated with it, was the representation of a set of moral and cultural principles. 8 Those principles were

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4 Captain Ahab is a character of Herman Melville’s *Moby-Dick*. He is one of the best whaling captains in Nantucket driven by a monomaniacal desire to seek revenge against the White Whale. Although he is a Quaker, he defies his religion’s pacifism.

5 Procedural fairness, as defined by the Law Society of New South Wales, is “the duty to act fairly in the making of administrative decisions which affect a person’s rights, interests and legitimate expectations.” The American legal system constitutionally guarantees the right to due process or procedural fairness.

6 G. S. Leventhal cites six foundations of procedural fairness: consistency, bias suppression, accuracy, correctability, representativeness, and ethicality.


8 The principles embodied by whiteness were ownership of property, rationality, restraint, self-discipline, self-reliance, and temperance, among other principles.
essential for the proper workings of the contract between the state and the citizen, as they proved fitness for self-government. Whiteness was the representation of “good republican substance.” The ideology of white racial superiority in class, politics, and mass culture worked well for European Americans until waves of immigrants in the nineteenth and early twentieth century challenged the nation’s whiteness ideology. Those immigrants were legally white, but their status as non-English speakers created debates over their capacity to be citizens.

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9 For more on whiteness moral and cultural principles, see Matthew Frye Jacobson, Whiteness of a Different Color: European Immigrants and the Alchemy of Race (Cambridge: Harvard University Press, 1999).
10 Ibid., 244.
11 The situation of African Americans and Native Americans was totally different. There is a robust and diverse literature discussing Native Americans, African Americans, and their history. The traditional depictions of non-white American history were very partial; their role was the celebration of white America’s accomplishments. However, the 1960s rejected the traditional historical discourse and attempted to create an alternative discourse. Those changes challenged historians to contemplate the past from a new perspective, which presented Native Americans and African Americans in a more positive light. At the same time, Europeans, Americans, and the United States government were presented as the “bad guys.” Most recent historiography fights the exchange of one oversimplified stereotype of non-whites for an oversimplified stereotype of whites. Recent historians use more nuance and complex explanations to produce a thoughtful scholarship, and they have produced some first-rate Native American and African American histories. Still, historians need to fight many obstacles; most important is the problem of written sources. The traditional written sources used by historians were created by Europeans or people of European descent, and the writings often reflected white cultural biases and interests. Recent historiography tries to use an understanding of a culture and its dynamics to answer historical questions. What results is a history that is sensitive to non-white cultures, trying to close the gap of histories from a non-white viewpoint that include forgotten voices.
12 The most recent scholarship on whiteness explicitly challenges a core tenet of traditional whiteness literature. Recent works refute the notion that the “New Immigrants” occupied an “in-between” racial status and had to actively work to obtain the benefits of being considered white. Far from that concept, the most recent scholarship insists that they arrived white and remained white. This new argument proposes the immigrant’s distinction between color and race; for them, color was a white/non-white binary while race was their ethnic group (Italian, German, etc.). The most recent scholarship argues that while immigrants may have been discriminated against because of their race, they enjoyed whiteness in citizenship, housing, jobs, schools,
Whiteness scholarship and the emergence of whiteness as a category of scholarly analysis have produced a vast historiography. The two most studied aspects in the whiteness historiography are the origins and definitions of whiteness and the legal and social construction of whiteness. One group of scholars focuses on the day-to-day class and race dynamics of working-class people while a different group of historians focuses more on the speeches and writings of political leaders to explain the need for big coalitions, based on the exclusion of people of color, and how mass media shaped the ideological and political currents. Both groups of scholars agree that white identity is socially constructed and that language supports the production of white racism and loyalty to whiteness. For some ethnic groups, assimilation into American society was facilitated by the stress upon whiteness, as the integration process placed greater emphasis upon race than ethnicity in the identity of a given immigrant group. Assimilation required immigrants to accept white consciousness and ideology in the process of politics, etc. The immigrant’s security in their color status as whites allowed them to proudly display their separate racial identity.

14 Roediger, *The Wages of Whiteness*.
16 Roediger, *Towards the Abolition of Whiteness*, 182-188.
becoming white. Adding to their arguments and using sports language, if you wanted to play in the big leagues, you needed to do it in English.

A group of scholars argues that race as a social construct was created with the help of the laws and its many interconnections with race.\(^{17}\) For those scholars, white supremacy was not a mistake or perversion of the law; on the contrary, it represented the law in action. Naturalization cases in the late nineteenth and early twentieth centuries presented the courts with the challenge of trying to use science to define whiteness, but once judges realized that science was not able to provide them with a set of standards, they opted to use the more subjective “Common Knowledge” standard. Once the courts had their standard, they rigidly enforced it as the superior and uniquely American national norm. The scholars argue that whiteness was assigned the top position in the social echelon, ascribing superior status to even the poorest of whites. Other scholars explore the importance of racial classification to American identity and the delimitation of white racial belonging.\(^{18}\) They examine how “racial categories themselves reflect competing notions of history, peoplehood, and collective destiny.”\(^{19}\) The dominant classes used the law to associate whiteness with American citizenship and to marginalize the Other, as the first naturalization laws reserved citizenship for the people fit to govern: English-speaking whites.

The problem appeared with the arrival of European immigrants who were not considered fit to rule. For example, the Italians, according to the Naturalization Law of 1790, were legally as white as an Englishman, but by the 1870s they were perceived as “in-between” people, in a gray

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\(^{17}\) Ian Haney López, *White by Law.*

\(^{18}\) Matthew Frye Jacobson, *Whiteness of a Different Color.*

\(^{19}\) Ibid., 9.
Politics, culture, and the formation of American identity reveal the complexities of citizenship. Contrary to some previous scholarship, this new perspective presents immigrants as active participants in the polity, which requires English fluency to be admitted to the club. Immigrants became white by the adoption of institutionalized practices and discourses of the dominant society, such as the adoption of the national language (English). An immigrant group’s designation as “non-truly-white” limited their options in society, so they had to reinvent the community’s ethnic culture in order to become white.

The transition from the twentieth to the twenty-first century was a crucial moment in the field of whiteness studies, a watershed moment evidenced by a revitalized academic debate on whiteness. Those debates influenced the appearance of a new wave of whiteness studies. This

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21 Jacobson, Whiteness of a Different Color.


24 The publication of the 2001 International Labor and Working-Class History scholarly controversy symposium on the impact of whiteness studies on American labor history and the scholar’s views on whiteness studies.

25 In this debate, Eric Arnesen acknowledges the importance of whiteness and states that the field lacked a sufficient amount of serious critical assessment due to a number of conceptual and methodological problems. Barbara J. Fields reflects on the difficult relationship between identity and agency in whiteness studies. Eric Foner agrees with many of Arnesen's criticisms, but he criticizes Arnesen for not giving whiteness the importance it deserves in the understanding of racial identities. Victoria C. Hattam finds Arnesen to be unfair, as whiteness contributes to re-examining questions of nationality and citizenship. Similar to Arnesen, Adolph Reed, Jr., points to many of whiteness studies’ weaknesses, as they are used to explain the failures of the American Left.
new wave is represented by works that move away from the more white-generic analyses dominant in the 1990s.\textsuperscript{26} The new direction in whiteness is to move to more clearly limited themes, such as Jewish whiteness, Irish whiteness, and other white ethnics.\textsuperscript{27} The field is becoming more mature and less radical, in part as a result of debates within whiteness studies itself. These scholars argue that European immigrants were both white on arrival and racially undesirable. That can only be understood if we accept that there were “primarily two ways of talking about and structuring race between the mid-nineteenth and mid-twentieth centuries. The first is color … [and the] second is race.”\textsuperscript{28} For example, as historian Thomas Guglielmo argues, Italians identified their color as white and their race as Italian. Those were groups that arrived as “non-truly-white,” but in a few decades became assimilated into America, in a process that had the double function of whitening as well as Americanizing.\textsuperscript{29} The story of their transformation from racial outsiders to becoming white American insiders reveals the many debates occurring within different ethnic communities about their own cultural particularity and the benefits or disadvantages of becoming white. In the end, working-class white ethnics acquired a white consciousness in response to the Great Migration.\textsuperscript{30}

\textsuperscript{26} The Rise and Fall of the White Republic, The Invention of the White Race, White by Law, and Whiteness of a Different Color
\textsuperscript{28} Guglielmo, White on Arrival, 9.
\textsuperscript{29} Roediger, Working Toward Whiteness, 9.
\textsuperscript{30} Kazal, Becoming Old Stock, 274-278.
When Melville’s Ishmael meditates on the connotations of whiteness, he is engaging in a philosophical exercise to interpret whiteness. The whale’s whiteness intrigues Ishmael because it suggests contradictory meanings as well as nothing at all. Ishmael concludes by telling us that “of all these things the Albino whale was the symbol,”31 which symbolizes above all his own inescapable uncertainties. Ishmael declares that Ahab “piled upon the whale’s white hump the sum of all the general rage and hate felt by his whole race from Adam down.”32 Ahab’s search for meaning is a source of torment; the bottomless mystery is simply unacceptable. One can imagine whiteness as a field of study composed by Ishmaels engaging in a philosophical exercise to interpret whiteness and by Ahabs for whom bottomless mystery is simply unacceptable.

The interplay of law and language suggests another way to examine the social power of whiteness. Previous scholarship has discussed the performative nature of race and whiteness,33 but those studies rely on simplistic notions of performance such as the idea of choice, which implies that one has the ability to switch at will. In contrast, this dissertation recalibrates the heart of the whiteness and citizenship debate by examining the importance of linguistic performance as a way of understanding what it meant to be white, an issue that became increasingly visible during the Progressive Era as debates about immigration and citizenship moved to the center of public discourse.

In the United States, the legal system and culture equated whiteness with citizenship and that idea helped to create and shape ideas of national identity and race formation. The law

32 Ibid., 200.
considered many groups (Greeks, Croats, and Slovenians among others) legally white, and they were allowed to become citizens. At the same time, the dominant social perceptions often considered them non-white, or at least less white. This raises a number of questions that this chapter seeks to answer: Why were they considered second-class whites by the dominant society? What made them different from other whites? How did they manage to become first-class whites? This chapter argues that English language proficiency, as the national language, was the key to their transition to whiteness.

Those questions are important to the study of the American legal system as they are crucial for understanding the way the American legal system (represented by the judges, counsel, and juries) saw those recent immigrants and the rights and protections they deserved. As we have seen, these discussions had been ongoing since the founding of the republic, but by the Progressive Era there emerged a clearer division in judicial opinion and action within the legal system, a division that placed jurists in two categories: nativists and paternalists. The nativist legal authorities used arguments that increased the fear of “the Other.” Nativists used the growing anxiety about the numbers of foreigners in America, the concerns about a group of people who did not know how to speak English, and the fears about foreign religions and beliefs. Nativists worried that society would be weakened by that foreign body, and they blamed immigrants for problems like unemployment and crime, among others.34 As Reverend Josiah

Strong wrote in 1885, “Immigration not only furnishes the greater portion of our criminals, it also seriously affects the morals of the native population. It is disease and not health which is contagious.”\textsuperscript{35} Nativists in the legal system pointed to the lack of English proficiency as a mark of suspicion and a reason to consider non-English speakers untrustworthy and of bad character.

Paternalist judges and counsel were not the opposite of their nativist counterparts; they shared many of their counterparts’ concerns about the country’s situation. The most important difference between the groups was that the paternalists saw non-English speakers as weak and in need of additional protections. As a result, they extended a gentle mantle of “paternal” protection over them. Paternalist and nativist sentiments ebbed and flowed in the legal currents of the Progressive Era. Language proficiency, however, was central in both approaches to non-English speakers in the courtroom.

\textbf{The Language of Rape}

Nativist and paternalist divisions can be seen most clearly by looking at Progressive Era rape cases where non-English speakers were present. I use the term “non-English speaker” in an expansive way; it will not be limited to the people who do not speak English or recent immigrants. The term will apply to a wide range of people, from those who lacked any kind of

English language skill to those who merely “spoke with an accent.” What unified this group was being perceived as outside of the mainstream American society and culture.

To be sure, the lack of English fluency as a mark of otherness in the American legal system was not limited to rape cases. It extended over the whole legal system, and it showed up in any kind of cases with non-English speakers involved. Nativist notions colored judicial proceedings, especially earlier in the period. For example, the commercial-law *Albert Christman v. Jules Ray* case is a clear example of non-English speakers’ disadvantage in the court when Americans’ fear or dislike of non-English speakers and immigrants is used against them. In this case, an English-speaking debtor, in an effort to exploit the court’s nativist tendencies, challenged the use of non-English depositions taken from a French-speaking creditor in Switzerland. The debtor’s main argument was that all judicial proceedings had to be conducted in English, which invalidated the depositions even if the depositions were taken before a notary and both parties consented to translate them into English. The court recognized that it was impossible to take the testimony of a non-English-speaking witness without using other languages, and if the debtor’s argument was accepted, such evidence would be entirely excluded. The court sided in favor of the creditor, even if the problem that the evidence itself was in another language remained. To solve the problem, the jury received a translation into English because many Americans were not comfortable hearing a language other than English. Thus, the court portrayed language minorities as inferior and suspicious.

Other cases describe non-English-speaking witnesses as “difficult to get anything reliable from … [their] testimony,”\textsuperscript{37} as if the lack of English fluency was evidence of low moral fiber or maybe a mark of a person not ready to embrace the rights and duties of citizenship. In another case,\textsuperscript{38} the appellate court questioned instructions that reminded jurors that the testimony of any non-English speaker was entitled to the same amount of credibility as the testimony of any English speaker, and the court considered it an obvious mistake that had to be rectified. The judge told the jurors that “although some of the witnesses are not able to speak or understand the English language, yet if you believe they have told the truth by means of an interpreter, then the testimony of such witnesses is entitled to the same amount of credibility as the testimony of such witnesses who may have spoken to the jury directly in the English language.”\textsuperscript{39} Similarly, in an 1869 Connecticut case,\textsuperscript{40} the defense challenged an Italian-speaking witness who, being unable to speak or understand the English language, was examined through an interpreter. The defense counsel challenged the validity of anything done in a language other than English. At the same time, they implied a suspicion against non-English speakers, suggesting they conspired together to damage the interests of English speakers.

An 1873 Louisiana case provides one more clear case of the pre-eminent place of the English language inside courtrooms. In this case, a challenge to a juror was sustained because he could not speak or understand the English language. Up to this point, all seems like the usual workings of the American legal system, but the bizarre part was that the native tongue of the

\textsuperscript{37} People v. Nitti, 312 Ill. 73 (1924).
\textsuperscript{38} Belskis v. Dering Coal Co., 146 Ill. App. 124 (1908).
\textsuperscript{39} Ibid.
\textsuperscript{40} State v. Noyes, 36 Conn. 80 (1869).
juror was French, most of the witnesses testified in French, the judge and one of the counsels spoke French, and a translator was appointed to help the non-French speakers. In the appeal opinion, the judge stated that “the court did not err. The proceedings of the court are required to be conducted in the English language, and the fact that the judge, counsel, witnesses and accused, understand and speak other languages can not [sic] dispense with this requirement. The jurors, to be competent, must be able to understand all the pleadings and proceedings, as they must be considered by them.” 41 The suspicion against aliens appeared again in a 1910 case where the appellant asked to reverse a judgment on the grounds that a German juror (possibly speaking with an accent) could not read or write,42 even when it was not one of the statutory requirements for jurors. That is a clear example of nativist prejudices in a court of law. The idea behind this appeal was the supposed lack of culture, civilization, and self-control that distinguished aliens from proper Americans.

The place of a language other than English was secondary, as all proceedings were to be conducted in English. In this nativist environment, non-English-speaking plaintiffs, defendants, witnesses, and jurors were all suspects. As the following rape cases demonstrate, however, the Progressive Era legal system was capable of granting some additional protection to non-English speakers because they were perceived as weak and vulnerable. Paternalistic judges in early twentieth-century rape cases deemed such people as worthy of that special privilege. But those instances of special treatment had their limitations in specific legal contexts.

As a commentary on Canadian law notes, “Sexual assault is not like any other crime. Almost all perpetrators are male. Unlike other violent crimes, most incidents go unreported.”

Rape is a crime where much of the harm is psychological or emotional. That makes the prosecution of this crime unlike many other crimes, as the legal system traditionally placed great interest in the character and motivation of the victim. The victim’s behavior, proof of resistance, and many other social, cultural, and political constraints helped shape judicial decisions in rape cases.

By the letter and spirit of the law, rape was a serious crime that carried the death penalty or a long prison term. Unfortunately, many cases were difficult to prosecute, and defendants were often acquitted. Nonetheless, the traditional assumption is that before the 1960s sexual crimes were of little concern in the American legal system or that the legal system was only trying to preserve a misogynistic status quo to oppress women. The following cases, however, present a more complex picture of the subject, a picture where some of the traditional misogynistic ideology was still in play but where new ideas were also present and shaping the law. One of the two most important developments in rape cases was the acceptance that rape was


a violent crime against women, instead of the traditional view of rape as a property crime against a man’s property (father, husband, brother). The second important development was the new ideal of women as weak and in need of protection due to changing attitudes toward male violence against women in Victorian England. In this second development, I want to illustrate the importance of non-English fluency as one of the markers of weakness. This marker operated in two ways. First, judges conceived of limited English fluency as a weakness of non-English-speaking women that attracted rapists who saw them as easy prey. Second, paternalistic judges used a lack of English skills as a factor that aggravated the crime and led to the imposition of harsher penalties.

In an 1865 appeal of a rape case in New York’s Supreme Court, English language fluency played an important role. Ida Klube, a twenty-three-year-old Prussian female with limited English proficiency, accused John Bransby, a Syracuse hackman, of raping her twice. The defendant was indicted for assault and battery and sentenced to imprisonment for one year and a fine of $250. He appealed the decision. At the trial, Bransby was presented as a man of good character. At the same time and in a nativist fashion, the victim’s good moral character was called into doubt. The suspicions about Klube’s good character were based on two points: the first one was that she lied about her English proficiency as the defense argued she was proficient enough at the time of the attack. That assumption implied that she was aware of the situation and consented to the sexual relationship. The second and related point was the length of time she

47 People v. Bransby, 32 N.Y. 525 (1865).
48 A hackman is the driver of a hack or carriage for hire.
took to denounce the attack. The assumption was that she did not denounce the attack promptly because the sexual act was consensual. The victim’s defense explained both points by her lack of English language command and cultural differences. She was not a consenting party because her lack of understanding placed her in a risky situation, and her cultural Prussian background predisposed her to follow the instructions from someone she perceived to be in authority. Her lack of English language skills also precluded her from promptly denouncing the sexual attack, and she waited to be with other German-speaking individuals to denounce the rape.

Reflecting nativist views, the majority opinion, read by Judge Porter, argued that even if it looked like the victim were answering truthfully, he was not sure about this point or whether she was entitled to full credit. Porter acknowledged the conflict between the complainant and the defendant’s witnesses, and he was understanding of a jury drawing “unfavorable inferences from her leaving a place of security, at a late hour of the night, in company with a perfect stranger, whose language she neither understood nor spoke.” Porter emphasized in his opinion the fact that the victim failed to fight vigorously to alert the adjoining rooms, and he noted her lack of complaint until “she was first interrogated by her countrymen in the German language, and in the absence of the accused,” an explanation that the judge thought “may not have been satisfactory to the jury.” Porter admitted that “she labored under the disadvantage of not speaking the same language with the accused.”

In a dissenting opinion, by Judge Potter, paternalist arguments reinforced the view of a particularly predatory man attacking a particularly weak woman. Potter saw the victim as “a

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49 People v. Bransby, 32 N.Y. 525 (1865).
stranger in a strange land, and in a strange city… without the knowledge of the language of the people, except the use of two or three words, to call upon or make known her wants. She was dependent upon her powers of observation, of the customs and habits and acts of others, and by the aid of signs, to make known her own wants.” He argued that “for such a person, in such condition,” it was normal to see the attacker as an “authorized person, whose business or duty it was to conduct her to a lodging place.” Moreover, the judge saw an aggravating circumstance in the fact that the defendant “knew she could not speak English, and he knew she was alone.”

Judge Porter and Judge Potter clearly represent the conflict at the heart of the American legal system; they are particularly illustrative of the two very different ways legal authorities saw non-English-speaking aliens. On one side, Judge Porter voiced the sentiments of those people who expected immigrants to assimilate at the moment they arrived in America. Failure to do so was seen as an attack on society. On the other side, Judge Potter was representative of those people who understood the difficulties immigrants, especially rape victims, had to endure to assimilate. Those paternalists wanted to grant special protections to especially weak groups. Both nativists and paternalists agreed that the final goal for any alien group was assimilation into American society, but they disagreed on the path to follow.

50 Ibid.
Nativist suspicions about the actual English proficiency of a rape victim were also at play in an 1885 appeal from the District Court of Dallas. In this case, Howard Montresser was accused of the rape of Emma Klapp, a nine-year-old German girl with limited English proficiency. The defense objected to the competency of the witness on account of her infancy. At the same time, the defense questioned the victim’s trustworthiness on linguistic grounds. Klapp’s credibility was put in doubt because she testified that she did not speak English, but some witnesses testified that the girl was fluent in the English language and understood it perfectly. When asked about her English fluency, she testified, “I do not understand the English language.” When re-examined, the little girl said that “the defendant does talk German a little.” Under further cross-examination, she reversed herself and claimed that the defendant “did not speak in German” and that she could “talk a little in English.” The defense relied on nativist arguments to discredit the victim. This case presented the idea that non-English speakers really knew the legal system’s language or, in more general terms, that they were better assimilated than they acknowledged, but they refused to fully assimilate in order to gain some advantage.52

In his opinion, Judge Willson fully agreed with the nativist arguments of the defense counsel. He wrote that “the testimony of the child is in many respects open to suspicion.” The judge’s suspicions were heightened by the fact that “she testified through the medium of an interpreter, stating that she could not speak the English language, but could only speak the German language.” Later, however, “she detailed conversations which she had had with the defendant, who, it was proved, could not speak the German language.” To the judge, that was a

clear example of the lack of American virtues (honesty) by an alien in the American society. The judge reversed the judgment and remanded the case on the grounds that the child’s testimony was suspicious due to her age and the doubts about her true English fluency. This case is especially interesting because, as in the previous case, it suggests a pattern of defendants targeting their victims for their non-English-speaking status. More pointedly, in this case, the defendant emphasized the victim’s otherness by calling her “Little Dutchman.” Attackers perhaps saw their victims’ lack of English fluency as an extra layer of protection for themselves.  

In the Supreme Court of Montana, an appeal of a conviction for rape shows another example of the judicial system trying to deal with an increasingly diverse population. One of the issues raised by the appellant was the “variance between the name of the person upon whom the offense is charged to have been committed as set out in the indictment and the proof on the trial of the cause.” In the original trial, the name of the victim was written as “Ellen Souderland,” but she testified that her name was “Ellen Soderland” as she spelled it. Later her last name appeared as “Soderlaud” and “Soderlund.” The court’s difficulties with the last name produced a confusing conversation when her father testified. The defense counsel asked, “What is your name? Spell it,” and he answered, “C. W. Saderlund. In English, I spell it Sonderlund.” Not happy with the answer, the counsel asked again, “How do you spell your name in English?” The answer was: “Sonderlund; and pronounced the same.” Still not happy, the counsel asked again “How do you pronounce it in your own language?” The answer was “Soederland.” Not having

53 Ibid.
enough, the counsel said, “I will ask you this question: If the diphthong ‘o’ is not a combination of the vowels ‘oe,’ is it ‘o,’ with two dots over it?” The father answered, “I can't say about that.” Not happy with the answer, the counsel handed the witness a paper with his name spelled as “Soederland,” and then he asked, “Would it be correct to spell your name in Swedish this way?” The answer was “Yes, sir.” Still not happy, the counsel asked, “Is that the way you spell it in Swede?” “No, sir,” replied the father. This entire linguistic dance around a Swedish last name justified the court to submit a question of *idem sonans* to the jury.54 The judge paternalistically instructed the jury to remember that “both witnesses were Swedes and spoke with marked accents.”55

The appellant argued that the names were “so dissimilar that the court should have pronounced them not to be *idem sonans*, and it was error to submit the question to the jury.” In his opinion, Judge De Witt affirmed the sentence because “the person bearing the name was a foreigner” and the witnesses were foreigners “who spoke with marked accents.” The judge acknowledged the limitations of the legal system to interpret a “collection of letters, which have different sounds in well-spoken English, to say nothing of Swedishly accented English.” This case displays an open-minded judge who accepted the challenges that American diversity created for the legal system. At the same time, the judge advanced paternalistic legal arguments against the nativist tendencies of other legal authorities. Maybe he was influenced by the new winds

54 The common-law rule of *idem sonans* states that, if a name in a legal document is incorrectly spelled but, when commonly pronounced, conveys to the ear a sound practically identical to the correct name as commonly pronounced, then the name thus given can be accepted as sufficient identification.

55 *State v. Thompson*, 10 Mont. 549 (1891).
coming from the other side of the Atlantic, where the British judiciary system was experiencing a radical revolution that imposed new values on judges. Some of those new values were to see all non-English males as weak and in need of judicial protection.

The same motivation to offer protection to the most defenseless victims appears at an appeal case heard in the Supreme Court of Iowa in 1892. The prosecution charged George Sigg with the rape of Fredericka Putzin, and the jury convicted him for assault with intent to commit rape. The appeal was based on the argument that the victim’s testimony was not sufficient to sustain the verdict. Embracing the new paternalistic judicial values toward victims, Judge Granger defended and excused Putzin. The judge admitted that “the testimony of the prosecuting witness is, in some particulars, quite contradictory,” but in the next sentence he excused her mistakes because “she is a German girl, and evidently understands and speaks the English language imperfectly.” Moreover, Judge Granger explained that “the contradictions are of a character to indicate that she did not comprehend the meaning of the questions or her answers.” He even chastised the defense counsel because even with Putzin’s imperfect English it was “not difficult to understand what she intended to say.” Apparently, the judge was sympathetic and understanding of the fact that she was confused on account of the situation and her lack of English skills.

A 1905 Supreme Court of Oklahoma case presents another example of a clear distinction between the expectations of American citizens and those of aliens. In the original trial, the jury

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56 Wiener, An Empire on Trial.
57 State v. Thompson, 10 Mont. 549 (1891).
58 State v. Sigg, 86 Iowa 746 (1892).
convicted James Harmon of rape against Annie Patt. Harmon appealed on account of the victim’s bad character. The victim was a twenty-two-year-old Dutch woman recently emigrated from Holland. Patt “learned to speak the English language, which to her was an unknown tongue prior to her coming to the United States.” Probably, the simple fact that the victim was learning the English language and making the proper efforts to assimilate into American society made her much more sympathetic to the jury and judge. The defense based its case on the fact that the victim had been drinking for a couple of hours before she went with her sister and aunt to a house of ill-repute where she was raped. If the victim were American, the case might have rapidly ended because of the common notion that American women should know better than to go to bars or houses of ill-repute. But in this case, the otherness provided by the lack of language and cultural norms was a protection. Patt testified that one of the cultural differences between America and her homeland was that “in Holland it was a common and usual thing for people to go into beer gardens and beer drinking places, and drink there.” Given her original cultural background, she was doing something perfectly normal and reasonable for her.59

In the court’s opinion, read by Judge Gillette, the court clearly sided with the victim in the face of conflicting testimonies. First, Gillette referred to the defendant’s testimony that described himself as “a gambler by profession, a constant and daily visitor of the gambling houses of the city, a frequenter of the houses of prostitution, and a frequenter of Big Ann’s place, one of Hell’s recruiting stations.” The judge dismissed all the defense witnesses because they were “tainted by the same moral leprosy which infects that of the defendant himself.”

59 Harmon v. Territory of Oklahoma, 5 Okla. 368 (1897).
Conversely, the judge gave all the credibility to the “two girls,” Annie and Lucy Patt, because they were recently from Holland and because houses of ill-repute did not carry “the same immoral stench that accompanied the defendant and his witnesses when they went there” with their uncle, “their natural guardian and protector.” The judge made a clear distinction between the American men who “thoroughly understood” where they were, and the alien girls who were oblivious of the moral implications of the place. It is interesting to note that in the opinion both victims were consistently referred as “girls,” though Annie Patt was twenty-two years old, hardly a girl. This usage suggests an instance where the subaltern language reserved for “the Other” (similar to the usage of “boy” for African American males, regardless of their age) makes it into the court transcripts. The infantilization of the victim illustrates that she was not on equal footing with “proper” Americans.60

The benefits that the non-English speakers enjoyed from paternalistic judges were not limited to the victims. In a 1908 appeal to the Court of Criminal Appeals of Texas, the defendant was helped by paternalistic arguments. John Eiley was charged and convicted of assault with intent to rape by the District Court of Lampasas. He appealed the two-year imprisonment sentence. In his opinion, the first thing that Judge Davidson highlighted from the case was the fact that the appellant was “a foreigner not familiar with the English language, and he was tried without the benefit of counsel.” The accused’s lack of English skills and the absence of counsel made the court decide that the case was “not fully developed.” The judgment was reversed and the cause remanded.61

60 Ibid.
A transition in the 1910s brought nativist arguments again to the forefront in American courtrooms. Interestingly, this was the same decade that saw the end of Victorian civilizing efforts on the British judicial system. Paternalistic attitudes of judges changed on both sides of the Atlantic. In a 1911 appeal to the Supreme Court of South Dakota, John De Marias appealed his conviction on statutory rape. The defense’s central argument was that the victim, Cora Johnson, was at least eighteen years old. The difficulty in establishing Johnson’s age was due to the lack of organized bureaucracy on the Lake Traverse reservation for the Dakota Sioux. The case was further complicated because the witnesses were Native Americans testifying through interpreters, and the testimonies of the four witnesses who claimed to know the victim’s age were “inconsistent and conflicting.” The evidence about the victim’s age was inconclusive and unsatisfactory. In his opinion, Judge Smith complained about the “numerous discrepancies [that] appear in the testimony of the witnesses.” His frustration with the testimonies of the non-English-speaking witnesses (and the reservation’s lack of government structure, which many saw as a marker of civilization) stands in stark contrast to the court’s acceptance of David J. Robertson’s testimony. Robertson was a missionary on the reservation, and he was fluent in both the English and Dakota languages. He testified that at the time of Johnson’s baptism, she was “a little girl of considerable size, learning to talk, and could walk unaided, and that in his opinion she was about one year old at that time.” That testimony was enough to establish Johnson’s age and to necessitate a new trial. Probably, Robertson’s testimony represented civilization and

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assimilation to the American way, unlike the other testimonies that represented resistance to “Americanization.”

The following year, an appellate case presented in front of the Supreme Court of Illinois illustrates that the old judiciary paternalism survived in some places, even if it had to share the spotlight with a revived distrust of non-English language speakers. Three English speakers (Henry Rardin, Samuel Newlin, and Ira Walker) were found guilty by a jury and sentenced to imprisonment for life. They appealed their charge of rape by force and motioned for a new trial. The victim was Julia Shadid, an eighteen-year-old non-English-speaking Assyrian female who had been in the country only six months. The victim was on a train and was carried past her station. She decided to wait at the next station for the return of her train. The defendants waited inside the station until Shadid was alone and asleep. They awakened her and one of them made her believe that he was a hotel porter. She thought that she was going in the direction of the hotel, but instead, she was guided to an alley where the assailants raped her. She pleaded in “broken English” to no avail, and she called for help “in her native tongue.”

In a paternalistic fashion, the overview of the case stressed the victim’s condition as a non-English speaker to illustrate her aggravated defenselessness against her attackers. In the case opinion, Justice Hand argued that “the offense committed in this case against society and upon the person of Julia Shadid was most shocking.” The justice found it very predatory that the victim was alone and “could not speak the English language, which fact the plaintiffs in error knew.” Justice Hand saw the defendants as predatory men because they conspired together to

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63 State v. De Marias, 27 S.D. 303 (1911).
64 People v. Rardin, 255 Ill. 9 (1912).
assault her in a cruel and brutal manner just because her non-English speaker status made her easy prey. For Justice Hand, those circumstances justified the extreme punishment of life in prison.65

Yet alongside those paternalistic sentiments, nativist views crept into the judicial opinion as well. As the victim could not speak or understand English, it was necessary to use an interpreter. A very distant family connection between the translator and the victim, however, was cause of suspicion and debate. The interpreter was Elias Tayar, a merchant from Assyria residing in a nearby city, who was sworn as an interpreter. The fact that Tayar and Shadid had the same great-great-grandfather was cause for controversy, and the defense counsel reasoned that such relationship made Tayar “incompetent to act as an interpreter.” In the opinion, Justice Hand referred the question to The English and American Encyclopedia of Law, which states that “it would evidently be improper for a court to appoint as interpreter one who would reasonably be expected to be unfair and biased in his translation of the testimony. A degree of discretion must, however, necessarily be vested in the trial court as to the person who shall be employed.”66 Justice Hand did not deny the validity of the suspicions against Tayar, in a clear example of some nativist tendencies on the court, but he reasoned that the “discretion ought not to be so exercised as to deprive a party altogether of the testimony of his witness.” So, while Tayar’s participation was suspect, his services were necessary to protect Shadid.67

65 Ibid.
67 People v. Rardin, 255 Ill. 9 (1912).
Over the following years, nativist attitudes predominated in the ideological framework of judges towards non-English speakers. In 1914, Antone Bonzani appealed to the Third Appellate District of the Court of Appeal of California, looking to appeal a conviction of rape. Bonzani was accused by Mrs. Bell de Bell. The defendant acknowledged having consensual sexual relations with the victim, and he was asking for a reversal of the judgment on the grounds that the evidence was insufficient. Reinforcing nativist arguments, Judge Hart’s opinion stressed that the defendant was “an Italian… [who] was able to speak the English language only to a very limited extent.” His position as a non-English speaker marked him as “the Other.” Judge Hart explained that the defendant was able to communicate “by means of signs and gesticulations suitable” to what he wanted to express, being able “to make himself understood.”

The judge presented Bonzani as a lustful beast who tried to take advantage of Mrs. Bell many times. After one of his advances, the victim told Bonzani to behave properly, asking him not to “put your hands on me again. I am here alone, and I want you to be a gentleman and I am a lady and want to be treated as such.” The judge described how those demands of propriety were met by Bonzani with force and brutality, as he caught “her by the shoulders and throat and [threw] her upon a couch” to consummate the rape. To reinforce the idea of the defendant’s bestiality, Mrs. Bell testified that during the rape “she was convinced, from the appearance of his face, that he was determined to accomplish his purpose at any cost; that, consequently, she labored under the fear that he might inflict more harm upon her.” The opinion clearly stated that it was “the province of the jury to determine the credibility and degree of believability of the

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witnesses” and that the jury members “were mainly influenced by the testimony of the prosecutrix [or victim].” At no time did the jury or the judge suggest that the victim, who was a strong 220 pound woman, might have resisted the attack. For Bonzani, his lack of English language proficiency marked him as “the Other.” The opinion agreed with the jury’s belief that the victim “was so overcome with fear as to have been prevented from resisting.” All the blame was placed on a barbarian non-English-speaking foreigner who ravished an innocent, respectable, English-speaking American woman. Therefore, the appeal was denied and the judgment affirmed.69

All these cases present compelling evidence of two competing tendencies of the late nineteenth- and early twentieth-century American legal system: the nativist and the paternalist. Both sensibilities were present to some extent in most cases, as they were probably present in the minds of legal authorities. In the early decades of the twentieth century, however, nativist ideas increasingly clashed with claims to respectability and paternalism in American society, and those clashes were played out before the courts. The court cases examined above tell the story of the earlier, temporary triumph of paternalistic values in the legal and cultural reshaping of judiciary ideals. The legal system policed a notion of proper behavior which was embodied in better treatment and protection of women, especially those women perceived as the most weak and vulnerable in society: non-English-speaking women. This triumph of paternalistic values in the legal culture was short lived, though. By the 1910s, nativist ideals were back in force in the American legal system.

69 Ibid.
The Language of Degeneracy and Legal Competence

In 1918, an Illinois circuit court judge evaluating Sylvester Moriarity’s legal competence to make a will refused to accept the assertion that Moriarity’s performance of Irishness was a valid argument for the court to declare him legally incompetent. The judge stated that “singing Irish ballads and dancing was not a sign of insanity.” Moriarity’s proud displays of Irishness were an important argument of his more Americanized son’s attempt to declare him legally incompetent. Moriarity’s dancing, singing, and drinking were signs of legal incompetence only when paired with his Irishness.\(^7\) This case presents an example of a “legally white” participant in the legal process being suspected because he lacked fluency in English or American cultural performance. As such, this kind of litigation raises an important analytical question: What was the importance of English fluency and cultural performance in the discourses of legal competency?

The assertion that inappropriate pride and performance of Irishness were linked to degeneracy and incompetence was not a sufficient argument for the court. More importantly, it was one more item in a long list of supporting evidence. Similarly, in a 1900 Superior Court of Pennsylvania petition, Levi Smith, a 60-year-old man, was suspected of lunacy because he “could not read or write. He had never received an education; his eyesight was deficient, and he

\(^7\) Moriarity v. Palmer, 286 Ill. 96 (1918).
suffered from a speech defect. He did not speak English. He was easily confused and, when not willing to answer questions, stood mute.”

The link between whiteness, English fluency, and citizenship has been central to constructions of American identity. Whiteness, and the English fluency supposedly associated with it, was the representation of a set of moral and cultural principles. Those principles were essential for the proper workings of the contract between the state and the citizen, as they proved fitness for self-government. Whiteness was the representation of “good republican substance.” The ideology of white racial superiority in class, politics, and mass culture worked well for white European Americans until waves of immigrants in the nineteenth and early twentieth centuries challenged the nation’s whiteness ideology. Those immigrants were legally white, but their status as non-English speakers provoked debates over their capacity to be citizens.

During the second half of the nineteenth century, the concept of degeneration was evolving and acquiring new meanings. Degeneration as an affliction of the nation continued to

71 Smith, 12 Pa. Super. 649 (1900).
72 The principles embodied by whiteness were ownership of property, rationality, restraint, self-discipline, self-reliance, and temperance, among other principles.
73 For more on whiteness moral and cultural principles, see Jacobson, Whiteness of a Different Color.
74 Ibid., 244.
75 Social degeneration has been an important theory since the eighteenth century. Initially, this theory was an explanation of the nature and origin of human difference, as it argued that humans had degenerated over time due to differences in climate from a common origin. Further, they argued that differences in the climate created variety within species, as observed in animals, and that those changes must have also shaped humankind. For more on early degeneration theories, see Johann Friedrich Blumenbach et al., The Anthropological Treatises of Johann Friedrich Blumenbach (London: Published for the Anthropological Society, by Longman, Green, Longman, Roberts, & Green, 1865); Arthur Herman, The Idea of Decline in Western History (Riverside: Free Press, 2010), 13-146; George Louis Leclerc, Thomas Tegg, and W. Hutton, Buffon's Natural History: Abridged (London: Printed for the editor & sold by T. Tegg,
be a source of concern, but it was increasingly centered in the body, in the physical selves of the citizens. Courts used the terms “degeneration” and “degeneracy” in an expansive way. It was not limited to people who were physically ill. The term applied to a wide spectrum of people, from those who were considered clinically insane to people who only were considered childish. The unifying aspect for all of them was being perceived as outsiders to mainstream American society and conventions, making them unable to properly function in society.

At first, degeneracy was mainly characterized as “physical degeneracy” that, later on, created some kind of moral crisis. By 1880, degeneration was understood as body and moral disintegration working at the same time. This change occurred at the same time that Darwinist theories of natural selection became popular. Darwinist theories began to inform older debates about the nature of human civilization and historical change. The fusion of the degeneration discourse and Darwinism was possible because all parties were deeply invested in the idea of a linear spectrum of movement. There was progression, retrogression, or equilibrium. Human beings could progress or they could degenerate. Both proponents of Darwinism and its opponents agreed that the most highly advanced political and cultural form was the Anglo-Saxon, and therefore it was the most desirable and perfect ideal of human society. Newspaper articles

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commenting on Darwin's hypothesis of a primate origin for the human species often argued that “every living thing has a tendency to revert to its original type.” That belief in biological degeneration linked to the notion of cultural degeneration, a reversion to an inferior moral or intellectual type that threatened all citizens, but especially those citizens of other than Anglo-Saxon ethnic backgrounds.78

Degeneration was morally charged. Scientific articles for the general public illustrated degeneracy with human examples that connected with popular ideas of personal decay and moral corruption.79 A person, species, or population created the circumstances for their own degeneration. This moral charge was supported by and encouraged theories of degeneration that focused on the behavior of specific people and specific populations. The fact that the authors of popular articles argued that most of the working poor were not from Anglo-Saxon stock allowed the false correlation between non-Anglo cultures and degeneracy.

The 1880s popular literature popularized the concept of the “degenerate,” the embodiment of a sickness linking physical and moral weakness, instead of the more complex concept of degeneration.80 The figure of the degenerate was not clearly defined to allow the

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speaker to include different meanings for different audiences.¹ The main shift in the discourse was that “degeneracy” was the symptom of the sickness and the “degenerate” was the agent of degeneracy.² Locating the origins of degeneracy was important because origins suggested remedies. Degeneration was worthy of attention and examination because it threatened the vitality of the nation as a whole.³ Degeneration was always primarily a matter of the moral and physical functioning of the nation. Progressive Era reformers linked degeneracy as a threat to the health of the nation and to the physical bodies of the nation’s subjects. Those ideas were reinforced by high crime, especially violent crime, spikes in larger cities due to urban growth and rapid industrial development combined with increased immigration. Progressives called to reform the penal system and for more substantial penalties for criminals.⁴

To illustrate the importance of linguistic fluency in the discourses of degeneracy, I study court cases where legally white non-English speakers were present. Focusing on these litigations serves to illustrate the importance of non-English fluency as one of the markers of legal incompetence. Similar to the efforts of eugenic activists’ efforts to contain degeneracy by containing degenerates, nativist activists tried to contain the foreign body represented by non-English speakers. Nativists worried that American society would be weakened by those people

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whom they blamed for problems such as unemployment and crime, among others. How
degeneracy operated as part of that nativist discourse within the court system is the main focus of
this section.

A 1919 Supreme Court of Illinois case is a very good example to illustrate the importance
of linguistic fluency and cultural performance inside the courthouse.85 In this case, Louisa
Udstuen sought review of a Circuit Court of Vermilion County (Illinois) decision that declared
her father, Gottlieb Illk, was mentally sound. Udstuen argued that the deed executed by Illk and
his wife to John D. Illk, her brother, was invalid because the father was mentally unsound and
unduly influenced by John. Gottlieb Illk was born in Germany in 1839, and he came to America
in 1874. During the case it was made clear many times that Gottlieb spoke English imperfectly
and could not write it at all except to sign his name. However, everyone agreed that he was able
to communicate with English and German speakers.

During the case, about one hundred witnesses testified on behalf of the respective parties
on the issues of Gottlieb’s mental soundness and John’s undue influence. Most of the witnesses
agreed that Gottlieb was an eccentric character, to say the least. No witness was able to bring any
proof, however, that Gottlieb was mentally incapable of transacting business and of disposing of
his property. As Justice Farmer wrote in his opinion, Gottlieb’s capabilities to conduct business
“seem[ed] to be rather conclusively shown by the fact that, starting with $5000 or $6000, he
accumulated over 1000 acres of land and personal property, worth more than $100,000.”86

85 Udstuen v. Illk, 291 Ill. 443 (1920).
86 Ibid.
The main arguments proffered to assert his insanity were his religious ideas, hereditary insanity, and his unfavorable opinions about America and Americans. It was a fact that Gottlieb was a believer in the theories of the German Lutheran theologian Johann Christoph Blumhardt. A respected theologian, Blumhardt was the central figure of a famous exorcism that led to a massive revival followed by many healings and conversions. Blumhardt acquired a thermal spa that he transformed into a Christian retreat where he held revivals and practiced faith healings until his death. The testimony of Reverend Howe, Gottlieb’s pastor, vindicated the normalcy of the people who believed in Blumhardt’s theories; he even said, “As far as I knew he was sane.”

All of Gottlieb’s German-speaking neighbors testified that he was a very religious person but not insane.

On the other hand, many of Gottlieb’s English-speaking neighbors had different opinions of his religious ideas. In their testimonies, Blumhardt was demoted from a respected theologian to a simple preacher, and the English-speaking witnesses ridiculed his ideas. One of those neighbors accused Gottlieb of telling the story that he saw “a spirit in the shape of a frog jumping out on his ear.” Another neighbor accused him of being obsessed with spirits and demonic possessions and talking all the time about “a preacher in Germany… [who] could drive out spirits that caused people to be hexed.” When the neighbor tried to change the subject “he [kept] telling about them.” What can explain the difference between one group and the other? Could it be cultural differences aggravated by linguistic misunderstanding on both parts? After all,

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87 For more of this figure, see Friederich Ziegel, *Pastor Johann Christoph Blumhardt: An Account of his Life* (Eugene, OR: Cascade Books/Plough Publishing House 2010).
88 *Udstuen v. Ilk*, 291 Ill. 443 (1920).
another of Gottlieb’s English-speaking neighbors who found his talk about spirits disturbing conceded that “he talked broken, he would talk about spirits done so and so” and that he “couldn’t hardly understand him when he was talking English.”  

Another argument for Gottlieb’s insanity was hereditary. Two of his four sons were in an insane asylum, and four of his five daughters were insane with two of them in an asylum. It was proved that some other of his relatives were classified as insane. This argument played into the late nineteenth- and early twentieth-century Darwinian and hereditarian ideas of degeneracy. During the Progressive Era, degeneracy was defined as both hereditarian and environmental. This idea of degeneracy was deeply tied to the rhetoric of eugenics. If disability was understood as hereditary, those degenerate people were unable to compete in a Darwinist struggle with other nations and were therefore not doing their duty as citizens.

However, we need to be aware that some of the instances used to describe insanity in the family can be easily explained by cultural differences. For example, Gottlieb’s brother Dan committed suicide and that was proof of insanity for his English-speaking neighbors, but the German-speaking next-door neighbor excused Dan’s actions, saying he was sick, suffering, and did not want to become a burden to the family. She said that she “thought that Mr. Illk and Dan

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89 Ibid.
Dan’s suicide is a clear example of a life experience (death) that is very much culturally bound. Death is a universal experience to which different cultures prepare and respond in different ways. These cultural differences can explain why some actions were perceived as a mark of insanity for some people and accepted as normal behavior by some other people.

Finally, the third main argument for Gottlieb’s insanity was his supposed dislike for America and Americans, attested to only by English-speaking witnesses and the family members who could benefit from finding him insane. This argument played into popular nativist sentiments as well. Nativists used the growing anxiety caused by the number of foreigners in America. That anxiety rested on concerns about groups of people who did not know how to speak English and who brought their own religions and beliefs along with their foreign tongues. Nativists in the legal system pointed out the lack of English proficiency as both a mark of suspicion and a reason to consider non-English speakers untrustworthy people of bad character. One of Gottlieb’s neighbors said that Gottlieb did not trust him “because we wasn’t German.” Gottlieb’s son-in-law testified that Gottlieb “called the Americans lazy and dishonest.” Worst of all, his insanity did not allow him to realize the superiority of the American way and, as his daughter testified, “He said the German rules and laws should be carried out in his house,” and to reinforce the point, he said “he cared nothing for America.”

When asked about the patriotic line of questioning, the judge said, “I think it is admissible on the question of insanity.” Just a few months after the end of the Great War, the

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91 *Udstuen v. Illk*, 291 Ill. 443 (1920).
92 Ibid.
93 Ibid.
judge accepted the idea that the most highly advanced political and cultural form was the Anglo-Saxon, and therefore it was the most desirable and perfect ideal of human society. Only insanity could explain how anyone would prefer German laws over American ones.

While Gottlieb’s case illustrates the prevailing negative use of degeneracy, some cases presented a more positive take on these notions. A paternalist approach to non-English speakers saw them as weak and in need of additional protections. Rather than degeneracy, paternalists emphasized the language of “childishness.” As it happened with children, non-English speakers’ weaknesses created an obligation to practice a higher degree of caution with them. It was another way to describe a kind of “feeble-mindedness” that lacked adult rationality and self-control. Paternalist legal actors worried that non-English speakers would attract criminals who saw them as easy prey.

Paternalistic judges used the lack of English skills as aggravating circumstances to impose harsher penalties to dissuade future offenders. In one 1912 appellate case presented to the Supreme Court of Illinois, the justices found it predatory that the victim was alone and unable to “speak the English language.” Paternalist concerns sometimes extended beyond lack of basic fluency to considerations of more subtle language barriers such as accent. In a case appealed to the Supreme Court of Montana in 1891, the lower court judge asked the jury to remember that “both witnesses were Swedes and spoke with marked accents.” The judge acknowledged the limitations of the legal system to interpret a “Swedishly accented English.” In an appeal case to

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94 People v. Rardin, 255 Ill. 9 (1912).
95 State v. Thompson, 10 Mont. 549 (1891).
the Supreme Court of Iowa in 1892, the judge admitted that “the testimony of the prosecuting witness is, in some particulars, quite contradictory,” but in the next sentence he excused her mistakes because “she is a German girl, and evidently understands and speaks the English language imperfectly.” Moreover, the judge explained that “the contradictions are of a character to indicate that she did not comprehend the meaning of the questions or her answers.” Some paternalistic judges took into account cultural differences to afford extra protections to the victims, as in a 1905 Supreme Court of Oklahoma case. In the court’s opinion, the judges justified the presence of a Dutch woman in a beer-and-dancing saloon because those places in the Netherlands did not carry “the same immoral stench” as they did in America and the victim did not know any better.

These brief examples drawn from the Gilded Age and Progressive Era illustrate how ideas about degeneracy operated as a discourse within the court system when determining the competency of non-English speakers. As these cases show, the American legal system was capable of granting some additional protection to non-English speakers because they were perceived as “childish” and “feeble-minded” and therefore deemed worthy of special privilege. Usually, non-English speakers were at a clear disadvantage, unable to clearly communicate with the jury or judge or to fully understand the whole legal process. Misinterpretation and cross-cultural miscommunication were common. The connections between cultural performance and citizenship were multifaceted, but these examples demonstrate that English fluency in the legal system was a key to the acquisition and preservation of legal competence.

96 State v. Sigg, 86 Iowa 746 (1892).
97 Harmon v. Territory of Oklahoma, 15 Okla. 147 (1905).
The Right to an Interpreter

The trends in the legal process that we have seen in previous eras continued in the early twentieth century. Progressive Era courts continued to develop the notion of a right to interpretation paired with a judicial obligation to provide services. Additionally, the practice of paying for interpretation services became more common, another step on the road to professionalization. Still, in some instances, non-English speakers’ misunderstandings of the legal system and their cultural and linguistic differences put them at a disadvantage due to the lack of interpreting services, a biased interpreter, or the lack of quality control.

In an 1893 Supreme Court of South Carolina case,98 the tribunal had to decide if the lower court acted correctly by accepting the testimony of a deaf-mute through sworn interpreters. In the opinion, the justices argued that the subject was settled in Francis Wharton’s *A Treatise on Criminal Law*:

Deaf and dumb persons were formerly regarded as idiots, and, therefore, incompetent to testify; but the modern doctrine is, that if they are of sufficient understanding, and know the nature of an oath, they may give evidence, either by signs, or through an interpreter, or in writing. A deaf mute may be permitted to express himself in writing, if this be the mode in which he can be better understood, or through a sworn interpreter by whom his signs can be interpreted. Such interpretation is not hearsay, nor is it excluded by the fact that the witness can write.99

Moreover, the opinion pointed out that the *American and English Encyclopedia of Law* stated, that “Deaf and dumb persons may be witnesses if any person can be found who can interpret their signs to the court and jury upon oath, or if they can write and read writing, so that the questions and answers may be conveyed in writing.” 100 The superior tribunal reaffirmed the doctrine that an expert testimony was not needed and that “any person who is able to communicate with the deaf mute by signs may be sworn as an interpreter.” 101 This case is a clear example of a tribunal that does not see expertise and professionalization as necessary to retain someone as an interpreter.

In a 1901 Supreme Court of California, Department Two, case, the tribunal had to decide whether the lower court, under California’s Penal Code Section 925 (enacted in 1872 and amended in 1889), 102 acted correctly in a murder case by allowing the presence of an interpreter in a grand jury investigation. The appellant, who spoke only Chinese and was sentenced to life imprisonment, argued that the court erred by allowing the presence of an interpreter during a session of the grand jury. The lower court allowed the interpreter’s presence because “two of the main witnesses to be examined were Chinese and could not speak or understand the English language.” The lower court subpoenaed and administered an oath to the interpreter, who was only present during the examination of those two witnesses, “and as soon as said examination

was concluded, he left, and was not again present, and was not present during any of the deliberations of the grand jury concerning said charge.”

The opinion stated that the lower court was correct in its actions because “waiving the absurdity of the proposition that the legislature intended that a grand jury should be precluded from inquiring into a public offense where the investigation made necessary the hearing of the testimony of witnesses who spoke only a foreign language, it is evident that the word ‘witnesses’ used in section 925, includes interpreters. Moreover, the law of evidence is the same in criminal as in civil cases, except as otherwise provided in the Penal Code [sec. 1102].” The court used the definition of the Code of Civil Procedure (Sec. 1878): “A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit.” The same statute stated that the interpreter must be sworn (Sec. 1884). The court argued that “the interpreter states, under oath, to the jury what the other witness said; and this is testimony, -- as clearly such as the statement of any ordinary witness who testifies to the declaration or admissions of another person.” To reinforce the same idea, the opinion cited The American and English Encyclopaedia of Law: “an interpreter, whether in the trial of a case in court, or as interpreter of a witness giving his deposition, must give his testimony under oath. In either case he is a witness, and there is every reason for saying that the general rules which govern the testimony of other witnesses apply to him, [and that] an

103 People v. Deo, 132 Cal. 199 (1901).
interpreter is a witness, distinguished from the person whose testimony he interprets.”105

Moreover, “the testimony of an interpreter, like the testimony of any other witness, may be impeached; his testimony goes to the jury under those rules of law by which the testimony of all witnesses is weighed.”106 The justices asked:

Can there be any doubt that perjury could be assigned, where an interpreter had knowingly and feloniously sworn falsely as to what the other witness had said? Therefore, what essential of the definition of a witness does an interpreter lack? That he is a witness, and that what he says under oath is testimony, is strikingly illustrated by the case of Schearer v. Harber. In that case,107 it was sought to show that the plaintiff had made contradictory statements at a former trial. This was sought to be done by a witness named Smith, who was present at the first trial. But it appeared that the plaintiff was a German, who did not understand English, and had been examined through an interpreter; and it thus appeared that Smith was swearing as to what the interpreter said. It was held that this could not be done, -- at least, without accounting for the absence of the interpreter.

The court, having said that an interpreter appointed by the court “is not thus made the agent of the party whose testimony is to be interpreted,” proceeded as follows:

The interpreter, on the trial of the cause before the justice, we may assume was duly sworn, because the law required that he should be sworn. He translated what the appellant testified to in the German language into English, and in the latter language delivered it to the justice and the jury. To this extent, the interpreter was a witness, and the case falls clearly within the rule that regulates the introduction of evidence of what a witness testified to on a former trial. The rule is, that such evidence is inadmissible unless the witness be dead, out of the jurisdiction, or is insane or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. There was no reason whatever shown why the interpreter could not be produced, and therefore there was no foundation laid for the introduction of evidence of what he swore to on the former trial, -- in other words, of the interpretation he gave of the plaintiff's evidence on that trial. The evidence, therefore, was incompetent, and should have been stricken out on the

106 Ibid, p. 31.
107 Schearer v. Harber, 36 Ind. 536 (1871).
motion of the appellant, which seems to have been made as soon as it was ascertained that the witness Smith was testifying to what the interpreter said, instead of what the appellant said.

The same ruling was made by this court in *People v. Lee Fat*,\(^{108}\) where the opinion in the case of *Schearer v. Harber*, supra, was cited, and also in *People v. Ah Yute*.\(^{109}\) This case is very interesting as we can see a Chinese-only speaker trying to deny other Chinese speakers the right to have an interpreter.

In an 1903 Supreme Court of California case, the tribunal reaffirmed the right, under Section 1884 of the Code of Civil Procedure (discussed in the previous case), of the lower court to have an interpreter available to some Indian witnesses who claimed to be unable to speak English. The lower court examined those witnesses and concluded that their claims were true. Moreover, the opinion agreed with the lower court that it was not necessary to give instructions to the jury “to the effect that the jury should distrust the whole testimony of any witness who had willfully deceived the court as to her ability to speak English, and thereby caused the court to direct that her testimony be given through an interpreter.”\(^{110}\) Here again, we see a similar use of jurisprudence.

In an 1904 Supreme Court of New York, Appellate Term, case, the tribunal reaffirmed the obligation of any court to appoint an interpreter to assist a material witness who does not understand English. In this case, the main reason to dismiss the case in the lower court was that the plaintiff “had failed to have an unobjectionable Italian interpreter in court, through whom his

\(^{108}\) *People v. Lee Fat*, 54 Cal. 527 (1880).

\(^{109}\) *People v. Ah Yute*, 54 Cal. 89 (1880).

\(^{110}\) *People v. Morine*, 138 Cal. 626 (1903).
mother, who did not understand English, could be examined.” Three different interpreters were proposed by the attorney for the plaintiff, “who he claimed were competent, and they were rejected without any examination into their competency, for the sole reason that the defendant refused to consent to either of them.” The lower court judge based his ruling “upon the ground that there was no official interpreter attached to the court, and that in the absence of one he could not compel the defendant to accept a person proposed by the plaintiff for that purpose.” The superior court saw the lack of an acceptable interpreter as an error because “at common law the court has not only the right but also the duty to make such appointment where the necessity exists.” The opinion clarified that “statutes for the appointment of official interpreters in certain courts exist to enable said courts to proceed promptly with their assistance, but the duty to appoint as occasion requires remains irrespective of statute. A poor litigant as well as a rich one is entitled to his day in court and to a respectful hearing, and in so far as he cannot present his case, except through an interpreter, it is right to be heard in that way. It would be a denial of justice to make such right depend upon the consent of the defendant.” Moreover, the opinion propounded that if it is “impossible to obtain the services of a competent interpreter, the trial should have been suspended and the case remanded to the calendar.”

In a concurring opinion, a different justice argued that if the judge knew that “the witnesses could not speak the vernacular to the court, it was his duty to secure the presence of an interpreter, not only linguistically competent, but also qualified to interpret the statements of the witnesses in a manner to command the confidence of the jurors and of the court. That the person

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\(^{111}\) *Menella v. Metropolitan Street Railway Co.*, 43 Misc. 5 (1904).
proffered as interpreter is friendly to the parties, and even that he is friendly to one of the parties, is not cause of his exclusion but goes to the credibility of his interpretation.” Moreover, his opinion states that “the function of an interpreter is much like the function of an expert, and like any other expert the interpreter’s qualification must be shown either by his own oath or by the oath of someone else. If not a sworn officer of the court, he must be sworn in each case and his qualifications duly established. Proffering several persons to the court and jury as interpreters, the counsel for the plaintiff was not at the pains to have it appear, other than by his own unverified statements, that the person so proffered was either competent, qualified or fit.” This case is a clear example of the increasing importance of interpreters in the legal system, especially in places like New York, and how their need was accepted and even embraced by the legal system. Importantly, these opinions do not use the term “right”; instead, they talk about the duty of the courts. In such cases, a duty came as close as litigants could get to a right without being officially a right. Moreover, in these cases at least, the justices placed considerable importance on the quality of translation and the need for a professional body of translators available to the different courts.\footnote{Ibid.}

In some cases, the duty to require an interpreter rested on the trial court’s understanding of the English proficiency of the litigants present in the courtroom. In a 1904 Court of Appeals of Illinois, Chicago, First District, case, the tribunal reaffirmed the decision of the lower court to refuse to provide an interpreter for the appellant. The superior court argued for the discretion of the court to decide when the case being judged requires an interpreter or not and that “its refusal...
is not error unless there has been an abuse of that discretion.” From an examination of the record, the lower court was satisfied that the appellant did not require the assistance of an interpreter because, “when the questions were put in plain, simple, everyday language, the witness had no difficulty either in understanding or in answering them.”

In a 1905 case leaning in the other direction, a California court reaffirmed the decision of the lower court to provide an interpreter for a witness under Section 1884 of the Code of Civil Procedure because even if he “understood some of the language addressed to him in English, he could not understand it all.”

Progressive Era decisions involving hearing impairments highlight the differences between the use of interpreters for physical disabilities and those for immigrants. In a 1906 Supreme Court of Arkansas case, the tribunal reaffirmed the decision from the lower court to admit the testimony of a deaf-mute “to be given by means of the sign language through an interpreter, instead of through written questions and answers, where there was nothing to show that the latter was the best method.” The opinion stated that “in the absence of a statute upon the taking of deaf mutes' testimony, the common-law rule prevails.” Moreover, the opinion stated that deaf-mutes “are competent witnesses where they have sufficient knowledge to understand and appreciate the sanctity of an oath.” The opinion cited by Chief Justice Best about the subject of deaf-mutes testifying by interpreter: “I have been doubting whether, as this lad can write, we ought not to make him write his answers. We are bound to adopt the best mode. I should certainly receive the present mode of interpreting, even in a capital case; but I think, when the witness can write, that it is a more certain mode.” In conclusion, the superior court agreed that

113 Kozlowski v. City of Chicago, 113 Ill. App. 513 (1904).
114 People v. Salas, 2 Cal. App. 537 (1905).
when a witness “is unable to communicate the facts within his knowledge to the jury in the ordinary way that can be understood by them, and where such knowledge may be imparted to the jury by means of sign language through an interpreter, it is proper to have such interpreter. The court should adopt the best method of having the facts in the knowledge of such witness imparted to the jury.” This case is another example of a growing consensus about interpretation for deaf-mute legal actors. Maybe due to the fact that interpretation for the deaf and mute did not have the same kind of political and cultural controversies as the ones associated with interpretation for immigrant groups, there was more consensus on these kinds of cases.\footnote{Dobbins v. Little Rock Railway & Electric Co., 79 Ark. 85 (1906).}

In a sign that professionalization had not completely taken hold by the early twentieth century, the Supreme Court of Illinois in 1909 reaffirmed a decision from the lower court to admit the use of an interpreter for the testimony of the father of the plaintiff. Even if the defendant “objected and sought to have some inquiry as to the ability of the witness to testify in English,” the lower court decided to proceed without any further procedure to establish “whether the witness could speak English or not.” The opinion complained that the lower court called an interpreter based only on the attorneys for the plaintiff’s word, without providing the defendant any recourse to prove that the witness was able to testify in English. The superior court stated that “the constitution [sic] provides that all judicial proceedings shall be conducted in no other [than] that the English language, and witnesses should be required to testify in English when possible.” Moreover, the “witness had lived in Decatur fourteen years, during all of which time he had worked in defendant’s mine under those who spoke the English language, and he
necessarily had considerable knowledge of that language.” In the end, due to the fact that the presence of the interpreter did not create a prejudice against the defendant, the court did not find enough justification to reverse the lower court’s decision.116

An Iowa case from five years later also underscores the continuing use of non-professional interpreters. In 1910, the Supreme Court of Iowa reaffirmed the decision from the lower court to admit the testimony of one witness who had to use an interpreter,117 even if such testimony was confusing due to the lack of interpreting skills of the interpreter. The appellant complained that the interpreter was allowed “to hold extended conversations with the alleged feeble-minded witness, thereby robbing the plaintiff of the force and effect of his imbecilic answers to the simplest questions.” The opinion stated:

The method adopted for the examination of this witness was that the attorneys directed their question to the interpreter, addressing him in the second person, and directed him to put the question to the witness, referring to the witness in the third person. After the witness had answered, the interpreter was asked to state what he said. The result of this method of examination was that the language of the witness was repeated by indirect quotation in the third person, instead of by direct quotation in the first person, and it makes a confusing record.

The opinion included an example of those exchanges that made the interpretation confusing for the court:

Howell--Q. What did he say? What was he saying all that time? Interpreter--A. Yes, sir; he said it was the truck he was using. Howell--Q. He was not talking all that time just to make that answer, was he? I submit to the court that we are entitled to what the witness said. Q. What was it he said? Interpreter--A. I had to explain what I wanted. Howell--Q. What did he say then? What was it he said to you? Interpreter--A. He just asked me what

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I meant. At this point the trial court enjoined the use of some common-sense in this matter.

The opinion delved deeply into how the translation process should work:

There is no hard and fast rule as to the method by which a witness shall be examined through an interpreter. It is necessarily a difficult and unsatisfactory proceeding, and the method of conducting it must be left to the sound discretion of the court in view of all the circumstances. In our view the ideal way to examine a witness through an interpreter is to require the interpreter to be impersonal, and to require the attorneys to address no question nor remark to the interpreter. On the contrary, all questions should be direct to the witness in the second person. These questions should be repeated by the interpreter without any remarks of his own. The answer of the witness should be repeated literally by the interpreter in the first person, without any remarks of his own. That is to say, the interpreter should be a phonograph for the time being. This method, when followed, results in least confusion in the record. But it is often quite impracticable to enforce it. Some interpreters find it impossible to suspend their personality, and they talk of the witness in the third person. The attorneys often forgetfully address their questions to the interpreter, and then ask him what the witness said. It is a time when the ‘common sense’ enjoined by the trial court is a great desideratum, and it needs to be well distributed and reasonably active in order to obtain the best results.

One seminal case to establish the rights in the practice of interpretation was the 1916 English Court of Criminal Appeal decision, based on the principle of fairness, in Rex v. Lee Kun, which stated that non-English-speaking individuals must receive interpretation of all the evidence presented in court to understand the case against them (including evidence and witnesses) to be able to instruct their counsel accordingly.118 In this case, a Chinese-speaking defendant was sentenced to death in a murder trial held in English where the interpreter did not interpret any prosecution evidence for him. Even his defense lawyer admitted, “The matter never occurred to me until the verdict was interpreted to the prisoner, and he said in Chinese, ‘Who is the witness?’” To remedy that situation, in the Court of Appeals, Lord Reading read the

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118 Rex v. Lee Kun, 1 K. B. 337 (1916).
judgment of the court majority stating that “when the foreigner accused is defended by counsel, … the evidence should be interpreted to him… [so that] the accused substantially understands the evidence to be given and the case to be made against him at the trial.” The court declared that translating was “safer, and therefore the wiser, course” of action. The American legal system had to wait until the 1970 case of Negron to address the right of non-English-speaking defendants to understand the case against them “as a matter of simple humaneness.”

As courts in the Progressive Era continued to develop the right to an interpreter, they also carried on discussions about salary and professionalization. In an 1891 United States Court of Claims case, the tribunal considered the case of an interpreter working for the American consulate at Tangier who claimed that he had not been paid for his last five months of services. The court accepted that the Diplomatic and Consular Appropriation Act, 1886 (24 Stat. L., 108), recognized the interpreter as a “subordinate employee for whom an appropriation of $200 was made.” However, the court found the United States not liable for those payments because they were not a party to the contract. The contract was signed by the consul and the interpreter. “The Department of State neither authorized nor forbade, neither approved nor disapproved, the selection; it simply assigned to the consul a certain sum of money with which he could pay an interpreter, any interpreter he chose to employ.” The Consular Regulations of 1888 established that some salaried interpreters’ posts needed “to be made under the direction of the Secretary of State,” but that was not the case in Tangier. The same regulations recognized different degrees of importance between the interpreters, with the most important being appointed directly by the Department.

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president and receiving an official commission. In this case, the interpreter “received no appointment from any officer of the Government in Washington, and his only commission was the personal agreement we have already cited, an agreement which it is safe to assume would not have received the approval of the Department of State had it been brought to the attention of that Department.”

To be an official government interpreter, the plaintiff had to be nominated by the head of the consulate to the Department of State, and that never happened. Moreover, the consular regulations required any interpreter to take the oath of office, and it did not appear that the plaintiff took that oath. In this case, the interpreter was “classed among the subordinate employees of the consulate whose tenure depended upon the will of the consul. He fell into the same category as the clerks, guards, cavasses, janitors, and porters, who are employed and discharged by the consul as he may find them needful to the consulate or satisfactory to him in service.” The interpreter’s petition was dismissed. This case presents a new variable by introducing the different categories or statuses of interpreters. One group of interpreters was not officially recognized as professionals and were placed together with other nonspecialized employees while a second group was officially recognized and granted many additional protections. Again, we see the importance of the oath to make someone an officially recognized interpreter.

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120 Azogue v. United States, 26 Ct. Cl. 430 (1891).
121 Ibid.
Training for interpretation also became more important as the twentieth century approached. In an 1892 Supreme Court of South Dakota case, a state veterinary surgeon, in an action against the state to recover wages for services rendered, used the case of *U.S. v. Mitchell* as a precedent. That case was about an interpreter in the state of Nebraska claiming his salary. Here, a specialized worker who was hired for his professional skills had to prove that he had the appropriate training and experience and equated his profession to that of the interpreters. Such a requirement was a far cry from previous eras when some courts accepted anyone to translate without being particularly concerned about the degree of skill and accuracy in interpreting. This case shows changing legal structures that would eventually end the use of bilingual neighbors or family members as interpreters in the courts. Instead, the interpreter was perceived as a professional person who was required to adhere to stringent ethical and professional standards.

In large urban areas, the trend towards permanent professional interpreters was even clearer. In an 1898 Supreme Court of New York, Appellate Division, Second Department, case, an assistant clerk was suing to recover two months of his salary. This case referred to the Greater New York Charter that listed “clerks, assistant clerks, stenographers, interpreters and attendants of the District Courts in the city of New York, and of the Justices’ Courts of first, second and third districts of the city of Brooklyn” as “officers of the said Municipal Court.” The same section authorized a justice to appoint an interpreter in each district of the borough of Manhattan with a prescribed salary (an annual salary of $1200) and a term of two years. The justice was

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124 For a similar case, see *United States v. Swiggett*, 83 F. 97 (1897).
authorized to remove any of those interpreters after notice and hearing. The Greater New York Charter of 1897 shows the increasing importance and professionalization of the interpreters in the big cities, where the increased demand for their services was met by an increased number of professional interpreters.\footnote{McKenna v. City of New York, 34 A.D. 152 (1898).}

Another New York case from a few years later reinforces this point but also suggests the matter was still in transition. In this 1902 murder appeal, the defense lawyers asked the comptroller to pay for their expenses incurred for an interpreter and a stenographer. The lower court agreed to pay for the interpreters but not the stenographer. The lower court argued that the New York Code of Criminal Procedures, Section 308, included the use of an “Italian interpreter upon the trial and defense of an Italian charged with murder may be allowed his assigned counsel, when not speaking Italian nor able to understand him or his witnesses not speaking English, as ‘personal and incidental expenses.’” However, the expense of a stenographer not ordered by the court was not contemplated. The lawyers claimed an “allowance of $100 for disbursements incurred in employing an Italian interpreter” under personal and incidental expenses. In this case, the court agreed that the lawyers had to employ an interpreter “to understand their own client as well as those witnesses who did not speak the English language, and whom they proposed to place on the stand as witnesses.” The court saw the allowance for the interpreter as “absolutely necessary for the counsel to incur it so that they could familiarize themselves with the case.” In this specific case where the court had “designated attorneys who did not speak the Italian language, the expense became personal to them in that they could not
discharge the duty they were required to perform without being informed what their client and his witnesses were talking about.” However, the superior court argued that if the lower court had “designated counsel familiar with the language of the accused, counsel would not have incurred personal expenditure on the score, just as an attorney who lived near the scene of the crime would have to incur no personal expenditure in visiting it, or as an attorney who lived in the county where trial was to be had would have to incur no additional personal expenditure for living expenses.” This case shows how the right to an interpreter was undisputed so that any non-English speaker could receive fair representation, but at the same time, there was little concern about the quality of the interpretation. The court would have been fine with a lawyer familiar with the language. This case presents a situation where the right to have an interpreter was clear, but the professionalization of the court interpretation services was still not identified as a priority to ensure a fair trial.126

A 1904 case from Arizona shows that in other areas of the country regular salaried interpreters had become the norm. In its specifics that case was an appeal of a fraud conviction where the appellant had received money for per diem services as an interpreter that he did not provide. The defense argued that at that time “there was no provision of law authorizing the payment by the county of compensation to interpreters for services in criminal cases, and that as such a claim could not, under any circumstances, become a legal charge against the county, the allowance and payment thereof could not, in contemplation of law, be induced by any false pretense made in relation to it.” The court disagreed with that assertion because the appellant

knew that “it was the rule and the custom of the county to pay interpreters an established rate per
diem for services in criminal cases before justices of the peace.” That customary policy was so
prevalent that the courts found it safe to assume that the county officers assumed “that the law
authorized the payment of claims of this character.” The court saw no error, and the judgment
was affirmed. This case shows how the use of courtroom interpretation services for the benefit of
non-English speakers was so accepted that it was a law in all but name. It is a clear case of
society moving faster than the law, and the law had to catch up with those changes. When even
con men used interpretation to make money illegally, it is safe to say that it had become the
norm.\(^\text{127}\)

By the early twentieth century, salaries for interpreters had become common enough that
they were considered within the bounds of normal procedure. In a 1905 Supreme Court of
Wisconsin case, a constable demanded compensation from the county for services rendered
“before a justice of the peace in a criminal action.” The county refused to pay because the claim
was not submitted in the proper form as required by an 1868 law that stated: “Any officer or
other person having a demand or claim against any county for money or other thing, shall make
out a statement thereof in writing, with his affidavit attached.” Moreover, the same statute
declared that “no claim of any juror, witness or interpreter for fees which may become due after
this act goes into effect, shall be allowed by any board of supervisors, unless it comes before
them in the manner above prescribed.” The court pointed out that the Statutes of 1878 excepted
jurors, witnesses, and interpreters from those requirements because, in the court’s opinion, the

\(^{127}\) Berreyesa v. Territory, 8 Ariz. 385, 76 Pac. 472 (1904).
creators of the Statutes of 1878 may have “thought that jurors, witnesses, and interpreters, whose claims are often so small that very little effort could be afforded by claimants for the collection thereof, should have the sums allowed without personal attention thereto.” This case is another example of the importance interpreters were acquiring in the legal system, important enough to be exempted from rules that would make the payment for their services more difficult and consequently diminish the pool of legal interpreters.128

Even as professional interpretation became more widespread, judicial discretion continued. In a 1910 Court of Appeals of Ohio, Eighth Appellate District, case,129 a police court interpreter demanded his lawful compensation. The General Code, Section 4589, established:

The business of the court shall be dispatched with all speed consistent with a full, fair trial or hearing of the case. In cities where there is more than one police judge, the judges of the police court may appoint an interpreter for the court, and in case they fail to agree, the clerk of the court may appoint such interpreter, for the term of two years, who shall receive as compensation fifteen hundred dollars per year; the interpreter shall attend all sessions of the court and obey all orders of the judges thereof. He shall receive no fees while acting in the capacity of the interpreter, and the judges may for adequate cause remove him.130

The police court interpreter claimed that he was appointed because he was “qualified and has since been recognized by the judges as the incumbent of the place.”131 However, the City of Cleveland claimed that the interpreter misled the court clerk when he served as a court interpreter (for eight days) because the judges did not determine the right of the claimant to the

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128 Birdsall v. Kewaunee County, 124 Wis. 576 (1905).
position. The petition was dismissed. This case reinforces the idea that only through the recognition of the judges, who in previous eras were happy to accept the legitimacy of interpreters after taking an oath, could the legal system make a bilingual person an interpreter.

Important distinctions in salaried interpretation emerged between criminal and civil cases. In a 1914 Supreme Court of Arizona case, an interpreter sued the county to receive compensation for his services as a Spanish interpreter in the Second District Court. The interpreter was “subpoenaed to appear before the said district court.” He claimed that a reasonable price for his services was $5 per day and that the presiding judge recommended the payment of that quantity, but the county refused to pay. One of the questions that the tribunal had to answer was: “In what cases is a county liable for interpreter’s fees?” The opinion of the court was that after examining the statutes it was clear that “a county cannot be held to answer for fees claimed by an interpreter while acting as such in civil cases in which the county is not interested.” The 1901 Revised Statutes of Arizona clearly stated that “the court may, when necessary, appoint interpreters, who may be summoned in the same manner as witnesses, and shall be subject to the same penalties for disobedience.” Moreover, a 1903 law provided that “the board of supervisors of the various counties in this territory are hereby authorized to audit and pay interpreters’ fees to persons who shall act as such in the prosecution or defense of criminal cases in the various courts of the territory. However, such compensation shall not exceed for interpreters in the justice courts the sum of two dollars and fifty cents per day, and the district courts, not exceeding the sum of five dollars per day.” The court declared that “a person cannot
maintain an action against the county for interpreter’s fees unless they are for services rendered in the prosecution or defense of criminal cases, or in civil cases in which the county is a part.”\textsuperscript{132}

This case clearly drew a distinction between the right to an interpreter in criminal cases versus civil cases. In a criminal case, the legal system had an obligation to provide all the necessary tools (such as an interpreter for non-English-speaking actors) to ensure the fairness of the criminal process. In civil cases, the county was only obligated to pay for the interpreters if they were one of the interested parties. If both parties to a civil suit were private citizens, interpretation had to be paid by the interested party. This case shows that, in some jurisdictions at least, the right of interpretation was limited to criminal cases, a fact that was implied in many other cases but not stated as clearly as in this instance.

Sadly, the right to full interpretation of the proceedings was not the only obstacle for non-English speakers. The issue of the quality of translation brought many appeals based on the right to obtain an accurate translation of the proceedings. The provision of interpretation without any guarantee of its competence was not enough to ensure a safe and fair trial. Some judges were worried that the application of justice was put in jeopardy in cases where interpretation was needed. Sadly, as one 1923 study of the American legal system interaction with the immigrant community demonstrated,\textsuperscript{133} the American legal system was far from a perfect system with high-quality standards.

\textsuperscript{132} Cochise County v. Michelena, 15 Ariz. 477, 140 Pac. 62 (1914).
\textsuperscript{133} Kate Holladay Claghorn, The Immigrant’s Day in Court (New York and London: Harper & Brothers Publishers, 1923).
One clear example of those worries appeared in an 1889 Michigan Supreme Court case\textsuperscript{134} where the court warned of interpreters taking too many liberties with their translations. The court declared that “the danger of mistakes in legal proceedings is such that nothing but practical necessity can justify the intervention of an interpreter between counsel and witness or witness and jury, although it is well settled that on a proper occasion it is allowable, and the occasion must usually be judged of by the trial court... It is necessary, for the due course of examination, that the interpreter shall give to the witness the precise form and tenor of each question propounded, and no more or less, and that he shall in like manner translate the precise expressions of the witness.” Furthermore, the court identified errors in translation as “the evil,” equating them to voluntarily lying to the court. In their opinion, the court stated that “we have seen so many instances in the records before us of testimony which appeared of questionable accuracy that, while it is beyond our power to correct the evil, we deem it proper to advert to the occasion for having it corrected, if possible. It is not for us to do more than call attention to it.” A 1919 Supreme Court of Illinois is a very good example to illustrate the importance of quality translation services.\textsuperscript{135} In this case, Prudencio Laures was accused of the murder of Celestino Blanco in DePue, Illinois. Prudencio and Celestino had both moved to Illinois from Spain. The two men had some prior unpleasant history because Celestino had had an affair with Prudencio’s wife in Spain and his girlfriend in Illinois. At a party, both were in a fight and Prudencio shot and killed Celestino, who was unarmed.

\textsuperscript{134} Rajnowski \textit{v. Detroit, Bay City & Alpena Railroad}, 78 Mich. 681 (1889).
\textsuperscript{135} \textit{People v. Laures}, 289 Ill. 490 (1919).
One of the reasons given to appeal the original trial was the poor quality of the translation services. In this case, most of the witnesses were non-English speakers and they gave their testimony through an interpreter employed by the prosecution, Agustina Piña, who interpreted the questions from English to Spanish and the answers from Spanish to English. The argument centered on the meaning of certain Spanish words which could imply premeditation to commit a murder. The main argument was about the expression “quitar de lantre” that some witnesses testified Prudencio used to refer to his intentions toward the deceased. The interpreter translated the expression as “to kill,” making Prudencio guilty of premeditated murder. However, the situation was not as clear as the interpreter implied because, as the representative of the Spanish consulate in Chicago argued by affidavit, “the words ‘quitar de lantre’ have no meaning in the Spanish language. The man who uttered words of a similar sound must have said ‘quitar de delante’ which in idiomatic English means ‘get out of my way’ or ‘go away from me.’” What the representative of the Spanish consulate failed to mention was that in Spanish language slang the expression “quitar de delante” is commonly used with the meaning of “to kill someone.”

Furthermore, a couple of witnesses testified by affidavit against the professionalism and qualifications of the interpreter to do a proper job translating their testimonies. For example, Marie Menendez said that “it was difficult for her to understand some of the questions put to her by said interpreter, for the reason, that she was a Mexican and could not speak the Spanish language as fluently as a Spaniard could.” When asked about one of her answers in the transcription of the case that stated that Prudencio had told her that “if he had a revolver he

\[136\] Ibid.
would kill him [Celestino],” she stated that “she made no such reply to said question … [and
that] said interpreter must have misunderstood the answer.” Similarly, the second witness, Frank
Fernandez, testified that because the interpreter “is not a Spaniard but is a Mexican … it was at
times difficult … to understand the questions which were asked by said interpreter … and it was
difficult for the interpreter to understand the answers given” by him. Furthermore, Fernandez
denied that Prudencio told him that “he was going to kill” Celestino, as appeared in the record of
the case, and he ventured to guess the interpreter must have misunderstood him.137

Prudencio’s defense argued that the interpreter failed in her “duty to translate the
evidence given by the witness into equivalent terms of the language employed by the tribunal
trying the cause, so as to preserve in the translation the precise meaning of the original.” The
court disagreed with that argument, stating that “every opportunity was given plaintiff in error
and his counsel to have a proper interpretation of the disputed words during the trial. We cannot
say, even in the light of all the evidence in the record, that plaintiff in error was injuriously
affected by an improper translation of the disputed words.” At the same time, the court defended
the quality of the interpretation services provided in this case because nothing presented in front
of the court justified “that the judge acted improperly with reference to the interpreters who were
employed during the trial of the case … [or] that either of the interpreters employed during the
trial was incompetent to act in that capacity.”138

These brief examples drawn from cases where court interpreting was at the center of
dispute illustrate how, due to the influx of immigrants, the different legal systems had to shift

137 Ibid.
138 Ibid.
towards multilingualism to accommodate the new demographic realities. While the place of a language other than English in the American legal system was and remains secondary, the legal system worked to accommodate non-English speakers because they were perceived as a minority group in need of protection. Linguistic barriers stood in the way of the equal application of justice. Usually, non-English speakers were at a clear disadvantage, unable to clearly communicate with the jury or judge or to fully understand the whole legal process. Misinterpretation and cross-cultural miscommunication were common. These examples demonstrate that English fluency in the legal system was key to the acquisition and preservation of many of the legal safeguards that are a given for English speakers.
CONCLUSION

In 1886 the Supreme Court of California reaffirmed the idea that a witness was not disqualified to be an interpreter. In this case, the court assumed that Louis Locke “possessed the necessary knowledge of the English and Chinese language, and that he discharged the duties of interpreter fairly and impartially.”\(^1\) The fact that Locke was a witness for the prosecution was not considered relevant to the decision, and the judgment was reaffirmed. The lack of interpreters, or an institutionalized system of court interpreters, created situations such as this, where the need for an interpreter forced the court to resort to peculiar solutions such as using a witness, a solution more in line with the pre-Civil war era than the perceived professionalization of the interpretation services of the Gilded Age era. *People v. Fong Ah Sing* stood out because of who the interpreter was. Louis Locke had been an interpreter for the police court at San Francisco’s City Hall since the early 1870s. Known as a cosmopolite, Lock was one of the few Chinese people in California who had the level of education in both “English and Chinese that was required to work full-time as a professional translator.” As Mae Ngai has found, “San Francisco city directories from the early 1870s to the late 1890s listed under the category ‘interpreter of languages’ only one Chinese (Locke) but at least eight Euro-Americans working as Chinese

\(^1\) *People v. Fong Ah Sing*, 64 Cal. 253 (1883).
The level of Locke’s English fluency gave the court enough evidence of Locke’s qualifications and impartiality to take the role of interpreter.

Louis Locke stood at a crossroads in the history of court interpretation, when professionalism had only started to take hold. Such a position placed him in the middle of a long story, for the English language has held a central place in US courtrooms since the beginnings of the American legal system. This point is succinctly illustrated by the 1811 Enabling Act of Louisiana.3 Passed to begin the process of statehood for the previously French-and-Spanish-speaking territory, the statute required that after statehood all legal proceedings in Louisiana must be conducted “in the language in which the laws and the judicial and legislative written proceedings of the United States are now published and conducted” – in short: English.4 As recently as 1992, the state attorney general’s office in Louisiana affirmed that “English is the sole official language of Louisiana.”5

The central place of English language fluency in US law has created numerous countervailing tendencies. Indeed, this dissertation provides many examples of how the American legal system was always divided between those who wanted to use the law to integrate the diverse populations residing in America versus those who wanted to use the law to either

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3 This Act is also known as “An Act to enable the people of the Territory of Orleans, to form constitution and state Government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes.”
4 Enabling Act passed by Congress on February 20, 1811 (Act of Feb. 20, 1811, ch. 21, 2 Stat. 641)
assimilate or expel those diverse populations. As my research shows, none of those groups was successful. American jurisprudence evolved into something new that incorporated ideas of both sides due to the constant struggle of those two sides to impose their vision. Court interpretation evolved from being no more than an afterthought to becoming a central idea in the American legal tradition. Accepting that interpreters were necessary for the courts to do their jobs created a movement to professionalize court interpreting services that in some instances had the unintended consequence of creating a slow-moving bureaucratic system that had a much harder time adapting to constantly changing realities in comparison with the earlier eras. During this lengthy fight, non-English speakers had to endure legal and cultural obstacles to obtain the right to get access to court interpretation services. Some see this long process ending in the 1970s with the federal recognition of the right to interpretation, but others envision an unfinished struggle that still creates obstacles for non-English speakers. As this project has shown, even if American jurisprudence agreed to introduce interpreters in legal proceedings, the position of English as the primary language of the courts was never in danger.\(^6\)

While this dissertation has focused primarily on European immigrants, they were not to the only legal actors to encounter the Anglophone legal system. In future work, I hope to look at other groups such as Mexicans, Chinese, or Hawaiians. Those groups were closer to a colonial mentality than anything else. My intention is to join scholars like Diane Kirkby, Catharine Coleborne, Elizabeth Kolsky, and other legal historians of empire who address social and

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\(^6\) For more information on some of those difficulties, see Michael B. Shulman, “No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants,” *Vanderbilt Law Review* 46, no. 1 (January 1993): pp. 175-196.
cultural themes to emphasize multiple histories rather than one single imperial metanarrative. They do so by studying parallel stories that trace the legal evolution of different parts of the Empire, or in this case colonial subjects, to identify Empire-wide issues and developments that spread from the metropolis to the colonies or from the colonies to the metropolis. Unlike those scholars, who study the transportation of imperial law to colonial societies, I hope to explore the effect of the law in colonial/immigrant societies and the importance of legal transplantations and cultural borrowings in the integration of colonial/immigrant populations in the American legal system. I believe that the imperial history framework and methodology can provide a new perspective on the story of how those people helped transform the American legal system.

The American state adopted the position of the colonial state versus the colonial/immigrant people. In both cases, an ideologically liberal state had to deal with what was perceived by the state as “inferior” cultures that needed to be uplifted because the Anglo-Saxon way of life was to be preferred over others. In both cases, nondominant groups with different cultures had to navigate inside a “strange” cultural apparatus that at the same time was the source of today’s oppression and the hope of a better tomorrow. Non-English speakers became an internal borderland that had an impact on Americans and immigrants. Those internal borderlands

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were characterized by a greater cultural diversity and some degree of allowed legal pluralities inside the American legal system. Transnational migration scholarship can be helpful to explain flexible family strategies to deal with new legal realities in the receiving countries or the changing gender and social relationships in both receiving and sending nations.

Everything considered, this project tells the story of a legal system in constant change, but these transformations sought to ensure that even under the new social realities they would be faithful to their basic principles. Actors in the legal system saw that the only way to provide fair trials to non-English speakers was by changing the rules and procedures that made their legal system. This notion was beautifully expressed by Giuseppe di Lampedusa in *The Leopard*, when Tancredi, the main character's nephew, says, “If we want things to stay as they are, things will have to change.”

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