CAN YOU HEAR ME NOW? DUE PROCESS AND LANGUAGE BARRIERS TO JUSTICE

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ABSTRACT

Are state courts' translator services sufficiently offering due process protections when language creates a barrier in the courtroom?

Nearly one-in-five people in the United States stop speaking English when they go home at night.[1] That translates to 60.6 million people; a number that has more than tripled over the past three decades.[2] Ironically, though the number of people speaking other languages at home is growing exponentially, the percentage of people who speak English proficiently has remained the same.[3] With the population census predicting that the U.S. will becomes a minority-majority country by 2042 or 2048,[4] language barriers, such as English proficiency, can no longer be ignored.[5]

This Note examines whether state courts' translator services are sufficiently offering due process protections when language creates a barrier in the courtroom. Section I discusses common issues with interpreters and cultural competence in the courtroom. Section II examines and analyzes what certain state courts are doing to address this problem followed by national comparisons. Section III then proposes several ideas for solutions, including language-specific courts, a state constitutional right to language, and shared interpreter banks. As the U.S.'s minority population continues to grow, the country's judicial system will require important attention in order for due process to be adequately provided for each citizen.

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[1] Lisa Barron, *Census: Non-English Speakers in U.S. Nearly Triple in 30 Years*, NEWSMAX (Aug. 7, 2013, 3:05 PM), https://www.newsmax.com/US/english-language-speakers-report/2013/08/07/id/519251/.

[2] 37.6 million people speak Spanish at home. *Id.*

[3] Of those polled, "22 percent said they speak English 'not well' or 'not at all.'" *Id.*

[4] Kathryn Alfisi, *Language Barriers to Justice*, WASHINGTON LAWYER (Apr. 2009), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/april-2009-language-barriers.cfm. "Minority–majority . . . is a term used . . . [when] one or more racial and/or ethnic minorities . . . make up a majority of the local population." *See also*, Noor Wazwaz, *It's Official: The U.S. Is Becoming a Minority-Majority Nation*, US NEWS & WORLD REPORT (July 6, 2015, 5:14 PM), https://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation. ("The minority population is expected to rise to 56 percent of the total population in 2060, compared with 38 percent [in 2014]. When that happens, 'no group will have a majority share of the total and the United States will become a "plurality" [nation] of racial and ethnic groups.'").

[5] Barron, *supra* note 1 (addressing the "growing role of languages other than English in the national fabric").

I. BACKGROUND

A. Issues with Interpreters

1. Rapid Growth of Non-English Speaking Populations

An informal survey by the chair of the National Association of Judiciary Interpreters and Translators (NAJIT) found that "there are [about] 3,000 certified interpreters in the U.S. . . . 2,500 of [whom] speak Spanish."[6] This means that for every qualified interpreter who speaks Spanish, 15,040 people might one day need his or her services.[7] As for the remaining interpreters, each of them would, theoretically, be charged with being available to 46,000 people a piece. Even then, these numbers are not realistic because, of the 500 remaining qualified interpreters, countless languages will likely be underrepresented, or not represented at all.[8]

Take for example the story of Salvadoran native, Juan Granados. Granados spent thirteen years in prison after making an Alford Plea to kidnapping his common law wife based on his understanding that he would receive a light sentence. However, in reality, the sentence he received was five years to life.[9] It wasn't until several months later that Granados realized the error when his bilingual cellmate reviewed his court papers.[10] Eventually, his criminal conviction was overturned, but it did not change the fact that Granados suffered greatly for the unjust loss of his liberty.[11]

How did this happen? Granados does not speak English, and due to an error by his court-assigned interpreter, he never saw the translated

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[6] Bernadine Racoma*, Problems the Courts Face with Foreign Language Interpreters*, DAY TRANSLATIONS BLOG (Oct. 17, 2017), https://www.daytranslations.com/blog/2017/10/problems-foreign-language-interpreters-9979.

[7] *See generally id.; See* Barron, *supra* note 1.

[8] *See generally* Racoma, *supra* note 6*; See* Barron, *supra* note 1.

[9] Timothy Pratt, Court Case An Example of Language Barrier Problems, LAS VEGAS SUN (July 29, 2002, 10:54 AM), https://lasvegassun.com/news/2002/jul/29/court-case-an-example-of-language-barrier-problems/. Granados originally pleaded guilty believing he would only receive between five to fifteen years in prison. *Id.* "An Alford plea allows a criminal defendant to enter a guilty plea without admitting guilt". Rather than admitting the act, the criminal defendant is admitting that the prosecution's evidence is likely strong enough to win at trial. "The rare plea serves as a … last-ditch option for those who maintain their innocence but are confronted with overwhelming evidence against them." "Generally, attorneys are instructed not to consent to Alford pleas except in the most unusual circumstances and only with the recommendation of assistant attorneys general. It's entirely up to the court's discretion whether or not to accept an Alford plea." Aditi Mukherji, *What Is An Alford Plea?*, FINDLAW BLOTTER (Nov. 1, 2013, 8:08 AM), http://blogs.findlaw.com/blotter/2013/11/what-is-an-alford-plea.html.

[10] Pratt, *supra* note 9.

[11] *Id.*

plea bargain.[12] Unfortunately, a situation like this is not an isolated anomaly. Granados himself stated, "Like me, there are many more people out there that don't understand the language of this country."[13] Such a flagrant procedural blunder displays the need for "revision of established rules and procedures" as regions with "rapidly growing Hispanic population[s]" create new challenges in all areas of civic life.[14]

Our criminal justice system is in tremendous need of adequate, timely translating so that defendants have a better chance of understanding what is really at stake, and to deprive defendants of such an opportunity is really a second punishment over-and-above the actual criminal penalties.[15] The most reasonable solution would be to have pleas translated ahead of time and to ensure attorneys are accompanied by interpreters even when their clients say they understand "a little bit of English."[16] Similar to many other states throughout the country experiencing such fast growth, the judicial system in Nevada is fracturing and there has just not been sufficient time to "cover the cracks" with proper procedures.[17]

2. When Interpreters Aren't Provided in Time or at All

In another, more harrowing, tale of when language barriers prevented due process, no interpreter was provided at all. In the wee hours, police came knocking at the Virginia home of Jong Yeol Lee with a District of Columbia warrant in hand.[18] Awoken suddenly in the middle of the night and without the ability to communicate with his arresting officers, Lee had no means by which to learn the cause for his arrest.[19] He was taken to a detention center and held for four days without an

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[12] In Nevada, this was the first time in state history that a case like this one had been overturned. *Id.*

[13] *Id.*

[14] "The problem of Hispanic defendants not understanding aspects of their court case is a national one." *Id.*

[15] *Id.*

[16] *Id.* "Generally court pleading forms used to initiate or respond to a legal matter are documents that are considered 'vital.'" Thus, many courts are increasing the availability of translated materials. For example, "a legal aid organization in Idaho, in collaboration with the court, has created four interactive online forms in Spanish, which guide the user through a series of questions to produce the final pleading." Standing Committee on Legal Aid and Indigent Defendants, Standards for Language Access in Courts 80 (American Bar Association, 2012) [hereinafter *Standards*].

[17] *See* Pratt, *supra* note 9. Rivera-Rodgers, twenty-year program administrator for the Eighth Judicial District in Nevada, commented that the non-English speaking population in that area has grown so significantly that twenty years ago she "needed interpreters for 100 cases a month and now that number is 3,000."

[18] Lee is a permanent U.S. resident but has limited English-speaking skills. Racoma, *supra* note 6.

[19] *See id.*

interpreter to assist him. For this reason, Lee did not understand his incarceration.[20] Eventually, he was transferred to a police station where Metro Police released him without charges after determining that his arrest had been a mistake.[21]

Following the incident, Asian Pacific American Resource Center (APALRC), the legal services provider assisting Lee, stated:

> When we deal with language access issues, it's usually when people don't have access to their food stamps or when they get notices sent to them only in English, but this was different. This was a guy who lost his liberty, so it becomes easily apparent just how important language access is—this guy went to prison for no reason.[22]

The attorneys further argued that this action against Lee was a clear violation of the D.C. Language Access Act of 2004, "which require[d] District agencies with major public contact to provide interpretation, and sometimes translation, services."[23] Lee's case against the Metro Police Department through the D.C. Office of Human Rights (OHR) was the first time a language access complaint "saw its way through investigation and resolution, which is . . . surprising" when you consider the number of LEP and NEP people who live in the area.[24]

While statistically it is unlikely that Lee's case was the first, or only one, of its kind, it is easy to understand why it was the first language access complaint to make its way fully through the legal process.[25] The majority of the LEP and NEP populations in the United States "are low income and face an additional economic barrier to accessing justice."[26] Though there are numerous free legal service providers willing to help, resources are scarce, and it is not always possible to provide language access to every single person through these third parties.[27]

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[20] Alfisi, *supra* note 4.

[21] Racoma, *supra* note 6.

[22] Alfisi, *supra* note 4.

[23] *Id.*

[24] LEP and NEP stand for Limited English Proficient and Non-English Proficient. One study showed that "17 percent of District residents speak a language other than English at home", and this number marked an increase in LEP residents of about two percent over a ten-year period. *Id*. *See generally*, DC LANGUAGE ACCESS COMPLAINT: WHAT TO EXPECT, https://policecomplaints.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/LanguageAccessComplaintFlowChart.pdf (last visited December 22, 2017) (discussing the process for filing and resolving a language access complaint).

[25] Alfisi, *supra* note 4.

[26] *Id.*

[27] *Id.*

The immigrant population is exploding.[28] This problem will not be going away, so "our ability to serve that population has to change."[29] States cannot rely solely on legal service providers when people's fundamental rights are in jeopardy; rather, it is necessary to re-evaluate the system and provide adequate resources in order to prevent more stories like Lee's.

3. Challenges of Interpreting Within the Court System

There are three primary challenges that every interpreter encounters in the U.S. Court System: (a) speed of the trial proceedings, (b) training and qualification, and (c) lack of funding from the courts.[30]

a. Speed of Trial Proceedings

Interpreters face the impossibly difficult task of translating at the speed with which a trial is conducted.[31] Anyone who has ever witnessed a trial or courtroom hearing can attest to the speed at which lawyers and judges speak back-and-forth with one another, and in legalese no less![32] For each of them the routine is almost habitual, and in some cases even mindless. This is because, for a judge with a full docket, speed equals efficiency.[33] For the interpreter trying to work in this setting, there is also an additional pressure to "keep up" and, yet, stay accurate, especially when legal terms must be explained.[34] As an example, the pressure is significant enough that the coordinator for a court interpreter program in the 8th Judicial Court Circuit of Florida explained that, in their

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[28] "In 2015, the number of immigrants in the country was 43.3 million." About 20.7 million of them were naturalized citizens, 22.6 million comprised legal residents on temporary visas like temporary workers and students, unauthorized immigrants and lawful permanent residents, and 11 million people living in the United States are illegal immigrants. Racoma, *supra* note 6.

[29] Alfisi, *supra* note 4.

[30] *See* Stephen Ryan Smithfield, *Language Barriers Plague Our Court System*, THE VALLEY BREEZE (Apr. 24, 2013), http://www.valleybreeze.com/2013-04-24/observer-smithfield-west/language-barriers-plague-our-court-system#.WbMCHciGPIU. *See also* Fisher, Lise, *Interpreters Keep Busy in the Area Courtrooms*, THE GAINESVILLE SUN (Nov. 24, 2006, 12:01 AM), http://www.gainesville.com/news/20061124/interpreters-keep-busy-in-the-area-courtrooms; *see also* Alfisi, *supra* note 4 (acknowledging legal service providers' willingness to serve but lack of sufficient resources).

[31] Stephen Ryan Smithfield, *Language Barriers Plague Our Court System*, THE VALLEY BREEZE (Apr. 24, 2013), http://www.valleybreeze.com/2013-04-24/observer-smithfield-west/language-barriers-plague-our-court-system#.WbMCHciGPIU.

[32] *Id.*

[33] *Id.*

[34] *Id.*

courtrooms, "when interpreters are needed for a trial . . . two generally are scheduled so they can switch off every half hour."[35]

While this "shift change" method might be an ideal resolution of the difficulty speed poses for interpreters in the courtroom, the reality is there are just not enough interpreters available.[36] In the same six-county 8th Judicial Court Circuit of Florida, "the number of hours court interpreters worked jumped from 361 [per year] in 2002-2003 to 922 [per year] in 2005-2006."[37] Due to the ever-increasing demand, the 8th Judicial Circuit also began contracting with interpreters.[38] From a practical stand-point, court interpreters are almost guaranteed to be under-staffed and over-worked and, with the quick pace of trial, guaranteed to miss important things.[39]

b. Training and Qualification

While many people may assume interpretation is simply word substitution, the other equally important aspect of interpretation is that meaning must be translated in addition to words.[40] Often, words require cultural import; thus, it takes a skilled interpreter, with training and technique, to acquire the requisite cultural understanding needed to interpret correctly.[41] Addressing the problem of interpreter qualification, an immigration lawyer and former interpreter explained, "[b]ecause [this] job is so demanding with little room for error, most courts prefer to use certified interpreters, [but this] is not always possible," and courts must then turn to noncertified freelance interpreters.[42]

The process of certification varies state-to-state, and there is not yet a program in place to certify foreign language interpreters on a national level, with uniform standards, like the type of program that exists for interpreters for the deaf or hard of hearing.[43] By contrast, in federal court,

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[35] Lise Fisher, *Interpreters Keep Busy in the Area Courtrooms*, THE GAINESVILLE SUN (Nov. 24, 2006, 12:01 AM), http://www.gainesville.com/news/20061124/interpreters-keep-busy-in-the-area-courtrooms.

[36] *See id. See also* Alfisi, *supra* note 4 (citing the lack of interpreters in the DC Interpreter Bank, particularly in less common languages such as "Amharic (a Semitic language spoken primarily in parts of Ethiopia) or Korean.").

[37] Fisher, *supra* note 35.

[38] A similar situation can be found in federal courts as well. In 2004, the use of court interpreters increased more than eighteen percent, meaning court interpreters were used in a total of 223,996 federal court events. *Id.*

[39] *See id.*

[40] Alfisi, *supra* note 4.

[41] Alfisi, *supra* note 4.

[42] Alfisi, *supra* note 4.

[43] Each state has its own discretion in determining the proper way to qualify an interpreter, and "while there are various trainings and exams available for interpreters, only a state supreme court can deem a certification exam valid and reliable." *Id.*

a certified interpreter is required by statute, "unless one is not reasonably available."[44] There is also a specific federal certification exam, which has become the preference for qualification in many state courts as well.[45] However, because of the exception of "reasonable availab[ility]," and the scarcity of qualified interpreters, many times a noncertified interpreter or certified interpreter from another city must be used.[46] This can cause significant time delays by postponing trial dates or hearings, or worst-case-scenario, cause an incompetent interpreter to be appointed as the mouthpiece of justice.[47]

"[I]f the interpreter is not competent, it can render everyone incompetent."[48] Thus, there is great need for a national increase in the number of qualified and certified interpreters; otherwise, the justice system will be crippled in its attempts to "carry out its own work."[49] Ultimately, training and knowledge are the keys moving forward.[50] Many legal professionals continue to operate under the false assumption that being bilingual is sufficient for being a court interpreter, but such a broad, and unfounded, generalization is dangerous in a setting where so much is at stake.[51]

c. Lack of Court Funding

Many courts will not challenge the use of a noncertified, bilingual friend or family member acting as an interpreter because the court is without an interpreter program in the first place.[52] Generally, this is the result of inadequate financial resources.[53] "In an effort to address this problem, in 2008 the Senate Judiciary Committee approved a bill [S.702] authorizing $15 million a year for five years to fund a state court interpreter grant program.[54] Unfortunately, "[this] . . . bill was placed on

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[44] 28 U.S.C. § 1827(b)(2) (1988).; Alfisi, *supra* note 4.

[45] Alfisi, *supra* note 4. Additionally, many "state courts accept professional translator organization certifications to establish competency to translate complex court materials and have not created internal testing systems for translators." The minimum competency level required by such translation services is that the individual can translate texts that contain not only facts but also abstract language. Such texts usually contain situations and events which are subject to value judgments of a personal or institutional kind. Standards, *supra* note 16.

[46] Alfisi, *supra* note 4. *See also* 28 U.S.C. § 1827(b)(2) (1988).

[47] Alfisi, *supra* note 4.

[48] *Id.*

[49] *Id. See also* Standards, *supra* note 16, at 1–2.

[50] Alfisi, *supra* note 4.

[51] Alfisi, *supra* note 4.

[52] Alfisi, *supra* note 4.

[53] *Id.*

[54] State Court Interpreter Grant Program Act, S. 702, 110th Cong. (2008). "States applying for the program would be eligible for a $100,000 base grant, while $5 million would

the Senate Legislative Calendar in August 2008, but it failed to pass after the 110th Congress adjourned in January."[55]

As reflected by the failing of bill S. 702, some are thinking about language equality issues, but many are not.[56] Awareness and supportive legislation are essential to addressing the challenges interpreters encounter in the U.S. Court System.[57] Inadequate or strained budgets, though difficult to overcome, can no longer serve as excuses for subverting due process and stripping fundamental rights from innocent people.[58]

B. Cultural Competence in the Courtroom

In 2009 Justice Sonia Sotomayor became the first Hispanic to serve on the U.S. Supreme Court.[59] Since her appointment, cultural sensitivity has presented itself as an important issue of just and fair adjudication.[60] Thus, to be culturally competent as an interpreter, the individual must be taught to communicate in a way "that is not prejudiced by different cultural norms and behaviors."[61]

Recognizing the need for this type of training, "many state court administrative agencies have made it mandatory [as a part of the certification process]."[62] There are two reasons for this: 1) interpreters must be aware that responding to questions about the norms of the litigant's culture are not a part of their role as an interpreter, and, in fact, directly violate ethical code, and 2) any misconceptions on this topic could allow "misinformation and bias" to cloud the legal proceedings.[63] Thus, when state courts provide formal cultural competence training, it "reinforce[s] the appropriate role of the court interpreter in a consistent

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be set aside for states that are able to demonstrate an extraordinary need." Once these initial funds were awarded, a formula, based on the percentage of non-English speaking population in a state, would be used to distribute the remaining funds. Alfisi, *supra* note 4, at 3.

[55] Alfisi, *supra* note 4, at 3.

[56] *Id.*

[57] *Id.* at 2–3.

[58] *Id.*

[59] Hon. Gail S. Tusan & Sharon Obialo, *Cultural Competence in the Courtroom: A Judge's Insight*, FROM THE BENCH 39, 39 (2010), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/articles/Cultural%20Competence%20in%20the%20-Courtroom%20A%20Judge%27s%20Insight.pdf. *See also* Charlie Savage, *Sotomayor Sworn In as Supreme Court Justice*, N.Y. TIMES (Aug. 8, 2009), http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html.

[60] *Cultural Competence*, *supra* note 59, at 30.

[61] *Standards*, *supra* note 16, at 118.

[62] *Id.*

[63] *Id.*

and accurate manner," and, incidentally, encourages the individual's appreciation of diversity.[64]

An additional consideration is that in many other countries the rule of law and court systems are the product of systematic corruption; thus, litigants from these countries will likely view legal relief as a futile means of resolving their problems, especially if the litigant is not wealthy or of high status.[65] Even if these litigants chose to pursue litigation, "residual feelings of distrust of the court system can lead parties to falter in providing information in advance, frustrating the goals of discovery and due process."[66]

One judge, the Honorable Gail S. Tusan of the Superior Court of Fulton County, Georgia, suggests that community outreach by judges or other officers of the court is another answer to this problem.[67] Outreach would "cultivate greater confidence in the legal system" by communicating directly to this underserved population about "court rules, procedures, and available resources," and would be a highly effective way to educate and prepare them, just in case they should ever need to be in a courtroom.[68]

II. REVIEW OF LAW

A. Current State of Federal Law

In addition to Constitutional protections, other federal statutes and Department of Justice regulations support the right to language access services.[69]

One of the most notable sources of protection from language discrimination comes from Title VI of the Civil Rights Act of 1964,[70] which in section 601 "prohibits discrimination on the basis of race, color, and national origin, [this], among other things, means federally conducted and funded programs and activities must provide meaningful access to LEP

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[64] *Id.* at 118–19.

[65] *Cultural Competence, supra* note 59, at 40.

[66] *Cultural Competence, supra* note 59, at 40.

[67] *Cultural Competence, supra* note 59, at 40.

[68] *Cultural Competence, supra* note 59, at 40.

[69] "Although the U.S. Constitution does not expressly guarantee the right to an interpreter in criminal cases, courts have found that an interpreter is necessary to effectuate the guarantees of the Fifth, Sixth and Fourteenth Amendments' right to a fair trial, right to be present at trial, right to confrontation, right to effective assistance of counsel, and right to due process." *Standards*, *supra* note 16, at 22; *see also* United States v. Edouard, 485 F.3d 1324, 1337 (11th Cir. 2007) (denial of interpreter for LEP defendant implicates the "rights to due process, confrontation of witnesses, effective assistance of counsel, and to be present at [] trial")."The constitutional right to an interpreter in all civil proceedings is less settled." *Standards*, *supra* note 16, at 23.

[70] Title VI of the Civil Rights Act, § 602, 78 Stat. 252 (1964), *amended by* 42 U.S.C.S. § 2000d–1 (LexisNexis 2018).

[Limited English Proficiency] and NEP [Non-English Proficient] people."[71] Subsequently, the Department of Justice is charged with ensuring that *those who receive financial assistance* from federal agencies do not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[72]

On August 16, 2000, the protections against discrimination by the federal government broadened even more.[73] On that day President Clinton signed Executive Order 13166, which required each federal agency granting financial assistance, in accordance with Title VI, to publish guidance on how both the agency and the recipient of their funds could provide "meaningful access" to the LEP population.[74] As a result, this executive order both enforced Title VI and "set forth a new language access obligation for all federally funded programs and activities."[75]

A final important protection is found in The Court Interpreters Act of 1978, which requires an interpreter to be appointed in all criminal and civil actions in federal court.[76] The right to an interpreter is broad under this act and applies even to pretrial and grand jury proceedings.[77] However, while certified interpreters are statutorily required in every case, these courts also allow noncertified interpreters to be used if a certified interpreter is not "reasonably available."[78]

With a better understanding of the current state of federal law regarding language access in the United States (and why the need for improvement is so great), this Note will now examine the programs and policies in place in some of the States leading the front on eradicating language barriers.

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[71] Alfisi, *supra* note 4, at 4.

[72] 28 C.F.R. § 42.104(b)(2) (2018).

[73] *Standards*, *supra* note 16, at 26.

[74] Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that there is no private right of action to enforce Title VI disparate impact regulations, and that only the funding agency issuing the disparate impact regulation has the authority to challenge a recipient's actions under this theory of discrimination).

[75] Alfisi, *supra* note 4, at 4. Courts that fail to abide by U.S. civil rights law, which prevent discrimination due to an individual's origin, could lose their federal funding. Racoma, *supra* note 6, at 2.

[76] "The Court Interpreters Act of 1978 requires federal courts to appoint an interpreter in criminal and civil actions brought by the federal government in U.S. District Courts." Standards, *supra* note 16, at 27.

[77] Court Interpreters Act, 28 U.S.C.A. § 1827 (West 1996).

[78] 28 U.S.C. § 1827 (2018); *see also* Alfisi, *supra* note 4, at 2 (discussing the implications of the federal statute).

B. State-by-State Comparison

California

In the past, one of the states most faulted for their failure to provide foreign language interpreters was California.[79] California is the most populous state in the nation, and 20 million of its residents have English-language limitations. In fact, more than 200 languages and dialects are represented.[80] The state's recent leadership on the language access front is, consequently, made even more impressive in light of the fact that a couple of years ago the state's court system faced severe budget cuts that resulted in the closing of dozens of courts.[81] Yet, despite these challenges, Californian courts have managed to implement numerous services and protections for non-English speaking litigants.[82]

The California ACCESS Program is one of the best and most impactful services California is using to reach non-English speaking litigants. ACCESS stands for "Assisting Court Customers with Education and Self-Help Services," and it is a service which provides centralized information to litigants on a variety of small matters in multiple languages.[83] Through this initiative the state aims to "keep[ ] courts open and provid[e] remote access to the judicial system" as well as to ensure Title VI compliance across California State Courts.[84]

Additionally, the state requires each individual court to implement a Language Assistance Plan that the court must update every year.[85]

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[79] Racoma, *supra* note 6.

[80] *States Find Solutions to Language Barriers in Court*, ABA NEWS (July 31, 2015, 8:44 AM), https://www.americanbar.org/news/abanews/aba-news-archives/2015/07/states_find_solution.html [hereinafter *State Solutions*]. "In California, the courts have provided interpreters in approximately 120 languages." *Standards*, *supra* note 16, at 97 n.37. Thus, California is the country's most linguistically diverse state. Racoma, *supra* note 6, at 1.

[81] *State Solutions*, *supra* note 80, at 1.

[82] *See id.*

[83] "[T]he California Courts Self-Help Center provides information on many civil law matters in Chinese, Korean, Spanish, and Vietnamese." *Standards*, *supra* note 16, at 63. Additionally, the Centro de Ayuda de las Cortes de California provides materials in Spanish that help individuals navigate the California court system. *See Centro de Ayuda*, CORTES DE CALIFORNIA, http://www.courts.ca.gov/selfhelp.htm (last visited Sept. 27, 2018). Similar services are available in courts across the country, and"[w]hile some courts provide this information directly, others provide it in collaboration with outside organizations [like Centro de Ayuda]." *Standards*, *supra* note 16, at 63, 63 n.14.

[84] *State Solutions*, *supra* note 80, at 1.

[85] "The benefits of this coordination among court components can be seen [in the language access working group, created by the Administrative Office of the Courts,] that includes representatives from various court units and divisions, including Court Interpreters Unit, Human Resources, Education, Office of the General Counsel, Equal Access Unit, Communications Office, Facilities Division (re: court design and signage), Access and Fairness Advisory Committee, and the Task Force on Self-Represented Litigants. This office

Each year, when evaluating their plan, the courts (1) look at how many people are requesting interpreter services and language assistance, (2) assess what additional services or translated materials need to be provided based on current language needs, (3) seek feedback from the LEP community in their county, and (4) assess the LEP plan's implementation.[86] Ultimately, the purpose of this statewide coordination of a Language Assistance Plan is to encourage courts to be accountable for not only their language access problem areas but also for creating solutions.

California is also participating in several pilot projects.[87] These projects include: (1) creating a process to produce court orders in Spanish,[88] (2) reviewing multiple court forms and orders to simplify their "legalese" and reduce the number of blank fields in favor of standardized checklists (which allows the court to translate the majority of the form in advance to save time and cost),[89] (3) providing multi-lingual videos which describe the services of the clerk's office and welcome litigants to the court,[90] (4) providing legal glossaries in multiple languages that are

developed and updates the AOC's LEP plan, shares information on different projects, and identifies which member department should take the lead on Language Assistance Plan (LAP) implementation and support of the courts." *Standards*, *supra* note 16, at 123."One example of the benefits of statewide coordination of plans can be seen in Minnesota, where, like California, each state court, including the State Court Administrator's Office, is required to annually update and post its LEP Plan on the Judicial Branch's public website." *Id.* at 125. "California is one example of a state with a centralized office that conducts a comprehensive survey to gather data with a large array of data fields including information on ASL and Deaf and Hard of Hearing individuals as well as those who are LEP." *Id.* at 126.

[86] *See* Superior Court of Sacramento County, Limited English Proficiency (LEP) Plan, https://www.saccourt.ca.gov/general/docs/lep-plan.pdf (last visited Nov. 12, 2018).

[87] "Pilot projects in California and Texas are in current development. Resources will be posted at the ABA website as they become available." *Id.* at 82 n.19.

[88] "Courts in California and Texas are participating in pilot projects to create a process for producing court orders in Spanish." *Standards*, *supra* note 16, at 82.

[89] "For example, a project in California is currently reviewing multiple court forms and orders, converting them to plain language, and reducing the number of blank fields requiring a written response by replacing them with standardized checklists." *Id.* at 84 n.28. "One way to do this is to reduce the amount of individualized information in the form and develop checklists of commonly used options. By creating checklists instead of fill-in-the-blank sections, courts can translate the majority of the form in advance, adding the limited individualized information with little additional time and cost." *Id.* at 84.

[90] "An example of this approach is the Superior Court of California, County of Contra Costa, which provides videos describing the services of the clerk's office in 7 languages." *Id.* at 88. "Multi-lingual videos in English, Spanish, Vietnamese, Punjabi, Korean, Tagalog, and Mandarin welcoming litigants to the court and introducing the court's online self-help services." *Id.* at 88 n.44.

accessible on the court's website,[91] and (5) mandating all certified and registered interpreters to complete continuing education requirements.[92]

All of these initiatives have been a priority of the state because, as the Chief Justice of the California Supreme Court, Tani G. Cantil-Sakauye, so aptly put it, "[o]ne of the components of equal access is language access."[93] In fact, U.S. Department of Justice guidelines requires that LEPs have "'meaningful access' to contact points in the judicial system," inside and outside the courtroom.[94] With "more than 300 languages spoken or signed" in the United States, equal justice under the law requires equal accessibility under any one of those 300 languages.[95] With this in mind, California's efforts to recognize and begin bridging these gaps in due process within its justice system are an example the rest of the country would do well to follow.

District of Columbia

Another equally impressive leader in the fight to eradicate language barriers to justice is the nation's capital, the District of Columbia.[96] In 2005, the D.C. Court of Appeals formed the District of Columbia Access to Justice Commission (the Commission) to lobby for city funding on behalf of D.C.'s low-income residents whose civil legal needs were going unmet.[97] Eventually, after discussions with legal and social services providers, the commission had the revolutionary idea to create a shared interpreter bank that would "recruit, train, and keep a registry of interpreters," and the commission successfully secured funding to establish it in 2006.[98] Each

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[91] "For example, court administrator offices in California, Minnesota, and Washington have each developed legal glossaries in multiple languages and made them available on their publicly accessible websites." *Id.* at 88.

[92] "[I]n California all certified and registered interpreters are required to complete 30 hours of continuing education within a two year period." *Standards*, *supra* note 16, at 108.

These continuing education classes also have a Cultural Competency Training Program. *See Cultural Competency Training Template: An Outline for a Half-day Program,* UCSF CENTER FOR HEALTH PROFESSIONALS (2002), https://depts.washington.edu/ccph/pdf_files/Halfdaytemplate-network.pdf.

[93] *State Solutions*, *supra* note 80, at 1.

[94] *Id.*

[95] *Id.*

[96] "A study conducted by the National Center for State Courts reported that the Eleventh Judicial Circuit, the Circuit Court of Miami-Dade County, and the Superior Court of the District of Columbia were all providing protection orders translated into non-English languages." *Standards*, *supra* note 16, at 81. Additionally, D.C. requires an interpreter to be appointed in all civil cases. D.C. Code § 2-1902(a) (2018).

[97] DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION, http://www.dcaccesstojustice.org/about-commission (last visited Aug. 30, 2018).

[98] Alfisi, *supra* note 4, at 3. The bank is currently being managed by a legal service provider that caters to non-English speakers (Ayuda), and has grown to include 16 providers and 21 interpreters, a language line service for brief conversation, and an initial screening

interpreter is screened and required to attend a three-day training session, including ethical training, before being allowed to work for the bank.[99] However, the bank faces challenges in finding enough interpreters, especially for less common languages, and in outreach to legal services providers who are not yet utilizing the bank's services.[100]

The District is uniquely advantaged, compared to the States, because it can rely on the State Department for additional interpreters. However, despite having access to the State Department's resources, and the District's own contract interpreters, there are still occasions where trials are "postponed because no interpreter can be found."[101] Additionally, though the District's Superior Court "prefer[s] to use interpreters who are federally- or U.S. State Department-certified, it will use interpreters who do not fit such criteria if they pass an exam administered by the court."[102] These interpreters, though, will not be allowed to participate in a trial setting and will not earn as much money as certified interpreters.[103] Thus, even though certified interpreters are not always used in the District's courtrooms, the District is still providing incentives that create compelling reasons for uncertified interpreters to seek certification.[104]

Additionally, to address these challenges, the District also utilizes a Language Access Act, which is overseen by the D.C. Language Access Coalition, and focuses on outreach to educate the LEP and NEP population about their rights under the Language Access Act.[105] In 2004, when the Act was created, the District was only the third city in the country to pass a comprehensive language access statute.[106] While there

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and intake system for languages with no interpreter available. Additionally, "[s]ince 2006 the city has provided another $6.8 million for civil legal services, and some of that money has been administered by the D.C. Bar Foundation to fund the interpreter bank." *Id.*

[99] *Id.* at 3. "In the attorney-client relationship, the interpreter is an agent for, responsible to, and is supervised by the attorney, and, therefore, is covered by attorney-client privilege and is subject to all the ethical requirements of the attorney regarding confidentiality and communication." *Id.*

[100] *Id.* at 4.

[101] *Id.* at 2. *See also Office of Language Services,* U.S. DEPT. OF STATE, https://www.state.gov/m/a/ols/index.htm. (last visited Sept. 24, 2018) (describing the U.S. Dept. of State's Office of Language Services' responsibilities including the federal agencies and other groups to whom they provide interpretation and translation services).

[102] Alfisi, *supra* note 4, at 2.

[103] *Id.*

[104] *Id.*; "There also is a District statute mandating that any 'communication impaired' person, including anyone who doesn't speak English, involved in a civil proceeding must be provided with an interpreter, with some stipulations." *Id.* at 4.

[105] *See generally* Language Access Act of 2004, D.C. Code Ann. §§ 2–1901 et seq. (West 2007).

[106] Alfisi, *supra* note 4, at 4. The first two cities were Oakland and San Francisco, respectively; Hawaii, New York, and Philadelphia have since followed suit. *Id.*

is still much work left to be done, two of the District's greatest contributions to the language accessibility conversion are the D.C. Language Access Coalition and the Shared Interpreter Bank. Outreach and adequate resources are going to be the most difficult, yet most crucial, aspect when a state is implementing procedure to protect its citizens' right to due process.

New Mexico

New Mexico is also a longstanding, national leader in non-English services.[107] Boasting a large Mexican-American population, in addition to a variety of Native American tribes, New Mexico has a tradition of protecting due process that dates back to the early 1850s.[108] In their criminal proceedings, arrangements are made for interpreters to be in the courtroom any time there is a litigant who speaks a language other than English.[109] Additionally, the state's protections even go so far as to include protecting jury members from being excluded on the basis of their inability to speak or write English.[110] This is a new frontier in language access for most of the nation, but this dedication comes at a cost. Because training and education are absolutely essential in New Mexico, the expense of implementing training and education on such a large scale is unavoidable.[111]

In addition to statutory protections,[112] New Mexico serves as an example of a state utilizing the power of community partnership and collaboration as a source of added protection. The New Mexico Justice System Interpreter Resource Partnership brought together justice system agencies (such as the New Mexico State Police) and those outside of it (such as local universities and a school of law) to develop additional resources for the most common languages spoken in their surrounding communities.[113] The Partnership's primary achievement was The New

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[107] *State Solutions*, *supra* note 80.

[108] *Id.*

[109] *Id.*

[110] *Id.* For example, the interpreter is allowed to be the "13th man" in the jury room to assist with deliberations. *Id.*

[111] *See id.* In pursuance of this necessity, the majority of New Mexico Magistrate, District, and Metropolitan Courts had fully developed Language Access Plans in place by December 31, 2012 and all state courts had Language Access Plans in place by July 1, 2013. *Language Access in State Courts*, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV. 23 n.64 (Sept. 2016), https://www.justice.gov/crt/file/892036/download.

[112] New Mexico requires interpreters for both civil and criminal cases. N.M. STAT. ANN. § 38-10-3 (LexisNexis 1986). *See also* Standards, *supra* note 16, at 24 n.29.

[113] *See* Standards, *supra* note 16, at 76 n.24. "The Partnership expanded beyond justice system agencies and initial partners (including the New Mexico State Police, Administrative Office of the District Attorney, Public Defenders, and the Children, Youth & Families Department and the University of New Mexico-Los Alamos) to include the University of New

Mexico Center for Language Access (NMCLA), which provides state-of-the-art online interpreter training for bilingual individuals who have an interest in securing language access services for LEPs.[114] Thus, New Mexico serves as another valuable model of reforming a state's court system to ensure due process protection for LEPs.

New York (Ellis Island)

A discussion on language access in the United States would not be complete without also noting the similarities and differences between integration today and the integration of the first wave of immigrants to the United States. In 1905, just over a million immigrants entered the United States, and about four-fifths of them took their first steps on American soil at the port of New York at Ellis Island.[115] The majority of them, about 974,273, came from Europe.[116]

Unlike earlier European arrivals, these immigrants were primarily from Southern and Eastern Europe and differed in their linguistic and religious backgrounds.[117] However, compared to the U.S. foreign-born population today, European immigrants were still "much more likely to be both proficient in English and to speak English at home."[118] Additionally, immigrants today are generally both ethnically and racially different, whereas immigrants from Europe, though ethnically different, were generally considered white.[119]

Although studies do not believe racial disparities are a strong variable affecting the rate of integration into American society today, there is still a credible argument to be made that ethnicity and race correlate with language which can have a significant effect on a person's ability to receive permanent legal status and education (both of which

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Mexico Hospital and School of Law." *Overview of the Collaborative Process*, N.M. CTR. FOR LANGUAGE ACCESS 1 (Oct. 2012), http://www.ncsc.org/~/media/Files/PDF/Conferences%20and%20Events/Language%20Access/NMCLA%20-%20Overview%20of%20the%20Collaborative%20Process.ashx [hereinafter NMCLA].

[114] NMCLA, *supra* note 113, at 1.

[115] P P.T. Cherington, *Ellis Island: Gateway to America for European Immigrants,* 3 COM. AMERICA 1, 12 (1906).

[116] *Id.*

[117] Elijah Alperin & Jeanne Batalova, *European Immigrants in the United States*, MIGRATION POLICY INSTITUTE (Aug. 1, 2018), https://www.migrationpolicy.org/article/european-immigrants-united-states.

[118] *Id.* In 2014, approximately 27 percent of European immigrants (ages 5 and over) were limited English proficient (LEP), compared to 50 percent of all foreign born. Approximately 34 percent of all European immigrants spoke only English at home, versus 16 percent of all immigrants.

[119] Adrienne Farachi, *The Integration of Immigrants into American Society*, CARNEGIE CORP. OF N.Y. (Sept. 23, 2015), https://www.carnegie.org/news/articles/integration-immigrants-american-society/.

have been proven to slow the rate of integration).[120] The United States has successfully integrated various cultures and languages in the past, while still preserving national cultural values; however, it must be mindful of the barriers, education and legal status, that are significantly slowing integration rates today among the LEP population.[121] Thus, in its haste to see the current LEP population integrated just as many LEP populations have been previously, the U.S. court system has often overlooked, perhaps unintentionally, due process protections.[122]

While there are many other states whose protection of LEP and NEP persons could be discussed, most of the legislation or other protections in place bear some semblance to the states whose protections were discussed. The states specifically mentioned in this Note are those with the most creative solutions and/or states most in need of protections due to a large minority population of LEP and NEP persons.

C. International Standards

Kenyan Courts

Kenya, like the United States, is a very heterogeneous society, and more than 42 languages are spoken by its population.[123] Thus, English and Kiswahili were designated as the official languages of courtroom communication in order to more efficiently conduct official communications.[124] Consequently, those who do not understand these designated languages are discriminated against, particularly in the legal setting, even though interpreters are provided for those who need them.[125]

The High Court of Kenya is statutorily required to function in English with interpreters provided as needed. However, whether a Lower Court in Kenya will conduct its proceedings in English or Kiswahili depends on the linguistic competency of the judicial officers.[126] By having the linguistic competency of the judicial officers as the basis for language selection in the Lower Court and by relying on interpreters to be adequate in both the official court language and one of the 41 remaining languages spoken in

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[120] *Id.*

[121] *See id.*

[122] *See id.*

[123] Kenneth Odhiambo et al., *Court Interpreters View of Language Use in Subordinate Courts in Nyanza Province, Kenya*, 3 THEORY & PRAC. IN LANGUAGE STUD. 910, 910 (2013).

[124] High Court (Organization and Administration) Act (2015) Cap. 27 § 34 (Kenya).

[125] Odhiambo, *supra* note 123. Kiswahili, also known as Swahili, "is a unifying African language spoken [to some degree] by nearly 100 percent of the Kenyan population. Even illiterate Kenyans know some basic Swahili." While English, on the other hand, was "inherited from Kenya's British colonial past. English is the language of choice in business, academics, and social set-ups in Kenya." *Kenya Language*, KENYAN INFORMATION GUIDE, http://www.kenya-information-guide.com/kenya-language.html (last visited Sept. 10, 2018).

[126] Odhiambo, *supra* note 123.

Kenya, there will inevitably be "persons of unequal linguistic efficiency."[127] Additionally, because the litigant is being excluded from direct communication because he or she does not speak and understand the language being used, the litigant is denied the right to participate in the trial, and, even with competent representation, injustice is almost guaranteed to occur.[128]

For the majority of Kenyans, the language of the courts is foreign to them, and, therefore, heavy reliance is placed on the competency of the interpreter.[129] This task is made significantly more difficult in Kenyan courts because the interpreter is often translating between the varying levels of English or Kiswahili competency represented by the judicial officers and the language of the litigant, which the interpreter may or may not speak with confidence.[130]

As seen in Kenyan courts, basing language choice on the overall competency of the judicial officers leads to linguistic disparities.[131] Additionally, untrained or undertrained interpreters only serve to further impede the judicial process.[132] While providing interpreters in the courtroom is an important step toward language access, the state of Kenyan courts serves as evidence that the need for qualified interpreter training is an international one.[133] Legal discourse relies mainly on verbal communication; thus, being without sufficient comprehension of the questions asked of you or the comments made about you could impede due process, a life-changing disadvantage, both in Kenya and in the United States.[134]

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[127] *Id.*

[128] *Id.*

[129] *Id.* In many subordinate courts, like the ones in the Nyanza Province, which were selected for a case study conducted by several universities in Kenya, the residents of the district are "functionally bilinguals but with [a] very strong affinity to their mother tongue (Dholuo)." Thus, an interpreter will almost always be needed because these litigants will nearly always choose to communicate in Dholuo. *Id.* at 911.

[130] *See generally id.* Of those surveyed, 20% of the interpreters said they could not communicate proficiently in the language of the court. *Id.* at 913–914.

[131] *See generally id.*

[132] *See id.* at 910. 80% of the interpreters in the Nyanza Province indicated that they had not been trained as interpreters, and even the 10% who were trained only had training in sign-language interpreting, not court interpretation. *Id.* at 913.

[133] *See id.*

[134] *See id.*

European Union—European Court of Justice

The main goal of Article 22 of the Charter of Fundamental Rights of the European Union ("the Charter") is to preserve linguistic diversity.[135] However, under the Charter, linguistic diversity is not recognized as a guaranteed right; instead, the Charter merely commands a respect for diversity and linguistic minorities.[136] With this type of wording, the European Union and its Member States are only required to acknowledge this principle and apply it in their respective areas.[137] In fact, the European Union passed the Charter to "protect" minorities, in part, as a response to France's refusal to constitutionally provide for minority populations.[138]

Though well-intended, the Charter, in practice, is a weak and inadequate document, "[conferring] no tangible rights or protections" where the State chooses not to act.[139] No person in a court of law can seriously rely on the Charter's "strong promotion" of respect for linguistic diversity as a basis for expecting that Member States will comply.[140] Member States must define for themselves the scope of linguistic diversity through legislation, regulations, and administrative agency actions.[141] Despite the non-limited scope of the Charter, there is still a textual argument for the Charter's support of "affirmative action," as affirmed by the European Court of Justice, that the linguistic minority's right to use his or her language in judicial and administrative procedures is a protection for which there may be a "legitimate aim."[142] Thus, whether a courtroom in the European Union will be accessible for linguistic minorities is a determination entrusted to the Member States, and, consequently, will be unstable and unpredictable because the determination inevitably depends on the differing policy interests to be balanced..[143]

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[135] Iñigo Urrutia, *Approach of the European Court of Justice on the Accommodation of the European Language Diversity in the Internal Market: Overcoming Language Barriers or Fostering Linguistic Diversity?*, 18 COLUM. J. OF EUR. L. 243, 248 (2012); Charter of Fundamental Rights of the European Union art. 22, 2000 O.J. C 364/01, at 13 [hereinafter *Charter*].

[136] *See Charter*, *supra* note, 135 at 13.

[137] *See Charter*, *supra* note 135, at 249.

[138] *Id.* at 249. *See* Mark Bell, *The Right to Equality and Non-Discrimination*, *in* ECON. & SOC. RTS. UNDER THE EU CHARTER OF FUNDAMENTAL RTS.: A LEGAL PERSP. 91, 107–08 (Tamara K. Hervey & Jeff Kenner eds., 2003).

[139] Urrutia, *supra* note 135, at 249.

[140] *Id.*

[141] "The Charter simply entrusts European Institutions with the task of balancing the different policy interests at play." *Id.*

[142] *Id.* at 250. *See* Bell, *supra* note 138, at 108.

[143] Urrutia, *supra* note 135, at 249.

III. SOLUTION/PROPOSAL

A. Reimagining Tried Solutions That Failed

During the process leading up to constitutional reform in Kenya in 2010, the constitutionality of the Islamic Kadhis' Courts was a central tenet of the debate.[144] With the state's refined commitment to secularism and religious equality, the Kenya High Court determined that Kadhis Courts were not constitutional, and, consequently, could no longer be utilized by the Muslim community.[145] Up until that point, Kadhis courts had functioned as separate courts limited to questions of Muslim law and practice where both parties were Muslim.[146] Thus, the ruling by the Kenya High Court was not just important for its constitutional amending implications, but also for its impact on the symbolic role Kadhis courts played in representing "political belonging in spite of [Muslims'] marginalization in Kenyan society and politics."[147]

Kenyan Muslims are a religious minority in Africa;[148] thus, the existence of Kadhis courts were not only important as a mechanism of due process for a culturally distinct religious group, but also as a means of integration for a historically excluded community, and as a symbol of the state's acceptance of Islamic practice as compatible with political membership in African society.[149] Kadhis courts were never meant to take away from the authority of secular courts. In fact, state surveillance of the court was preserved by allowing supervision of administrative operations and through appellate review jurisdiction being held by the Kenyan High Court.[150] Though Kadhis courts ultimately failed the "due process test," valuable lessons regarding their legal and cultural implications can be

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[144] Rachel Vanderpoel, *Religious Equality in Kenya? Adjudicating the Constitutionality of Kenya's Kadhis' Courts*, REGULATING RELIGION E-J. 1 (August 2012), http://religionanddiversity.ca/media/uploads/rachel_vanderpoel_-_regulating_religion.pdf.

[145] *Id.* The High Court of Kenya sits above magistrates and Kadhis' Courts (which are at the bottom of the judicial hierarchy), but underneath the Court of Appeals and the Supreme Court. *Kenya Court Hierarchy*, HIERARCHY STRUCTURE, https://www.hierarchystructure.com/kenya-court-hierarchy/ (last visited Sept. 27, 2018).

[146] Constitution art. 66 § 2(b)(5) (2008) (Kenya).

[147] Vanderpoel, *supra* note 144, at 3.

[148] Kenyan Muslims make up an estimated 10% of the population. *Id.* at 4.

[149] *Id.*

[150] Before being declared unconstitutional, there were 15 Kadhis' Courts in operation throughout Kenya. *Id.* State surveillance over the courts took "a variety of forms: qāḍīs (Kadhis) must comply with the edicts concerning the administrative operation of the courts; their work [was] periodically reviewed; and any appeals of their decision [were] heard in the Kenya High Court rather than in an Islamic Court of Appeal" *Id.*

gleaned and applied to the American court system based on the rule of law.[151]

Like the Kahdis courts of Kenya, which were separate courts limited to questions of Muslim law and practices, the states could consider reconstructing one or more of their trial level courts into "language courts," certifying them to specialize in parties who were not native English speakers and appoint judges who have been trained to work with LEP populations.[152] The training for judges and court officials working this language court would be modeled after the certification training given to interpreters, and states could consider creating some incentive for judges and court officials who agree to go through this language court training or who agree to go through interpreter certification training.[153] Further, states could conduct a jurisdiction-by-jurisdiction analysis of the languages most commonly spoken, besides English, in order to better determine the specific LEP populations the language courts, and the training, should seek to assist.[154]

The purpose of these language courts would be to recognize, as the Kadhis courts did, the need for symbolic inclusion of historically excluded minority populations.[155] These language courts would also serve as a source of integration into the American court system for LEP persons byallowing them to be introduced to the workings of a courtroom and the legal process in their own language, and, thereby, ensuring a greater likelihood of due process protection in the future.[156] Further, LEP persons would gain an opportunity to see the compatibility of their language and culture with the American ideals of justice.[157] Just as the Kadhis courts were never meant to take away from the authority of secular courts, these language courts would not take away from the state court's superiority because they would follow state and Constitutional law as well as adhere to the Article III appellate jurisdiction as established by Congress.[158]

B. State Constitutional Right to Language

"Although federal law and international treaties focus on anti-discrimination and adequate access to education and language, a stronger right to access to education and language can be found in state law, which is underpinned by corresponding state constitutions' guarantees of

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[151] *See* Vanderpoel, *supra* note 144, at 1.

[152] *Id.* at 2, 4.

[153] *See generally* Alfisi, *supra* note 4 (referencing the certification training that is required for court interpreters).

[154] *See* Standards, *supra* note 16, at 24, 42, 56, 70, 72.

[155] Vanderpoel, *supra* note 144, at 4.

[156] *See generally* Cultural Competence, *supra* note 59, at 40.

[157] *See generally id.*

[158] Vanderpoel, *supra* note 144, at 4, 6.

education." A fundamental right to public education can be found in most state constitutions, and this fundamental right carries with it an implicit guarantee to make education accessible to all students (because information in school cannot possibly be conveyed without language).[159] Thus, recognizing the implicit fundamental right to language granted through state constitutional protections can be an effective way of enforcing change in state courts,[160] specifically by requiring state courtrooms to provide interpreters free of charge.

1. "States Friendly To Language"

A "state friendly to language" for the purposes of this Note means that in addition to the state managing (or making progress to manage) its court system in compliance with Title VI and Executive Order 13166, the state has gone one step further by recognizing that the right to language access in federal and state law requires interpreters to be provided without charge. Below are a few examples of states who, in collaboration with the Department of Justice (DOJ), worked to ensure meaningful access to the court's language access program in this specific way.[161]

For example, in an Arizona Superior Court, the DOJ worked to improve the court's language access program in various ways, most notably by "clarifying that all LEP parties, witnesses, and anyone with a substantial interest in a matter [would] be provided interpreter services in all court proceedings free of charge regardless of case type, court user income, or language spoken." Consequently, Arizona is a "state friendly to language."[162] Further, in Rhode Island, after numerous complaints regarding language access, the DOJ "negotiated the provisions of an executive order issued by the Rhode Island Chief Justice in 2012, which mandated comprehensive and free language assistance to LEP persons in all court proceedings and operations."[163] In 2016, after several other

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[159] *Id.*

[160] *See id.*

[161] U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, LANGUAGE ACCESS IN STATE COURTS, at 9 (2009) [hereinafter LANGUAGE ACCESS]. Additional examples include: Nebraska passed legislation making clear that LEP individuals would not be charged for court interpretation. In 2014, the Superior Court of the District of Columbia issued an order articulating its policy that it would "provide interpreting services to all hearing-impaired and non-English and limited English proficient persons participating in court proceedings involving all case types in all divisions of the Superior Court, and to pay the cost for such services, unless such services are waived by the participant. *Id.* at 15.

[162] *Id.* at 9 ("The Division has engaged in similar efforts in response to complaints in places such as Hawai'i, Kentucky, New Jersey, and King County, Washington."). *See also* Press Release, Dep't Just., Department of Justice and Mohave County, Arizona, Superior Court Work to Ensure Equal Access for Non-English Speakers (May 14, 2015).

[163] LANGUAGE ACCESS, *supra* note 161, at 10.

improvements were successfully implemented, the DOJ closed the Rhode Island case in recognition of Rhode Island's progress toward becoming a "state friendly to language."[164]

Finally, in 2012, the DOJ received complaints about various problems with the Hawaii State Judiciary's provision of language access services, one of which was "the absence of a clear court policy on the provision of high quality, timely, language assistance services free of charge to LEP individuals in court proceedings and operations."[165] Immediately, the Hawai'i Judiciary was committed to addressing these concerns.[166] Over the course of about a year, staff from the Hawai'i State Judiciary Office on Equality and Access to the Courts worked cooperatively with the DOJ to make a number of improvements to interpreter and translation services provided in the courts, among which was the "[issuance of] a clear[er] policy stating that the courts will provide all LEP individuals with free, competent court interpretation in all court proceedings, and that language assistance services will be provided in court operations free of charge," making Hawaii another state proud of its status as a "state friendly to language."[167]

2. "States Not Friendly To Language"

Despite the legal requirements that are afforded LEP persons at the state and federal level, many state courts are avoiding their responsibilities.[168] One survey examined interpretation services in 35 states and found that "80% fail to guarantee that the courts will pay for the interpreters they provide, with the result that many people who need interpreters do not in fact receive them," often in violation of federal law.[169] One solution to these failings was a Consortium for State Court Interpreter Certification, and at least 40 states have joined.[170] The remaining states include Arizona, Kansas, Louisiana, Montana, North Dakota, Oklahoma, Rhode Island, South Dakota, and Wyoming, but many of these states are improving (see Arizona and Rhode Island above).[171] However, regardless of the Consortium's existence, there are still at least

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[164] Press Release, Dep't of Justice, Justice Department Closes Case after Rhode Island Judiciary Reforms Provide Equal Access for Individuals with Limited English Proficiency (Apr. 21, 2016).

[165] LANGUAGE ACCESS, *supra* note 161, at 11.

[166] *Id.*

[167] *Id.* at 11–12.

[168] Laura Abel, *Language Access in State Courts* 1 (BRENNAN CTR. JUST. N.Y.U., 2009), http://www.brennancenter.org/sites/default/files/legacy/Justice/LanguageAccessinStateCourts.pdf.

[169] *Id.*

[170] *Id.* at 2.

[171] *Standards*, *supra* note 16, at 122 n.7.

28 "states who are not friendly to language" by failing to guarantee the language access provisions they have promised.[172]

It is important that a court provide free interpretive services. To do otherwise would impose an unconstitutional burden on non-English litigants, that is not imposed on English-speaking litigants, and would encourage LEP individuals to either struggle through court appearances without the ability to communicate clearly with the court or to refrain from participation in the justice system altogether.[173] Both of these options adversely affect the interest of everyone involved because it "inhibits not only the LEP person's ability to participate in the proceedings, but also the ability of the judge, jurors, and other participants to . . . communicate with the LEP person"[174] Without free interpretive services, justice is thwarted, whether the LEP person has a direct interest in the outcome of the case or not.[175] Thus, the imposition of fees is contrary to the court's interest in legitimate adjudication.[176] Rather than charging for language assistance services, state courts may address interpreter costs by "rais[ing] fees across the board, seek[ing] additional external funding, or treat[ing] interpreter costs as general operating costs," all of which affect individuals equally, regardless of the language they speak.[177]

C. Shared Interpreter Banks and Language Access Coalitions—The D.C. Approach

The idea for a Shared Interpreter Bank originated in D.C. and was initially explained in the previous section, State-by-State Comparisons. The success of this recruiting and training tool in the District suggests that there is potential for successful application in other parts of the country as well. Allowing a registry to be maintained with the help of legal service providers is an excellent solution to the shortage of interpreters, as well as the accompanying judicial resources required to recruit bilingual persons in the effort to fill the gaps. In addition to creating a Shared Interpreter Bank, states would also need to consider implementing a Language Access Coalition to promote outreach, particularly in the introductory phase of the bank, and to advocate for

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[172] *See* Abel, *supra* note 168 (stating that 80% of 35 states do not guarantee payment of interpreters).

[173] LANGUAGE ACCESS, *supra* note 161, at 7.

[174] *Id.* at 8.

[175] *Id.* at 7 ("An LEP person who must pay for an interpreter to participate in proceedings bears a greater financial burden to pursue a case than individuals who are not LEP").

[176] LANGUAGE ACCESS, *supra* note 161, at 8.

[177] *Id.*

statutes and funding to protect the right to language access. With the benefit of a "state" that has already paved the way, emulating this approach would be a reliable and manageable means of preventing the loss of due process to LEP persons within a state.

CONCLUSION

America does not have a national language, and nothing in the Constitution, or federal law, expressly values English more than any other language.[178] While, in practice, the courts and education system use English, legally, there are no grounds for denying an LEP or NEP person translation services.[179] So long as there is a national shortage of qualified interpreters, for many, the constitutional right to a fair trial will be less than guaranteed.[180] Further, these poorly interpreted cases, where challenged, will be subject to repeated appeals and clog the American court system.[181]

While many new laws, committees, interest groups, and legal aid service providers are working to provide more protections for LEP and NEP persons, there seem to still be many gaps in court translator services, both at the state and federal levels.[182] This is not acceptable because even if just one person fails to receive due process the foundational principles of this country are in jeopardy. Language access services do not give an advantage to LEP persons; rather, they are the means by which LEP persons receive an equal footing in the courtroom.[183] It will take time to ensure competent interpretation services are provided in all court proceedings,[184] but every state, as well as the federal government, is responsible for continuing to make every effort possible to ensure their citizens are given a fair trial. Ultimately, until the voice of justice can be heard and understood by all, the service just isn't good enough.

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[178] *Washington: State Court Interpreter Grant Program Act Introduced*, TRANSLATOR'S CAFE (June 17, 2008), https://thetranslatorscafe.wordpress.com/2008/06/17/washington-state-court-interpreter-grant-program-act-introduced/ ("Though English has been declared the official language of 30 states (with an additional ten state legislatures currently considering it), every state court system must nevertheless employ translators. In other words, the presence of an official state language changes very little.").

[179] *Id.*

[180] *See id.* "[T]here [has] always been a lack of qualified foreign language interpreters. It's just that it [has become] more prominent in recent years because of the continuous arrival of immigrant, the 9/11 events and the Courts Language Access Initiative of the Department of Justice." Racoma, *supra* note 6.

[181] TRANSLATOR'S CAFE, *supra* note 178.

[182] *See generally* Alfisi, *supra* note 4.

[183] *See generally Standards*, *supra* note 16, at 13.

[184] *See generally Standards*, *supra* note 16, at 38.