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AMADOU DIALLO AND THE "FOREIGNER" MEME: INTERPRETING THE APPLICATION OF FEDERAL COURT INTERPRETER LAWS

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I. INTRODUCTION

A. *Amadou Diallo and the "Foreigner" Meme*

This is an Article about a particular meme[1] and its effect on a certain aspect of the federal criminal justice system. A meme is anything passed from person to person generally by imitation or copying.[2] It is a behavior, idea, or attitude adopted from relatives and strangers and then transmitted to other relatives and strangers until it permeates the dominant culture, if not the society as a whole.[3] In the following pages, I examine the meme of "foreigner" as reflected in the accessibility of court-appointed interpreters to non-primarily-English-speaking defendants in federal criminal proceedings. However, I initially focus on the brief life and shocking death of Amadou Diallo to illustrate how extensively the "foreigner" meme governs intercultural interaction in this country.[4] I then turn to the federal court interpreter statutes and cases to analyze the extent to which the "foreigner" meme influences the application of these federal laws.[5]

For the dominant culture, "foreigner" pejoratively refers to any non-native-born American.[6] However, the meme communicates more than nativism, or the dominant culture's wish to wall-off the United States from outsiders and to force current immigrants either to assimilate or leave.[7]

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1. Rhymes with "theme." *See* NEW SHORTER OXFORD ENGLISH DICTIONARY 1740 (1993).

2. "An element of culture or system of behavior that may be considered to be passed from one individual to another by non-genetic means, esp. imitation." *Id. See generally* SUSAN J. BLACKMORE, THE MEME MACHINE (1999); RICHARD BRODIE, VIRUSES OF THE MIND: THE NEW SCIENCE OF THE MEME (1996); AARON LYNCH, THOUGHT CONTAGION: HOW BELIEF SPREADS THROUGH SOCIETY (1996).

3. "Culture" is "synonymous with 'a nation,' or 'a people'—that is, an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history." WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 18 (1995). I use "dominant culture" to describe white native-born Americans.

4. Around 1:00 a.m. on Feb. 4, 1999, four white plainclothes police officers killed Amadou Diallo, a recent Guinean immigrant, while he was standing in the vestibule of his apartment in New York City. At the time, the officers were reportedly searching for a rape suspect in the area. The officers fired 41 rounds at Mr. Diallo because he supposedly seemed to fit the generic description of the rapist and to act suspiciously. Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed,* N.Y. TIMES, Feb. 5, 1999, at A1. Mr. Diallo also reportedly appeared to reach for a weapon, although only a pager and wallet were later found on his body. *Id.*

5. With the exception of *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), which influenced Congress and the federal judiciary, this Article covers only federal criminal cases. *See* discussion *infra* Parts II.B., III.A.

6. "Foreigner" in this Article encompasses all of the vicious and degrading expressions the dominant culture has historically inflicted upon subordinate or minority cultures in this country.

7. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity,* 64 N.C. L. REV. 303, 311 (1986). Nativism has been defined as:

> [I]ntense opposition to an internal minority on the grounds of its foreign (i.e. "un-

"Foreigner" also conveys the dominant culture's belief that the immigrants, themselves, induce any animosity they suffer by not abandoning their national or ethnic identity in favor of dominant culture norms.[8] To the extent immigrants fail to "pass" as part of the dominant culture, they are to be vilified as challenging its self-identity and fundamental values.[9] The

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> American") connections. Specific nativistic antagonisms may, and do, vary widely in response to the changing character of minority irritants and the shifting conditions of the day; but through each separate hostility runs the connecting, energizing force of modern nationalism. While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life.

JOHN HIGHAM, STRANGERS IN THE LAND 4 (2d ed. 1988).

8.

> The metaphor of "melting" popular from the early nineteenth century up to the 1930's, implied that both the "old stock" and more recent immigrants would contribute to a new American character and culture. The term, however, often served as an integrationist cloak for public and private programs aimed at forcing new Americans and their children to conform to the attitudes and behavior of their British-American predecessors. This "Anglo conformity" came to dominate the idea of assimilation and thus to redefine the qualifications for being received in our Alma Mater's lap.

Karst, *supra* note 7, at 312. Before the 1960's, the dominant culture expected complete assimilation or the "Anglo-conformity" model of immigration, even refusing entry to those individuals seen as "unassimilable" due to race or ethnicity. *See* KYMLICKA, *supra* note 3, at 14. At that time, "[a]ssimilation was seen as essential for political stability and was further rationalized through ethnocentric denigration of other cultures." *Id.* Beginning in the 1970s America's immigration policy changed. Immigrants were encouraged to maintain their national or ethnic identities. *Id.* at 13, 61-62. This change was due in part to the repeal of the national origins quota act in 1965. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 344 (1992). Later, large numbers of undocumented immigrants from Latin America were legalized during periods of amnesty in 1987 and 1988. *Id.* Some immigrants responded by demanding greater political, social, and economic recognition and participation within society as national or ethnic groups. KYMLICKA, *supra* note 3, at 13, 61-62. Their response led to a dominant culture backlash. "Liberals argued that immigrants had no legitimate basis to claim such national rights. After all, they had come voluntarily, knowing that integration was expected of them. When they chose to leave their culture and come to America, they voluntarily relinquished their national membership, and the national rights which go with it." *Id.* at 62. Dominant culture conservatives reacted more harshly. In the 1980s, they generated a renaissance of the English-only movement, this time targeting the newest influx of Hispanic and Southeast Asian immigrants. *See generally* Laura Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. REV. 17, 23-25 (1990); Leslie V. Dery, *Disinterring the "Good" and "Bad Immigrant": A Deconstruction of the State Court Interpreter Laws for Non-English-Speaking Criminal Defendants*, 45 KAN. L. REV. 837, 838-39 (1997); Karst, *supra* note 7, at 351; Perea, *supra*, at 340-45; Michael W. Valente, Comment, *One Nation Divisible By Language: An Analysis of Official English Laws in the Wake of* Yniguez v. Arizonans for Official English, 8 SETON HALL CONST. L.J. 205, 207-11 (1997).

9. *See* Karst, *supra* note 7, at 313-15.

meme's message is quite clear: to belong in America,[10] immigrants must conform or face stigmatization, exclusion, and even violence from the dominant culture.[11]

The extent to which immigrants assimilate, if at all, varies according to their individual needs and experiences. Many immigrants do aspire to become part of the American "melting pot"[12] but find it daunting because of differences in beliefs, customs, language, education, and job skills. Assimilation is indeed a complicated process culminating with a change of self-identity, which usually occurs only in succeeding generations.[13] Other immigrants resist assimilating for various reasons, preferring to retain their national or ethnic identity while making the United States their new home.[14] Some want to insulate themselves completely from the

10. "America" in this Article is synonymous with the United States.

11. *See* Karst, *supra* note 7, at 303-25. The dominant culture's behavior has been described as the projection of an internalized "negative identity," which its individual members constantly strive to keep in check to satisfy the idealized self-image of their group:

> To grow up in a culture is to learn that some ways of acting or talking or thinking are right and other ways are wrong. The very sense of one's identity is connected intimately with this learning; a young girl, in order to appreciate the idea of correct behavior must understand the possibility of behaving incorrectly and recognize that possibility in herself. Thus, each of us carries around inside the image of . . . a "negative identity," which must be repressed if we are to live up to the expectations of our cultural groups. Outsiders — those who belong to other groups with other ways of behaving — make us uncomfortable partly because our own acculturation has not prepared us to understand their behavior and partly because they serve so handily as screens on which we can project our own negative identities. Our psychic response is predictable: we want to repress the outsiders' incorrect foreign ways.

Id. at 309 (citations omitted).

12. The reported origin and definition of the term "melting pot" varies. *See* Karst, *supra* note 7, at 312. "The term 'melting pot' is also somewhat misleading. It referred primarily to 'the biological fusing of various (white) ethnic groups through intermarriage, more than through cultural practices.'" *See* KYMLICKA, *supra* note 3, at 197.

13. *See* Karst, *supra* note 7, at 332.

14. For example, not all "Hispanics" emigrate from their respective countries for the same reason:

> The Cuban refugees living in Miami see themselves as exiles, not immigrants. When they arrived in the United States, they assumed that their return to Cuba was imminent. The American government encouraged this assumption, partly for political reasons during the Cold War. As a result, Cuban exiles have not had the incentive to integrate, and the larger society has not encouraged them to do so. . . . Similarly, Mexicans working illegally in the United States are always one step away from leaving the country. Since they are not able to apply for citizenship, and face a serious task of being deported at any time, they too have not had the incentive or encouragement to integrate. Moreover, they lack access to the language instruction offered immigrants. If we set aside these special cases, and

dominant culture, anticipating a temporary stay in this country. These last immigrants intend to remain just long enough to improve their education or finances or until the civil unrest or repressive government in their country of origin no longer exists.[15] Like other immigrants, arriving Africans are diverse in their desire or ability to "become Americanized." Many come to the United States to escape the internal strife or poverty of their respective countries.[16] Some may find themselves in fairly menial jobs here, working as taxi drivers or street peddlers to earn money to send to their families, before returning themselves.[17] Whether these immigrants eventually stay in America for two years or twenty, they proclaim Africa as their home.[18] For them, the United States is a "utilitarian stop" rather than a permanent residence.[19]

On the other hand, there are many middle-class, well-educated Africans who are seeking better educational and employment opportunities in the United States.[20] Most of these immigrants, like Amadou Diallo, are young men. At the time of his death, the twenty-two year old Guinean had been in America for two and one-half years.[21] Apparently, he came to New York for a college education, possible entrepreneurship, and "adventure."[22] To

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> look instead at Hispanic immigrants who come to the United States with the intention to stay and become citizens, the evidence suggests that they, as much as any other immigrants, are committed to learning English and participating in the mainstream society. Indeed, among Latino immigrants, "assimilation to the English group occurs more rapidly now than it did one hundred years ago."

KYMILKA, *supra* note 3, at 16 (citation omitted).

15. *Id.*

16. Amy Waldman, *In a Quest for Peace and Opportunity, West Africans Find Anger,* N.Y. TIMES, Feb. 6, 1999, at B6.

17. *See* Amy Waldman, *Shooting in the Bronx: The Immigrants; Killing Heightens the Unease Felt by Africans in New York,* N.Y. TIMES, Feb. 14, 1999, at A1.

18. *Id.*

19. *Id.*

20.

> "The reason most Africans leave to come here is not different from the reasons any European leaves for—for education, upward mobility, to maintain their family, to star as an entrepreneur," said Sidique Abubakarr Wai, the president of the United African Congress, one of the many groups that the African diaspora has created in the United States.

Id.

21. Amadou Diallo had emigrated from Guinea in West Africa. Amy Waldman, *A Hard Worker With a Gentle Smile,* N.Y. TIMES, Feb. 5, 1999, at B5. Although Guinea is not involved in civil war, it is an impoverished country "where literacy hovers at 80 percent and avenues for advancement are few." Amy Waldman, *In a Quest for Peace and Opportunity, West Africans Find Anger,* N.Y. TIMES, Feb. 6, 1999, at B6.

22. Ginger Thompson & Garry Pierre-Pierre, *Portrait of Slain Immigrant: Big Dreams and a Big Heart,* N.Y. TIMES, Feb. 12, 1999, at A1.

support himself, Mr. Diallo was a street peddler in the Bronx.[23] If he had emigrated from an English-speaking country, he could have qualified to work for the City of New York.[24] It is unclear how long Mr. Diallo intended to stay or whether he hoped to assimilate, but increasingly more young African men are choosing to remain here, yet opting to live apart from both the dominant culture and African-Americans.[25] "Some Africans simply fear that mixing with the melting pot that is in New York will mean subjugating their culture."[26] Others try to acculturate as much as they can and begin to identify with the concerns of African-Americans.[27]

Whether or not Amadou Diallo had planned to settle here and to integrate, he was an immigrant, and consistent with the "foreigner" meme, the mainstream media considered him to be somehow blameworthy for his shooting.[28] Significant were published accounts that Mr. Diallo was not proficient in English and that his lack of proficiency explained the officers' "panic response."[29] The *New York Times* initially quoted friends and family as saying that Mr. Diallo's "English was good but he spoke slowly, with a stutter."[30] Thereafter, without explanation, the *Times* related that he "spoke halting English."[31] Finally, the paper quoted a police union lawyer who claimed that "Mr. Diallo appeared to have a problem understanding and responding to the officers' shouted commands."[32] Although the *Times* added that Mr. Diallo's friends had refuted this claim,[33] the suggestion to

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23. *Id.*

24. *See id.*

25. *See* Waldman, *supra* note 17, at A1.

26. *Id.*

27. *Id.*

28. Published reports were based on information obtained exclusively from police investigators and the suspect officers' attorneys. There were apparently no civilian eyewitnesses and the officers involved declined to comment. *See, e.g., Holding Fire*, N.Y. TIMES, Feb. 9, 1999, at A22; Kevin Flynn, *Police Establish Location of the Officers Involved in Shooting*, N.Y. TIMES, Feb. 12, 1999, at B8; Kevin Flynn, *Shooting in the Bronx: The Overview*; *Revisiting a Killing: Many Details but a Mystery Remains*, N.Y. TIMES, Feb. 14, 1999, at A37.

29. Patricia Williams, *Usual Suspects; New York, New York Police Shoot African Man*, THE NATION, Mar. 8, 1999, at 10. "Many white citizens believe there had to be some causal trigger for the burst of gunfire. A 'panic response' is most frequently cited as the 'rational' explanation." *Id.*

30. Amy Waldman, *A Hard Worker With a Gentle Smile,* N.Y. TIMES, Feb. 5, 1999, at B5.

31. *Holding Fire,* N.Y. TIMES, Feb. 9, 1999, at A22.

32. Flynn, *supra* note 28, at A37; *see also* Somini Sengupta, *Far From Home, Alone*, N.Y. TIMES, Mar. 14, 1999, at A1 (describing troubles faced by young immigrant children lacking education and English skills).

33. Flynn, *supra* note 28, at A37. "Mr. Diallo's friends have disputed the notion that he had a problem understanding English." *Id.* On March 26, the *Times* again relied on the statements of Stephen Worth, lawyer for the Patrolmen's Benevolent Association, in reporting:

> It was unclear from the lawyer's account at what point in the confrontation the officers drew their weapons. They asked Mr. Diallo to do something, the lawyer said, though he did not say what it was. There may have been a language problem.

the contrary was strong enough for one legal commentator later to assert: "[Amadou] Diallo's limited English surely could have been the source of some awful misunderstanding."[34] In other words, his apparent inability to speak and understand English "as a native-born American would," must have helped trigger the barrage of police gunfire.

Such reporting by and for the dominant culture left no doubt that as a "foreigner" Mr. Diallo was at least partially "at fault" for his own death. No mainstream media accounts asked if Mr. Diallo had been given the chance to respond to police or if his response was heard or ignored by officers. Ironically, police insistence that Mr. Diallo "acted suspiciously" could mean that his conduct matched that of an innocent person, as opposed to that of the criminal the officers thought they were encountering. After all, if Mr. Diallo did seem non-responsive, unpredictable, confused and afraid, he was behaving as anyone would when suddenly accosted at 1:00 a.m. by four armed strangers, yelling orders and insisting they were (undercover) police. English language fluency would have altered neither Mr. Diallo's nor the officers' actions in these circumstances.[35]

At this point, it would be disingenuous for me to disregard the institutional racism that motivated the four white officers and resulted in media outrage. Amadou Diallo was a black man. For New York's African-

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> Friends of Mr. Diallo said he spoke English, but slowly and with a stutter. In any case, Mr. Diallo did not comply, the lawyer said.

Robert D. McFadden, *Four Officers Indicted for Murder in Killing of Diallo, Lawyer Says*, N.Y. TIMES, Mar. 26, 1999, at A1.

34. Williams, *supra* note 29, at 10.

35. *But see* Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 195-96 (1997).

> Some defendants, victims, or witnesses from different cultures may be misunderstood, or their actions, appearance, or demeanor misinterpreted by police, parties, jurors, or the court itself. This is because social and behavioral norms of persons from a foreign country may appear suspect because they are not within the common experience of native-born Americans. Excessive and exaggerated hand gestures, for example, may be incorrectly interpreted as a sign of threatening behavior or emotional instability rather than behavior learned as a child in a foreign culture to accentuate a point. Prejudicial misimpressions may result because a defendant fails to make eye contact with the police or jury, speaks in a voice unnaturally loud or soft, or appears without emotion. These and other forms of non-verbal communication may be misinterpreted because of cultural differences. An understanding of cultural norms may be relevant and necessary to the accurate evaluation of a defendant's demeanor and behavior in interactions with the police, in assessing witness credibility, as well as in determining the level of culpability and contrition of a defendant for sentencing purposes.

Id.

Americans and Hispanics, his killing was "the latest tragic manifestation of the ruthless and humiliating treatment of ethnic minorities that is part of the daily routine of so many cops in this city."[36] *New York Times* editorials endorsed the widespread feeling among ethnic minorities that, unlike the dominant culture, they "live in a police state."[37] The paper maintained that racial profiling and police brutality strip minority populations of their constitutional rights[38] and that such misconduct is tolerated, if not condoned, by the dominant culture.[39] In other words, when the mainstream

36. Bob Herbert, *In America; A Brewing Storm*, N.Y. TIMES, Feb. 11, 1999, at A33.

37. David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1; *see also* Frank Bruni, *Ideas and Trends: Crimes of the War on Crime; Behind Police Brutality: Public Assent*, N.Y. TIMES, Feb. 21, 1999, at D1; Jodi Wilgoren & Ginger Thompson, *After Shooting, an Eroding Trust in the Police*, N.Y. TIMES, Feb. 19, 1999, at A1.

> In the aftermath of the shooting death of Amadou Diallo, fewer than a quarter of all New Yorkers believe that the police treat blacks and whites evenly, with blacks in particular viewing the police with fear and distrust, according to a New York Times poll. Nearly 9 out of 10 black residents said they thought the police often engaged in brutality against blacks, and almost two-thirds said police brutality against members of minority groups is widespread.

Dan Barry & Marjorie Connelly, *Poll in New York Finds Many Think Police Are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1.

38. Racial profiling is "the practice of targeting citizens for police encounters on the basis of race." David Cole, *The Color of Justice: Courts Are Protecting, Rather than Helping to End, Racial Profiling by Police*, THE NATION, Oct. 11, 1999, at 12. Both racial profiling and police brutality violate an individual's Fourth (search and seizure), Fifth (due process), and Fourteenth (due process, equal protection) Amendment rights. Indeed, the U.S. Commission on Civil Rights found on June 16, 2000 "that the New York Police Department widely uses improper racial profiling to stop and question blacks and Latinos, contributing to turbulent racial tensions that can escalate into 'tragic and unnecessary' events like the police shooting of unarmed Amadou Diallo." *U.S. Rights Panel says NYPD Uses Racial Profiling*, L.A. TIMES, June 17, 2000, at A1.

39. "I don't believe that most white New Yorkers condone police misconduct, but there have not been nearly enough white voices raised against the atrocities committed by the police. This unfortunate silence is, indeed, a form of encouragement." Herbert, *supra* note 36, at A33.

> As James Alan Fox, Dean of the College of Criminal Justice at Northeastern University, notes, these officers have been told that they form the front line in a "war" on crime and a "war" on drugs, that they have been enlisted in special "operations" and drafted for bold new "offensives." "We use all of these paramilitary terms," Mr. Fox said, "and we have promoted somewhat of a siege mentality among police: The enemy is out there, and there are more of them than we thought." Mr. Fox paused, sighed and added, "When you have this sort of mentality, excessive brutality and improper actions are more likely to occur." Mr. Fox's comments root out what is indisputably a dirty little secret embedded in the public angst over police brutality: many Americans have come not only to tolerate a degree of it from their police officers but also, in ways subtle and unsubtle, to encourage it.

media saw Amadou Diallo solely as a black man (rather than as a Guinean immigrant) he became a victim. The "foreigner" meme did not apply. Accordingly, Mr. Diallo was not responsible for his own death. So, despite its extensive coverage on racial profiling, exposing the discriminatory practice in several states, the mainstream media adheres to the meme in covering an immigrant.[40] This dichotomous view of what can be the same person generates a kind of schizophrenic public image: Amadou Diallo was both guilty and innocent in provoking law enforcement. Unfortunately, the lingering imprint of his image is probably one of guilt; the officers' racial profiling led to their initial approach, but the "foreigner's" language problems caused his own death. In other words, the dominant culture media generated the impression that law enforcement infringed Mr. Diallo's constitutional rights in confronting him, but shooting him was legally excusable under the circumstances.[41]

B. *The "Foreigner" Meme and Federal Court Interpreter Access*

Another irony is that although Mr. Diallo's English knowledge was supposedly "bad" enough to imperil his life at the hands of police, it may have been "too good" to imperil his right to counsel and due process in the courtroom to give him access to interpreter services.[42] If Amadou Diallo had not been killed, but instead had been arrested and then tried for committing a federal crime, he would not have been automatically entitled to an interpreter, even on demand.[43] The availability of court interpreters in federal criminal proceedings is at the discretion of the trial judge, who controls every aspect of their appointment and use.[44] Federal statutes and

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Bruni, *supra* note 37, at D1.

40. *See* Cole, *supra* note 38, at 12. "The press has covered the subject [of racial profiling] widely, recounting tales of black professionals stopped for petty traffic violations and investigating the arrest patterns of offending cops." *Id.*

41. Tried in state court on charges ranging from second-degree murder to criminally negligent homicide and reckless endangerment of bystanders, the four officers were acquitted on February 25, 2000. Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1. After the verdict, the N.Y. Times reported that

> [d]uring the trial, the officers acknowledged their mistake in shooting Mr. Diallo. The defense lawyers made the officers' testimony the centerpiece of their defense, asserting that the shooting was justified because they had believed Mr. Diallo was grabbing a gun.... Their lawyers laid much of the blame for the shooting on Mr. Diallo himself, saying that he had behaved suspiciously and had not obeyed the officers' commands to stop.

Id.

42. *See* discussion *infra* Part III.

43. *See* discussion *infra* Part III.

44. *See* discussion *infra* Part III.

case law serve only to guide the judge on the appropriate exercise of discretion.[45] The controlling "standard"[46] is the defendant's linguistic need for interpreter services as perceived by the judge.[47] While there is no absolute constitutional right to an interpreter, if the judge decides that a language barrier will prevent a defendant from comprehending the proceedings or communicating with counsel, or a witness from being questioned or understood, the judge must furnish an interpreter.[48] In other words, the federal district court shall supply interpreter services only after finding that the defendant's level of English competency implicates the defendant's rights of fundamental due process, adverse witness confrontation, and effective assistance of counsel embodied in the Constitution.[49] Whether or not the defendant wants an interpreter is not dispositive; the judge is to assess the defendant's linguistic need, apart from any request for an interpreter. A request merely serves to put the judge on notice that the defendant's linguistic need should be ascertained.[50] Consequently, the defendant can neither require nor reject interpreter services in federal district court.[51]

The district court's exercise of discretion is easy when the defendant is a newly arrived immigrant with no English skills whatsoever.[52] Such a defendant obviously satisfies the linguistic need standard for interpreter services, which then translates into a constitutional right to such services.[53] However, the existence of the immigrant's linguistic need and the correlative constitutional right is more problematic when the immigrant exhibits some English competency but nevertheless has difficulty speaking and understanding the language.[54] What compounds this dilemma is the immigrant's failure to ask for interpreter services. To what extent, if at all, is the judge nevertheless obligated to consider and then delve into this immigrant's potential linguistic need in spite of such silence?[55]

Additionally, competing needs for interpreter services during trial can impact the district court's decision. The discretion to appoint an interpreter includes determining how that individual will perform during trial, either

45. *See* discussion *infra* Part III.

46. A standard is a "principle or policy," examples of which are "good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness." Duncan Kennedy, *Form and Substance In Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

47. *See* discussion *infra* Parts II., III.

48. *See* discussion *infra* Parts II., III.

49. *See* discussion *infra* Parts II., III.

50. *See* discussion *infra* Parts II., III.

51. *See* United States v. Petrosian, 126 F.3d 1232, 1234-35 (9th Cir. 1997).

52. *See* United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973).

53. *See, e.g.*, United States *ex rel.* Negron v. New York, 434 F.2d 386, 388-89 (2d Cir. 1970).

54. "The status of the right becomes less certain, however, where . . . the defendant has some ability to understand and communicate, but clearly has difficulty." *Carrion*, 488 F.2d at 14.

55. *See* discussion *infra* Part III.

as a party, proceedings, or witness interpreter. Traditionally, the judge's discretion regarding interpreter function has been tied to a kind of assumed hierarchy of need. To assist the court, a witness interpreter is invariably furnished to translate into English the witness' (or the defendant's) primary language testimony for the judge, jury, and attorney.[56] Generally, judges have been more willing to provide witness interpreters to ensure the steady progress of the trial.[57] On the other hand, the main beneficiary of a party or proceedings interpreter is the defendant. The court appoints a party interpreter to facilitate counsel-client communications and a proceedings interpreter to translate the communications among the lawyers, witnesses, and the judge for the defendant.[58] However, the absence of a party or proceedings interpreter is not considered an impediment to the normal trial process.[59] Therefore, unless the defendant establishes the requisite linguistic need, the judge is not predisposed to providing a party or proceedings interpreter during trial.[60]

Judges also face time and expense disincentives to employing interpreter services.[61] First, locating a qualified interpreter may generate delays and increase costs.[62] Second, the attorneys' reliance on an interpreter while questioning witnesses disrupts the natural flow of the testimony, thereby hindering its spontaneity and increasing its length.[63] Third, the judge must be prepared for potential errors in translation and resulting challenges to the interpreter's competency that further impede the progress of trial.[64] Legal commentators have discussed all of these constraints on interpreter access for immigrants who are semi-fluent in English.[65] My

56. *See* Dery, *supra* note 8, at 842; Charles N. Grabau & Llewellyn J. Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation,* 30 NEW ENG. L. REV. 227, 244-46 (1996); *The Right to an Interpreter,* 25 RUTGERS L. REV. 145, 145-46 (1971); Williamson B.C. Chang & Manuel U. Araujo, Comment, *Interpreters for the Defense: Due Process for the Non-English Speaking Defendant,* 63 CAL. L. REV. 801, 802 (1975).

57. *See* Dery, *supra* note 8, at 842.

58. *Id.*

59. *See id.* at 853.

60. *See id.* at 842. It is easy to envision judges choosing to provide only witness interpreters to defendants who "ought to" understand English, and thus have no "real need" for a party or proceedings interpreter, but whose foreign accents render them "incapable of being understood" by the dominant culture. While the trial proceeds routinely from the standpoint of the judge, jury, and attorneys, the defendant is at a loss to understand the process and the outcome. *See* discussion *infra* Part III.B.

61. *See* Dery, *supra* note 8, at 853; Michael Schulman, Note, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants,* 46 VAND. L. REV. 175, 182 (1993); Chang & Araujo, *supra* note 56, at 802; *see also* Grabau & Gibbons, *supra* note 56, at 244-46; *The Right to an Interpreter, supra* note 56, at 145-46.

62. *The Right to an Interpreter, supra* note 56, at 145-46.

63. *See id.*

64. *See id.*

65. *See* discussion *infra* Part II.C.

Article pursues a different impediment to interpreter availability in federal district court. I argue that the "foreigner" meme has reshaped the evaluation of linguistic need in two respects: (1) As with Amadou Diallo, the dominant culture attributes "fault" for the "need," this time by its judiciary rather than by its police or media. (2) Linguistic need is no longer a standard of judicial discretion, it has been supplanted by several *de facto* general rules. I summarize both of these arguments below, before delving into the development of the federal court interpreter laws and the evolution of their changing application in federal district court, which I discuss at length.

C. *"Linguistic Need" and "Blameworthiness"*

The judiciary's imposition of blame in regulating interpreter access occurs at both the district and circuit court levels. It arises as a kind of cycling and recycling of the "foreigner" meme through the federal justice system. The cycle begins with the defendant's post-conviction appeal, attacking the trial judge's failure to provide an interpreter as either a constitutional or statutory violation or both.[66] The appellate court reviews the record and blames the defendant for neither seeking an interpreter nor satisfying the linguistic need standard to warrant an interpreter appointment.[67] The appellate court also observes that the defendant should have known enough English based on education, employment, and time spent in the United States. It then surmises that this defendant's partial proficiency was indeed sufficient to dispense with interpreter assistance.[68] The defendant's conviction is thus affirmed.[69] In light of such precedent, future trial judges are excused from considering the linguistic need of similarly situated defendants who do not request interpreter services.[70] Without such prompting from the defendant, district courts are rarely expected to investigate *sua sponte* the defendant's linguistic need.[71] In subsequent trials other defendants fail to seek interpreter services and trial judges refrain from providing them. The lack of these services becomes an issue in the post conviction appeals, and the cycle is repeated.[72]

What this cycle reveals are two subtle changes to the "foreigner" meme when it is operating in the context of court regulated access to interpreter services. First, while language skills are still the source of the immigrant's blameworthiness, here, fault is derived not from the immigrant's "unmistakable" lack of English proficiency when interacting with the

66. *See* discussion *infra* Part III.B.
67. *See* discussion *infra* Part III.B.
68. *See* discussion *infra* Part III.B.
69. *See* discussion *infra* Part III.B.
70. *See* discussion *infra* Part III.B.
71. *See* discussion *infra* Part III.B.
72. *See* discussion *infra* Part III.B.

dominant culture, but instead from the immigrant's inadequate demonstration of that lack of proficiency when participating in its justice system. Second, the circuit court opinions imply that the immigrant defendant could not show English incompetence because the defendant was sufficiently proficient in the language. In other words, underlying this "foreigner's" blameworthiness in the courtroom is a supposedly sinister motive, the desire to "cheat" the justice system.[73]

D. *"Linguistic Need" as a Set of "General Rules" Rather Than as a Standard*

The prevalence of the foreigner meme has also changed the composition of linguistic need as a standard of judicial discretion governing interpreter access. In judicial decisionmaking, standards are valued for their absence of "formal realizability" or "ruleness."[74] In applying a standard, the trial judge is obligated to both discover "the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard."[75] What is important to the decisionmaking process is how unique circumstances can be accommodated within the boundaries of recognized norms. Standards promote flexibility in decisionmaking, whereas rules are unyielding and directive. The application of rules is formulaic, requiring judges "to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way."[76] Rules are helpful in preventing "official arbitrariness" and in ensuring "certainty."[77] Both standards and rules have their strengths and weaknesses in the decisionmaking process. Subverted by the "foreigner" meme, the linguistic need standard has become fragmented into several "general rules" or standard/rule hybrids that govern interpreter appointments.[78] These general rules undermine the fundamental worth of the discretionary process in that they dissuade trial judges from seeking justice in the individual case.

My Article proceeds as follows: Part II addresses the origins and development of federal court interpreter laws. Part III traces the federal judiciary's reliance on those statutes and constitutional provisions through case law, illustrating how the "foreigner" meme is determinative of an immigrant defendant's linguistic need. Part IV is the conclusion, which

73. *See* discussion *infra* Part III.B. Such attribution of ill will to immigrants reinforces "the assumed connection between alienage and disloyalty, [that] appears to be deeply rooted in the role that 'negative identity' plays in [the dominant culture's] self-definition." Karst, *supra* note 7, at 318.

74. Kennedy, *supra* note 46, at 1687.

75. *Id.*

76. *Id.* at 1687-88.

77. *Id.* at 1688.

78. *See id.* at 1687-88.

details why reliance on judicial discretion for interpreter access is no longer tenable and should be replaced by interpreter appointments on demand.

Now I turn to a final point to forestall possible confusion. Federal court jurisprudence encompasses two distinct formulations of judicial discretion, both of which I discuss in my Article.[79] One meaning is "primary discretion," or the power of the trial judge to ascertain the facts and then to arbitrate and apply the law to those facts in rendering a decision.[80] In exercising such discretion, the judge is "free from the constraints which characteristically attach whenever legal rules enter the decision process."[81] I track the district court's discretion to decide whether or not a particular immigrant merits an interpreter within the meaning of relevant constitutional and statutory provisions. Primary discretion here turns on the interaction between the judge and the defendant. Another meaning is "secondary discretion," which entails the respective roles of the district and circuit courts. Of concern is the allocation of power between them, specifically, the right of the trial judge "to be wrong without incurring reversal."[82] For the appellate court, secondary discretion signifies the self-limitation that is established when the trial judge's decision is given "a status or authority that makes it either unchallengeable, or challengeable to only a restricted degree."[83] I explore the extent to which district court decisions on interpreter access are accorded deference by the courts of appeal.[84]

II. THE ORIGINS AND DEVELOPMENT OF FEDERAL COURT INTERPRETER LAWS

A. *The Source of "Primary" Judicial Discretion and the Early Provisions*

The trial judge's discretion to regulate interpreter access was originally derived from the federal judiciary's longstanding power to regulate its proceedings. Since the 1800's, the United States Supreme Court has consistently held that Article III of the United States Constitution[85] implicitly grants district courts "inherent" authority[86] "to manage their own

79. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754-55 (1982).

80. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637-41 (1977); *see also* discussion *infra* Parts II., III.

81. Rosenberg, *supra* note 80, at 637.

82. *Id.* Justice Friendly described secondary discretion as "how far an appellate court is bound to sustain rulings of the trial judge which it disapproves but does not consider to be outside the ball park." Friendly, *supra* note 79, at 754.

83. Rosenberg, *supra* note 80, at 641.

84. *See* discussion *infra* Part III.

85. U.S. CONST. art. III, § 2.

86. Livingston v. Story, 34 U.S. (9 Pet.) 632, 656 (1856). The district courts' inherent

affairs so as to achieve the orderly and expeditious disposition of cases."[87] In other words, trial judges can "adopt and enforce their own self-preserving rules" when appropriate.[88] Congress has been of the same mind. The Judiciary Act of 1789 and its progeny allow federal courts to formulate "all necessary rules for the orderly conducting of business."[89] The Court and Congress codified this inherent authority with respect to interpreter access in several rules and statutes.[90] These early provisions guide district courts on the appointment,[91] compensation,[92] and expert qualifications[93] of interpreters. Rule 28 of the Federal Rules of Criminal Procedure empowers trial judges to supply interpreter services at their discretion for any reasonable purpose.[94] A proper exercise of such discretion includes

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authority is either distinct from or a subset of their supervisory power. *See* Sara Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1455-57 (1984). However, the concepts are not interchangeable. *See* United States v. Mosquera, 816 F. Supp. 168, 174-75 (E.D.N.Y. 1993).

87. Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991) (quoting Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962)); *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 33-34 (1812). For an exceptional analysis of the federal courts' inherent power and its (improperly) extended supervisory power, *see* Beale, *supra* note 86, at 1433.

88. MacDonald v. Pless, 238 U.S. 264, 266 (1915).

89. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, 83 (1789). In modern times the statute has been succeeded by 28 U.S.C. § 2071 and Rule 57(b) of the Federal Rules of Criminal Procedure. Federal statute 28 U.S.C. § 2071 (2000) states: "The Supreme Court and all courts established by Acts of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." Rule 57(b) of the Federal Rules of Criminal Procedure (1944) provides:

> A judge may regulate practice in any manner consistent with federal law, these rules and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

FED. R. CRIM. P. 57(b) (1944). The Advisory Committee note states: "One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever." FED. R. CRIM. P. 57 advisory committee's note.

90. FED. R. CRIM. P. 28 (1975); Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A(e) (1994); FED. R. EVID. 604).

91. FED. R. CRIM. P. 28.

92. *Id.*; *see also* The Criminal Justice Act of 1964.

93. FED. R. EVID. 604.

94. *See* FED. R. CRIM P. 28. In 1933, Congress authorized the Supreme Court to prescribe rules as to criminal proceedings after the verdict. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904 (amended 1934). The Supreme Court promptly issued rules in 1934. *See* R. CRIM. P. (1934). Finally in 1940, Congress enlarged the power of the Court to include procedure prior to and including the verdict. Act of June 29, 1940, ch. 445, 54 Stat. 688 (1940). The Court exercised its power and the new rules became effective in 1946. Among them, Rule 28 extended the common law practice of district courts calling and examining their own witnesses to include expert witnesses. *See* original

deciding when an interpreter is to be furnished and what role that interpreter will play as a witness, party, or proceedings interpreter.[95] The Criminal Justice Act of 1964 mandates that interpreters be compensated by the federal government if they are necessary for "an adequate defense."[96] Rule 604 of the Federal Rules of Evidence, effective in 1975,[97] directs that interpreters be bound by the same evidentiary requirements covering expert witness qualifications and testimony.[98]

All of these interpreter-related provisions remain in effect today. Because their intended purpose was to benefit the judge, jury, and attorneys, they were used initially for the appointment of witness-interpreters. Interpreter access was mainly a matter of convenience to the district court rather than of constitutional protection for the defendant.[99]

Advisory Committee Note of 1946 to Rule 28: "The rule provides a procedure, whereby the court may, if it chooses, exercise this power in connection with expert witnesses." FED R. CIV. P. 28 advisory committee's note. In the 1966 amendment to Rule 28, the procedure was expanded to include the appointment and compensation of interpreters. The expert witness portion of the Rule became a separate subdivision. *See* FED R. CIV. P. 28 advisory committees's note of 1996 to Amendment to Rule 28. Rule 28(a) expert witnesses, and (b) interpreter services. Then in 1975, the expert witness subdivision was stricken, but the text concerning interpreter services was retained. As a result, FED. R. CIV. P. 28 currently provides: "The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such an interpreter. Such compensation shall be paid out of the funds provided by law or by the government, as the court may direct." "General language is used to give discretion to the court to appoint interpreters in all appropriate situations." FED R. CIV. P. 28 advisory committee's note of 1996.

95. FED R. CIV. P. 28 advisory committee's note of 1966. "Interpreters may be needed to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel. Interpreters may also be needed where a witness or a defendant is deaf." *Id.; see also* United States v. Dempsey, 830 F.2d 1084, 1088 (10th Cir. 1987) (holding that Rule 28 governs appointment of interpreter for deaf juror).

96. Court-appointed counsel may obtain expert or "other" services "necessary to an adequate defense." Criminal Justice Act of 1964, 18 U.S.C.§ 3006A(e).

97. The original Federal Rules of Evidence were enacted in 1975.

98. Specifically, Rule 604 directs that an interpreter be subject to the rules "relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation." FED. R. EVID. 604. Rule 604 should be read in conjunction with FED. R. CIV. P. 28 and FED R. EVID. 603. FED. R. EVID. 603 provides: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so. Effective January 1975."

99. *See* Marilyn R. Frankenthaler, *Spanish Translation in the Courtroom*, 7 SOC. ACTION & L. 51, 52 (1980) (citing United States v. Desist, 384 F.2d 889, 891-92 (2d Cir. 1967)).

> Since a witness interpreter is appointed so that witnesses can communicate with the court in a manner which as closely as possible approximates the communication of English-speaking witnesses, one might assume that this type of logic is also carried over to the appointment of party interpreters, i.e., so that the non-English speaking defendant can understand all testimony and communicate with his attorney in a manner which as closely as possible puts him in the same position as an English-speaking defendant. However, if we bear in mind that the benefit of the party interpreter is primarily personal to the party,

Accordingly, these provisions contain no accompanying penalties or other enforcement mechanisms to encourage compliance. In exercising secondary discretion, appellate courts allotted trial judges broad primary discretion in mediating witness-interpreter access within the meaning of these provisions.[100] Thus, there was little chance of a successful challenge on appeal.[101] Moreover, a defendant's failure at trial to object to the lack of witness interpreter services operated as a waiver by silence of those services on appeal.[102] On the other hand, if a defendant did demand and

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> while the benefit of the witness interpreter is primarily for the court as a whole, we may find it more comprehensible to deal with the "double standard," whereby the same party may have better interpreter services as a witness than when exercising his right of confrontation as a party.

Id.

100. *Perovich v. United States*, 205 U.S. 86 (1907), is the first case on interpreter access and the only Supreme Court opinion. In *Perovich*, defendant was convicted of homicide in the district court of the territory of Alaska. *Id.* at 89. The trial judge had sustained the prosecution's objection to the appointment of a witness interpreter for defendant's testimony. *Id.* at 91. On appeal, defendant contended the judge's denial of interpreter services was improper. *Id.* The Supreme Court summarily dispensed with defendant's claim of error, declaring interpreter access is at the district court's discretion. *Id.* Moreover, whether or not the appointment of an interpreter is necessary is within the sound discretion of the trial court. *Id.* at 88, 91; *see also* United States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980); United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); United States v. Barrios, 457 F.2d 680, 682 (9th Cir. 1972); Suarez v. United States, 309 F.2d 709, 712 (5th Cir. 1962). *See generally* Donna F. Coltharp, Comment, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARYS L.J. 149, 183-85 (1996).

101. Judge Friendly observed that the level of appellate scrutiny is linked to the nature of the trial judge's decision. Friendly, *supra* note 79, at 764.

> The justifications for committing decisions to the discretion of the trial court are not uniform, and may vary with the specific type of decisions. Although the standard of review in such instances is generally framed as "abuse of discretion," in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

Id. Because interpreter appointments were initially made for the benefit of the district court (as opposed to the defendant), it is reasonable that its discretion would be typically affirmed on appeal. Moreover, interpreter access is generally (1) a pre-trial matter, (2) dependent upon the judge's "observation of the witnesses" and "opportunity to get 'the feel of the case,'" and (3) an aid to the judge and thus not affecting substantial rights of the defendant. *Id.* at 761 (quoting Noonan v. Cunard S.S. Co., 375 F.2d 69, 71 (2d Cir. 1967)). These factors traditionally encourage appellate court deference.

102. *See Perovich*, 205 U.S. at 88.

> As no objection was taken to the ruling of the court sustaining the objection of the district attorney to the appointment of an interpreter, and as it will be seen, by reference to the defendant's testimony that an interpreter was unnecessary, there was no error. The defendant evidently understood the questions that were asked

was then refused interpreter services, the defendant had no immediate right of review. The defendant's only possible remedy was an appeal from the final judgment.

B. *The Constitutional Protections*

There is no *per se* constitutional right to an interpreter. Yet, if English incompetence precludes a defendant from comprehending the proceedings or communicating with counsel, or a witness from being questioned or understood, the defendant's constitutional rights to fundamental due process, adverse witness confrontation, and effective assistance of counsel are jeopardized.[103] For these rights to be ensured, a party or proceedings interpreter or both must be supplied.[104]

Due process requires that a criminal defendant be "present" at trial, which implies more than just being physically inside the courtroom.[105] It presupposes the defendant will be familiar with and defend against the charges, participate in the proceedings, and testify if necessary.[106] Unlike the English-fluent defendant, the non-English-fluent defendant cannot enjoy due process rights without the assistance of a proceedings interpreter.[107] In *United States ex rel. Negron v. New York*, the circuit court held that due process entitles an (indigent) defendant, who cannot speak or understand English, to the services of a proceedings interpreter even without a timely request.[108] Defendant Negron was tried and convicted of murder by a New York state jury.[109] Neither he nor his counsel asked the

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> him and answered them intelligently. Moreover, whether or not the appointment of an interpreter is necessary is within the sound discretion of the trial court.

Id. (citations omitted); *accord Martinez*, 616 F.2d at 188; *Carrion*, 488 F.2d 12 at 15; *Barrios*, 457 F.2d at 682; *Suarez*, 309 F.2d at 712.

103. United States *ex rel.* United States v. Bennett, 848 F.2d 1134, 1140 (11th Cir. 1988); United States v. Gallegos–Torres, 841 F.2d 240, 242 (8th Cir. 1988); Luna v. Black, 772 F.2d 448, 451 (8th Cir. 1985); United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985); Jackson v. Garcia, 665 F.2d 395, 396 (1st Cir. 1981); *Carrion*, 488 F.2d at 14; Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970).

104. *See* cases cited *supra* note 103.

105. United States v. Mosquera, 816 F. Supp. 168, 172 (E.D.N.Y. 1993).

106. *Id.* (citing *Negron*, 434 F.2d at 389); Dickey v. Florida, 398 U.S. 30, 54-55 (1970); Smith v. O'Grandy, 312 U.S. 329, 334 (1941).

107. *See, e.g., Carrion*, 488 F.2d at 14; *Negron*, 434 F.2d at 389.

108. *Negron*, 434 F.2d at 390.

109. *Id.* at 387-88. The New York state jury found Negron guilty of murder in the second degree and sentenced him to a term of 20 years to life. *Id.* The appellate division affirmed the conviction with opinion. People v. Negron, 29 A.D. 2d 1050, 1050 (N.Y. App. Div. 1968). Leave to appeal to the New York Court of Appeals was denied. United States *ex rel.* Negron v. New York, 310 F. Supp. 1304, 1305 (E.D. N.Y. 1970). Negron then filed a pro se application for a writ of habeas corpus in the Eastern District of New York, alleging a violation of his constitutional rights. *Negron*, 310 F. Supp. at 1305. The federal district judge granted Negron his release, and the State

judge to appoint an interpreter. Both the prosecutor and the defense counsel acknowledged that Negron could not understand or speak English.[110] He occasionally received summaries of some prosecution witnesses from a witness interpreter during trial.[111] In determining that Negron had been denied his Fourteenth Amendment rights,[112] the court reasoned that "[c]onsiderations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial."[113]

The Sixth Amendment entitles a defendant to confront the prosecution's adverse witnesses by cross-examination.[114] Denial of this right has been found when defendants with English language difficulties have been refused proceedings or party interpreter services at trial.[115] Without such assistance, the trial is nothing but "a babble of voices."[116] Moreover, where the attorney is not proficient in the defendant's primary language, any meaningful and spontaneous consultation between counsel and client is impossible. This communication gap deprives the defendant of (linguistically) effective assistance of counsel guaranteed by the Sixth Amendment, which has been held to be grounds for appeal.[117]

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of New York filed an appeal in the Second Circuit. *Negron*, 310 F. Supp. at 1309; *Negron*, 434 F.2d at 388.

110. "The government does not dispute that at the time of trial, Negron . . . neither spoke nor understood any English." *Negron*, 434 F.2d at 388. And, at a hearing before the federal district court, Negron's lawyer testified that he "was not able to speak with" his client "at all" without an interpreter. *Id.* at 391 n.2.

111. *See id.* at 388. The due process clause of the Fifth Amendment governs federal court criminal proceedings. It provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

112. The Fourteenth Amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty or property, without due process of law. . . ." U.S. CONST. amend. XIV.

113. *Negron*, 434 F.2d at 388.

114. The Sixth Amendment provides in pertinent part: "In all criminal prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

115. *See Negron*, 434 F.2d at 389; United States v. Mosquera, 816 F. Supp. 168, 172-73 (E.D.N.Y. 1993); Giraldo-Rincon v. Dugger, 707 F. Supp. 504, 506-07 (M.D. Fla. 1989); United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676, 689 (E.D. Pa. 1973).

116. *Negron*, 434 F. 2d at 388.

> However astute [the witness interpreter's] summaries may have been, they could not do service as a means by which Negron could understand the precise nature of the testimony against him during that period of the trial's progress when the state chose to bring it forth. Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination.

Id. at 389-90.

117. *Id.* at 389.

C. *The Court Interpreters Act*

The Court Interpreters Act (CIA or section 1827) was signed into law on October 28, 1978, after a five-year legislative process.[118] It became effective January 26, 1979.[119] The new legislation was a direct response to *Negron*,[120] which had been critical of the callous treatment suffered by non-English-speaking defendants.[121] Section 1827 encompassed two purposes: First, Congress envisioned the CIA as affording language minorities consistent access to federal court interpreters when "appropriate."[122] The

> And it is equally imperative that every criminal defendant — if the right to be present is to have meaning—possess "sufficient ability to consult with his lawyer with a reasonable degree of rational understanding." Otherwise, "the adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object."

Id. (quoting Dusky v. United States, 362 U.S. 402, 402 (1962) and *Incapacity to Stand Trial*, 81 HARV. L. REV. 454, 458 (1969)). On the other hand, the trend among Courts of Appeal has been to dismiss the "ineffective assistance of counsel" argument if it is the exclusive ground of appeal and the court does not recognize the defendant's right to an interpreter. *See, e.g.*, United States v. Acevedo-Toscano, No. 99-50064, 2000 U.S. App. LEXIS 2589, at *2-*3 (9th Cir. Feb. 9, 2000); United States v. Cheng, No. 99-30073, 2000 U.S. App. LEXIS 4243, at *2-*3 (9th Cir. Mar. 16, 2000); United States v. Mendoza, No. 95-1269, 1996 U.S. App. LEXIS 12455, at *6 (6th Cir. Apr. 17, 1996); Gonzales v. United States, 33 F.3d 1047, 1051 (9th Cir. 1994); United States v. Maniego, 710 F.2d 24, 26 (2nd Cir. 1983); Cervantes v. Cox, 350 F.2d 855, 855 (10th Cir. 1965); United States v. Sanchez, C.A. No. 94-2866, Crim. No. 91-00148, 1994 U.S. Dist. Lexis 16725, at *3-*4 (E.D. Pa. Nov. 16, 1994).

118. Court Interpreters Act of 1978, 28 U.S.C. § 1827.

119. *Id.*

120.

> An original impetus for legislation addressing the issue of court interpreters was the 1970 decision of the U.S. Court of Appeals for the Second District in *U.S. ex rel. Negron v. New York* . . . which held that the sixth amendment to the Constitution requires that non-English speaking defendants be informed of their right to simultaneous interpretation of proceedings at government expense.

Court Interpreters Act, H.R. REP. NO. 95-1687, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4653.

121. "Particularly inappropriate in this nation where many languages are spoken is a 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." *Negron*, 434 F.2d at 390.

122.

> The purpose of the bill is to amend title 28, United States Code, by adding a new section 1827 to Chapter 119, which new section would specify the circumstances when an interpreter must be furnished to translate all or part of the court proceedings for the benefit of a non-English-speaking party or when a witness does not speak English. . . . The purpose of S. 1724, as amended, is to provide a congressional declaration of the situations which are appropriate for language interpretation.

legislative history recounts that it was not uncommon in federal criminal cases for judges to neglect to appoint interpreters even though the defendants' level of English did not safeguard their constitutional rights during trial.[123] As a remedy, section 1827 mandates the appointment of an interpreter

> if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case) or a witness who may present testimony in such judicial proceedings—(A) speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.[124]

By specifying the conditions under which judges have no choice but to provide party and witness interpreter services, Congress undoubtedly anticipated normalizing rather than liberalizing the current exercise of judicial discretion among district courts.[125] Congress did not intend to give defendants greater access to interpreter services than is allowed by the Constitution.[126] By designating the district court as the arbiter of the

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Senator John Tunney, BILINGUAL COURT ACT PROCEEDINGS, S. REP. No. 93-1185, at 1, 4-5 (1974) (precursor to the CIA). In emphasizing the defendant's and witnesses' linguistic need (rather than the trial judges'), the CIA has largely supplanted the earlier provisions in regulating interpreter access. *See* discussion *infra* Part III.

123.

> Despite the discretionary powers which these statute have conferred on federal judges, testimony before the Subcommittee indicated that several federal convictions have been reversed on due process grounds where an interpreter had not been appointed and where the defendant's knowledge of English was either minimal or nonexistant. In addition, by testimony and by affidavits submitted to the Subcommittee, we were given examples of recent cases where federal judges were reluctant to use the discretionary powers which they have been granted.

H.R. REP. No. 95-1687, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4654 (citations omitted).

124. Court Interpreters Act of 1978, 28 U.S.C. § 1827(d)(1) (2000).

125. Notably, the CIA did not increase interpreter access by making it available on demand. Interpreter services were still to be supplied at the district courts' discretion or when "the presiding judicial officer determines" the statutory prerequisites have been met. *Id.*

126.

> The Court Interpreters Act, while underscoring the importance of ensuring the highest quality translations for non-English speaking defendants, does not create new constitutional rights for defendants or expand existing constitutional safeguards rather, the purpose of the Act is to mandate the appointment of interpreters under certain conditions and to establish statutory guidance for the

defendant's English proficiency, Congress meant that judges retained their discretion to decide whether interpreter services are warranted in a particular case.

The legislative history indicates that the second aim of the CIA was to appease language minorities who had experienced dominant culture nativism:

> Various congressional committees also have found that in the areas of education, employment, and the administration of justice, national origin minorities have been discriminated against not only because of their color, but also because of their cultural and linguistic differences. It is not surprising then, that these minorities distrust America's institutions, including the courts, and view them as "Anglo" bastions, protectors of the status quo and particularly insensitive to their needs. Since they feel that they cannot expect fair treatment, many of them express outright distrust and cynicism with regard to the law. Enactment of the Bilingual Courts Act can help to dispel these attitudes.[127]

It is interesting that the congressional intent was not to eradicate America's discrimination against immigrants, but to dispel the immigrants' adverse reaction to that discrimination.

To meet its dual purposes, Congress passed legislation that was more comprehensive than all previous interpreter-service statutes combined. Section 1827 authorizes federal district court judges, including magistrates and bankruptcy judges, to appoint certified or otherwise qualified interpreters when appropriate in all cases instituted by the United States, including criminal and civil trials, grand jury, and habeas corpus proceedings.[128] Interpreter services for parties shall be in the simultaneous mode, and for witnesses, in the consecutive mode, unless otherwise ordered by the court.[129] The district court shall ascertain linguistic need for both non-English-speakers and the hearing impaired.[130] If such need is found to exist, the court shall appoint "the most available certified interpreter," and

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use of translators in order to ensure that the quality of the translation does not fall below a constitutionally permissible threshold.

United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir. 1990) (citations omitted).

127. Senator John Tunney, BILINGUAL COURT ACT PROCEEDINGS, S. REP. No. 93-1185, at 1, 3-4 (1974) (precursor to the CIA).

128. 28 U.S.C. § 1827(d)(1), (j) (2000).

129. *Id.* at § 1827(k). Prior to the 1988 amendment, interpreter services were in the consecutive mode, unless otherwise ordered by the court.

130. *Id.* at § 1827(d)(1).

barring that, "an otherwise qualified interpreter."[131] An incompetent interpreter shall be dismissed and replaced.[132]

There is also an express waiver provision. A party may waive interpreter services, with the courts' approval. The waiver must be made on the record, after consultation with counsel and include an explanation by the court, through an interpreter, as to "the nature and effect of the waiver."[133] A party who has waived the use of a court-appointed interpreter may use a non-certified interpreter of the party's choice.[134]

Lastly, the CIA directs the Director of the Administrative Office of the United States Courts to implement a program to "prescribe, determine, and certify" interpreters for the federal courts.[135] The Director is also charged with maintaining a master list of all certified and otherwise qualified interpreters.[136] Payment to interpreters for their services is also prescribed.[137]

The CIA does ameliorate interpreter availability in some ways. It eliminates the indigency requirement the judiciary read into prior provisions.[138] Interpreter appointments are to be made without regard to the defendant's financial status—the costs to be borne by the federal courts. Furthermore, the common law policy favoring the use of witness-interpreters is abolished. Instead, there is an implied acknowledgement in section 1827 that interpreters undertake different tasks of equal value in district court. Nor are defendants obligated to formally request interpreter services before they can be furnished. Rather, the district court may appoint an interpreter *sua sponte*. Finally, the statute makes it nearly impossible for the judge to ignore a defendant's demand for interpreter services, in that the

131. *Id.* The 1988 amendment substituted "qualified" for "competent." *Id.*

132. 28 U.S.C. § 1827(e)(1) (2000).

133. *Id.* at § 1827(f)(1).

> Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

Id.

134. *Id.* at § 1827(f)(2).

135. *Id.* at § 1827(b)(1).

136. *Id.* at § 1827(b)(3).

137. *Id.*

138. *See, e.g.*, United States v. Desist, 384 F.2d 889, 902 (2d Cir. 1967).

demand automatically triggers an investigation of the defendant's linguistic need.[139]

These improvements notwithstanding, the CIA cures few of the more serious defects of the previous statutes concerning waiver by silence, the absence of statutory penalties or interlocutory review procedures, and limited review on appeal. The CIA's dependence on judicial discretion is a controversial holdover from earlier provisions. Interpreter access is not a statutory "right" upon demand. While a defendant may ask for interpreter services, the district court must independently recognize the defendant's linguistic need for such services.[140] Thus, apart from making the request, the defendant must "act out" or otherwise adequately exhibit sufficient English language deficiency as the statutory predicate for interpreter access. The district court, in turn, is not obligated to contemplate providing interpreter services unless and until the defendant successfully communicates the (ostensible) linguistic need for such services.[141] However, once that need is made known, the court shall probe the defendant's language competency. From the results of that investigation, the court must resolve the question of interpreter access.[142] Section 1827 is therefore a fusion of two distinct discretionary decisions: (1) whether to acknowledge and then look into the potential need, and (2) whether to provide the available services as a result of that inquiry. In that fusion, the first decision clearly predominates over the second, for if the potential need

139. 28 U.S.C. § 1827(d)(1) (2000).

140. *See* discussion *infra* Part III.

141. *See* discussion *infra* Part III.

142. Once the duty to investigate is triggered, whether or not a defendant meets the statutory threshold of linguistic need would seemingly require an evidentiary hearing, by which the judge could thoroughly explore the defendant's English language knowledge. Otherwise, the judge could not fully assess the defendant's ability to maintain constitutional protections. Yet, Congress expected district courts to base this decision routinely on counsels' suggestions and a brief colloquy with the defendant at the courts' discretion.

> While the judge has the ultimate responsibility in determining whether or not an interpreter is required under this legislation, it is anticipated that counsel will alert the judge's attention to the fact that an interpreter may be needed. It is anticipated that the need for formal proceedings to make an initial determination of whether the appointment of an interpreter is required will be minimal. Instead, we anticipate that during discovery or other pretrial matters counsel for both parties will be able to assess the language capability of a party. Upon agreement of both attorneys and perhaps brief questioning by the judge of the party, the judge can make the determination regarding appointment of an interpreter.

Court Interpreters Act, H.R. REP. NO. 95-1687, at 6-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4657. As a result, some district courts engage in perfunctory or haphazard questioning of defendants and in close cases, deny such services by reason of competing economic concerns, administrative expense, court calendar expediency, or shortage of qualified interpreters. *See* discussion *infra* Part III.A.

is never recognized or thoroughly evaluated, no duty to supply services ever arises.[143]

Commentators disapprove of the judicial discretion embodied in the CIA because its exercise is neither linguistically informed nor objectively controlled. It is their position that assessing a defendant's English proficiency is a formidable task for which most judges are ill equipped.[144] They argue that section 1827 improperly leaves out any instructive guidelines or testing mechanisms for a court to employ in gauging linguistic need. As non-linguists, judges are incapable of independently discerning such need and their decisions are therefore "inequitable" and arbitrary.[145] However, such criticism is faulty in three respects. First, it is not supported by any references to legal authority. None of these commentators name any cases where a defendant would have benefited from the court's use of either guidelines or testing to determine linguistic need. Nor do they cite any decisions where a trial judge's exercise of

143. *See* Hrubec v. United States, 734 F. Supp. 60, 67 (E.D.N.Y. 1990); *see also* discussion *infra* Part III. A.

144. *See* Frankenthaler, *supra* note 99, at 54. "Judicial officers are not necessarily trained linguists nor is it appropriate that we ask them to be so. Yet they must decide upon the linguistic competency of parties and witnesses." *Id.*; Schulman, *supra* note 61, at 179. "Judges generally are not equipped to determine whether a given defendant needs an interpreter." *Id.*; Alice Pousada, *Interpreting for Language Minorities in the Courts, in* GEORGETOWN UNIVERSITY ROUND TABLE LANGUAGES AND LINGUISTICS 1979: LANGUAGES IN PUBLIC LIFE 190 (James E. Alatis & G. Richard Tucker eds., 1979). "The determination still rests in the long run with the discretion of the judge, a man generally noted more for his legal acuity than his linguistic expertise." *Id.*

145. Pousada, *supra* note 144, at 195. "The basic problem with the dependence on the discretionary powers of the judge is that most judges lack the necessary linguistic expertise and standards with which to exercise those powers equitably." Beth Gottesman Lindie, *Special Topics in the Law of Evidence: Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. MIAMI L. REV. 399, 405 (1993). "Although the [Court Interpreters] Act provides guidelines, it has not been effective in providing qualified interpreters to non-English speaking individuals." *Id. See generally* Miguel Méndez, *Lawyers, Linguists, Story-Tellers, and Limited English-Speaking Witnesses*, 27 N.M. L. REV. 77, 97-98 (1997) (suggesting the development of language assessment tests to assist the trial judge in ascertaining the defendant's English knowledge). None of these commentators favor an automatic evidentiary hearing as the way to investigate linguistic need. One even states it is a matter of "linguistic competency" rather than evidence. Frankenthaler, *supra* note 99, at 53. However, the requirement of conducting a formal examination of every defendant's English skills, even without an interpreter request, would make the exercise of discretion easier and more open. No longer would the defendant have to transmit sufficient hints of potential interpreter need to provoke a judicial inquiry that could establish such need. In other words, a mandatory evidentiary hearing would supplant the first discretionary aspect of the CIA, the decision that is primarily dispositive of a defendant's interpreter access. An evidentiary hearing is also the means by which a defendant can preserve a record of English language fluency and comprehension for purposes of appeal. Because the CIA does not include a presumption of interpreter need and a process for interlocutory review, a defense counsel whose client has been refused interpreter access without an evidentiary hearing is stymied. The attorney has no choice but to proceed with trial and hope the existing record sufficiently evinces the defendant's interpreter need on appeal from an unfavorable verdict.

discretion was "inappropriate," or unfairly deprived a defendant of an interpreter.

Second, not only is their criticism rooted in speculation, but it is also misplaced. Commentators take aim at the second (primary) discretionary decision and overlook the impact of the first in more recent circuit court opinions governing district court interpreter access.[146] In assailing the trial judge's capacity to assess linguistic need, commentators ignore the predominant contention on appeal, which is the judge's failure at the outset to consider and then sufficiently explore the possibility of such need.[147] In other words, at what point should a district court be put on notice of the possibility that the defendant may require an interpreter and then be expected to investigate thoroughly the level of the defendant's English proficiency? The court's quandary is compounded by the fact that the defendant typically knows some English and neglects to request interpreter services.[148] The issue then becomes, even if the judge should have furnished interpreter services, were those services waived by the defendant's silence? Generally, appellate courts have held that any error in not furnishing an interpreter is waived or precluded in these circumstances.[149]

Third, in urging district courts to rely on external constraints to decide linguistic need, commentators show a profound misunderstanding of primary judicial discretion. Fundamental to this formulation of judicial discretion are the notions of case-by-case flexibility and personal investment by the trial judge.[150] Flexibility means that a district court is free

146. By "more recent circuit court opinions" I mean those opinions dealing with appeals grounded, in part, on the CIA, which became effective Jan. 26, 1979.

147. *See* discussion *infra* Part III. This makes analytical sense. Defendants who had or did not have interpreter services but were acquitted are not going to appeal. Defendants who did or did not request interpreter services but received them and were then convicted are going to appeal on different grounds. Remaining defendants are either: (1) those who failed to request an interpreter in a timely fashion and were then convicted (their appeals contest the trial judge's failure to investigate the defendant's linguistic need *sua sponte*), or (2) those defendants whose request for interpreter services was denied, and they were then convicted (these defendants will contest the court's assessment of their linguistic need in light of its investigation). Only this last group would be the subject of the commentators' criticism.

148. *See* discussion *infra* Part III.

149. *See* discussion *infra* Part III.

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> The element of flexibility and choice in the process of adjudicating is precisely what justice requires in many cases. Flexibility permits more compassionate and more sensitive responses to differences which ought to count in applying legal norms, but which get buried in the gross and rounded-off language of rules that are directed at wholesale problems instead of particular disputes. Discretion in this sense allows the individualization of law and permits justice at times to be hand-made instead of mass produced.

Rosenberg, *supra* note 80, at 642.

to do justice by ascertaining and applying "the law of the land" according to the particular facts then before it.[151] The trial judge's exercise of discretion cannot be formulaic. It cannot involve the uniform processing of uniquely situated individuals according to standardized criteria.[152] Moreover, the exercise of a discretionary decision is purely a judicial enterprise. A district court is expected to decide based upon its own experience and expertise. To require a trial judge instead to yield to or be monitored by outside experts takes the decisionmaking process out of the courtroom and removes the judge's inherent authority to regulate proceedings. And, as a judicial enterprise, the exercise of primary discretion necessitates the trial judge's personal investment. Discretionary decisions require the district court's effort, consideration, and risk, involving attention to distinct persons in specific circumstances at given moments in their lives.[153] In recognition of the work and worth of this process, appellate courts traditionally defer to trial judges as "jurists on the scene" in the best position to ascertain the facts.[154] When a judge's exercise

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> Judicial discretion in its broadest meaning is that sense of right and justice from which has sprung a vast array of legal and equitable principles never written in any constitution, code or legislative act, but which nevertheless by the sanction and approval of the courts have become component parts of the law of the land. In its narrower sense it is the capacity of the individual judge presiding over a particular court to perceive and apply to the facts of each case in judgment the law of the land, so that in each case the rights of the parties under the facts of the case may be declared and enforced according to the law of the land.

Scott v. Marley, 124 Tenn. 388, 394-95 (1911).

152.

> Precise norms are not laid down, decision is intended to pivot on the circumstances of the particular case, and each court along the route is free to reach an independent conclusion as to the result called for by its own sound exercise of discretion. Primary discretion bestows *decision-liberating* choice.

Rosenberg, *supra* note 80, at 638.

153. I do not disagree with some commentators' assertions that the CIA's perpetuation of judicial discretion undercuts the statute's effectiveness. However, by attempting to systematize the exercise of discretion, commentators cannot expect the decisionmaking process to be more meaningful to the individual defendants. A more reasonable change would be to dispense with judicial discretion entirely. In other words, trial judges should be precluded from deciding the question of interpreter access. Rather, the defendants themselves should be allowed to determine their own linguistic need. *See* discussion *infra* Part IV.

154. Friendly, *supra* note 79, at 759. "The most notable exception to full appellate review is deference to the trial court's determination of the facts. The trial court's direct contact with the witnesses places it in a superior position to perform this task." *Id.* Federal Rule Civil Procedure 52(a) provides that findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). *See generally* United States v. Criden, 648 F.2d 814, 817-19 (3d Cir. 1981).

of discretion is attacked on appeal, it is seldom disturbed.[155] As with interpreter appointments, circuit courts generally review district courts' primary discretion for clear error, or where the trial judge acted arbitrarily or capriciously, thereby abusing that discretion.[156] It is rare that the exercise of secondary discretion leads to reversal or even remand of the trial judge's decision on interpreter access.[157]

III. HOW THE FEDERAL JUDICIARY APPLIES THE FEDERAL COURT INTERPRETER LAWS

Although there was a spate of appellate opinions in the 1990's,[158] the common law construing a criminal defendant's interpreter access is relatively sparse. Since January 26, 1979, the CIA's effective date,[159] only one of the roughly thirteen cases[160] regarding the absence of interpreter services has been reversed.[161] Two were remanded with instructions for the trial judge to inquire into the sufficiency of the defendant's English skills

155. *See* discussion *infra* Part III.

156. With some exceptions beyond the purview of this article, the "clear error" standard is typically the standard of abuse of discretion employed by an appellate court in reviewing the trial judge's decision on interpreter access. *See* United States v. Desist, 384 F.2d 889, 891-92 (2d Cir. 1967); Frankenthaler, *supra* note 99, at 51-52; Méndez, *supra* note 145, at 90. After noting the varied definitions of "abuse of discretion," Judge Friendly reasoned:

> All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

Friendly, *supra* note 79, at 764.

157. See discussion *infra* Part III.

158. Dated 1983 through 2000, the majority of these cases have been depublished or only published in part. Méndez, *supra* note 145, at 90,

159. Court Interpreters Act of 1978, 28 U.S.C. § 1827.

160. United States v. Mendoza, No. 95-1269, 1996 U.S. App. LEXIS 12455, at *6 (6th Cir. Apr. 17, 1996); Huitron v. United States, No. 94-55805, 1995 U.S. App. LEXIS 1937, at *2-*5 (9th Cir. Jan. 25, 1995); Gonzalez v. United States, 33 F.3d 1047, 1048 (9th Cir. 1994) (appeal of denial of 28 U.S.C. § 2255 motion); United States v. Mayans, 17 F.3d 1174, 1048 (9th Cir. 1994); United States v. Catalano, No. 91-50372, 1992 U.S. App. LEXIS 20942, at *1-*3 (9th Cir. Aug. 21, 1992); United States v. Rosa, 946 F.2d 505, 507 (7th Cir. 1991); United States v. Perez, 918 F.2d 488, 490 (5th Cir. 1990); United States v. Maniego, 710 F.2d 24, 26 (2d Cir. 1983); United States v. Tapia, 631 F.2d 1207, 1209-10 (5th Cir. 1980); United States v. Sanchez, No. 94-2866, 1994 U.S. Dist. LEXIS 16725 at *2 (E.D. Pa. Nov. 16, 1994) (28 U.S.C. § 2255 motion); Hrubec v. United States, 734 F. Supp. 60, 62 (E.D.N.Y. 1990) (Habeas corpus petition from a federal conviction.); *cf.* United States v. Torres, No. 94-1113, 1995 U.S. App. LEXIS 264, at *15-*22 (6th Cir. Jan. 4, 1995); United States v. Coronel-Quintana, 752 F.2d 1284, 1291-92 (8th Cir. 1985).

161. United States v. Mayans, 17 F.3d 1174, 1180-81 (9th Cir. 1994) was reversed and remanded on several grounds, including the district court's "insistence on evaluating [defendant's] language skills in the course of the trial itself, and in front of the jury." *Id.*

pursuant to the CIA.[162] My goal is not to second-guess the district courts in the remaining fourteen cases. I do not maintain that their failure to provide an interpreter constituted clear error. Instead, my interest is two-fold: First, I am intrigued as to how these trial judges exercised their primary discretion when it came to interpreter access. Second, I am curious as to how appellate justices rationalized those decisions in applying their secondary discretion. My concern is the extent to which the "foreigner" meme controls both meanings of judicial discretion in the federal justice system, especially following the *Negron* and *Valladares* opinions.[163]

A. *The "Foreigner" Meme and Federal Court Interpreter Access*

The "foreigner" meme infiltrated the federal justice system by way of a habeus corpus application filed in United States District Court by an immigrant who had been convicted in state court of murder. When the Second Circuit affirmed the grant of the writ of habeus corpus for Rogelio Negron, its decision was heralded as advancing constitutional rights for immigrant defendants.[164] The *Negron* opinion was the first to grapple with the related issues of the trial judge's duty to inform a non-English-speaking defendant of available interpreter services and the defendant's waiver of such services by silence. The court of appeals reasoned that because of Negron's English deficiency, he had been unaware of and thus unable to secure his Sixth and Fourteenth Amendment rights during the proceedings.[165] Therefore, the court held, to afford this defendant his constitutional protections, the trial judge was obligated to apprise him of the interpreter services available and then to provide them.[166] The court declared that Negron's silence could not have constituted "passive acquiescence" to the absence of such services when he did not know of their existence.[167] In other words, Negron could not have intended "a knowing, intelligent waiver" of rights about which he was ignorant due to his total lack of English competence.[168]

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162. United States v. Osuna, 189 F.3d 1289, 1295 (10th Cir. 1999); United States v. Tapia, 631 F.2d 1207, 1209-10 (5th Cir. 1980).

163. *Negron*, 434 F.2d at 386; Valladares v. United States, 871 F.2d 1564 (11th Cir. 1989).

164. Indeed, the Second Circuit described its own opinion as having "important precedential value." *Negron*, 434 F.2d at 387; *see also* Carlos A. Astiz, *A Comment on Judicial Interpretation of the Federal Court Interpreters Act*, 14 JUST. SYS. J. 103, 103-09 (1990).

165. *Negron*, 434 F.2d at 389.

166. *Id.* at 390-91.

167. *Id.* at 390.

168. *Id.* It has been held that the constitutional prerequisite to a valid waiver is "an intentional relinquishment or abandonment of [the] . . . right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Indeed, unless the judge explains to the non-English speaking defendant, through an interpreter, that interpreter services are available, the defendant cannot possibly choose to forego those services within the meaning of *Johnson v. Zerbst*. At most, the defendant has forfeited rather than waived the constitutional or statutory right to an interpreter. *See* United States v. Olano, 507

The precedential value of the *Negron* opinion is fairly limited. Undoubtedly, it has given those defendants with no English skills ready access to an interpreter in district court. However, the latest fourteen appeals contesting the absence of interpreter services have involved defendants with semi-English fluency who, like Negron, never demanded them at trial. Unlike Negron, these defendants (apparently) never otherwise demonstrated the linguistic need for such services. For them, the *Negron* opinion has been devastating in both the district and circuit courts in two respects. First, the defendants found themselves competing for the appointment of an interpreter against what has become an idealized prototype of linguistic need. Second, they discovered their partial English proficiency, coupled with their silence, rendered the trial judge exempt from investigating and assessing their linguistic need.

The only fact about the defendant Negron that was determinative of his interpreter access was his inability to speak or understand English. Yet, the decision spins a sympathetic tale of an impoverished Puerto Rican native, with only a sixth grade education, who had twice immigrated to the United States, each time staying merely a few months as an agricultural laborer.[169] During his second visit he was arrested for the crime of murder.[170] While true, these additional facts relate to Negron's identity or background and not to his issue of linguistic need. A non-native speaker's English knowledge is not necessarily derivative of his country of origin, education level, and time spent in the United States. And, even if it were, such facts could only explain the reason for the speaker's degree of proficiency, not actually demonstrate it. Nevertheless, the Second Circuit insisted on using these facts to depict Negron as a helpless innocent, "thrown into a criminal trial as his initiation to our trial system."[171] The court reasoned that because Negron was newly arrived, with probable plans for the briefest stay, relatively uneducated and unemployed, his language deficiency was to be expected and accommodated by the federal justice system.[172] The *Negron* opinion is the first example of judicial "immigrant profiling" in the context of interpreter access. An immigrant who fits the *Negron* profile is

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U.S. 725, 731 (1993); discussion *infra* Part IV.

169. *See Negron*, 434 F.2d at 387-88.

170. *Id.* at 387.

171. *Id.* at 390.

> Nor are we inclined to require that an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them.

Id.

172. *See id.*

presumed to have no knowledge of English, thereby allowing the judge to dispense with the task of actually investigating and assessing linguistic need.[173] Moreover, the *Negron* profile depicts the immigrant who has a right to interpreter services as a "victim." In other words, interpreter access hinges on the defendant's perceived "blamelessness" in needing them. This connection between interpreter worthiness and absence of fault is suggestive of the "foreigner" meme in reverse. In effect, the "foreigner" meme has been introduced into the federal justice system in the guise of a negative implication. Although the *Negron* prototype is both emotionally charged and factually irrelevant to an immigrant's actual linguistic need, it is one against which other defendants have inevitably been compared, to their detriment. Following the *Negron* opinion, and without reference to it, some circuit courts have recited the levels of education, employment, as well as length of stay of the defendant, without comment, before affirming the conviction.[174] In *Gonzalez v. United States*[175] the defendant pled guilty to three federal offenses and was sentenced to 168 months.[176] His motion to vacate or modify his sentence was denied.[177] Miguel Gonzalez then filed an appeal in the Ninth Circuit, claiming he did not understand the nature and cause of the charges against him within the meaning of his Fifth and Sixth Amendment rights because he was not furnished an interpreter.[178] Gonzalez never sought an interpreter in district court. He claimed his attorney's failure to demand one constituted ineffective assistance of counsel.[179] At the outset, the Ninth Circuit detailed the defendant's education and employment history, and his length of stay in the United States, some of which had been known by the district court.[180] The court of appeals noted that Gonzalez was a naturalized citizen, had worked in a variety of businesses, and was buying his own home at the time of his plea.[181] The court eventually affirmed the trial judge's denial of the defendant's motion. The inference to be drawn from opinions like

173. This approach is also contrary to logic, which would require an inquiry into the defendant's actual competence that could then be then accounted for by the *Negron* facts. *See, e.g.*, United States v. Cheng, No. 99-30073, 2000 U.S. App. LEXIS 4243, at *2-*3 (9th Cir. Mar. 16, 2000).

174. *See, e.g.*, Huitron v. United States, No. 94-55805, 1995 U.S. App. LEXIS 1937, at *5 (9th Cir. Jan. 30, 1995) ("Huitron has been a legal resident of this country for twenty years and attended high and vocational training schools in this country."); Gonzalez v. United States, 33 F.3d 1047, 1050 (9th Cir. 1994); United States v. Perez, 918 F.2d 488, 490 (5th Cir. 1990) ("The testimony reflected that although a Mexican citizen, Perez had lawfully resided in the United States for 19 years."). *But see Cheng*, No. 99-30073, 2000 U.S. App. LEXIS 4243, at *2.

175. 33 F.3d 1047 (9th Cir. 1994).

176. *Id.* at 1048.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1050.

181. *Id.*

Gonzalez is that immigrants whose educational and employment levels and residence in the United States exceed those of the *Negron* profile are deemed to know enough English to safeguard their own constitutional rights. It is an inference that displaces the trial judge's obligation to be alert to such defendants' potential linguistic need. Circuit courts regard them as incapable of showing viable need even if the judge had opted to investigate it.

Additionally, circuit courts have "faulted" immigrant defendants not matching the *Negron* profile for failing to object to the lack of interpreter services, or to request or otherwise show the linguistic need for them, when the defendants do know some English. It is a judicial perception of the immigrants' "blameworthiness" more in keeping with the "foreigner" meme and of the immigrants' silence as a conscious choice. In affirming the defendant's conviction, the Ninth Circuit remarked in *United States v. Acevedo-Toscano* that he had "neither requested an interpreter nor objected to the lack of an interpreter during plea proceedings."[182] This observation typifies those of appellate courts facing partially English proficient defendants who neglected "to speak to" their linguistic need in district court.[183] It signals the unstated, but clear belief among courts of appeal that, unlike *Negron*, these defendants must pay the price of an implied waiver for keeping silent.[184] The courts' conclusion, that in failing to speak the immigrants have intentionally relinquished constitutional rights, necessarily springs from several underlying presumptions. Among them is that, had the

182. United States v. Acevedo-Toscano, No. 99-50064, 2000 U.S. App. LEXIS 2589 (9th Cir. Feb. 18, 2000).

183. *See* United States v. Arthurs, 73 F.3d 444, 446-47 (1st Cir. 1996); notes 200-09, *infra* and accompanying text. "Here, an interpreter appeared to be available. There is no indication that [defendant] ever requested the assistance of an interpreter." Huitron v. United States, No. 94-55805, 1995 U.S. App. LEXIS 1937, at *5 (9th Cir. Jan. 25, 1995); *see also* United States v. Sanchez, C.A. No. 94-2866, Crim. No. 91-00148, 1994 U.S. Dist. LEXIS 16725, at *6 (E.D. Pa. Nov. 16, 1994).

> In addition, neither defendant nor his wife requested that a certified interpreter be appointed nor claimed during the hearing that the wife was not qualified or unable to interpret the proceedings. Nor did defendant or his wife claim at any time during the resentencing hearing that defendant did not comprehend any part of the proceedings. In short, there was no evidence before the Court that indicated that defendant's ability to understand English based both on his own knowledge and the assistance of his common law wife was so deficient as to "inhibit" comprehension of the proceedings.

Id.

184. It is interesting that none of these courts declare that silence is to be understood as an abandonment of Fifth and Sixth Amendment rights. Indeed, some courts of appeal undoubtedly "protest too much" in pointedly asserting that the defendant's silence was not determinative of the appeal: "In addition, although his lack of objection is not dispositive, Gonzalez never indicated to the court that he was experiencing major difficulty, despite the opportunities afforded him." Gonzalez v. United States, 33 F.3d 1047, 1051 (9th Cir. 1994).

defendants requested or otherwise exhibited the need for interpreter services, they would have obtained them.[185] This presumption is false in that no cases have afforded a partially English-proficient defendant unmediated access to interpreter services on demand.[186] The statutory predicate for interpreter assistance is the finding, upon judicial inquiry, that a non-primary English speaker's skills are so deficient as to inhibit comprehension of the proceedings or communication with court or counsel.[187] A demand for interpreter assistance merely notifies the district court that the defendant's potential linguistic need should be explored. If the court finds the defendant has no need, it provides no services.[188] Moreover, should this defendant display obvious English problems, yet neglect to demand interpreter services, the likelihood the defendant will procure them is even less. The Eleventh Circuit has interpreted section 1827 as mandating an inquiry whenever a defendant has a language difficulty.[189] And, the Fifth and Tenth Circuits have held that the CIA compels the district court to make its findings on the record following an inquiry to enlighten the appellate court and to protect the defendant.[190]

185. The speciousness of this presumption I discuss immediately, because it factors into the *Negron*-induced process for resolving interpreter access. The other presumptions are (1) these defendants had been aware of the availability of interpreter services, and (2) because they could gauge their own English proficiency, these defendants (or their attorney) invariably would have requested interpreter services or otherwise exhibited the need for them if such services had been desired. These latter presumptions I cover in the next part entitled "Linguistic Need" and "Blameworthiness," because they largely underlie *Valladares v. United States*, 871 F.2d 1564 (11th Cir. 1989). None of the presumptions support the appellate courts' tendency to view the silence of these defendants on interpreter access as tantamount to a passive waiver of their Fifth and Sixth Amendment rights.

186. *See supra* note 140 and accompanying text.

187. *See supra* note 124 and accompanying text.

188. *See supra* notes 140-41 and accompanying text.

189. "Section 1827 does place on the trial court a mandatory duty to inquire as to the need for an interpreter when a defendant has difficulty with English." *Valladares*, 871 F.2d at 1565; *see also* United States v. Osuna, 189 F.3d 1289, 1293-94 (10th Cir. 1999); United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980).

190. *Osuna*, 189 F.3d at 1293-94.

> We cannot determine from this record whether use of an interpreter would have alleviated the [defendant's language] problem because the duty imposed by Section 1827 of the Act to inquire as to the need for an interpreter was not observed. The trial judge made no inquiries or findings as to the need for an interpreter, although the repeated language difficulties suggested the possible need for an interpreter.... In sum, due to the difficulties which became apparent during the trial proceedings here, it was the trial judge's duty to inquire into the possible need to obtain the services of an interpreter under the Court Interpreters Act.... Since these protections were not extended to him, we must remand for findings, and if necessary further proceedings in the trial court to make those findings.

Id. (citations omitted); *Tapia*, 831 F.2d at 1209 ("[T]he Court Interpreters Act of 1978 makes it

Nevertheless, some courts of appeal have created a "loophole" that could allow trial judges to avoid undertaking an inquiry. The loophole pertains to the judge's duty to be sensitive to the possibility of the defendant's linguistic need. At what point should it be obvious to the district court that a defendant's English deficiency could compromise his constitutional rights? When should the defendant's language difficulty automatically trigger a section 1827 investigation? Generally, appellate courts do not consider the defendant's status as a non-primary English speaker to be enough to precipitate an inquiry by trial judges.[191] Nevertheless, some district courts, when faced with a non-native speaker, habitually ask the defendant if an interpreter is desired. In *United States v. Torres*, the trial judge directly asked the defendant if he "could speak English." Although Eleno Torres responded affirmatively, he later changed his mind and requested an interpreter through his attorney.[192] The trial judge then immediately appointed an interpreter.[193]

The presence of a non-primary English speaker prompts other district courts to examine thoroughly the defendant's linguistic need and to make detailed findings in support of their discretion. In *United States v. Cheng*, the defendant was convicted of exporting and attempting to export munitions without proper licensing.[194] On appeal, George Cheng contended that the trial judge committed reversible error in failing to extend to him interpreter assistance. The Ninth Circuit affirmed the conviction after reviewing the judge's finding that Cheng's "working knowledge of English" was sufficient to dispense with the appointment of an interpreter.[195] This finding resulted from an extensive hearing on Cheng's English competence.

> [A]ll three of Defendant's trial interpreters testified that he waived off their translations so that he could listen to the English-language testimony himself. He answered questions at trial without waiting for an interpretation. He spoke English with his lawyer and with the court. Defendant's business associates testified that they conducted business with him in English and even discussed in English topics such as politics and philosophy. Defendant wrote letters in English and testified that he had read and understood various English-

incumbent upon a trial Court to make certain findings on the record, which are lacking in this case.").

191. *Hrubec*, 734 F. Supp. 60, 67 (E.D.N.Y. 1990) ("[T]he fact that a defendant's primary language is something other than English does not *ipso facto* create the duty to inquire of the need for an interpreter.").

192. No. 94-1113, 1995 U.S. App. LEXIS 264, at *16-*17 (6th Cir. Jan. 4, 1995).

193. *Id.*

194. No. 99-30073, 2000 U.S. App. LEXIS 4243, at *1 (9th Cir. Mar. 16, 2000).

195. *Id.* at *2.

> language documents. Defendant began to study English at the age of 13 and has lived in the United States since 1982.[196]

However, there are trial judges who refrain from investigating the defendant's linguistic need by ignoring or discounting a defendant's unmistakable language difficulty. Some judges never acknowledge the defendant's English deficiency.[197] Trial records reveal the silence of both the district court and the defendant on the question of interpreter availability. Other judges conduct a brief colloquy, having the defendant answer a few "yes/no" questions,[198] or they ask the defendant to "speak up" should any comprehension or communication problems arise during the proceedings.[199] In all of these cases, when the defendants later dispute the omission of interpreter services on appeal, circuit courts reject the notion of reversible error. They conclude the trial judge could not have been mindful of any potential linguistic need from the defendants' behavior alone. The onus was therefore on the defendants to inform the unsuspecting judge of any language problems to be investigated. However, according to most courts of appeal, because the defendants never demanded interpreter assistance nor objected to its absence, they could not have reasonably envisioned an investigation by the trial judge. In other words, the district court made its first discretionary decision, that any English problems were not worthy of investigation. Therefore, its second discretionary decision, whether to provide interpreter services, was unnecessary.

This rationale among appellate courts has produced some surprising decisions. One remarkable case is *United States v. Arthurs*, in which a jury convicted the defendant of possessing cocaine with the intent to distribute and importing cocaine, both federal offenses.[200] He was sentenced to sixty-three months of imprisonment and appealed from the judgment.[201] On appeal, Lloyd Arthurs asserted that: (1) he had asked the trial judge to have

196. *Id.*

197. United States v. Arthurs, 73 F.3d 444, 446 (1st Cir. 1996).

198. Gonzalez v. United States, 33 F.3d 1047 (9th Cir. 1994); United States v. Rosa, 946 F.2d 505, 507-08 (7th Cir. 1991).

199. United States v. Perez, 918 F.2d 488, 489-90 (5th Cir. 1990).

> At his initial appearance before the magistrate Perez indicated that he had some difficulty with the English language. The magistrate pointedly inquired whether Perez understood the proceedings. Perez responded: "I understand everything so far." The magistrate then advised Perez that "if you have any difficulty in understanding what's going on, stop and let us know so that we can do something because we can get a translator to assist you." Perez made no protestation of difficulty or request for assistance by a translator.

Id.

200. *Arthurs*, 73 F.3d at 445.

201. *Id.* at 446.

his Jamaican-English testimony translated "into a form of English more easily understood by the jury;" and (2) he "did not understand some of the questions put to him when he testified."[202] Arthurs argued that the district court's subsequent refusal to provide him an interpreter when he testified violated his Fifth and Sixth Amendment rights.[203] The First Circuit remarked that the record contained neither a request for interpreter assistance nor an objection to its omission (nor did the record show any findings by the trial judge as to the defendant's English skills). However, the court of appeals opted to address Arthurs' claim because the government conceded that defense counsel had demanded an interpreter in a chamber's conference during trial.[204] In reviewing the record, the First Circuit observed that defense counsel had made several references in open court to the possibility the jury would not understand Arthurs' testimony.[205] The appellate court also recognized the defendant was unable to read and write.[206] Finally it noted that during his testimony, Arthurs seemed to have "answered for the most part responsively, although he [had] occasionally misunderstood and needed to have a question repeated."[207] Nevertheless, the First Circuit affirmed Arthurs' conviction, in part, due to defense counsel's failure to object to the lack of interpreter services on the ground that Arthurs was "suffer[ing] from comprehension problems so severe as to deny him due process or the right to a fair and impartial trial."[208] Consequently, the district court was left "without notice of any claim that language difficulties bothered the defendant to the extent now claimed on appeal. Had the court been so notified, it could have made further inquiry and, if necessary, taken steps to deal with the alleged problem."[209] So, not even defense counsel's witness interpreter request nor his client's comprehension and communication problems were enough to convey

202. *Id.* at 446-47.
203. *Id.* at 447.
204. *Id.*
205. Id. at 447 n.2.

> For example, defense counsel explained in opening argument, "Mr. Lloyd Arthurs is a Jamaican National, they speak English but during this trial you will realize that the [sic] their English is not every time so easily understandable." When defendant took the stand, counsel stated, "I will appreciate that all your answers try to be as clear and slow as possible. . . . For the members of the Jury to clearly understand your testimony." And in closing arguments, defense counsel noted that the jury may have had some difficulty understanding defendant's speech, and reiterated key aspects of his testimony.

Id.

206. *See id.* at 447.
207. *Id.*
208. *Id.*
209. *Id.*

Arthurs' potential linguistic need to the judge. Apparently, the request of defendant or defense counsel must also specify the proper kind of interpreter (here witness, proceedings, or both) for the judge to consider it.[210]

The *Gonzalez* opinion provides a related example of the lower court downplaying language problems that are evident in *sua sponte* colloquies between the defendant and the bench.[211] First, the district court magistrate and then the judge asked the defendant some yes or no questions because they both "quickly perceive[d] that Gonzalez, whose primary language [was] Spanish, had some difficulties with English."[212] Nevertheless, both jurists felt that Gonzalez' English problems were not "major" enough to

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210. But see *United States v. Osuna*, 189 F.3d 1289, 1290 (10th Cir. 1999), where the defendant was convicted for unlawfully possessing firearms and other armaments. On appeal, Felix Osuna claimed the trial judge violated section 1827 in failing to appoint an interpreter for him. *Id.* at 1291. The language problems that developed during trial were "from both the rapidity of Osuna's testimony, and his basic Spanish language usage." *Id.* at 1292. The prosecutor requested witness interpreter services for defendant because the court reporter, judge, and perhaps the jury, were not entirely able to understand him. *Id.* at 1292-93. Yet, "[t]he trial judge made no inquiries or findings as to the need for an interpreter, although the repeated language difficulties suggested the possible need for an interpreter." *Id.* at 1293. The Tenth Circuit remanded the case for the trial judge to "determine from the trial record whether lack of an interpreter inhibited Osuna's comprehension of the proceedings or his ability to assist in presenting his case to the jury." *Id.*

211. Gonzalez v. United States, 33 F.3d 1047, 1049-50 (9th Cir. 1994); *see also* United States v. Febus *et al*, 218 F.3d 784, 792 (7th Cir. 2000); United States v. Rosa, 946 F.2d 505, 507-08 (7th Cir. 1991) (upholding determination of a knowing and intelligent waiver of an interpreter even though an interpreter was needed during judge's colloquy with defendant); United States v. Signo, C.A. No. 97-2312, Crim. A. No. 96-562-1, 1997 U.S. Dist. LEXIS 14470 at *7 (E.D. Pa. Sept. 16 1997).

212. *Gonzalez*, 33 F.3d at 1050. At Gonzalez' arraignment:

> Court: Do you understand?
> Gonzalez: Yeah, little bit.
> Court: What is your problem, language problem?
> Gonzalez: Well, no. I don't know how to read that much. I understand. I understand.
> At Gonzalez' change of plea hearing . . .:
> Court: What did you do? Did you work with other people to buy drugs and sell them?
> Gonzalez: I used the telephone.
> Court: In addition to using the phone, what did you do?
> Gonzalez: I worked with Forcelledo.
> Court: Did you sell drugs to people?
> Gonzalez: Yes.
> Court: Did you deliver drugs to people?
> Gonzalez: Yes.
> Court: Was that drug cocaine?
> Gonzalez: Yes.

Id.

inhibit his comprehension or communication within the meaning of the CIA.[213] As a consequence, no further factual inquiry was warranted.[214] The Ninth Circuit agreed, adding that "[t]he defendant's answers were consistently responsive, if brief and somewhat inarticulate, and he only occasionally consulted his attorney. In addition, although his lack of objection is not dispositive, Gonzalez never indicated to the court that he was experiencing major difficulty, despite the opportunities afforded him."[215] Once again, a court of appeal excused a lower court's dismissive reaction to a defendant's obviously impaired English skills. However, accompanying the *Gonzalez* opinion is Judge Stephen Reinhardt's vigorous and cogent dissent.[216] He strongly chastised the district court magistrate and judge for engaging in "cursory, half-hearted, and casual questioning" that was meant to eliminate the appearance of defendant's potential need or "to compensate for Gonzalez' inability to speak."[217] Judge Reinhardt argued that by eliciting responses to a series of "short, simple questions," the jurists hoped to sidestep the necessity of a full investigation.[218] He then castigated the *Gonazlez* majority for allowing the district court to read into the CIA a distinction between "major language problem" (i.e., a potential linguistic need to investigate for probable interpreter appointment) and "minor language problem" (i.e., no potential linguistic need to investigate).[219] Judge Reinhardt emphasized that the statute makes no such distinction because Congress did not wish to manufacture arbitrary and possibly harmful differences among those who are non-primary English speakers.[220] "Congress mandated the appointment of interpreters *whenever*

213. *Id.*

214. *See id.*

215. *Id.* at 1051.

216. *Id.* at 1052-54 (Reinhardt, J., dissenting).

217. *Id.* at 1053 (Reinhardt, J., dissenting).

218. *Id.* (Reinhardt, J., dissenting). "A district judge cannot compensate for his failure to appoint an interpreter by asking the defendant only extremely basic questions." *Id.* (Reinhardt, J., dissenting).

219. *Id.* (Reinhardt, J., dissenting).

> The only question and the sole permissible inquiry, in the case of defendants like Gonzalez is whether the defendant's comprehension is impaired for purposes of the judicial proceeding. Any other inquiry is improper. Had the majority examined the language and purpose of the statute in a more attentive manner, it surely would not have ignored such a clear congressional mandate.

Id. at 1052 (Reinhardt, J., dissenting) (Judge Reinhardt urged his colleagues to apply a *de novo* standard of appellate review rather than a "clear error" standard.).

220. *Id.* (Reinhardt, J., dissenting).

> There is absolutely no indication in the statute or its legislative history that a defendant must have a "major" language problem to be granted an interpreter, and the district court erred in reading such an additional requirement into the Act. . . .

a 'language-handicapped' defendant's comprehension of the proceedings is impaired because Congress concluded that the appointment of an interpreter represents 'a fundamental premise of fairness and due process for all.'"[221]

Judge Reinhardt's point is well taken, but he does not go far enough. Subdividing partially proficient speakers into groups tends to undermine the exercise of discretion as a judge's personal investment in the fate of a particular defendant.[222] Once categorized with a major or minor language difficulty, defendants are no longer individualized. As part of a group, their personal idiosyncratic linguistic need is no longer relevant in considering linguistic need. Judges do not have to be attentive to the more subtle English deficiencies uniquely characteristic of a certain defendant in a specific case.[223] Rather, they may be tempted to compare the current defendant to similarly situated defendants in previous cases (in terms of superficial and not necessarily relevant facts like age, education and employment levels, and length of residence) and to dispense with any meaningful factual inquiry.[224]

The upshot of opinions like *Arthurs* and *Gonzalez* is that appellate courts use the silence of a semi-English-fluent defendant as retroactive justification for the trial judge's disregard of the defendant's comprehension and communication problems. As a result, the burden of seeking and then legitimizing interpreter access falls on the defendant, without any corresponding burden on the judge to be conscious of and then inquire into the defendant's potential linguistic need. It is a peculiar irony of the federal justice system that English-deficient defendants must articulate their desire for interpreter services before their right to such services can be assessed. Another irony is that interpreter assistance is not guaranteed even for those defendants who do request it.

> Many people may be capable of speaking enough rudimentary English to function at a very basic level in this country but lack the ability to comprehend complex criminal proceedings. Others may speak English so fluently that, even though English represents their second language, they can follow the most complicated of criminal proceedings. Congress presumably had the latter group in mind when it required that language difficulties "inhibit" the defendant's comprehension of the proceedings for an interpreter to be appointed.

Id. (Reinhardt, J., dissenting).

221. *Id.* (Reinhardt, J., dissenting).

222. *See supra* notes 150-53 and accompanying text.

223. *See supra* note 173 and accompanying text.

224. *See supra* note 174 and accompanying text.

B. *"Linguistic Need" and "Blameworthiness"*

With *Negron*, the "foreigner" meme gained a foothold in the federal justice system. However, thanks to *Valladares v. United States*,[225] it became a driving force in resolving appeals challenging the absence of interpreter services. Suddenly, essential to appellate review was the reason these semi-English-fluent defendants had kept silent during the proceedings. Why had they not raised the issue of interpreter access to the trial judge? In effect, circuit courts began to question and then read into the defendants' silence certain motives that became determinative of their appeal. Nelson Valladares did not dispute his interpreter's competency when he was tried for possession and distribution of marijuana.[226] He was ultimately convicted.[227] Valladares moved to have his conviction overturned, alleging newly discovered evidence and ineffective assistance of counsel.[228] Testimony was also taken on the adequacy of his interpreter on the first day of trial at the ensuing hearing.[229] The district court rejected Valladares' initial claims but failed to consider the additional interpreter issue. On appeal, the Eleventh Circuit remanded the case for a determination of whether the CIA had been violated.[230] The district court subsequently found that the section 1827 provisions had been met, a decision from which Valladares then appealed.[231]

In an opinion authored by Justice Lewis Powell (then retired and sitting by designation), the Eleventh Circuit affirmed the district court's findings.[232] Justice Powell thought it "significant" that Valladares "made no objection to the adequacy of his interpreter at trial," warning that "to allow a defendant to remain silent throughout the trial and then upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse."[233] Justice Powell never defined what he meant by "abuse." Nor did he cite any authority that could help explain his admonition. However, *People v. Ramos*,[234] then a well-known 1970 New York state court decision, contains comparable language which may clarify

225. 871 F.2d 1564, 1564-66 (11th Cir. 1989).

226. *Id.* at 1566.

227. *Id.* at 1565.

228. *Id.* (basing Valladares' motion on 28 U.S.C. § 2255).

229. *Id.* On that day only, Valladares was assisted by a local Spanish-speaking attorney. *Id.* Thereafter, the defendant conceded that he relied on a "satisfactory" interpreter. *Id.* at 1565 n.1.

230. *Id.* at 1565.

231. *Id.* According to one commentator, neither interpreter had been federally certified, and the attorney-interpreter only provided Valladares summaries of the trial evidence. Astiz, *supra* note 164, at 106.

232. *Valladares*, 871 F.2d at 1566. "We affirm the district court's holding that [Valladares'] understanding of the trial and the assistance of his counsel were adequate under constitutional and statutory standards." *Id.* at 1564-65.

233. *Id.* at 1566.

234. 258 N.E.2d 197, 198-99 (N.Y. App. Div. 1970).

Justice Powell's concern. In that case, Jesus Ramos moved for a writ of error *coram nobis*, claiming he had been denied his constitutional right to a fair trial because he did not understand the proceedings due to language problems.[235] During his trial for narcotics possession, Ramos demanded an interpreter but only to translate his Spanish-language testimony.[236] In an opinion foreshadowing the previously discussed federal circuit court rationale in *Valladares*,[237] the New York appellate judge affirmed Ramos' conviction.[238] Judge Jasen wrote in part:

> The right to an interpreter, however, may be waived where a defendant, or his attorney, fails to call to the attention of the trial court, in some appropriate manner, the fact that he does not possess sufficient understanding of the English language. Where, as here, a defendant is adequately represented by competent counsel, and despite numerous opportunities to do so, fails to inform the court about any inability to understand the English language, he cannot be heard to complain in a collateral attack that his conviction was secured without due process of law.[239]

Using a rationale adumbrating Justice Powell's opinion, Judge Jasen concluded,

> Otherwise, it would be possible for a defendant to remain silent throughout the trial, and take a chance of a favorable verdict—failing in which, he could secure a new trial upon the ground that he did not understand the language in which the testimony was given. The absurdity of such a proposition is self-evident.[240]

This was assuredly the "abuse" Justice Powell later anticipated occurring in the federal justice system. He was afraid that if partially English proficient defendants were not subjected to an implied waiver for not speaking, they could then "trick" judges into granting them a new trial even though their conviction had been proper.[241] To Justice Powell, their apparent language difficulty occulted an actual English fluency.

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235. *Id.* at 198.

236. *Id.*

237. *See supra* notes 232-33 and accompanying text.

238. *Ramos*, 258 N.E.2d at 199.

239. *Id.* at 198 (citations omitted).

240. *Id.* at 198-99.

241. But see *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir. 1970), a Second Circuit opinion binding on New York state courts, decided October 15, 1970. *Ramos*, 258 N.E.2d at 197, was decided April 9, 1970.

Other circuit courts have had similar fears. In four of the appellate decisions citing the *Valladares* opinion to support an implied waiver,[242] two of them quoted Justice Powell's warning.[243] The cases add a darker dimension to the evolving "foreigner" meme, an aspect of "blameworthiness" that is more menacing and complicated. Appellate courts still view immigrants as solely responsible for preferring to remain silent and for generating the consequences of an implied waiver. However, the *Valladares* opinion and its progeny also ascribe to the immigrants' silence a perfidious motive. The decisions construe the immigrants' failure to speak as an attempt to exploit the justice system for an undeserved right (to a new trial).[244] This view reflects more than the belief that immigrants simply oppose assimilating into the dominant culture. Rather, it suggests they actively intend to sabotage dominant culture values and institutions. Furthermore, reviewing courts fear that by their efforts immigrants will achieve greater rather than equal access to constitutional rights if the dominant culture is not hyper-vigilant. In effect, the stigma of danger and dishonesty imputed to immigrants in society[245] has filtered into the justice system.[246]

The *Valladares* opinion, and by extension the "foreigner" meme, stems from two presumptions that supposedly account for the silence of semi-English-fluent immigrant defendants. First, that these defendants had known that interpreter assistance was potentially available to them. Second, that if they had wanted interpreter assistance, the defendants (or their

242. Gonzalez v. United States, 33 F.3d 1047, 1049 (9th Cir. 1994); United States v. Rosa, 946 F.2d 505, 508 (7th Cir. 1991); United States v. Signo, C.A. No. 97-2312, Crim. A. No. 96-562-1, 1997 U.S. Dist. LEXIS 14470, at *7 (E.D. Pa. Sept. 16, 1997); Hrubec v. United States, 734 F. Supp. 60, 67 (E.D.N.Y 1990).

243. *Gonzalez*, 33 F.3d at 1051; *Signo*, 1997 U.S. Dist. LEXIS 14470, at *7.

244. It is interesting that the fear was not that the defendant's silence would lead to interpreter services which the defendant did not merit in the initial trial.

245. *See supra* notes 6-11 and accompanying text.

246. And, because these immigrants are also convicted criminals, the system's negative perception of them tends to be reinforced. In other words, immigrants may also discover that their earlier adjudication of guilt bootstraps appellate review of whether they were entitled to interpreter assistance during lower court proceedings. In *United States v. Sanchez*, C.A. No. 94-2866, Crim. A. No. 91-00148, 1994 U.S. Dist. LEXIS 16725, at *1 (E.D. Pa. Nov. 16, 1994), the defendant pled guilty to narcotics offenses for which the district court sentenced him to a term of 121 months imprisonment. He was offered a sentence reduction in exchange for information against a co-felon. *Id.* at *2. However, Oscar Sanchez later transmitted exculpatory information to the prosecution that proved to be false. *Id.* The court reduced his sentence to 90 months. *Id.* Sanchez moved the district court to vacate, set aside or correct his sentence, contending he was denied a qualified interpreter at his re-sentencing hearing. *Id.* at *2-*3. He alleged that both the CIA provisions and his due process rights had thus been violated. *Id.* at *3-*4. In denying Sanchez' motion, the district court commented that the defendant never indicated his inability to understand English to the sentencing judge. *Id.* at *6. The court then surmised that "defendant only raises this claim at this time because he is not satisfied with the amount of time his sentence was reduced." *Id.* Sanchez' reason for appealing his sentence has no bearing on its constitutionality.

attorney) invariably would have requested it or objected to its omission. Based on these presumptions, appellate courts perceive the defendants' silence as the product of an informed choice justifying the determination of an implied waiver. However, because this perception is colored by suspicion, it is not necessarily accurate. The intellectual by-product of such skewed understanding is the appellate courts' refusal to entertain more likely explanations of the defendants' silence. Immigrants may not request interpreter services due to lack of knowledge. The district court is not compelled to advise them of interpreter availability unless and until they convey the requisite linguistic need.[247] In effect, unless informed by their defense counsel, the defendants may be unaware of interpreter access, especially at the commencement of proceedings. Even if they know they can seek interpreter assistance, these defendants may choose to forego it for reasons other than the lack of desire. For example, the immigrants may fear requesting interpreter services, misunderstand the availability of such services, or misjudge their own English proficiency. This last possibility arises when non-native speakers are comfortable with their English skills in daily situations but lose confidence in their proficiency in the intense and hostile courtroom environment.[248]

Of course, circuit courts labeling such silence an implied waiver are also influenced by the defense attorney's failure to speak.[249] Yet judicial reliance on counsels' behavior as a gauge of their client's linguistic need is a dubious practice. Why should the attorney be any more adept at judging the defendant's English skills than the trial judge? Moreover, some

247. United States v. Barrios, 457 F.2d 680, 682 (9th Cir. 1972). *Barrios* was later criticized on other grounds by *United States v. Valencia*, 669 F.2d 37, 38 (2nd Cir. 1980). However, should the court offer the defendant an interpreter, the court is only obligated to make the offer once. *See* United States v. Perez, 918 F.2d 488, 491 (5th Cir. 1990).

248. In this regard the following comments are persuasive:

> English language difficulty hinders the right of equal access to the criminal justice system. Even if a defendant, victim, or witness speaks some English, he or she may not communicate or comprehend English adequately for a legal proceeding. In order to avoid significant misunderstandings, a hurdle of constitutional importance, the defendant or witness may need an interpreter. This is not due solely to the legal terms and more sophisticated forms of English used in the courtrooms, but also because many persons who use English as a second language have difficulty speaking or comprehending English in a pressured or highly charged situation, or in a location that is not part of their common experience, such as in a courtroom or at a police station.

Cole & Maslow-Armand, *supra* note 35, at 194.

249. *See, e.g.*, United States v. Acevedo-Toscano, No. 99-50064, 2000 U.S. App. LEXIS 2589, at *2-*4 (9th Cir. Feb. 18, 2000); United States v. Arthurs, 73 F.3d 444, 446-47 (1st Cir. 1996); Huitron v. United States, No. 94-55805, 1995 U.S. App. LEXIS 1937, at *4-*5 (9th Cir. Jan. 30, 1995); United States v. Sanchez, C.A. No. 94-2866, Crim. No. 91-00148, 1994 U.S. Dist. LEXIS 16725, at *3-*8 (E.D. Pa. Nov. 17, 1994).

defense counsels refrain from requesting interpreter services for unexplained and inexplicable reasons. Nevertheless, their silence is deemed acceptable on appellate review.[250] Finally, the constitutional rights implicated by interpreter access are personal to the defendant and cannot be waived by defense counsel. Two appellate courts have rejected the notion of an interpreter waiver by either counsel or court.[251] Instead, they held that for a waiver to be valid it must comply with CIA provisions, mandating an express waiver by the defendant.[252] Medina Tapia appealed his conviction for conspiring to transport unlawfully undocumented aliens into the United States, alleging section 1827 had dictated the appointment of a Spanish/English interpreter for trial.[253] The Fifth Circuit commented that defense counsel was Spanish/English bilingual, the defendant had been arraigned through an interpreter, and while an interpreter had been available for trial, defense counsel never moved for an interpreter to sit with the defendant at trial.[254] The court of appeals held that Tapia's use of an interpreter for arraignment had put the judge on notice of his potential linguistic need that should have been investigated.[255] The silence of Tapia's lawyer was not dispositive of his client's interpreter access.[256] If the judge's investigation had shown Tapia merited an interpreter, the judge should have complied with the affirmative waiver provision of section 1827.[257] The "waiver of an interpreter is not a decision for his counsel or the Court to make. It is the defendant's decision, after the Court explains to him the nature and effect of a waiver."[258]

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250. Gonzalez v. United States, 33 F.3d 1047, 1049-51 (9th Cir. 1994); *Sanchez*, U.S. Dist. LEXIS 16725, at *3-*8.

251. United States v. Osuna, 189 F.3d 1289, 1294 (10th Cir. 1999); United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980).

252. *See Osuna*, 189 F.3d at 1294; *Topia*, 631 F.2d at 1209.

> Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

28 U.S.C. § 1827(f)(1) (2000).

253. *Tapia*, 631 F.2d at 1208.

254. *Id.* at 1209.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

The Tenth Circuit later cited the *Tapia* opinion in *United States v. Osuna*.[259] In *Osuna*, the prosecution suggested the defendant be appointed a Spanish/English interpreter during trial.[260] However, Felix Osuna's lawyer responded that using an interpreter "would even be more difficult."[261] The district court did not inquire further as to the defendant's potential interpreter need.[262] The court of appeals held that neither the defense attorney nor the district court could effectively waive defendant Felix Osuna's interpreter access.[263] "If the defendant stated he wished to waive his rights under the [CIA], the trial judge should have determined the validity of such waiver, which was required to be made by the defendant himself, not by his counsel or the trial court."[264] Nevertheless, most circuits permit a defense attorney, who is relying on trial procedure or strategy, to waive the client's interpreter assistance, thereby relieving the district court from its duty to investigate the defendant's potential linguistic need.[265] These same appellate courts do not interpret section 1827 as requiring the defendant's express waiver until after the investigation, when the district court has determined that the defendant has a right to an interpreter. "The waiver privilege is, of course, personal to the defendant, but it only factors into the proceeding upon a judicial finding that either the defendant's comprehension of the proceedings, or his communications with counsel or the court, is inhibited by language or hearing difficulties."[266] Ironically then, only those defendants who qualify for interpreter services but do not want them are guaranteed the statutory right of an affirmative waiver by the trial judge. Because of some circuit courts' *Valladares*-induced preoccupation with immigrant "blameworthiness," their opinions on interpreter access seem to be only peripherally about the linguistic need of semi-English-fluent defendants. These appellate courts are disinclined to look beyond the defendants' silence in assessing the trial judges' discretion. Nor do they mandate that district courts thoroughly investigate and make factual findings of the defendants' true linguistic needs. In effect, by divining an implied waiver, appellate courts have rendered the discretion exercised by trial judges virtually unreviewable. The result is nearly complete "appellate abdication."[267]

259. 189 F.3d 1289, 1291 (10th Cir. 1999).
260. *Id.*
261. *Id.* at 1292.
262. *Id.* at 1293.
263. *Id.* at 1292.
264. *Id.* at 1294.
265. *See supra* notes 249, 250.
266. United States v. Perez, 918 F.2d 488, 491 (5th Cir. 1990).
267. *See generally* Friendly, *supra* note 79, at 765-67.

C. *"Linguistic Need" as a Set of "General Rules" Rather Than as a Standard*

Established social values or norms govern personal interaction. Human conduct is the instantiation or failure to instantiate a norm. In exercising primary discretion, a trial judge has the flexibility of evaluating the significance of certain conduct with respect to the relevant norm on a case-by-case basis.[268] Guiding the judge in this process are one or more standards that directly reference and thus help reinforce acceptable norms.[269] In applying a standard, the judge must "both . . . discover the facts of a particular situation and . . . assess them in terms of the purposes or social values embodied in the standard."[270] The standard of linguistic need requires the trial judge to investigate an immigrant defendant's English difficulty to ascertain whether it interferes with the defendant's ability to comprehend the proceedings and communicate with court and counsel within the meaning of the CIA and the Fifth and Sixth Amendments.[271] Once made, the judge's decision on interpreter access is rarely disturbed on appeal.[272] And, appellate courts have declined to review the judge's exercise of discretion according to a set of rigid rules that would predetermine linguistic need.[273] Nor has Congress done more than encourage trial judges to use their best efforts in assessing linguistic need.[274] That appellate courts and Congress have refused to formulate strict boundaries beyond which sound judgment morphs into personal bias or arbitrariness is what makes the trial judge's exercise of judicial discretion meaningful.[275] The flexibility and broad-scope of the linguistic need

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268. *See supra* notes 150-53 and accompanying text. "The final reason . . . for bestowing discretion on the trial judge as to many matters is, paradoxically, the superiority of his nether position. It is not that he knows more than his loftier brothers; rather, he sees more and senses more." Rosenberg, *supra* note 80, at 663.

269. Kennedy, *supra* note 46, at 1688.

270. *Id.*

271. "A standard refers directly to one of the substantive objectives of the legal order." *Id.*

272. *See supra* notes 160-62 and accompanying text.

273.

> The use of an interpreter under section 1827 is committed to the sound discretion of the trial judge. Because the proper handling of translation hinges on a variety of factors, including the defendant's knowledge of English and the complexity of the proceedings and testimony, the trial judge, who is in direct contact with the defendant, must be given wide discretion.

Valladares v. United States, 871 F.2d 1564, 1566 (11th Cir. 1989) (citations omitted).

274. *See supra* note 142 and accompanying text.

275.

> While the judge has the ultimate responsibility in determining whether or not an interpreter is required under this legislation, it is anticipated that counsel will alert the judge's attention to the fact that an interpreter may be needed. It is anticipated that the need for formal proceedings to make an initial determination of whether

standard enables the trial judge to deal with as many unique and disparate facts in which the issue of interpreter access can arise.[276] In other words, the "shouldness" of completed acts or omissions can be generalized without depriving them of their uniqueness. Otherwise, any "how to" approach in terms of "formally realizable rules"[277] would not only be under-inclusive for facts that fail to fit the rules, but would also function in a fundamentally mechanical way.[278]

In truth, however, when interpreter access is at issue, the redeeming qualities of district court discretion are the purveyors of its own corruption. The absence of any congressionally or judicially mandated formal realizability of linguistic need has left a void. Simply put, trial judges are unsure what the standard means and how it should be applied. After all, they are not usually trained to identify and assess a defendant's English proficiency.[279] Unencumbered by de novo review,[280] appellate judges avoid close scrutiny of the judge's interpretation of the standard. They are no more positive of its meaning and application than is the district court. The result of such uncertainty is *sub rosa* judicial lawmaking in an effort to fill the void.[281] "Judicial private lawmaking takes place precisely in those marginal and interstitial areas of the legal system where there is unequivocal, or even extremely suggestive indication of legislative will."[282] In essence, circuit courts in conjunction with district courts "legislate and enforce" de facto general rules. These rules are not formally realizable; they do not involve fact-finding with respect to a known regime of legal

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> the appointment of an interpreter is required will be minimal. Instead, we anticipate that during discovery or other pretrial matters counsel for both parties will be able to assess the language capability of a party. Upon agreement of both attorneys and perhaps brief questioning by the judge of the party, the judge can make the determination regarding appointment of an interpreter.

S. REP. NO. 95-569, at 7 (1977) (Judiciary Committee). The Senate bill was passed in lieu of the House bill after amending its language to contain the text of the House bill.

276. "The wide scope of the rule or standard is an attempt to deal with as many as possible of different imaginable fact situations in which a substantive issue may arise." Kennedy, *supra* note 46, at 1689. "Narrow rules [are the] antithesis of primary discretion." Rosenberg, *supra* note 80, at 639.

277. "The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation." Kennedy, *supra* note 46, at 1687.

278. *Id.* at 1695. "The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the magistrate." Rosenberg, *supra* note 80, at 663.

279. *See supra* note 144 and accompanying text.

280. *See* Judge Reinhardt's dissent in which he makes the case for de novo review. Gonzalez v. United States, 33 F.3d 1047, 1052 (9th Cir. 1994) (Reinhardt, J., dissenting).

281. *See* Kennedy, *supra* note 46, at 1690.

282. *Id.* at 1760.

directives.[283] Rather, they are standard-like in that they inhere the "value judgments" of current norms.[284] The *sub rosa* rules for interpreter access are embedded in the text of appellate decisions that shore up the legitimacy of the "foreigner" meme. In particular, these rules serve to validate the dominant culture's perception of the immigrant's "blameworthiness" for the trial judge's failure to appoint an interpreter. Individually, or more typically, in combination, the following rules prescribe an implied waiver of interpreter services or justify their omission at trial: (1) An immigrant with educational, employment levels and United States residence greater than those of defendant *Negron* is presumed to know English sufficiently. (2) A semi-English-fluent immigrant who does not overtly indicate an inability to comprehend the proceedings or to communicate with court or counsel cannot satisfy linguistic need. (3) The silence of a semi-English-fluent defendant, or defense counsel, or both is a passive waiver of the CIA as well as Fifth and Sixth Amendment rights to interpreter services.

As a practical matter, the general rules are not a workable regime for ensuring that those who merit interpreter services should receive them. First, because they emanate from the dominant culture's nativism toward the immigrant defendant, rather than from an objective judicial assessment of the defendant's language skills, such rules are ineffective as arbitrary and emotionally biased. Indeed, their application transforms the tenor of trial judge decisionmaking from a cooperative effort to an adversarial process between district court and defendant. Second, based on faulty presumptions about immigrants, the rules are both analytically under and over-inclusive for those who know some English. Some but not all immigrants with prolonged education, employment, and residence in America are statutorily and constitutionally proficient in English. Third, the rules lack certainty and thus fail to deter wrongful conduct.[285] Because the rules are covert and *de facto*, immigrants receive no advance notice on how the federal justice system handles interpreter access.[286] How then can non-primary English speaking defendants anticipate the consequences of their behavior? Finally, the English language deficiencies that arise are too varied in kind and degree to be reducible to a functional set of rules.[287]

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283. "By contrast, formally realizable rules involve the finding of facts." *Id.* at 1752. "Formally realizable general rules are, by definition, knowable in advance." *Id.* at 1739.

284. *Id.* at 1752. "Standards refer directly to the substantive values or purposes of the community. They involve 'value judgments.'" *Id.*

285. *Id.* at 1695, 1739.

286. "Certainty, on the other hand, is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them." *Id.* at 1688.

287.

> Another principle supporting deference to rulings of the trial court is the absence of the benefits that ordinarily flow from appellate review in establishing rules that will govern future cases. This is true in the frequent situations . . . where the

IV. CONCLUSION

The "foreigner" meme has profoundly influenced primary and secondary discretion regarding interpreter access. At the district court level, the standard of linguistic need has devolved into a set of fixed general rules that mirror current anti-immigrant sentiment in this country. The district courts' application of these rules tends to supplant any vigorous fact-finding efforts to individuate each non-native speaker's true English proficiency. Moreover, the exercise of primary discretion to regulate interpreter services is not a joint enterprise shared by judge and defendant. Instead, it pits a wary judge against a potentially "deceitful" defendant who may be manipulating the justice system to obtain an undeserved benefit. At the circuit court level, the exercise of secondary discretion has nearly insulated from appellate scrutiny those district court decisions barring interpreter access. In turn, the nativistic leanings underlying the general rules are sanctioned and reinforced for use in subsequent criminal proceedings. More specifically, the judicially contrived "passive waiver" is readily attributable to defendants who remain silent at trial and then claim on appeal that their lack of interpreter services is reversible error.

Although it is severe, the impact of the "foreigner" meme on judicial discretion is symptomatic of the more fundamental problem of allowing primary and secondary discretion to regulate interpreter access. The problem raises several issues, namely, the level of reviewability that appellate courts should extend to trial judge decisions on interpreter services and whether "silence" should be considered as the defendant's implied waiver of such services. These two issues, to be discussed separately, are indeed related.

All district court discretionary decisions, both procedural and substantive, are subject to review for "abuse of discretion."[288] However, the standard is misleading in that the degree of appellate scrutiny will depend upon the nature of the decision.[289] "[I]n fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance."[290] Largely unassailable on appeal are rulings on pre-trial procedural issues because they derive from the judge's superior vantage point of witnesses, jury and

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> factors "are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair the trial judge's ability to deal fairly with a particular problem that would lead to a just result."

Friendly, *supra* note 79, at 760 (quoting United States v. McCoy, 517 F.2d 41, 44 (7th Cir. 1975)).

288. United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981).

289. *Id.*

290. *Id.*

lawyers.[291] Of significance is that "some but by no means all of these rulings escape only by inches the mandate against reversal for 'errors or defects which do not affect the substantial rights of the parties.'"[292] A decision on interpreter access falls within this category as a pre-trial procedural matter that depends upon the judge's first-hand knowledge of linguistic need. The correlative "hands-off" appellate attitude is reasonable when the issue is the appointment of witness interpreters. A district court is in the best position to determine its own linguistic need as well as the need of both the jury and attorneys when a non-English speaking witness testifies. And, since the purpose of witness interpreter appointments is to promote an orderly trial, the circuit courts should defer to the district court's exercise of discretion. Indeed, the appointment of a witness interpreter stems from the judge's inherent authority to ensure expeditious proceedings.[293] However, most appeals now deal with party and proceedings interpreter access, which implicates the defendant's constitutional rights and thus raises more than just questions of fact.

The statutory predicate for providing an interpreter is the factual determination that the defendant's English deficiency inhibits comprehension of the proceedings or communication with either counsel or the judge.[294] More is at stake here than procedural convenience for the criminal defendant. In making its factual determination, the district court is also resolving a question of law concerning the defendant's ability to vindicate Fifth and Sixth Amendment protections during trial.

As a conclusion of law that implicates substantive rights of great significance, the absence of an interpreter appointment mandates de novo review by the circuit court.[295] Appellate courts have failed to realize this because the nature of interpreter access has changed. Their traditional abstention in exercising secondary discretion is no longer justified. As a derivative right, the question of providing interpreter services during trial should be subjected to close appellate scrutiny. Instituting de novo review would also discourage circuit courts from inferring an implied waiver of fundamental rights from the defendant's silence regarding interpreter services. In this context, an implied waiver is a spurious court-created device. It is spurious for three reasons. First, the term "implied waiver" falsely suggests the defendant intended to forego interpreter access, when there may have been other reasons for the failure to request interpreter services or to object to their absence. Second, an implied waiver is in fact a judicial limitation on the defendant's access to interpreter services rather

291. *Id.* at 818-19; *see also* Friendly, *supra* note 79, at 760; Rosenberg, *supra* note 80, at 646.

292. Friendly, *supra* note 79, at 760.

293. *See supra* notes 85-90 and accompanying text.

294. *See supra* note 124 and accompanying text.

295. *See* Gonzalez v. United States, 33 F.3d. 1047, 1054 (9th Cir. 1994) (Reinhardt, J., dissenting).

than the defendant's decision to refrain from obtaining services made available by the district court. Third, "implied waiver" is actually a misnomer, and as such, effectively conceals what the defendant's silence actually means—a forfeiture as opposed to a waiver.

Forfeiture and waiver are entirely distinct. Forfeiture "is the failure to make the timely assertion of a right," which does not preclude appellate review of a claim for plain error.[296] Despite the lack of a timely objection during trial, an error is reviewable on appeal if it is "plain" or obvious on the record and "affect[s] substantial rights" or is prejudicial in that it influenced the outcome of the trial.[297] "An error may seriously affect the fairness, integrity or public reputation of judicial proceedings, independent of the defendant's innocence."[298] Waiver is the "'intentional relinquishment or abandonment of a known right,'" which extinguishes the claim altogether.[299] In essence, it is a tactical decision. For example, in *United States v. Huang*, the circuit court concluded that two of the defendants at trial "through their attorneys, made sufficient attempts to waive their rights to object to the non-certified interpreter and non-verbatim translation" where the lawyers opposed a mistrial motion made by other defendants and stated their intention to "live with" the witnesses' testimony as rendered by the interpreter.[300] Generally, a waiver of interpreter services is effected pursuant to the CIA, which requires the defendant's "express" waiver on the record after consultation with counsel and explanation by the judge of the nature and effect of the waiver.[301]

As the preceding discussion demonstrates, the application of federal laws regarding interpreter access involves some complex issues, made more complicated by the influence of the "foreigner" meme. I believe that modifying, while still retaining primary and secondary discretion, would

296. United States v. Olano, 507 U.S. 725, 773 (1993).

297. *Id.* at 734 (quoting FED. R. CRIM. P. 52(b)).

298. *Id.* at 736-37 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

299. *Id.* at 733 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

300. United States v. Huang, 960 F.2d 1128, 1136 (2d Cir. 1992).

301. 28 U.S.C. § 1827(f)(1) provides:

> Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

Id. An extensive examination of forfeiture and waiver with respect to interpreter access is beyond the purview of this article.

only further complicate the semi-English-fluent defendant's ability to obtain interpreter services when appropriate. Moreover, altering judicial discretion would not eradicate the "foreigner" meme that directs the exercise of that discretion. It would be more efficient and effective simply to dispense with primary discretion altogether and to allow interpreter access on demand. Similar to the Miranda warning, the district court could be required to advise all criminal defendants of their right to an interpreter appointment. Those defendants who wanted them would receive them. Those who did not would waive them pursuant to the express waiver provision of the CIA. Unless and until the "foreigner" meme is no longer ingrained in the fabric of the judiciary, and of society as a whole, the rights of immigrant defendants will remain hostages of the dominant culture's nativism.

The 1993 film *Falling Down* scripted the following dialogue between a Korean-born merchant ("Asian") with "a heavy accent" and a native-English-speaking customer (De-Fens):

> De-Fens . . . You give me seventy "fie" cents back for the phone . . . What is a fie? There's a "V" in the word. Fie-vuh. Don't they have "v's" in China?
>
> Asian: Not Chinese. I am Korean.
>
> De-Fens: Whatever. What difference does that make? You come over here and take my money and you don't even have the grace to learn to speak my language. . . .[302]

In this exchange, the native speaking customer is expressing the "foreigner" meme. He is accusing the Korean merchant of entering this country, achieving a position of economic power while failing to assimilate by learning English.[303]

> Of course, the evidence is just the opposite of what the customer is claiming: the shop owner does speak English. He speaks English well enough to get into a rousing argument with the customer, to assert his rights as owner of the shop,

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302. ROSINA LIPPI-GREEN, ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES 225 (1997).

303.

> The Korean has committed three sins in the eyes of the customer: he has "come over here" and, having immigrated, he "takes my money" by establishing himself in a social position in which he has economic capital and goods to dispense. These sins are compounded by the fact that the shop owner "doesn't have the grace to learn to speak my language."

Id.

> and to ask the customer to leave. But, crucially, he does not speak English to the customer's satisfaction, because he speaks with an Asian accent.[304]

As with Amadou Diallo, the merchant's inability to speak English fluidly or to sound "American" communicates to the customer, as a member of the dominant culture, an outright rejection of dominant culture norms. Moreover, the dominant culture views an immigrant, like the shop owner, who manages financial success without fully acculturating, as likely to alter and control the current social order. In response, the dominant culture uses the linguistic imperfections of non-native speakers as the means to rationalize and accomplish their subordination.[305] An accent is perceived as an "immutable characteristic" of speech.[306] However, there is a hierarchy of accented speech in white America.[307] Dominant culture members usually describe as "incomprehensible" the English of immigrants who are the most marginalized in society.[308] Typically these non-native speakers are also ethnic minorities.[309] When the "unintelligible speech" of such immigrants inevitably leads them to experience hardship in white America, the dominant culture faults their "refusal" to assimilate. Yet, until the dominant culture no longer "hears" their accent, these immigrants will never be allowed to join the melting pot, even if they want to acculturate. American English has thus become the dominant culture's tool of maintaining social order in this country.[310] And, the "foreigner" meme is the projection of both the dominant culture's fear and will.

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304. *Id.*

305. Karst, *supra* note 7, at 352.

306. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1392-92 (1991).

307. *Id.* at 1352.

> In many societies, certain dialects and accents are associated with wealth and power. Others are low-status, with negative associations. In a society with a speech hierarchy of this kind, it is quite common that speakers of the low-status speech variety, by necessity, are able to understand speakers of the high-status variety. Speakers of the high-status variety, on the other hand, frequently report that they cannot understand speakers below them on the speech-status scale.

Id.

308. *See id.* at 1352. "Low-status accents will sound foreign and unintelligible. High-status accents will sound clear and competent." *Id.* at 1355.

309. *See id.* at 1352.

310. "[A]s history constantly teach us, discourse is not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle, discourse is the power which is to be seized." Michel Foucault, *The Order of Discourse, in* LANGUAGE AND POLITICS 108, 110 (Michael J. Shapiro ed., 1984).