Discussing the Difficulties Language Barriers Impose on Legal Proceedings

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What Difficulties Do Language Barriers Impose on Legal Proceedings?

"In a criminal proceeding, rights are con-veyed in words. Words have meaning. If the words have no meaning to a defendant, then such a defendant has no rights. A trial without rights is . . . a sham" (Judge Donna Carr, 2001; Urbina, 2004).

Introduction

Thousands of people are criminally and civilly tried by the United States government everyday. English is the language of common-law, in which most legalese stem from. Courtroom discourse has notorious been dominated by niche legalese, a subset from day-to-day English. For a defendant who does not speak English, or has a limited English proficiency (LEP), language barriers can impose difficulties on any court proceedings where Legal English may dominate. barriers are perplexities in communication Language or comprehension between individuals speaking different languages and dialects. The Legal English used in legalese is designed to make legal proceedings sound official, but can also be difficult to understand. Due to preconceived gaps in discourse between Legal English and day-to-day English, discrepancies between both native-English and non-native English speakers (or limited English proficiency; LEP) is posed. This can potentially lead to difficulties carrying out criminal proceedings. Difficulties such as lack of interpreters or accurate interpretation for defendants, loss of nuance in translation of legal text, delays in proceedings, diminished defendant credibility (DDC) in testimonies, and due process are all at stake when defendants do not speak the dominant discourse. Conducting criminal proceedings solely in Legal English puts LEP individuals at risk of injustice. On many occasions language can be the only thing standing between a defendant's freedom and their incarceration. Through critical analysis taken from a variety of literature, this paper focuses on the difficulties language barriers impose on legal proceedings.

Literature Review

Interpreters:

With a significant flux of Latinos/as immigrating to the United States, there has since been a positive correlation of said Latinos/as passing through the legal process, both civilly and criminally. Such increases of this ethnic minority's population entails a greater demand for legal interpretation, and will continue as the number of cases increases. There are an estimated 26 million LEP/English as a second language (ESL) individuals living in the United States. An approximated 13 million reside in states that do not require court ordered interpreters in most civil cases (Abel, 2009; Alanen, 2009; Troshynski; Bejinariu; Willis, 2021). Martin Urbina's 2004 Language Barriers in the Wisconsin Court System depicts the inequalities and hardships faced by specific Latinx communities passing through Wisconsin's legal system. Based on a 72-county survey conducted in Wisconsin, Spanish was the most common language for which interpreters were needed (Urbina, 2004). Although this data shines light on the need for interpreters, qualified interpreters are not always used during legal proceedings. Unqualified interpreters pose a serious threat to the fairness of a defendant's proceeding- often omitting or adding to a testimony, encourage defendants to negotiate, plea guilty, go to trial and at times may make up words to mask their language deficiency (Urbina, 2004; Araiza, 1997; Crawford, 1992). Interpreters may sometimes exacerbate LEP defendants further by not interpreting at all, leaving several parties (prosecution, defense, jury, judge) misinformed on the current events of the legal proceeding.

Throughout the history of the United States, there has never been legal policy proclaiming any official language of the country. However, some states and politicians have shown support for enacting English-only movements, Wisconsin included. These movements aspire to deem English the only official language of the United States, thus advocating for English to be the official language used in any government operation. Despite the apparent need for qualified interpreters, "Some judges have been reluctant to mandate bilingual assistance to those with limited English proficiency...discourage non-English speaking Latino/as from learning English" (Urbina, 2004; Pantoga, 1999). Literature on Puerto Ricans has also demonstrated experiences of prejudice and discrimination due to language barriers (Urbina, 2004). Biases such as this puts millions of individuals with limited proficiency in English in jeopardy for

injustice. There is no existing legislature within the Constitution stating the right to an interpreter. Additionally, statutes providing language barrier protections for ethnic minorities can be antithetical. Up until the 1970s, there were little to no protections for non-English speakers in the country such as English literacy tests, non-bilingual voting statutes and little access to assistance with English in public schools. The United States ex rel. Negrón v New York case of 1970, where native Spanish speaking Rogelio Negrón was subject to a trial where no effort was made to translate proceedings into Spanish, "recognized the need to provide interpreters to non-English speaking defendants during criminal proceedings" (Urbina, 2004). Unfortunately, interpretation rights were not extended to many civil matters (ex: adoption or divorce) under this statute. It was not until Congress passed the 1978 Federal Court Interpreters Act, "mandating the use of qualified interpreters in both civil and criminal proceedings in federal court for those who do not understand English" (Urbina, 2004). However, the case of Perovich v. United States (1907) states that appointing a respective interpreter is utterly under the trial court's discretion. Some states, such as Wisconsin, are financially responsible for providing interpreters if defendants cannot afford one.

Preconceived implications exist that a person who is bilingual has full ability to communicate in criminal proceedings. Oftentimes, interpreters are assigned the job solely because they are bilingual, even if there is little-to-no interpreting history or training. Urbina's research concluded that even though some Spanish speaking interpreters believed they knew the language well enough to interpret in court, this is not always the case (Urbina, 2004). If an interpreter's verbatim transcript contains inaccuracies, it is of little use to the defendant and court. Although interpreters can be necessary in every state court, the pool for such interpreters is limited. The pool for qualified interpreters is even smaller, "Often leading to devastating ramifications" (Urbina, 2004). Wisconsin, as of 2003, had no definitive conditions for a qualified interpreter, leaving the courts to decide who is or is not qualified; "The statute was so vague that it gave judges and lawyers no way to determine whether the person called in as 'interpreter' was in fact gualified, and essentially forced us to take it on faith that he or she was doing an adequate job" (LaVigne, 2003). We've seen time and time again what happens when authoritative figures are given vague instructions to enforce on a group of people- it falls nothing short of oppression. Limiting the qualification process to potentially biased judges and attorneys puts defendants, and plaintiffs, at risk for an unfair trial. Because interpreters may be unavailable at times, the court is

subject to use whoever is available at the moment to assist in interpretation. Such interpreters could be anyone readily available to the court, regardless of relation to the defendant. This includes fellow inmates or, in some cases, children helping their parents. These interpreters may only understand how to translate certain legalese on a basic level, while unknowingly disregarding other important case-related factors. The high demand for interpreters has led to a large amount of unqualified interpreters being used. If there is an interpreter who can somewhat understand the legalese and speaks the language of the defendant/plaintiff, for the sake of time the court will appoint them. Once they begin interpreting, their job is to continue on. A common misconception is that all words in one language can be directly interpreted into another language, or word-for-word interpretation. This is not the case, as the interpreters must use a variety of cognitive skills, all acting simultaneously, in order to precisely interpret.

There are no federal regulations that require interpreters in all jurisdictions. Unqualified interpreters increase the risk of misunderstanding during criminal proceedings; "An interpreter who confused 'hat' and 'gloves' until corrected by a bystander in the audience" (Urbina, 2004).

Seemingly simple mistakes as this could be the difference between freedom and incarceration. Qualified interpreters have to perform mental gymnastics, in real time, switching between languages and formalities to relay information between the court and defendant. For courts to deem an interpreter 'qualified', they "generally operate under a rebuttable presumption that an interpreter in the performance of his official duty has acted regularly. As long as the interpreter is providing 'continuous... translation' courts will usually assume the interpretation is adequate" (LaVigne, 2003). This can be very problematic, as it is highly subjective. It is important that interpreters are not viewed as 'one size fits all'. It is even more important that trial judges, the deciding factor of the interpreter's credibility, understand this.

Urbina last introduces a set of seven steps believed to ensure adequate defendant/plaintiff interpretation in court. The first step is to determine the necessity of an interpreter, understanding any language barriers the defendant/plaintiff may have. Following up, a "language hearing" should be held where the magnitude of a defendant's linguistic understanding is measured. Second, if it pleases the court that an interpreter is needed, courts should examine the interpreter's competency or any possible biases the interpreter has

in hopes of eliminating any unqualified interpreters. Third, interpreters need to be certified after passing the federal court certification exam in which three elements are incorporated: "minimum level of competence, interpreters are bound by a code of ethics and high standard of professionalism" (Urbina, 2004). These certifications, Urbina proposes, should be conducted through a screening mechanism in which more unqualified interpreters are weaned out. Similarly a lawyer obtaining their law licenses from their school and bar examiners, legal interpretation should follow similar strict guidelines. Lawyers and interpreters work hand-in-hand during some cases. Wouldn't it be beneficial to their client if they were both qualified for the job? A client may not feel comfortable with a lawyer who only knows some rules of the law, or mistakes 'hat' with 'glove'. Why are interpreters not held up to the same standard? Urbina suggests interpreters be switched out every 30 minutes to ensure precise interpretation that faces little-to-no lag-time or possible fatigue.. Fourth, continuous training for interpreters should be implemented, as many other prominent professions require, in any historic or modern terms- as well as their cultural effects. Fifth, a monitoring system to adequately advocate and facilitate legitimacy of translation is necessary. Sixth. using technology combined with multi-linguistics tools (written translation or video interpreting) can be introduced to combat courtroom language barriers. Seventh, defense and prosecution parties should challenge any inadequacies or incompetent interpretation immediately. These steps could very well solve many recurring issues regarding language barriers in the courtroom. The most significant point addressed by Urbina is the necessity to challenge preconceived notions of language barriers at play not only within the Wisconsin Court System, but the entire criminal justice system and to challenge preconceived notions of language barriers.

Nuance:

Interpreting Legal English can entail more than simply just translating words. Being a courtroom interpreter requires that the interpreter understand complex legal concepts and other cultural contexts while simultaneously being able to convey such concepts and contexts to defendants, attorneys, juries and judges. Legal English is full of specific terms with specific meanings. For example, *mens rea* directly translates to *res para hombre* in Spanish; 'res for men' when directly translated back to English) that may not always have direct

translations to other languages. Thus, it is implied that translated terms are incapable of grasping the entire legal significance of the original term. In her 2022 article on language barriers, Moya outlines the obstacles LEP defendants oftentimes face during their time involved with the criminal justice system. She explains that poor interpretation can lead to misunderstanding of charges or other legal proceedings at hand; "In 2016, a Spanish-speaking defendant in Virginia thought he was was being accused of rape when his interpreter used the term "violación" to describe a criminal violation" (Moya, 2022). Other examples of mistranslation provided by Urbina have had similar occurrences; "Words like offense (crime) and appearance (coming before the court) are often translated as ofensa (insult) and apariencia (physical appearance). The word plea is often translated literally as supplication (supplication) or entreaty"... The case of battery, which is often translated as bateria. To non-English speakers Latinos/as, bateria simply means a mechanical device- a car or stereo battery" (Urbina, 2004). Inaccurate interpretation such as these can lead defendants confusion, frustration, hopelessness to or potentially agreeing/disagreeing with something they do not understand. Another idea Moya imposes is that LEP defendants face linguicism, as it is prevalent all throughout criminal legal processes. Linguicism is linguistic discrimination in which "ideologies, structures and practices which are used to legitimate, effectuate, regulate and reproduce an unequal division of power and resources (material and immaterial) between groups which are defined on the basis of language" (Gonzales Rose; Moya, 2022). Especially with languages not commonly used in legal context, little is done to ensure the defendant is being accurately represented, or what is articulated by attorneys and the judge, by the interpreter.

In my honest opinion, I would be terrified if I was somehow caught in the middle of a completely new criminal justice system, in a country speaking a language both unfamiliar to me.

Not only can translations cause a loss of nuance for a defendant, but cultural contexts may also be lost. Legal systems are embedded within their respective cultures, where differences in legal concepts vary from one jurisdiction to another. An LEP defendant from a different country will most likely have a hard time understanding that they are the one calling the shots on their representation, especially if they are not accustomed to defense attorneys. For example, "For Dr. Pita Loor...challenge that arose... related to the defendant's own cultural identity: the educational, racial and class hierarchies that exist in Ecuador were internalized by the client, and it was difficult to explain to him that, even when working with white male lawyers, he had the final say over any decision being made" (Moya, 2022).

In order to alleviate the loss of nuance when interpreting Legal English courtroom discourse, interpretation is required at the most qualified level. Interpreters must confidently understand legal jargon in both languages, understand how to apply cultural contexts from both source and target as well as legal concepts. Although interpreters are court officers, they must work together with the defending attorney to ensure proper representation of the defendant.

Delays:

A defendant facing language barriers may encounter having their proceedings delayed due. This can occur for several reasons; lack of interpretation, inability for attorney and client to communicate, complexity of translation, etc. Due to the lack of interpreters present in certain jurisdictions, defendants may have to await trial in jail or in their community for longer before a qualified interpreter is instilled; "2002, attorneys representing two Latinos... unable to speak to their clients to assemble a defense for more than a month because the court did not provide an interpreter right away" (Urbina, 2004). A 2021 University of Nevada study conducted by Emily Troshynski, Alexa Bejinariu and Carolyn Willis "Lost in Translation: Experiences of ESL/LEP Civil Protection Order Petitioners" analyzes different experiences of LEP individuals, specifically victims, in civil protection cases. Although the study focuses on victims instead of defendants, many translation and interpretation issues are studied, reassuring that language barriers are a systemic issue.

LEP defendants are required to wait for interpreters to translate and communicate with any judicial bodies (such as their lawyer or a judge). Oftentimes, this may slow down the process for individuals to properly comply with New York City's 24 hour arraignment rule. Most delays in court proceedings for LEP defendants occur because of unavailable court-ordered interpreters, frequent recess requests from the counsel or the interpreter running late to a hearing. As stated in the 1975 article by Williamson Chang and Manuel Araujo 'Interpreters for the Defense: Due Process for the Non-English Speaking Defendant', finding an interpreter for a defendant speaking a less commonly-known language can pose even longer delays; "When the defendant

only understands a rare language, and the trial is held in an area where multilingual experts may be few, the delay could be lengthy and costly" (Chang; Araujo, 1975). Housing defendants in a prison or treatment facility for long periods of time can be costly and unnecessary if there seems to only be an issue regarding translation. This unavailability of interpreters may cause the defendant to have to use an informal interpreter such as a family member or friend; "the failure of the court system to consistently provide professional interpreters means that the cases are sometimes delayed or that parties have to use unqualified translators" (Troshynski; Bejinariu; Willis, 2021). Interestingly enough, prior research from Troshynski, Bejinariu and Willismention documents the unfortunate impact that delays, specifically protection order cases, have on the victim's understanding of legal processes. If there is an absence of respective interpreters, the counsel will have to do their best to communicate with their client which takes immense focus and determination. More importantly, this facilitation takes time; "Without an interpreter, the defendant's counsel might be forced to request recesses frequently in order to work out communications problems with the defendant" (Chang; Araujo, 1975). Delays in proceedings may cause defendant's to remain in jail for longer periods of time if there is no interpreter available, or the inability to provide civil protections regarding the 2021 study. Delays in proceedings may also be the cause of confusion as to who is providing an interpreter. This mishap occurred multiple times, leading to a delay in proceedings. It appeared there was confusion as to whether the responsibility of providing an interpreter fell on the State Attorney's Office or the trial court" (Ihmud, 2023). Efforts made to ensure defendant comprehension of legal proceedings can cause a delay in hearings, longer delays than for a defendant who spoke the dominant legalese at play.

Diminish Defendant Credibility (DDC):

Difficulties in expressing oneself is often an occurrence faced by LEP individuals, posing possible threats to their credibility in diminishing ways. First, a defendant who struggles articulating themselves may have difficulties effectively explaining the series of events or other important case details. This may correlate to the individual seeming dishonest or withholding information to jurors or legal counsel. As previously stated, there is little accountability when determining an interpreter's qualification for court proceedings involving LEP

individuals. There is even less accountability in recording what the individual is saying because everything recorded by the court reporter is filtered through the interpreter (Moya, 2022). Client-attorney trust and communication is also extremely prevalent in ensuring attorneys represent their clients to the fullest extent. If an interpreter is used in legal proceedings, oftentimes a lot of communication is between the interpreter and attorney; "Client autonomy; when communication occurs primarily between the interpreter and the attorney, the client [defendant] may feel powerless to express their concerns when their desires or goals are not being accurately represented" (Moya, 2022). Other diminished defendant credibilities potentials include interpretation paraphrasing; "Because some defendants provide long explanations to what was asked, it is not uncommon to find interpreters paraphrasing what was said by the defendant" (Urbina, 2004). This quote may correlate into there being inconsistencies with the defendant's testimony, further discrediting the defendant. If there is continuous paraphrasing of defendant's statements, the context of that statement is at risk for being lost; "Some interpreters make the mistake of correcting the testimony of the defendant, and/or interpreting what is being said to the defendant in a much lower vocabulary" (Urbina, 2004). Paraphrasing can be particularly problematic in legal settings, due to details being omitted from the case. Even an exaggeration of words presented in a different manner than how the individual or counsel originally phrased it can be detrimental to the outcome of a case. It is important that an interpreter understands the individual they are working with, as well as the court discourse and environment they are working in. The harm that may unfold in diminishing defendant credibility can exceed far beyond the walls of a courtroom, highlighting the necessity of equitable treatment for individuals involved with the criminal justice system.

Due process:

The Fifth and Fourteenth Amendment's Due Process Clause, a fundamental legal principle ensuring fairness in legal proceedings, requires that any government personnel cannot deprive an individual of their liberty without respecting their legal rights and following through the criminal justice system. English is the preferred language used in courts, set by some state requirements, which can disproportionally place a burden on non-English speaking defendants. Such disproportionalities infringe due process clauses; "Denial of an interpreter to a non-English-speaking defendant involves both an infringement of

fundamental rights and a use of a suspect classification... infringes on non-English speaking indigent defendant's sixth amendment right to counsel, while communication barrier between the defendant and counsel severely restricts the defendant's right to confrontation [of witness]" (Chang; Araujo, 1975). Adequate confrontation of a witness requires the ability to properly cross-examine but is impaired when the defendant does not understand such testimonies that may be challenged. Many defendants raise the right to confrontation when claiming the need for an interpreter, as seen in cases such as Luera v. State (1933) and Escobar v. State (1926) where defendants claimed their right to confrontation was denied because they did not understand the English being spoken by the prosecution's witnesses. Authors Chang and Araujo compare an LEP defendant as similar to a mentally incompetent defendant, as the language barrier may infringe their ability to efficiently participate in their cases. Unlike a case involving mentally incompetent defendants, there are no hearings held before trial to measure defendant's language abilities or inabilities [in regards to English] to request respective interpreters. Additionally, a defendant's request for an interpreter may be overlooked by their attorney resulting in that attorney failing to request respective interpreters thus infringing their constitutional rights and harming attorney-client relationships.

According to a statistic from the Innocence Project, an astronomical 40% of Latine exonerees falsely confessed because they did not understand English. (Selby, 2020; Moya, 2022). Cases in the past, such as Padilla v. City of New York (2013), address the discrimination between LEP individuals and NYPD officers in which federal, state and local laws were violated on the basis of providing improper language support. This caused police to actually arrest the victims, instead of the perpetrators in this specific case of domestic abuse. With the over 2,400 interpreters working in the NYPD's Language Initiative Program for 85 languages, they are only 'necessary' to officers in "particularly complex cases" (Moya, 2022). It is my understanding that all interpretation encounters are necessary. Further, interpreters are officers of the court and oftentimes not an advocate for the defendants, even though some defendants may believe this to be true. LEP defendants rely on their interpreters very heavily and may disclose certain information meant for their lawyer. This can disrupt matters of representation in confidentiality, hindering attorney-client relationship. We see this with plea bargaining sometimes, because

misinterpretations can obstruct a defendant's conscious knowing, voluntary and intelligent entities of pleading guilty.

LEP defendants are also at risk before court proceedings, at the civil level regarding police; "Language barriers may influence whether a defendant is able to provide a voluntary confession to the police, knowingly and voluntarily consent to a police search, waive the right to trial by jury, or fully understand the elements and consequences of the charge, the constitutional rights waives and the significance of a plea in plea bargaining negotiations" (Urbina, 2004). These small errors violate a person's constitutional right under the Fifth Amendment right to a fair trial. In order for the system to ensure equity, there must be a call for legislative provisions that guarantee interpreters for LEP defendants at every stage of their journey through the criminal justice system. Discussion

Research Discussion:

After extensive research on this topic of language barriers, I concluded the answer to my original research question would be "a lot". Although language barrier imposition on court proceedings is very dense to sum down easily, its precedence should be relevant to everyone living within the American criminal justice system- or any criminal justice system for that matter. There are a lot of difficulties within legal proceedings caused by language barriers. The research provided me with several answers- that difficulties on legal proceedings stem from lack of interpretation, loss of nuance, delays in proceedings, diminished defendant credibility and violation of due process. Key components from this discovery was the idea that a system, such as the U.S. criminal justice system, has a lot of work to do if fair justice is to be served. Justice cannot be provided to a person if they are treated unfairly during the process. LEP individuals are some of the most vulnerable within the criminal justice system. A recurring question prevalent throughout the research is "Why? And How?". Why was this system built on such ideas of oppression? Why hasn't anything been done about this? How can I advocate for LEP defendants, in a system so set in its ways?

Proposed Solutions:

These proposed solutions, at the fundamental level, could challenge language barriers in legal proceedings. One solution is to facilitate cultural competency for Americans at a young age, such as beginning the practice in primary schools. If people are taught the significance of cultural humility, a state of mind in which a person continues on a lifelong understanding of others, more empathy towards people of different cultural backgrounds using different languages would exist. Through representation of other cultures, there would also exist a deep appreciation for cultures. Additionally, at the legal level qualified interpretation must be proposed. This does not necessarily solely apply to interpreters . It can apply to changing legalese as a whole. The application principles embedded into the Constitution are supposed to evolve in response to evolving societal values and circumstances. There is a demand for better interpretation of the legal system, so proposing that legalese be rewritten with the ability to smoothly shift back and forth between languages could be a great start in representation and understanding for all.

Further Research: What level of legal information do Americans have?

Legal competency is an area that can most definitely benefit from further research. The previous research I conducted intrigued me to think about the amount of knowledge Americans have about the legal system, regardless of what language they speak. Many times, people confess to crimes or are wrongfully convicted because they simply do not understand their due process rights. This phenomenon can extend further to a societal lack of knowledge on the legal system. In a scholarly perspective, a forensic linguist could conduct this study using a rather large sample of Americans who are literate at any age. Through a survey, the linguist can ask questions about the legal system to test the knowledge of everyday Americans. If there is an overall misunderstanding of certain statutes, or proceedings then the researcher may conclude the average American has little knowledge of their legal system and vice versa. This would be an interesting research project to conduct because results may show that legalese, or other legal proceedings, are too difficult for the average American to understand- or not. Understanding that legal information may be unknown to the average American may allow for an overall assumption that legal

information is not as well-known as it could be, furthering the need for legal education.

I am looking forward to continuing my research on language barriers, and hope to extend my focus onto other languages. The literature provided several instances of deaf individuals, Bengali and French. Somewhere to start. I also want to further research the intersectionality of racism and language barriers, as both can be true during a case.

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