

CONTRACTING WITH FOREIGNERS: THE POTENTIAL ABSENCE OF MUTUALITY OF ASSENT

Darryll M. Halcomb Lewis, J.D.*

The Debtor is of Puerto Rican origin, making Spanish his native language. Although he may be able to understand a few rudimentary words in English, he does not speak English. He speaks and conducts his affairs in Spanish. He deals with the English speaking world of the mainland United States through his wife and family members who translate and/or conduct his business for him. Throughout his life he often relied upon his sister Maria, who does speak English, to help him deal with government and private agencies and businesses.¹

Such is the typical reality of foreigners² who first arrive on the shores of the United States of America. In addressing the seemingly stubborn and elusive immigration problem, in his 2006 televised address to the nation, President George W. Bush proposed some limited form of citizenship program to those immigrants who paid their back taxes and learned the English language.³ Notwithstanding the legality of their presence in the United States, these individuals live and contract with each other and with other Americans.⁴ The proposed requirement to learn

* Associate Professor, College of Business Administration, University of Nebraska-Omaha, Omaha, Nebraska; J.D., Creighton University 1978; B.A. Economics, Dartmouth College 1975.

¹ *Rodriguez v. Mellon Bank and Credit Fund, Inc.*, 218 B.R. 764, 769 (Bankr. E.D. Pa. 1998). For similar cases regarding the reliance of foreigners on their children for language translation, see *Saginaw Medicine Co. v. Batey*, 146 N.W.329 (Mich. 1914), discussed *infra* notes 100-102 and accompanying text; *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145 (Neb. Ct. App. June 8, 2004), discussed *infra* notes 107-109 and accompanying text; *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781 (Wis. Ct. App. 1987), discussed *infra* notes 104-106 and accompanying text.

² In this paper, “foreigner” means a consumer who does not speak or understand English regardless of that person’s citizenship or immigrant status. It is used interchangeably with “non-English speaker.” Conversely, herein, the person with whom the foreigner deals is interchangeably referred to as a “retailer,” “seller” or a “merchant.” Cf. Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579 (2003) (dealing with special problems associated with immigrant small business owners who deal with English-speaking suppliers). Also, this article excludes discussion of language-interpretation issues in criminal, immigration cases (*infra* note 146) and social-security cases involving one’s English-speaking ability (literacy) in determining disability, or specific statutory provisions requiring certain disclosures be made in Spanish.

³ President George W. Bush, Nationally-televised Presidential Address (May 15, 2006).

⁴ See Steven W. Bender, *Consumer Protection For Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1034 (1996) (arguing *inter alia* that untranslated contracts are unconscionable); Jo Carrillo, *In Translation for the Latino Market Today: Acknowledging the Rights of Consumers in Multilingual Housing Market*, 11 HARV.LATINO L. REV. 1, 4-6 (2008) (discussing the language problem in California’s mortgage credit markets); Lim, *supra* note 2, at 581 (dealing with special problems associated with immigrant small business owners who deal with English-speaking suppliers); Patricia S. Abril, “Acoustic Segregation” and the Hispanic Small Business Owner, 10 HARV. LATINO L. REV. 1, 26 (2007) (discussing the inherent bias of the Uniform Commercial Code against language minorities); Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 U.C.L.A. L. REV. 999, 1002 (2007) (discussing the role of language interpreter in attorney-client relationships).

English⁵ seems reasonable, neutral and, perhaps, simple on its face. However, it poses peculiar legal problems for not only the foreigners who desire to contract with Americans, but also for Americans who purport to contract with foreigners.⁶ Foreigners are especially prone to predatory conduct by unsavory or dishonest individuals⁷ or misunderstanding of their obligations under the terms of a contract.⁸ It has been held that a person, even a foreigner, who signs a contract in the absence of fraud,⁹ artifice, or trickery, is required to read the document, held to be conclusively bound to know its contents and is subject to its consequences.¹⁰ In furtherance of that duty, it is not unusual for individuals who do not proficiently speak or understand English to utilize lay interpreters.¹¹ Many of these lay

⁵ Several bills in the U.S. Senate and the U.S. House of Representatives have proposed that English be the official language of the United States of America. (E.g., *Comprehensive Immigration Reform Act of 2006*, S. 2611, 109th Cong. (2006), *National Language Act of 2005*, (H.R. 4408, 109th Cong. (2005) (Act proposing to declare English as the official language of the country); *English Language Unity Act of 2005* (H.R. 997); H.R.J. Res. 43 109th Cong. (2005) (proposing an amendment to the United States Constitution to make English the official language of the United States); *Contra, English Plus Resolution*, H. Cong. Res. 9, 109th Cong. (2005) (opposing English-only measures as divisive and “violat[ive] of traditions of cultural pluralism”).

⁶ See *Notsu v. Eslambolipoor*, No. B162447, 2003 Cal. App. Unpub. Lexis 11830, at *2-3 (Cal. Ct. App. Dec. 19, 2003), discussed *infra* notes 58, 91, and *Martin v. 20th Century Ins. Co.*, 201 Cal.Rptr. 22, 24 (Cal. Ct. App., 1984), discussed *infra* notes 36, 39, 103, 113 where contracts were invalidated as a result of the foreigner’s inability to competently read, use or speak English. As an aside, it must be independently established that the foreigner does not speak English. In *Kam Hing Enterprises, Inc. v. Pem-America, Inc.*, No. 02 Civ. 6284(JFK), 2002 U.S. Dist. Lexis 24185, at *20-1 (S.D.N.Y. Dec. 17, 2002), the court refused to believe that the defendant did not speak English when a deposition from another proceeding demonstrating the defendant’s English skills was introduced into evidence. The court said that “had Cui [the defendant] wanted a translation he would have ... received one.” *Id.* at *21.

⁷ E.g., *Zuckerman v. Smart Choice Automotive Group*, No. 6:99-CV-237-ORL-28A, 2000 U.S. Dist. Lexis 13489, at *7 (M.D. Fla. Aug. 29, 2000)(stating that, in a scheme to falsify customer credit information and documentation in order to make sales, “the true costs of vehicles were misrepresented to trick customers who did not speak English well into signing financial contracts they were not qualified for and could not afford, which they were later forced to rescind”); In re *Rodriguez*, 218 B.R. 764, 776 (Bankr. E.D. Pa. 1998) (finding that the plaintiff, who only spoke Spanish, was wrongfully evicted and the mortgagee took possession of his home without notice allowing it to deteriorate into a state of disrepair). In *Rodriguez*, the mortgagee-in-possession misrepresented to the court that the plaintiff spoke English, signed the relevant documents with comprehension and fully consented to the defendant’s repossession of the premises. Ultimately, the court rejected these contentions. *Id.* at 819-20.

⁸ In *Assizadeh v. California Federal Bank*, 98 Cal.Rptr.2d 176, 210 (Cal. Ct. App. 2000), the non-English speaking buyer of property, whose son translated for him, relied on the seller’s representations that “installing a marble [floor] present[ed] no problem.” It turned out that the weight of the marble would cause structural instability. In rejecting the plaintiff’s fraud claim, the court held that the plaintiff had an “independent duty to investigate and inquire.” *Id.* at 210.

⁹ *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1008 (11th Cir. 1986) (holding arbitration agreement unenforceable where non-English speaking clients were duped into purchasing tradable securities rather than opening a money-market account which they believed they were doing).

¹⁰ *Gardner v. Johnson*, 210 N.W. 295, 298 (Mich. 1926). In *Gardner*, the court found the contract enforceable where the plaintiff “was possessed of her faculties. She could read, might have done so, but did not read before signing, nor were the papers read to her. There is no testimony of procuring her signatures by trick, or artifice, no testimony of any act of fraud.” *Id.* at 298. See generally, 17A C.J.S. *Contracts* §152 (1994).

¹¹ In this article, a “lay” interpreter is one who is specifically not hired or trained to provide language-translation services. In this article, one is not considered “lay” in circumstances when a person gratuitously offers or provides language-translation assistance from bilingual employees. See De Villagomez Gonzalez

interpreters are family members or children.¹² The use of these interpreters potentially undermines the presence of the contractual element of mutuality of assent. This article examines the doctrine of mutuality of assent,¹³ the traditional legal thought respecting the formation of contracts with the use of interpreters,¹⁴ the legislative responses¹⁵ to contract formation with and by non-English speakers, and the special problems regarding assent created by use of lay and child interpreters.¹⁶ Finally, the author proposes a uniform law¹⁷ concerning the problem and attendant equal protection¹⁸ and policy implications¹⁹ of the proposal.

I. MUTUALITY OF ASSENT

Typically, fraud, artifice, or trickery described in the case law can occur during three stages of contracting: (1) during the negotiation stage,²⁰ (2) during the execution of the contract,²¹ or (3) during the performance of the contract.²² Contracts can be voided if it is determined that they were procured fraudulently. However, if mutuality of assent is absent respecting material terms, then the agreement is void ab initio.²³ Thus, mutuality of assent is germane to contracting parties using language interpreters. Can parties who do not understand one another because they speak and understand different languages achieve mutuality of assent? Is mutuality of assent absent when a lay or child interpreter acts as the conduit of communication between the parties? Of course, rudimentary contract principles provide that a contract is not enforceable unless there is a mutuality of understanding, – the proverbial “meeting of

v. First National Bank-Edinburg, No. 13-04-367-CV, 2005 Tex. App. Lexis 6175, at *2 (Tex. App. Aug. 4, 2005), discussed *infra* notes 50, 52, 56, 148, 149 and accompanying text.

^{12a} “[T]he traditional pattern of English language acquisition extends to three generations: the first generation acquires some English ability but is mostly monolingual, the second generation is bilingual, and the third generation prefers English.” Steven W. Bender, *Consumer Protection For Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1032 (1996). Reasonably, one can assume that the child interpreters come from the second or third generations and their parents are from the first or second.

¹³ See *infra* notes 20-43 and accompanying text.

¹⁴ See *infra* notes 44-58 and accompanying text.

¹⁵ See *infra* notes 59-94 and accompanying text.

¹⁶ See *infra* notes 95-119 and accompanying text.

¹⁷ See *infra* notes 120-30 and accompanying text.

¹⁸ See *infra* notes 131-38 and accompanying text.

¹⁹ See *infra* notes 139-51 and accompanying text.

²⁰ *E.g.*, Figli v. Fisheries Development Corp., 499 F.Supp. 1074, 1085 (S.D.N.Y. 1980)(holding contract enforceable where foreigners participated in the negotiations with translators).

²¹ *E.g.*, Horvath v. National Mortgage Co., 213 N.W. 202, 203 (Mich. 1927) (finding that the plaintiffs’ signatures were procured by trickery). See Tex. Prop. Code § 5.068, discussed *infra* note 73 and accompanying text, which would address this problem.

²² *E.g.*, Fuentes v. Woodhouse Ford, Inc., No. A-02-1102, 2004 Neb. App. Lexis 145, at *2-3 (Neb. Ct. App. June 8, 2004) (plaintiff seeking to rescind the contract due to alleged post-execution malfunctions in the automobile he had purchased).

²³ *Tempop Entertainment Ltd. v. Heartbreakers, Inc.*, No. 209861, 2001 Mich. App. Lexis 661 (Mich. Ct. App. Feb. 9, 2001).

the minds.”²⁴ Historically, in fearing the absolute juridical chaos that would result if concluded contracts were unwoven because of an asserted lack of understanding by one or both parties,²⁵ the case law, legal scholars and jurists have determined that one’s signature to a contract is prima facie evidence of mutuality.²⁶ *A fortiori*, this is even more paramount when one or both contracting parties do not speak, read, or understand English.²⁷ Hence, there is a presumption of finality given to a foreigner who signs a contract.²⁸ However, although it is no small feat, that presumption can be overcome.

Mutuality of agreement requires a mutuality of assent by the parties to the terms of the contract, i.e., a “meeting of the minds.” Courts determine whether the

²⁴ *Raffles v. Wichelhaus*, 159 Eng. Rep. 375, 376 (1864) (finding an absence of assent where buyer and seller mistakenly believed that contractual reference to the ship *Peerless* was to the same ship, when, in fact, two ships were named *Peerless*). This is sometimes called “procedural unconscionability” (e.g., *infra* note 54 and accompanying text). *Accord*, *Martin v. 20th Century Ins. Co.*, 201 Cal.Rptr. 22, 26 (Cal. Ct. App. (1984) (finding that no contract of waiver exists where insurance applicant spoke no English and did not understand that she was waiving otherwise required uninsured motorist coverage). Parole evidence may be introduced to establish the absence of mutuality of assent. *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 146-47 (Tex. App. 1986) (holding “in the absence of fraud, accident or mutual mistake, parole evidence is inadmissible to contradict the terms of a written instrument that is complete and unambiguous on its face”).

²⁵ *Sponseller v. Kimball*, 224 N.W. 359 (Mich.1929). The court stated:

“The stability of written instruments demands that a person who executes one shall know its contents or be chargeable with knowledge. If he cannot read, he should have a reliable person read it to him. His failure to do so is negligence which estops him from voiding the instrument on the ground that he was ignorant of its contents, in the absence of circumstances fairly excusing his failure to inform himself.”

Id. at 360.

²⁶ *Vera v. North Star Dodge Sales, Inc.*, 989 S.W.2d 13, 17-18 (1998) (“Absent proof of mental incapacity, a person who signs a contract is presumed to have read and understood the contract ... This is true even in cases in which a party to the contract is illiterate.”).

²⁷ *Advanta Bus. Serv. Corp. v. Colon*, 782 N.Y.S.2d 502, 503 (N.Y. App. Term 2004) (“Persons insufficiently proficient in the English language must prove reasonable efforts to have a document read and explained or account for why this was not done, if they would avoid the presumption of knowledge of the contents of an executed instrument and its correlate which binds a contract’s signor whether or not the contract was read or understood.”); *Kenol v. Nelson*, 581 N.Y.S.2d 415, 417 (N.Y. App. Div. 1992). The *Keno* court stated that defendant’s defense of inability to speak or understand English rejected in light of

overwhelming ... evidence to confirm that [defendant] spoke and read English well, and fully understood the nature of [the] transactions. In any event, a claim of illiteracy in the English language is, by itself, insufficient to avoid the rule that ‘a party who signs a contract without any valid excuse for having failed to read it is ‘conclusively bound’ by its terms.

581 N.Y.S.2d at 417 (quoting *Sofio v. Hughes*, 556 N.Y.S.2d 717, 718-19 (N.Y. App. Div. 1990).

²⁸ *British West Indies Guaranty Trust Co., Ltd., v. Banque Internationale Luxembourg*, 567 N.Y.S. 731, 732 (N.Y. App. Div. 1991) (stating that a signatory to the contract, is presumed to know the contents of the instrument she signed and to have assented to such terms); *De Villagomez Gonzalez v. First National Bank-Edinburg*, No. 13-04-367-CV, 2005 Tex. App. Lexis 6175, at *3-4 (Tex. App. Aug. 4, 2005) (“Even though English was not his first language, we must presume as a matter of law that appellant read and understood the contract, unless he was prevented from doing so by trick or artifice.”); *Kenol v. Nelson*, 581 N.Y.S.2d 415, 417 (N.Y. App. Div. 1992) (“A claim of illiteracy in English is, by itself, insufficient to avoid the rule a party who signs a contract without any valid excuse for having failed to read it is conclusively bound by its terms.”).

parties' minds have met "by looking to the intentions of the parties as expressed or manifested in their words or acts."²⁹ To quote from a vintage case,

There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. ... Where there is a misunderstanding as to anything material, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract does not exist, and neither party is bound. In the view of the law in such case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly.³⁰

The case law hardly addresses whether a contract is binding where a foreigner, in an obvious effort to bridge the language-comprehension gap, brings a lay interpreter to any of these stages.³¹ The interpreter would be considered an agent of the foreigner.³² However, there is little, if any, mention of the binding legal effect of a foreigner's signature when a lay interpreter either deliberately misinterprets the relevant provisions,³³ lacks competence³⁴ in the English language or capacity,³⁵ and

²⁹ *Chaganti and Associates, P.C. v. Novotny*, 470 F.3d 1215, 1222 (8th Cir. 2006) (stating that a settlement agreement not requiring signatures because the parties' conduct demonstrated that there was assent).

³⁰ *Utlely v. Donaldson*, 94 U.S. 29, 47 (1876) (finding no contract where parties' written communication to purchase bonds failed to establish assent).

³¹ Lay interpreters were involved in a number of cases. *E.g.*, *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145 (Neb. Ct. App. June 8, 2004); *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003); *Bonelli v. Burton*, 123 P. 37 (Or. 1912); *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781 (Wis. Ct. App. 1987).

³² In *Bonelli*, 123 P. at 39, the plaintiff, an Austrian who spoke no English obtained an interpreter to assist in acquiring real estate. The interpreter falsely represented the size of the premises. The court held

"when a person ... selects an interpreter to communicate with another person, ... such interpreter is the accredited agent of the one employing him . . ." When two parties, who speak different languages and cannot understand each other, voluntarily agree upon a third person to translate for them, they make the interpreter their own, so that each has a right to rely on the communication made to him by the other party through his representative.

Id. at 39 (quoting 1 Jones, Ev. § 267).

³³ *Perez v. Hempstead Motor Sales, Ltd.*, 662 N.Y.S.2d 184, 188 (N.Y. Dist. Ct. 1997) (finding that defendant's own Spanish-speaking employee misled plaintiff into believing that she was purchasing rather than leasing the vehicle); *Pimpinello v. Swift & Co.*, 170 N.E. 530, 531-32 (N.Y. 1930) (finding deed voidable where non-English speaking plaintiff was misled by her own attorney); *Tartar and Onel v. Elite Gold, Inc.*, No. 01 Civ. 2443 (R.L.C.), 2002 U.S. Dist. Lexis 16588, at *11-13 (S.D.N.Y. 2002) (court voiding the alleged employment contracts when two Turkish citizens, who did not speak English, were told by their Turkish father figure, on who they heavily relied for advice and jobs, that they were signing forms required for their L-1 Visas when in reality they were signing employment contracts and further misrepresented their employment obligations). In finding that the plaintiffs were not negligent in failing to seek an independent interpretation of the documents they signed, the *Tartar* court noted that the contracts were in English but signed in Turkey "where individuals with skills necessary to translate an English-language legal document were presumably scarce". 2002 U.S. Dist. Lexis at *13.

³⁴ The interpreter failed to read the entire document in *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203, 205 (Ga. Ct. App. 2003).

³⁵ In *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145, at *2 (Neb. Ct. App.

thus provides an inaccurate or incomplete translation (written or spoken) of either party's communication. The situation is most troubling when the interpreter is a minor.³⁶ A fatal absence of mutuality is most likely to occur when the parties (at least one of whom does not read, understand or speak English) are verbally bargaining or executing a contract.³⁷ Often an interpreter is utilized to bridge the comprehension gap. When such an intermediary lacks actual or legal capacity to comprehend the contract terms, mutuality of assent may be absent.³⁸ This is typically the case when the lay interpreter is a child.³⁹ In this situation, the minor can only translate and convey thoughts, queries, and other communications per his⁴⁰ limited life experiences and integrally-dependent abilities to comprehend written or spoken English, notwithstanding the legal niceties which may be involved.⁴¹ The American system allows minors to avoid their contracts.⁴² However, an adult foreigner may not avoid a contract *because* it has been translated by a minor.⁴³

II. TRADITIONAL LEGAL THOUGHT

A cursory review of the law would lead one to believe that the law on the subject is settled.⁴⁴ The traditional, perhaps conservative, legal view does not differentiate the situation of foreigners and those who read, speak and understand English. Those cases essentially hold that a foreigner is bound to know the meaning of the terms of the contract in which he or she enters or is expected to discover its

June 8, 2004), the lay interpreter was the plaintiff's 13-year old son. In *Saginaw Medicine Co. v. Batey*, 146 N.W.329, 331 (Mich. 1914), the 17-year old son, who did not speak or understand English well, served as the interpreter. The lay interpreter was 15-years old in *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781, 791 (Wis. Ct. App. 1987). In *Vialez v. New York City Housing Authority*, 783 F.Supp. 109, 121 (S.D.N.Y. 1991), the lay-interpreter daughter was 19 years old, however, did not adequately comprehend English.

³⁶ The lay interpreters were minors in several cases. *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145, at *2 (Neb. Ct. App. June 8, 2004); *Saginaw Medicine Co. v. Batey*, 146 N.W.329, 331 (Mich. 1914); *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781, 791 (Wis. Ct. App. 1987); *Martin v. 20th Century Ins. Co.*, 201 Cal.Rptr. 22, 25 (Cal. Ct. App. (1984).

³⁷ See *Fuentes*, *infra* notes 107-09 and accompanying text.

³⁸ See *supra* note 24 and accompanying text.

³⁹ See *supra* note 36.

⁴⁰ For simplicity, "his" may be used henceforth throughout the paper to represent "his or her."

⁴¹ In *Fuentes*, 2004 Neb. App. Lexis at *4, it is assumed that the 15-year old son of the plaintiff was involved in translating the meaning of a disclaimer (as is) contained in the contract.

⁴² See *infra* notes 111-12 and accompanying discussion.

⁴³ See *Fuentes*, *infra* notes 107-09 and accompanying text. Note that California in its proposed legislation requires that translated copies of contracts be provided to consumers except in the case where the consumer brings his own (non-minor) interpreter.

⁴⁴ *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 146 (Tex. App. 1986) (Vietnamese client mistakenly believing that the fee arrangement with their attorney was on a contingent rather than hourly basis). In rejecting the claim the court ruled "[i]t is well settled that illiteracy will not relieve a party of the consequences of his contract. . . . Every person having the capacity to enter into contracts, in the absence of fraud, misrepresentation, or concealment, must be held to have known what words were used in the contract and to have known their meaning. . . ." *Id.* at 146.

contents to his or her satisfaction prior to its execution. However, in actuality, a non-English speaker may not understand the material terms of the agreement. Moreover, the parties may not understand each other.⁴⁵ Some conventional legal responses have been “[a] party to a contract must exercise ‘ordinary diligence in making an independent verification of contractual terms and representations, failure to do [so] will bar an action based on fraud’.”⁴⁶ In the event that a foreigner does not understand the language in which the contract is written,⁴⁷ he must have someone read or explain it.⁴⁸ In fact, some courts place the onus on foreigners to make reasonable efforts to have a document read and explained.⁴⁹ Where the foreigner has developed a confidential or fiduciary relationship with the person with whom he or she is contracting, then reliance on the other party’s representations may be deemed justifiable.⁵⁰ This would abrogate the duty to independently verify the contents of the

⁴⁵ In *Jane v. The Bowman–Gray School of Medicine–North Carolina Baptist Hospital*, 211 F. Supp. 2d 678, 679 (M.D. N.C. 2002) (discrimination case involving plaintiff unsuccessfully suing medical school for being dismissed from program for having inappropriate relationship with patient), one of the parties described the difficulty of lay translation: “because I was Hispanic that sometimes I may be thinking things in Spanish and when they come out translated in English, that people misinterpret what I’m saying.” *Id.* at 681.

⁴⁶ In *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003), the insured, a foreigner, brought a lay interpreter to a meeting wherein the parties agreed that the insurance covering a van would be effective in Mexico. The insured, through the interpreter, insisted that he wanted insurance to cover the van while he was driving it in Mexico. However, the written policy specifically stated that the coverage was not valid outside the United States. When the van was destroyed, the insured was surprised to learn that the coverage was not operative in Mexico. *Id.* at 204. The interpreter, Escamillia, “testified that she understood from meeting with Wilson that the policy would cover the van while it was in Mexico.” *Id.* at 204. The insured admitted that he had not read the policy. Apparently, the interpreter had also failed to read the policy. “Interpreter said she would have read it to him if he had asked her to do so.” *Id.* at 204.

⁴⁷ Courts consider whether the negotiations leading to the contract or resulting contract were translated into the language spoken by the foreigner. *E.g.*, In *Re: Big 8 Food Stores, Ltd.*, 166 S.W.3d 869, 873 (Tex. App. 2005) (holding arbitration clause valid where the explanatory meeting with plaintiff, who spoke only Spanish, as well as a copy of the agreement were translated into Spanish).

⁴⁸ *Sponseller v Kimball*, 224 N.W. 359, 360 (Mich. 1929). In refusing to void a mortgage due to the parties’ misunderstanding of its meaning, the court held that

[t]he stability of written instruments demands that a person who executes one shall know its contents or be chargeable with knowledge. If he cannot read, he should have a reliable person read it to him. His failure to do so is negligence which estops him from voiding the instrument on the ground that he was ignorant of its contents, in the absence of circumstances fairly excusing his failure to inform himself.

Accord, In *Re Dan Ledet*, 2004 Tex. App. Lexis 11474, at *14 (Tex. App. 2004) (finding inability to speak or understand English is not a defense to enforcement of arbitration clause where plaintiff asked no questions nor sought an explanation of the agreement); *Salinas v. Beaudrie*, 960 S.W.2d 314, 320 (Tex. App. 1997) (finding deeds not invalid where documents were translated into Spanish).

⁴⁹ *Advanta Business Services Corp. vs. Colon*, 782 N.Y.S.2d 502, 503 (N.Y., App. Div. 2004). The court ruled that the lease agreement negotiations raised triable issues where non-English speaking lessee was absolved from negligence even though she failed to translate the relevant documents. *Id.* at 504. However, the dissent explained that it was absurd to believe that defendant “could not find anyone available to her that is bilingual in Spanish and English in the New York City area,” nor was there any assertion by the defendant that she had employed reasonable efforts to obtain a translator or anyone to assist her but was unable to do so.” *Id.* at 506 (Golida, J., dissenting).

⁵⁰ *De Villagomez Gonzalez v. First National Bank-Edinburg*, No. 13-04-367-CV, 2005 Tex. App. Lexis

contract.⁵¹ However, establishing this “special” relationship may prove arduous.⁵²

By itself, merely being unable to speak, read or understand English is not sufficient grounds to avoid a contract.⁵³ One court has held that a “language barrier” in combination with being “pressured into signing [an] agreement quickly” may render a contract unenforceable.⁵⁴ The business acumen, savviness of the foreigner and whether translation assistance was made available⁵⁵ or provided to the foreigner⁵⁶ may be taken into account.⁵⁷ A duped or uninformed Non-English speaker may find it difficult to establish the defense of fraud since the element of justifiable reliance may be lacking.⁵⁸ The lack of mutuality of assent may be more availing as a defense.

6175, at *8 (Tex. App. Aug. 4, 2005); *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003). See *infra* note 55 and accompanying text.

⁵¹ In *Vercellotti v. Bowen*, 371 S.E.2d 371, 375 (W. Va. 1988), the court held there existed a confidential relationship where the decedent spoke little or no English and relied heavily on the party in which he created a joint account with the right of survivorship.

⁵² *Salinas v. Beaudrie*, 960 S.W.2d 314, 320 (Tex. App. 1997) (finding the inability to speak English does not convert an arm’s length transaction into a fiduciary relationship). *Accord*, *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 146 (Tex. App. 1986); *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003); *De Villagomez Gonzalez v. First National Bank-Edinburg*, No. 13-04-367-CV, 2005 Tex. App. Lexis 6175, at *1-3 (Tex. App. Aug. 4, 2005). In *De Villagomez*, where a foreigner unknowingly pledged her certificate of deposit as collateral on a defaulted loan, the foreigner argued that because she did not speak English, the bank had a duty to disclose to her the nature of the transaction in which she was entering. In rejecting this argument, the court ruled that “[n]on-disclosure is neither fraudulent [n]or negligent unless there is a duty to disclose. ... The inability to speak English ... [is not] sufficient to transform [a] ... normal arm’s length relationship ... into a fiduciary relationship. ... [T]he fact [one] may not be fluent in English [does] not of itself create ... a confidential relationship as to relieve [the foreigner of his] duty to read contract documents.” 2005 Tex. App. Lexis at *7.

⁵³ *Id.*

⁵⁴ *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 946 (S.D. Tex. 2001) (holding arbitration agreements “procedurally unconscionable” where the agreements “were not translated for [non-English speaking employees.] that they did not know the nature of the agreement into which they were entering, ... and their superiors told them not to worry about it and to quickly sign the documents so they could get back to work”).

⁵⁵ In *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003), in rejecting the foreigner’s argument that he was in a “confidential” relationship with the insurance agent which would have entitled him to rely on the inaccurate representations of the agent, the court held that the foreigner’s rejection of the use of the agent’s Spanish-speaking interpreter and his election to bring and use his own interpreter was “further evidence that his relationship with [the agent] was arm’s length rather than confidential.” *Id.* at 205.

⁵⁶ *De Villagomez Gonzalez v. First National Bank-Edinburg*, No. 13-04-367-CV, 2005 Tex. App. Lexis 6175, at *8 (Tex. App. Aug. 4, 2005) (“It would seem especially drastic for this Court to impose for the first time such a fiduciary duty here, given that Spanish-speaking employees were on hand to assist [the plaintiff] and answer any questions.”)

⁵⁷ In *Figli v. Fisheries Development Corp.*, 499 F.Supp. 1074, 1085 (S.D.N.Y. 1980), the court refused to invalidate the contract where the plaintiffs were Italians who did not speak or read English. The court reasoned that although the plaintiff’s “counsel’s portrayal of plaintiffs as naive fishermen unfamiliar with the English language, it is quite apparent that they are sophisticated and substantial businessmen who during the course of the transactions ... were represented by competent counsel and apprised of key developments in translation.” *De Villagomez Gonzalez*, 2005 Tex. App. Lexis at *8 (*inter alia*, in refusing to invalidate the transaction, the court noted that the plaintiff “had previous experience with U.S. banking institutions).

⁵⁸ *Notsu v. Eslambolipoor*, No. B162447, 2003 Cal. App. Unpub. Lexis 11830, at *1 (Cal. Ct. App. Dec. 19, 2003). While renting a car to a Japanese lessee who did not read, understand, or speak English well, it was

Where lay or child interpreters are involved, the risk increases that a careful and accurate translation of material terms will not be conveyed. One may legitimately question the ability of a lay or child interpreter to accurately convey the legal concepts of a disclaimer, condition, or some other important contractual obligation. Where lay or child interpreters are involved in legal transactions, linguistically, it may be the proverbial blind leading the blind.

III. LEGISLATIVE RESPONSES

In some segments of society, foreign-language translation is required.⁵⁹ Few states have addressed the issue of translation of contracts. Those states target the situation where a foreigner executes a contract written in English although it was negotiated in a different language. Many negotiations or transactions by foreigners do

disputed whether the lessee agreed to include personal injury insurance in his rental contract. While driving the car during the lease term, the lessee's arm was completely severed in an accident. Although the box which indicated insurance was included in the contract was left open, the court concluded that it was not clear whether the lessee elected to decline the insurance option due to his inability to read, understand or speak English competently. At trial,

with the aid of a Japanese interpreter, the lessee testified that the lessor's employees only spoke English, that the lessee did not speak good English, that the lessee did not understand the word 'insurance,' that the lessee could read some words, but could not read most of the words, although he could read numbers. The lessee believed that insurance was included. ... He noticed that the number [the lessor] presented to [him] later was much larger than the weekly rate number. ... [He testified] that in Japan, when you rent a car, if an employee explains various things and what they go over toward the end is about insurance. So [the lessee] thought that he was talking about insurance.

Id. at 6-8. The court dismissed the plaintiff's fraud claim on the ground that the indispensable element of justifiable reliance could not be met because it was impossible for the plaintiff to "rely" on assertions which he could not understand. However, the court ruled that it was reversible error to grant a motion for summary judgment on the issue of mutuality of assent. *Id.* at 11.

⁵⁹ *E.g.*, Tex. Prop. Code §5.068 (providing "[i]f the negotiations that precede the execution of an executory contract are conducted primarily in a language other than English, the seller shall provide a copy in that language of all written documents relating to the transaction, including the contract, disclosure notices, annual accounting statements, and a notice of default required by this subchapter"); 12 C.F.R. 226.27 ("[D]isclosures required by [the Truth in Lending Act] may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request."); *United States v. Villegas*, 388 F.3d 317, 321 (7th Cir. 2004) (noting that Miranda warnings are typically given in Spanish to Spanish-speaking defendants); 28 U.S.C. §1827 (b)(1) (the Court Interpreters Act instructing the Director of Administrative Office of the United States Courts to provide certified interpreters in judicial proceedings in federal courts for "persons who speak only or primarily a language other than the English language if the Director determines that there is a need for certified interpreters in a language"); *United States v. Gilberto Bailon-Santana*, 429 F.3d 1258, 1261 (9th Cir. 2005) (holding a jury-trial waiver invalid where the Spanish-speaking attorney provided the Spanish translation, the court stating "we cannot be sure that [the attorney's] Spanish-speaking ability is as good as he believes it to be"). *Contra*, *United States v. Riveria-Rosario*, 300 F.3d 1, 10 (1st Cir. 2002) (finding it reversible error to conduct a federal trial in Spanish even where all the participants speak Spanish) (citing 48 U.S.C. §864 (1948), which provides in pertinent part that "all pleadings and proceedings in the United States District Court for the District of Puerto shall be conducted in the English language").

not result in written contracts, or, even if they do, were negotiated with aid of minors.⁶⁰ Of course, the foreigner's horror story is threefold: (1) the executed contract intimates something other than what was contemplated or negotiated,⁶¹ (2) the foreigner cannot overcome the presumption that he or she understood the contract he signed,⁶² and (3) the difficulty or impossibility of proving fraud.⁶³ Accordingly, the reacting states have required translated contracts be given to the foreigner. Those laws presume if a seller is linguistically competent to induce the buyer in a foreign language, the seller should be able to provide a contract in that language. These contract-translation requirements may increase the intrinsic costs of goods and services offered to non-English speakers. Some business may be deterred from doing business with foreigners. Thus, some commentators have suggested that the translated-contract requirement apply only after reaching a threshold dollar amount,⁶⁴ where the population of an identified group of foreigners exceed a certain percentage,⁶⁵ or only upon request by the foreigner.⁶⁶ None of the states which have attempted to tackle the issue have adopted these precise limitations.

Although one commentator categorizes these enactments into five types,⁶⁷ the relevant legislative actions generally take two approaches. The first scheme, followed by Texas⁶⁸ and California,⁶⁹ requires the merchant to provide a copy of the

⁶⁰ E.g., *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145 (Neb. Ct. App. June 8, 2004).

⁶¹ See *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003), discussed *supra* note 55 and accompanying text.

⁶² See *supra* notes 44-52 and accompanying text.

⁶³ See *supra* note 52 and accompanying text.

⁶⁴ Steven W. Bender, *Consumer Protection For Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1064 (1996) (“[T]he legislature should limit any transaction requirement to significant consumer transactions above a floor dollar amount . . .”).

⁶⁵ *Id.* at 1069 (“[T]hese population-based thresholds help to create a consumer expectation of translations in covered regions based on the conduct of other merchants in the area. Once established, this expectation helps consumers to identify and seek redress from merchants who fail to comply with the translation law.”).

⁶⁶ Jo Carrillo, *In Translation for the Latino Market Today: Acknowledging the Rights of Consumers in Multilingual Housing Market*, 11 HARV.LATINO L. REV. 1, 10 (2008) (“[Assembly Bill 212, a proposed California law] authorize[ing] Spanish-speaking consumers to request an unexecuted translation of English-language contract documents upon pain of rescission”).

⁶⁷ See Steven W. Bender, *Consumer Protection For Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1063 (1996), which places the potential types of legislative approaches as

- (1) the Language of the Consumer Standard (protecting any consumer whom the merchant knows or has reason to know is unable to understand English); (2) the Language of the Bargain Standard (protecting any consumer with whom the merchant negotiates in language other than English); (3) the Language of the Solicitation Standard (protecting any language minority group that the merchant has targeted in non-English advertising); (4) the Variable Language Threshold Standard (protecting any language minority group that represents more than a specified percentage of the population or of the merchant's past customers); (5) the Fixed Language Standard (protecting only those members of a designated language minority); and (6) some combination of these approaches.

⁶⁸ See *infra* notes 73-74 and accompanying text.

⁶⁹ See *infra* notes 75-83 and accompanying text.

contract to non-English speakers presumably to permit the non-English speaker the opportunity to review it to his or her satisfaction. Once the copy is provided to the non-English speaker, the burden would be on the non-English speaker to seek advice, if needed. Illinois represents the other legislative approach.⁷⁰ Its design requires the non-English speaker to affirm that he or she has used an interpreter in the consummation of the contract and, therefore, understands the terms of the contract.⁷¹ In the latter scheme, the merchant is not required to provide a translated copy of the contract. Although none of the statutory schemes address the issue of contracts interpreted by minors,⁷² the author believes that the general legislative approach and effect of the Texas law is the best.

Texas legislation has the widest reach. It mandates if the pre-contractual negotiations are in *any* language other than English, then the seller must provide a contract written in that language to the Non-English speaker. A uniform law modeled after Texas law would address the mutuality-of-assent problem in cases where a written contract is proffered. Texas law provides, in pertinent part, that

[i]f the negotiations that precede the execution of an executory contract are conducted primarily in a language other than English, the seller shall provide a copy in that language of all written documents relating to the transaction, including the contract, disclosure notices, annual accounting statements, and notice of default ...⁷³

In adopting the Texas law as a model law, the author would further propose that the non-English speaker have a reasonable period of time after the review to revoke his or her acceptance.⁷⁴

The proposed California law⁷⁵ is more narrow in several respects. Recognizing specific predominant immigrant populations,⁷⁶ it requires the provision

⁷⁰ See *infra* notes 84-95 and accompany text.

⁷¹ See *infra* notes 84 and 89 and accompany text.

⁷² See *infra* notes 88-119 and accompanying text.

⁷³ Tex. Prop. Code §5.068.

⁷⁴ See *infra* notes 120-30 and accompanying text.

⁷⁵ Cal. Civ. Code Section 1632(b) provides:

Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, ... shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, which includes a translation of every term and condition in that contract or agreement.

⁷⁶ Cal. Civ. Code Section 1632(a) provides:

The Legislature hereby finds and declares all of the following: (1) This section was enacted in 1976 to increase consumer information and protections for the state's sizeable and growing Spanish-speaking population. (2) Since 1976, the state's population has become increasingly diverse and the number of Californians who speak languages other than English as their primary language at home has increased dramatically. (3) According to data from the United States Census of 2000, of the

of translated contracts only if the language of pre-contract negotiation is “primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean.”⁷⁷ Further, the proposed California law does not require a “copy” of the contract in the language other than English, but requires “a translation of the contract or agreement in the language in which the contract or agreement was negotiated, which includes a translation of every term and condition in that contract or agreement.”⁷⁸ It is uncertain whether the California version would merely permit a translated summary of the major provisions of the contract. Transactions made with the consumer’s own adult interpreter⁷⁹ are excluded from the translated-copy requirement.⁸⁰ Unlike other states which have translated-contract requirements, minors are expressly excluded from the definition of “interpreter.”⁸¹ This provision assumes that adult interpreters are more capable than child interpreters. However, this assumption may be unfounded where adult lay interpreters are used in legal transactions.⁸² The California statute does not expressly indicate the consequence (e.g., rescission) of using a minor interpreter.⁸³ Texas law

more than 12 million Californians who speak a language other than English in the home, approximately 4.3 million speak an Asian dialect or another language other than Spanish. The top five languages other than English most widely spoken by Californians in their homes are Spanish, Chinese, Tagalog, Vietnamese, and Korean. Together, these languages are spoken by approximately 83 percent of all Californians who speak a language other than English in their homes.

⁷⁷ See *supra*, notes 65 and 75.

⁷⁸ See *supra*, notes 69-73 and accompanying text.

⁷⁹ Cal. Civ. Code Section 1632(h) provides: “This section does not apply to any person engaged in a trade or business who negotiates primarily in a language other than English ... and the party negotiates the terms of the contract, lease, or other obligation through his or her own interpreter.”

⁸⁰ Cal. Civ. Code Section 1632(h) provides:

This section does not apply to any person engaged in a trade or business who negotiates primarily in a language other than English, as described by subdivision (b), if the party with whom he or she is negotiating is a buyer of goods or services, or receives a loan or extension of credit, or enters an agreement obligating himself or herself as a tenant, lessee, or sublessee, or similarly obligates himself or herself by contract or lease, and the party negotiates the terms of the contract, lease, or other obligation through his or her own interpreter.

⁸¹ Cal. Civ. Code Section 1632(h) (emphasis supplied) provides:

“[H]is or her own interpreter” means a person, *not a minor*, able to speak fluently and read with full understanding both the English language and any of the languages specified in subdivision (b) in which the contract or agreement was negotiated, and who is not employed by, or whose service is made available through, the person engaged in the trade or business.

⁸² See Muneer I. Ahmad *Interpreting Communities: Lawyering Across Language Difference*, 54 U.C.L.A. L. REV. 999, 1002 (2007) (describing interpreters as “third parties” when involved in the attorney-client relationship “inject[ing] the subjectivity of a third person – her thoughts and feelings, attitudes and opinions, personality and perception – into what previously had been the exclusive province of the lawyer and client”). *A fortiori*, adult lay interpreters may be only slightly more able than a child interpreter to explain a technical legal concept.

⁸³ Cal. Civ. Code §1632(k) provides that

Upon a failure to comply with the provisions of this section, the person aggrieved may rescind the contract or agreement in the manner provided by this chapter. When

has none of these limitations.

The legislative approach of Illinois differs from both California and Texas. Illinois law⁸⁴ limits its contract-interpretation requirement to “retail transactions or negotiations related to a retail transaction.”⁸⁵ Implicitly, the law recognizes that not all contracts are reduced to writing and only applies to those which result in a written agreement.⁸⁶ Unlike Texas and California, Illinois does not require merchants to provide translated copies of contracts to consumers.⁸⁷ Illinois seems to force the Non-English speaker to comply with the American majority rule on the subject: if one does not understand the terms of a contract, obtain a translation or an interpreter to translate its terms.⁸⁸

The Illinois law is written in the alternative allowing the translation to come either from the merchant or the consumer.⁸⁹ If the consumer brings his or her own

the contract for a consumer credit sale or consumer lease which has been sold and assigned to a financial institution is rescinded pursuant to this subdivision, the consumer shall make restitution to and have restitution made by the person with whom he or she made the contract, and shall give notice of rescission to the assignee.

It is unclear whether using a minor interpreter would constitute a “failure to comply” under Cal. Civ. Code §1632(k).

⁸⁴ Section 815 ILCS 505/2N (b) provides:

If (i) a person conducts, in a language other than English, a retail transaction or negotiations related to a retail transaction resulting in a written contract and (ii) *the consumer used an interpreter other than the retailer* or an employee of the retailer in conducting the transaction or negotiations, the retailer must have the consumer and the interpreter sign the following forms:

I, [name of consumer], used [name of interpreter] to act as my interpreter during this retail transaction or these negotiations. The obligations of the contract or other written agreement were explained to me in my native language by the interpreter. I understand the contract or other written agreement.

[signature of consumer]
[relationship of interpreter to consumer]

I, [name of interpreter], acted as interpreter during this retail transaction or these negotiations. The obligations of the contract or other written agreement were explained to [name of consumer] in the consumer’s native language. I understand the contract or other written agreement.

[signature of interpreter]
[relationship of interpreter to consumer] (emphasis supplied).

⁸⁵ *Id.* The contract-interpretation requirement is part of Illinois’ broader “Consumer Fraud and Deceptive Business Practices Act” (815 ILCS 505/1 et seq.). This Illinois law seems to be the most narrow of the three discussed legislative approaches. Texas law applies the requirement to any “executory” contract negotiated in a foreign language (see *supra* note 73 and accompanying text) whereas California law applies to anyone who engages in a “trade or business who negotiates” in specific languages (see *supra* note 79 and accompanying text).

⁸⁶ See *supra* note 84 and accompanying text.

⁸⁷ See *supra* notes 77-78 and accompanying text.

⁸⁸ See *supra* notes 46-58 and accompanying text.

⁸⁹ Section 815 ILCS 505/2N(b) provides:

(b) If (i) a person conducts, in a language other than English, a retail transaction or negotiations related to a retail transaction resulting in a written contract and (ii) *the*

interpreter and obtains a translation of the contract in his or her native language then, presumptively, the consumer is fully informed of the relevant terms and cannot later claim deceit or misinformation because of the lack of language competency. The Illinois law would require the non-English speaker and the interpreter to attest to their comprehension of the contract.⁹⁰ This affirmation would only be a factor in determining whether the consumer actually understood the terms of the contract. It seems designed to preclude any lack-of-mutuality-of-assent allegations. However, whether one understood the terms of contract is a question of fact.⁹¹ In reality, although the consumer affirms that he or she understands the agreement, at maximum, the consumer understands only as much and as well as the interpreter conveys. The affirmation does not require witnesses or verification of language competency, not that either would matter. Illinois law does not prohibit lay persons or minors from acting as interpreters. Therefore, minors could sign the affirmation as the contract's interpreter.

Under Illinois law, consumers may elect to utilize the merchant's employees as interpreters in retail transactions.⁹² In such case, the consumer must affirm that he or she "voluntarily chose"⁹³ to use the retailer's interpreter and that the terms of the contract were likewise satisfactorily explained in his or her own language. One can reasonably speculate that the use of a merchant's interpreter is a common occurrence in communities heavily populated with homogenous non-English speakers. In some American minority communities, most inhabitants speak a common language other than English. In such case, the merchant's store is located in or near the relevant community and employs salespeople or workers who speak the language of the non-English speaking community. Inherent in this interaction is a higher risk of fraud or deceit since the worker's ultimate undivided loyalty is to his or her employer,⁹⁴ not to

retailer or an employee of the retailer acted as the consumer's interpreter in conducting the transaction or negotiations, the retailer must have the consumer sign the following form in the consumer's native language (except as provided in subsection (c)):

This retail transaction or these negotiations were conducted in (language), which is my native language. I *voluntarily choose* to have the retailer act as my interpreter during the negotiations. The obligations of the contract or other written agreement were explained to me in my native language. I understand the contract or other written agreement.

[signature of consumer]

[signature of retailer] (emphasis supplied).

⁹⁰ See *supra* note 84 and accompanying text.

⁹¹ E.g., *Notsu v. Eslambolipoor*, No. B162447, 2003 Cal. App. Unpub. Lexis 11830, at *11 (Cal. Ct. App. Dec. 19, 2003). See *supra* note 58 and accompanying text.

⁹² See *supra* note 84.

⁹³ See *id.*

⁹⁴ See Steven W. Bender, *Consumer Protection For Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1028 (1996).

These statutes should not defer to any interpreter who stands to benefit financially from the transaction, such as when a bilingual home improvement contractor acts as an intermediary between the consumer and the consumer and a lender that finances

the consumer. Neither the retailer nor its worker has a driving incentive to protect the interests of the non-English-speaking consumer (e.g., disclosure of negative material terms such as a disclaimer). The voluntary-choice provision of the statute may be a selection of convenience rather than a real choice. Most likely, the retailer's interpreter is onsite, easily accessible and inexpensive to both parties. The voluntary-choice language of the statute may amount to an effective waiver of common law fraud and mutuality-of-assent defenses. In essence, non-English speakers would use the retailer's interpreters at their own risk. In both situations, the non-English-speaking consumer must affirm that he or she understands the mutual obligations prior to or simultaneous with the execution of the contract.

IV. CHILD INTERPRETERS

Except for California, none of the statutes discussed specifically address the use of child interpreters. Although California removes minors from the definition of an interpreter,⁹⁵ it cannot legislate away reality. Families of foreigners may contain adults who rely on their children or grandchildren for interpretive purposes.⁹⁶ However, ordinary diligence requires that the non-English speaker obtain a satisfactory translation of the proposed contractual terms.⁹⁷ The use of child interpreters may demonstrate an absence of ordinary diligence. However, in America, such a conclusion may be culturally biased⁹⁸ given that the use of child interpreters (typically family members) among immigrants and non-English speakers is not a new phenomenon.⁹⁹ Under certain circumstances, their use may be reasonable. The children are easily and readily accessible, virtually expected to aid their loved ones in the translation from their native tongue to English, and are generally used without expense. However, their use has had untold negative contractual consequences for the

the contractor's improvise. Even so limited, this interpreter exception seems ill-advised. The court must determine whether the consumer's interpreter was in fact competent to interpret the bargain. Moreover, those bargain terms that the interpreter deems important enough to translate may not coincide with those terms important to the consumer.

Id. at 1079.

⁹⁵ See *supra* notes 81-82 and accompanying text.

⁹⁶ See *supra* notes 12, 35 and accompanying text.

⁹⁷ See *supra* notes 46-58 and accompanying text.

⁹⁸ See Muneer I. Ahmad *Interpreting Communities: Lawyering Across Language Difference*, 54 U.C.L.A. L. REV. 999, 1000 (2007).

Unable to express themselves in language understood by the majority population, and forced to rely upon others to mediate their interactions with the world, [non-English speaking] individuals are almost definitionally deprived of voice. For many, reliance upon their bilingual children as interpreters is an inescapable source of infantilization and shame, and widespread hostility toward non-English speakers

Id. at 1028.

⁹⁹ See *supra* note 36.

involved foreigners.¹⁰⁰ Child interpreters have been used in the preliminary, often informal, negotiations leading up to putative contracts. Many of these contracts are not in writing and may not involve large sums of money. Despite the use of child interpreters, the American judiciary has been unwilling to avoid contracts *solely because* the contract had been consummated with the use of a child interpreter. As early as 1914, and most likely before then, courts have not been swayed by defensive arguments that formalized contracts should be undone as a result of the use of child interpreters. The scenario of *Saginaw Medicine Co. v. Batey*¹⁰¹ was and has become quite familiar. There,

[the defendant] claimed he was illiterate and did not understand the words used in the contract. The defendant was born in Switzerland, claimed he did not speak English well, and that what the seller said was explained to him by his 17-year old son, who also did not understand English or business very well. They claimed to rely on false statements by seller.¹⁰²

The use of child interpreters replays itself frequently in the life of foreigners attempting to contract in modern-day America using child interpreters. Where a child has been involved in an alleged mistranslation or misinterpretation of material facts between an English and non-English speaker, some courts have been willing to at least conclude the existence of a factual dispute.¹⁰³ However, it seems many courts are unwilling to invalidate contracts involving their use. Such was the case in *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*¹⁰⁴ where a child was involved in the apparent misinterpretation of the material terms of a

¹⁰⁰ With the exception of *Martin v. 20th Century Ins. Co.*, 201 Cal.Rptr. 22, 26 (Cal. Ct. App. (1984), in spite of the use of child interpreters, the relevant contracts were held to be enforceable in *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145, at *32 (Neb. Ct. App. June 8, 2004), *Saginaw Medicine Co. v. Batey*, 146 N.W.329, 336 (Mich. 1914); *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781, 788 (Wis. Ct. App. 1987).

¹⁰¹ *Saginaw Medicine Co. v. Batey*, 146 N.W.329 (Mich. 1914).

¹⁰² *Id.* at 331.

¹⁰³ In *Martin v. 20th Century Ins. Co.*, 201 Cal.Rptr. at 24, on the issue of whether the insured had knowingly waived his uninsured motorist coverage, the appellate court reversed the trial court's grant of summary judgment. The court held "the applicant, because of difficulty with the English language, [did not understand] what was being waived." *Id.* at 27. In that case, Ms. Del Rosario contacted an insurance agent, Mr. James K. Connor, to obtain automobile insurance. "Ms. Del Rosario was accompanied by her teenaged sister, Maria Martin. Neither woman spoke fluent English and no one in Mr. Connor's office spoke fluent Spanish." *Id.* at 26. The court commented: "Contrary to what 20th Century contends, there is a fact question as to whether there exists any meeting of the minds as between Ms. Del Rosario and her agent to exclude the otherwise mandatory motorist coverage from the application for insurance." *Id.* at 28.

¹⁰⁴ *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781 (Wis. Ct. App. 1987). In this case, issues of mutuality of assent, the existence of a contract, or breach of contract were not before the court. Had they been, this author would have suggested that it was akin to a personal-satisfaction contract. This would have given the family the right to declare its breach and recover the contract price. See *supra* notes 1, 31, 35, 36, 100 and *infra* notes 131 and 148 and accompanying text for related discussions involving *Doersching*.

funeral-service contract – to embalm or not embalm the decedent.¹⁰⁵ The three-justice dissent of the Wisconsin Court of Appeals case opined that the age of the interpreter was a significant factor in the unfortunate mishap.¹⁰⁶ Likewise, in a more recent case, *Fuentes v. Woodhouse Ford, Inc.*,¹⁰⁷ the Nebraska Court of Appeals glossed over the plaintiff's inability to speak or understand English¹⁰⁸ as well as the intermediate use of his minor son as an interpreter¹⁰⁹ of the contract involving a sales disclaimer. Instead, the Court focused on the fact that the buyer neglected to have the vehicle inspected and had driven it for over a month.¹¹⁰

¹⁰⁵ In that case, through the 15-year-old brother of a decedent who was killed in a car accident, there was confusion between the funeral director and the family of the decedent as to whether the final preparation of the body was to take place in the United States or Mexico and whether the casket was to remain open or closed. The funeral director told the “decedent’s brother, that because of the extent of the injuries to the decedent, there should be a closed casket funeral.” *Id.* at 784. Apparently, the 15-year-old brother of the decedent, based on Mexican tradition and culture, communicated that the casket should remain open. In shipping the remains to Mexico under the apparent belief that final preparations would be made in Mexico,

the director, however, put the nude body in two large plastic trash bags, wrapped the body in a flannel sheet and put it in a casket. He did not put the clothes provided by the decedent’s family in or with the casket. He did not suture the carotid incisions, suture or otherwise close the head wound, further wash or clean the hair or undertake any further embalming procedure. When the body arrived in Mexico, the widow asked the casket to be opened to permit identification of the decedent. The embalming had not been entirely successful. Some decomposition of the body was apparent.

Id. at 784 The funeral director’s license was permanently revoked on the determination that his neglect was “outrageous” under the standards established by the Wisconsin Funeral Directors and Embalmers Examining Board. *Id.* at 787.

¹⁰⁶ The court said,

In evaluating [the director’s] conduct according to this standard, several points should be emphasized: he may have believed the family had acquiesced in his recommendation that, in view of the severity of the injuries to the deceased, there be a closed casket ceremony (the family could not speak English; [the director] communicated with the family through a fifteen-year old interpreter; [the director] testified that the family told him ‘They wanted me just to prepare him and ship him down to funeral director’ in Mexico.

Id. at 791.

¹⁰⁷ *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145, at *2 (Neb. Ct. App. June 8, 2004). The buyer was a Mexican immigrant who did not read, understand or speak English. His 13-year-old son accompanied him to assist in communicating to the seller that the buyer needed a reliable vehicle to transport his ill infant child more than 100 miles, four times each week for medical treatment. When asked by the foreigner whether the vehicle would achieve the buyer’s desired goals, the seller answered in the affirmative as well as several times visually giving the buyer the “thumbs up” gesture. The buyer signed numerous documents and when, asked through his 13-year old son, if he understood what he was signing, the father indicated that he did. One of the documents provided that the vehicle was being sold “AS IS.” Almost immediately, the vehicle developed serious mechanical problems and after a month or so, the buyer asked that the contract be rescinded. *Id.* at *7-9. The Nebraska Court of Appeals refused to rescind the contract. It called the seller’s representations “puffing.” *Id.* at *24.

¹⁰⁸ “[W]e acknowledge [the plaintiff’s] inability to speak English may have hindered his understanding of the transaction.” *Id.* at 162.

¹⁰⁹ The court did not address this issue.

¹¹⁰ *Id.* at 152.

Most states, under most circumstances, at the minor's option, permit the minor to disaffirm a contract.¹¹¹ The underlying rationale presumes that minors lack the maturity, experience and judgment to make sound decisions.¹¹² In the cases discussed¹¹³ and in most cases involving child interpreters, it is doubtful that a minor child could have conveyed or can convey to the involved adult foreigners, let alone understood, the actual meaning of the legal consequences involved. For example, in *Fuentes*,¹¹⁴ there is substantial doubt that the foreigner-buyer, relying on the child's presumptively inadequate translation, could have understood the critical disclaimer contained in the bargain.¹¹⁵ It is not the function of an interpreter to provide legal advice. However, a child cannot be expected to provide an adult Non-English speaker an accurate, meaningful and equivalent translation of the English legalities.¹¹⁶ However, inherently, the translated communication by a child of putative contract terms is not reliable.¹¹⁷ Further, in court, the child would be required to testify as to what he *said* in contrast to what he observed. The court would have to explore what was communicated by the seller to the child, then from the child to the non-English speaker. This duplicitous venture raises problems regarding the child's ability and recollection.

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As a general rule, an infant does not have the capacity to bind himself absolutely by contract. . . . See 43 C.J.S. Infants §166 (1978). The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the design of others The policy of the law is to discourage adults from contracting with an infant they cannot complain if, as a consequence of violating that rule, they are unable to enforce their contracts. . . . "The result seems hardly just to the [adult], but persons dealing with infants do so at their peril. The law is plain as to their *disability* to contract, and safety lies in refusing to transact business with them."

Webster Street Partnership v. Sheridan, 368 N.W.2d 439, 442 (Neb. 1985) (original citations omitted) (emphasis supplied). Thus, it is implied that the persons with whom adults should deal are adults.

¹¹² There is "a long-standing presumption that minors lack the experience, perspective and judgment critical to making sound decisions." In re Jane Doe, 19 S.W.3d 346, 348 (Tex. 2000) (Abbott, J., dissenting) (Texas case dealing with minor's right to obtain an abortion without parental consent). Many courts describe the state of minority as a "disability," e.g., one court stating "[t]he [parties] are not subject to a *disability*, such as being a minor, that would require additional time following the removal of that *disability* to realize and act upon a cause of action accrued during the *disability*." Parkhurst v. Tabor, No. 07-2068, 2008 U.S. Dist. Lexis 44619, at *4 (W.D. Ark. June 2, 2008) (emphasis supplied) (case dealing with a tolling statute).

¹¹³ *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145, at *1 (Neb. Ct. App. June 8, 2004); *Saginaw Medicine Co. v. Batey*, 146 N.W.329, 330 (Mich. 1914); *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781 (Wis. Ct. App. 1987); *Martin v. 20th Century Ins. Co.*, 201 Cal.Rptr. 22, 24 (Cal. Ct. App. 1984).

¹¹⁴ *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145, at *4 (Neb. Ct. App. June 8, 2004). See *supra* notes 107-09 and accompanying text.

¹¹⁵ See *supra* notes 99-101 and the accompanying text.

¹¹⁶ One commentator suggests that exact translations are a fiction. "[W]hen properly understood, the linguistic complexity and cultural embeddedness of interpretation reveal the lie of verbatim translation and underscore the inescapable subjectivity of all interpretation." Muneer I. Ahmad *Interpreting Communities: Lawyering Across Language Difference*, 54 U.C.L.A. L. REV. 999, 1003 (2007).

¹¹⁷ See Stephen J. Ceci & Richard D. Freidman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000).

Without judicial or legislative intervention, the child's translation is imputed to the adult non-English speaker.¹¹⁸ Therefore, the foreigner is bound by the child's translation. Oddly, if the child were transacting business independently with *either* adult, the child would be able to disaffirm any resulting contractual relationship.¹¹⁹ The law of minority is to protect the child from his or her own improvidence. In this case, the foreigner is in need of protection. In actuality, neither the child interpreter nor the adult principal alone has the ability to maturely understand the English speaker.

V. PROPOSAL FOR A UNIFORM LAW

The author proposes that contracts entered into by foreigners with the critical aid of a child interpreter be voidable within a reasonable time¹²⁰ of the formation of the contract at the option of the foreigner. This proposed right of revocation is akin to the similar right under the Uniform Commercial Code¹²¹ granted to a disgruntled sales buyer who has accepted a shipment of goods only to discover a "nonconformity which substantially impairs its value."¹²² Under the Code, revocation of acceptance is permitted where the buyer "was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances."¹²³ Where such nonconformity is discovered, the UCC allows revocation of acceptance "within a reasonable time after the buyer discovers or should have discovered the ground for"¹²⁴ the revocation. Similarly, if a contract, once translated, is determined to be incongruent with desires of the foreigner, it is "nonconforming." Comparatively, the nonconformity was "difficult of discovery before acceptance" due to the child's interpretation or the "seller's assurances." Like the Code, it is proposed that a foreigner be permitted to void such an agreement based on a child interpretation.

¹¹⁸ See *supra* note 32 and accompanying text.

¹¹⁹ See *supra* notes 111-12 and accompanying text.

¹²⁰ See *infra* notes 130 and accompanying text where a "reasonable time" means fourteen (14) days.

¹²¹ Uniform Commercial Code §2-608 provides:

Revocation of Acceptance in Whole or in Part. (1) The buyer may revoke his acceptance of a lot or commercial unit whose *non-conformity substantially impairs its value* to him if he has accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such non-conformity *if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.* (2) *Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it* and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it. (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

¹²² See *supra* note 121.

¹²³ *Id.*

¹²⁴ *Id.*

The author proposes a uniform law predominantly patterned after the Texas statutory provision with certain modifications. It would read as follows:

If the negotiations that precede the execution of an executory contract for goods or services in excess of five hundred dollars (\$500) are conducted primarily in a language other than English, through an adult interpreter of the consumer's choice or one provided or employed by the seller, at the consumer's request, the seller shall provide a copy in that language of the contract, all subsequent written documents relating to the transaction, including the contract, disclosure notices, annual accounting statements, notice of default, and any modifications. In such case, and in all cases where a minor has been utilized as an interpreter, the consumer shall have a reasonable period of time, not to exceed fourteen (14) days from the time the contract is signed or from the date of actual receipt of the translated copy of the contract, to revoke his acceptance if previously executed, or to return an executed copy signed by the buyer and the interpreter.

The proposal combines various selected aspects of the Texas, California and Illinois laws.¹²⁵ First, the proposal would require the seller, upon request, to provide a translated copy¹²⁶ of the contract to the non-English speaker in transactions greater than a certain dollar amount. Although the establishment of this monetary floor would be arbitrary, the author proposes the trigger amount to be five hundred dollars (\$500.00).¹²⁷ States may wish a higher or lower threshold amount. Like Texas, some states may want sellers to provide a translated contract in *all* instances where the negotiations take place in a language other than English. The proposal would require the non-English speaker to initiate by request his or her desire for a translated contract.¹²⁸ The seller would incur the initial costs associated with the proposal. The

¹²⁵ From Texas comes the general provision that translated contracts be provided to the non-English speaker (*see supra* notes 73-74 and accompanying text). From the California legislation comes the provisions on the general requirement that adult interpreters be utilized (*see supra* notes 75-83 and accompanying text). From the Illinois law derives the notion that if an interpreter is utilized in the translation, the interpreter ought to execute the agreement as well (*see supra* notes 84-92 and accompanying text). It is not intended by the interpreter's execution of the agreement that he incur any responsibility for the contract's performance. The right-of-revocation provision applicable to transactions five hundred dollars or more and to all transactions utilizing a child interpreter is the author's suggestion (*see supra* note 119 and accompanying text).

¹²⁶ *See supra* note 75 and accompanying text regarding California Assembly Bill 212, which proposed that the seller provide the non-English speaker with an "unexecuted" copy. The author finds this approach unnecessary where the non-English speaker has the right to revoke his acceptance within a reasonable time of receipt.

¹²⁷ *See infra* note 131 and accompanying text.

¹²⁸ This suggested provision addresses the concern of one commentator that requiring the seller to establish the language proficiency of a prospective buyer will be perceived as an "attempt to verify [the buyer's] immigration status or as a precursor to discrimination." Steven W. Bender, *Consumer Protection For Latinos:*

seller would have to anticipate and acquire translations of retail sales contracts into the language of the consumer. The author believes these costs would be relatively low. After the translation is performed once, it is likely the generated document can be used repetitively by subsequent non-English-speaking consumers. These suggestions increase the ability of market participants to be informed of the terms of their bargains, to communicate any objections and negotiate mutually-acceptable terms. It brings them much closer to the literal and proverbial goal of being able to “speak the same language.” The American society, as an egalitarian example, benefits from the implementation of these proposals. Initially, the seller may be marginally burdened with the costs of translation. Ultimately, the attendant costs will be passed on to the consuming public. Some may even suggest that those consumers who speak and understand English well may be subsidizing those who lack such ability. However, by eliminating or reducing the uncertainty regarding the legal absence or presence of mutual assent in contracts involving foreigners, the proposal enhances the stability and enforceability of those contracts. Arguably, business with foreigners would increase in many communities since the business climate would be welcoming and the marketplace less intimidating and acidic to those who do not speak English well. Legislatures nationwide would be sending a strong, qualitative, philanthropic and benevolent message that mutual respect and understanding in the marketplace are desirable societal goals regardless of language impediments.¹²⁹

Second, unlike any of the existing legislation,¹³⁰ the proposal would make voidable a seller’s failure to provide a translated contract. In addition, the proposal would provide fourteen (14) days for the non-English speaker to rescind the agreement. The proposed law assumes that fourteen (14) days from the time the initial contract is signed is sufficient for the non-English speaker to have the contract reviewed and to decide whether to rescind the agreement. The fourteen (14) days is a compromise. Given that the author’s proposed buyer’s right of revocation is somewhat extraordinary and perhaps places sellers in a volatile position, the 14-day period of review creates a sense of urgency for the buyer to act expeditiously.

Third, except for transactions involving child interpreters, it would exempt transactions under five hundred dollars (\$500) from coverage. The exemption would relieve sellers of providing translated copies of contracts for transactions under the said amount. The exemption assumes most retail transactions under five hundred dollars, not involving a child interpreter, are routine purchases. Therefore, the threshold assumes that non-English-speaking buyers and English-speaking sellers would not go through the effort or expense of obtaining an interpreter for those transactions.¹³¹

Overcoming Language Fraud and English-Only in the Marketplace, 45 AM. U. L. REV. 1027, 1065 (1996).

¹²⁹ See the accompanying text of this note and *infra* notes 140-41 for some of the negative political concerns of the proposed legislation, *infra* notes 132-39 on the equal protection implications and *infra* notes 142-52 for other practical consequences of the proposed law.

¹³⁰ See *supra* notes 59-94 and accompanying text.

¹³¹ *E.g.*, see *supra* notes 46, 55 and accompanying text, discussing *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003) (interpreter failing to read the entire contract, foreigner held to know its contents).

Fourth, regardless of the face value of the contract, fourteen (14) days would be extended to any non-English-speaking buyer to obtain a translation of any putative contract based on a child interpreter's translation. This is to protect non-English speakers who have utilized a child interpreter. It would not give relief where the foreigner utilizes an adult lay interpreter. In such case, the foreigner's reliance on the lay adult's translation would be done at his or her own risk.

VI. EQUAL PROTECTION ANALYSIS

Not everyone will support the proposal for various reasons. Some might argue that the proposal violates the equal protection¹³² rights of indigenous English-speaking consumers whose comparable contracts lack assent perhaps because of illiteracy or mistake. The proposal would permit non-English-speaking foreigners to rescind their contracts within fourteen (14) days while no such remedy is provided for similarly-situated indigenous English-speakers who may have misread a contract, are illiterate, or for some other reason, fail to understand the terms of a contract written in English. The author believes these concerns would be legally unsupportable. Under equal protection analysis, the legislation would require a rationale basis. First, the state is entitled to make distinctions based on a group's inability to speak English. When a consumer does not speak or understand English, it is well within the province of the state to require retailers to make reasonable efforts to ensure that the person's rights are protected as English speaking consumers' rights are protected.¹³³ It is a legitimate governmental objective that non-English-speaking consumers be given the opportunity to "reach a threshold point of understanding the choice presented to [them] so that [they] may at least be able to make a decision as to the course of conduct [they] will take."¹³⁴ Second, for the proposal to violate constitutional equal protection provisions, it would have to either be intentionally promulgated to discriminate against a suspect class or be facially neutral and substantially burden a suspect class.¹³⁵ The proposed legislation would be a non-invidious exercise of a

¹³² The United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. Const. Amend. XIV, §1 (emphasis added).

¹³³ *People v. Molina*, 887 N.Y.S.2d 784, 792-795 (N.Y. Sup. Ct. 2009)(finding police failure to administer an alcohol-sobriety physical coordination test to non-English speaking driver to violate defendant's equal protection rights where such tests are routinely given to English-speaking drivers). While this case does not involve contracting, the language is useful as a matter of constitutional principle.

¹³⁴ *Id.* at 794 (quoting *People v. Niedzwiecki*, 487 N.Y.S.2d 694 (N.Y. Crim. Ct. 1985)).

¹³⁵ "[W]hen a neutral law has a disparate impact upon a group that has been historically the victim of discrimination, an unconstitutional purpose may still be at work. ... [It is the] settled rule that the Fourteenth Amendment guarantees equal laws, not equal results" *Personnel Administrator of Massachusetts v. Freney*, 442 U.S. 256, 273 (1979).

state's police powers which "reflect[s] the reality that [languages other than English are] spoken in [the effected states] and in the United States."¹³⁶ It would neither disadvantage a suspect class nor burden a fundamental right of English-speaking consumers. Thus, the proposed legislation would not invoke a higher level of scrutiny. Under equal protection analysis, the non-suspect criterion of differentiation – the retailer's customers' inability to speak, read or understand English – would invoke a rational-basis scrutiny.

Social and economic legislation that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose. "Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Social and economic legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the legislature's actions were irrational."¹³⁷

The proposal is social and economic legislation. It would be enacted to facilitate the participation of non-English speakers in the marketplace. It does not differentiate on the basis of suspect criteria (race, national origin or alienage).¹³⁸ The proposal does not impinge any fundamental rights.¹³⁹ Clearly, it would be a legitimate goal of government to reduce the marketplace language barriers borne by non-English speakers. Further, the proposal provides a logical nexus between its goal and

¹³⁶ *Kustura v. The Department of Labor and Industries*, 175 P.3d 1117, 1133 (Wash. Ct. App. 2008) (rejecting Bosnian plaintiffs' claim that the state's Department of Labor's practice of providing interpreters for Spanish-speaking claimants but not for those who spoke other languages violated their equal protection rights).

¹³⁷ *Kamaole Pointe Dev. LP v. County of Maui*, 573 F.Supp.2d 1354, 1383 (D. Haw. 2008) (citations omitted) (quoting *Hodel v. Indiana*, 452 U.S. 314, 331 (1981); *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

¹³⁸

Equal protection challenges to English-only policies have frequently been rejected because courts do not consider non-English speakers, taken as a whole, to be a suspect class and therefore do not subject such policies to heightened scrutiny. Nor have courts identified language as a fundamental right which triggers strict scrutiny analysis.

Lim, *supra* note 2, at 585 n.14.

¹³⁹

Fundamental rights are those specifically guaranteed in the Constitution and those rights that are "implicit in the concept of ordered liberty"... These generally include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and abortion." The [right to contract] is not a fundamental right "implicit in the concept of ordered liberty."

Myers v. Delaware County, Ohio, No. 2:07-cv-844, 2008 U.S. Dist. Lexis 90608, at *26 (S.D. Ohio Nov. 7, 2008) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969); *Washington v. Glucksberg*, 521 U.S. 702, 720, (1997)).

requiring retailers to provide translated contracts to its non-English-speaking customers. Providing retailer-translated contracts for review or supplying retailer-provided interpreters are logical approaches to the problem. These options manifest a reasonable legislative judgment which places the initial costs of implementation on retailers rather than consumers.

VII. POLICY CONSIDERATIONS

The legislative proposal may be politically unpopular in some areas of the country since some may argue that the law favors foreigners¹⁴⁰ by giving an advantage to foreigners not enjoyed by indigenous citizens or those who speak English well. Others may suggest the proposal encourages rather than deters illegal immigration and may aid and abet illegal alienage.¹⁴¹ One may argue that the incidence of bad-faith avoidance on the part of foreigners will certainly increase. Naysayers will assume that the right will be a misused weapon by the foreigners rather than a protective shield to the foreigners. They argue that a foreigner will be legally armed with the option of avoiding a contract without good cause. The author insists that the opposite result will transpire. This author's proposal will have the following practical and legal effects not inconsistent with present case law. (1) Knowing the potential consequences, persons dealing with foreigners will insist upon the use of adult interpreters, lay or not, much like prudent persons who deal with contracting minors now demand adult cosigners.¹⁴² (2) It is conceivable and, perhaps, predictable that in communities with large non-English-speaking populations, specialized agencies providing routine contract-translation/interpretation services for unsophisticated foreigners will sprout.¹⁴³ In fact, this is not farfetched given that similar services on a limited basis are already established in institutions such as Legal Aid Society,¹⁴⁴ the Social Security Administration,¹⁴⁵ and the

¹⁴⁰ One case suggests that a more politically-charged argument may be whether the proposed law favors one group of foreigners over another of group foreigners. See *supra* note 136 and its accompanying text.

¹⁴¹ One might ask "Why should merchants bear the costs of translating contracts involving non-English speaking consumers, especially those who may not be legally in this country?" Undoubtedly, some of those consumers will be undocumented aliens who would take advantage of the provisions of the proposal in the face of anti-illegal-alien sentiment. Further, merchants will pass on these costs to the consuming public. "Why should they be forced to absorb the costs?" Like so many legislative social initiatives, the proposal may displease some merchants and English-speaking consumers. However, in seeking to balance the disparate language abilities of contracting parties, legislators would be recognizing and taking a proactive approach to the large presence of non-English-speaking consumers in the marketplace (a non-disappearing and growing reality). In so doing, some market participants may be negatively affected.

¹⁴² See *supra* notes 95-119 and accompanying text on courts' traditional refusal to void contracts that involve the use of child interpreters.

¹⁴³ *E.g.*, Language Line Services, Inc. (language.com).

¹⁴⁴ In a telephone conversation with Legal Aid of Nebraska, in Omaha, Nebraska, the author was told that translation and interpretive services are provided to applicants who meet its income guidelines. The telephonic interviewee, however, expressed some doubt whether a non-English speaking person desiring to enter into a contract for the purchase of a car or a home would meet the income guidelines established by the Legal Services Corporation. The interviewee indicated that cases are routinely referred to the Language Line Services, Inc., for such individuals. A visit to that website (language.com) revealed fee-arranged

Immigration and Naturalization Service.¹⁴⁶ (3) With the exception of cases involving wrongdoing or incompetence on the part of an interpreter¹⁴⁷ no cases have been located in which a contract was voided where an adult interpreter was provided or made available by a contracting entity to a foreigner.¹⁴⁸ Conversely, courts have looked favorably on this practice, have virtually presumed the good-faith benevolence of such merchants, and, essentially, have raised the burden of proof for foreigners claiming fraud where the merchant has offered language-translation assistance.¹⁴⁹ This should provide an incentive for merchants to take the initiative in providing translation/interpretation services or directing foreigners to agencies who make available such services.¹⁵⁰ (4) In addition, as a policy matter, it is unfair to place a child, particularly an adolescent family member, in the precarious position of having to translate or interpret a legal document as well as shoulder the familial responsibility, consequence, shame or regret if or when the transaction collapses or goes awry. Under this proposal, the foreigners in *Fuentes*¹⁵¹ and *Doersching Funeral Home*¹⁵² perhaps would have had the option to void the contract. Rightfully, the implementation of the author's proposal will force persons who deal with foreigners utilizing child interpreters to do so at their own peril.

language-translation services for "public and private" clients, merchants as well as individuals. Of course, for indigent individuals this may pose a problem.

¹⁴⁵ Most of the federal social services programs, e.g., child health assistance program (42 C.F.R. 457.402 (aa)), consider language translation as enabling.

¹⁴⁶

The INS Examinations Handbook directs the examining officer to "make certain whether the services of an interpreter are required" if the person does not speak English. [The regulations] requires LOs [(the local legalization offices of the INS)] to "maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages ... if necessary."

Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555, 1562 (11th Cir. 1989).

¹⁴⁷ *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203 (Ga. Ct. App. 2003) (interpreter failing to read the entire contract, foreigner held to know its contents); *Bonelli v. Burton*, 123 P. 37, 39-40 (Or. 1912) (Interpreter falsely representing the size of deed lands).

¹⁴⁸ *Figli v. Fisheries Development Corp.*, 499 F. Supp. 1074, 1085 (S.D.N.Y. 1980) (concluding that foreign merchants in an international transaction were "sophisticated" because they used interpreters); *De Villagomez Gonzalez v. First National Bank-Edinburg*, No. 13-04-367-CV, 2005 Tex. App. Lexis 6175, at *7 (Tex. App. Aug. 4, 2005) (finding contract not voidable two bilingual employees were made available for plaintiff's use, which she declined); *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203, 205 (Ga. Ct. App. 2003) (holding contract not voidable where insurer offered the assistance of Spanish-speaking interpreter, but the insured chose to utilize her own interpreter). See *supra* note 20 and accompanying text.

¹⁴⁹ *De Villagomez Gonzalez v. First National Bank-Edinburg*, No. 13-04-367-CV, 2005 Tex. App. Lexis 6175, at *7 (Tex. App. Aug. 4, 2005).

¹⁵⁰ See *supra* notes 143-46 and accompanying text.

¹⁵¹ *Fuentes v. Woodhouse Ford, Inc.*, No. A-02-1102, 2004 Neb. App. Lexis 145, at *1 (Neb. Ct. App. June 8, 2004). See *supra* notes 98-101 and accompanying text.

¹⁵² *Doersching v. Wisconsin Funeral Directors & Embalmers Examining Board*, 405 N.W.2d 781 (Wis. Ct. App. 1987). See *supra* notes 98-119 and accompanying text regarding the use of child interpreters.

VIII. CONCLUSION

The entry and assimilation of non-English speakers into American culture takes place on many fronts and many ways. The ability to effectively communicate affects every aspect of their transition into American life. This skill is critical in the marketplace. American law rightfully obliges the foreigner to have translated documents he or she does not understand. The author's proposal does not vitiate this responsibility. However, it does further level the legal playing field between foreigners and retailers who have induced them to contract in a language other than English. More importantly, all buyers, regardless of language skill, will have the right and opportunity to review the putative contract in their own language. In that sense, the proposal would place contracting foreigners on an even keel with their English-speaking counterparts. The proposal would provide some protection to foreigners who utilize child interpreters. At the same time, it places merchants on notice that agreements so procured are voidable at the foreigner's option. It will virtually eliminate the absence-of-mutuality-of-assent defenses in contracts involving non-English speakers. Under this proposal, foreigners would no longer be able to assert that they did not understand a material contract term. If that goal is achieved, our multilingual society would be the better for it.