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WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE: AN APPROACH FOR EVALUATING CREDIBILITY IN AMERICA'S MULTILINGUAL COURTROOMS

DANIEL J. PROCACCINI*

Abstract: In the American justice system, the jury is the ultimate and exclusive finder of fact. In particular, credibility determinations are sacrosanct, and no witness is permitted to “invade the province of the jury” by testifying as to another party’s credibility. This rule is strictly enforced despite being thoroughly discredited by behavioral research on the ability of jurors to detect deception. In the modern multilingual courtroom, this rule places linguistic minorities at a distinct disadvantage. The communication gap between cultures is vast, and courtroom interpretation suffers from many well-documented inadequacies that can profoundly affect a fact-finder’s conclusions about a non-English speaker’s credibility. In other circumstances, when it is reliable and will assist the trier of fact, courts routinely admit expert testimony. This Note advocates for a similar solution: where non-English speaking parties or witnesses would otherwise suffer prejudice, courts should abandon the “province of the jury” rule and allow expert testimony regarding a witness’ credibility.

INTRODUCTION

On a summer night in July 1986, in the strawberry fields of Sandy, Oregon, someone murdered Ramiro Lopez Fidel by stabbing him twice in the chest.¹ The series of events culminating in his death is unclear, but it began the previous evening with an argument during an unruly birthday party held at a nearby camp for migrant workers.² Witnesses recall that around two o’clock in the morning, Lopez jumped into a car and “tore out” toward the strawberry fields; seven men followed him in “hot pursuit,” one of whom was an eighteen-year-old fruit picker named

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¹ See Peter Carlin, *What Becomes of the Resurrected?*, L.A. TIMES, Mar. 8, 1992 (Magazine), at 20; Barnes C. Ellis, *With a Reasonable Doubt*, SUNDAY OREGONIAN, Jul. 24, 1988, at A1.

² See Carlin, *supra* note 1; Ellis, *supra* note 1. According to an eyewitness to the chase, the scene was chaotic: “It was like watching ‘Miami Vice’ that night, it was crazy.” Ellis, *supra* note 1.

Santiago Ventura Morales.³ Around dawn, a farm hand discovered Lopez's body amid a grisly crime scene.⁴ That same day, seven men from the camp—including Ventura—were arrested and questioned by local police.⁵ The following morning, Ventura alone was accused of murder.⁶

The subsequent investigation and trial of Mr. Ventura illustrate how “linguistic and cultural differences can unfairly penalize immigrants thrust into the cauldron of the American justice system.”⁷ At the time of his arrest, Ventura did not speak English or Spanish, but rather Mixtec—an indigenous Indian tongue native to the province of Oaxaca, Mexico.⁸ Nevertheless, to the extent that investigators and court personnel were aware of this language comprehension problem, they largely ignored it.⁹ During the trial, interpreters complained that Ventura and several Mixtec witnesses were not speaking Spanish, but the court disregarded their concerns.¹⁰ In addition to a basic language barrier, broader and more complex problems of verbal, cross-cultural communication pervaded the investigation and trial.¹¹ For example,

³ See Carlin, *supra* note 1; Ellis, *supra* note 1. According to Ventura, he and the other men found Fidel's vehicle abandoned. See Carlin, *supra* note 1. They slashed its tires, shot out its windshield, and set fire to the sedan. See *id.* Around 2:25 a.m., police officers responding to a report of the car fire stopped Ventura and his compatriots but merely confiscated their weapons and allowed them to depart. See Carlin, *supra* note 1; Ellis, *supra* note 1.

⁴ See Ellis, *supra* note 1. “Blood from the wounds extended in a pattern of blood that investigators said measured almost seven feet long and three feet wide.” *Id.*

⁵ See Carlin, *supra* note 1; Ellis, *supra* note 1.

⁶ See Carlin, *supra* note 1; Ellis, *supra* note 1.

⁷ Paul J. DeMuniz, *Introduction to IMMIGRANTS IN COURTS* 3, 5 (Joanne I. Moore & Margaret E. Fisher eds., 1999). See generally Carlin, *supra* note 1; Ellis, *supra* note 1. Ventura was tried in the Circuit Court of Clackamas County, Oregon. See *Oregon v. Ventura Morales*, Nos. 86-630, CA A42459, 1988 Ore. App. LEXIS 1627, at *1 (Or. Ct. App. Aug. 30, 1988) (affirming judgment below without opinion). Because there is no appellate record or published trial court opinion, this Note relies on several comprehensive accounts of the case in order to relate its facts. See DeMuniz, *supra*; Carlin, *supra* note 1; Ellis, *supra* note 1.

⁸ See DeMuniz, *supra* note 7, at 3.

⁹ See *id.*; Ellis, *supra* note 1. John Haviland, a linguistic anthropologist, examined Ventura and concluded that he only “had a ‘market command’ of Spanish—enough to buy or sell vegetables in a marketplace.” Ellis, *supra* note 1. The Spanish-speaking police officer who interviewed Ventura dismissed this fact: “Just because a guy speaks a dialect doesn't mean he can't understand Spanish.” *Id.* The Mixtec language is not a Spanish dialect, but rather a tongue related to a language once spoken by Native Americans. See *id.*

¹⁰ See Lourdes de León, *The Mixtecs' Annual 3,000-Mile Journey*, in *NOSOTROS: THE HISPANIC PEOPLE OF OREGON: ESSAYS AND RECOLLECTIONS* 119, 119 (Erasmio Gamboa & Carolyn M. Buan eds., 1995).

¹¹ See DeMuniz, *supra* note 7, at 4–5. Here, the phrase “cross-cultural communication” refers specifically to misimpressions held by the police or jury resulting from perceptions of behavior or demeanor rooted in unfamiliar cultural norms. See Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and*

“the officer who initially questioned Ventura insisted that [his] lowered eyes during questioning were an obvious guilt reflex.”¹² In Mixtec culture, however, lowered eyes are a sign of respect.¹³ Interpretation of such seemingly obvious mannerisms is considered a common element of a fact-finder’s credibility determinations and likely played an undue role in the trial’s outcome.¹⁴

Less than four months after his arrest, an Oregon jury found Santiago Ventura Morales guilty of murdering Ramiro Lopez Fidel.¹⁵ When the verdict was announced, Ventura “threw himself against the defense table and let loose a wail so chilling and anguished that it even seemed to shock the judge.”¹⁶ Although it was a ten-day trial, this visceral protest marked the first and only time that the jury heard Ventura’s voice.¹⁷ He received a sentence of life in prison.¹⁸ The verdict ignited a national media frenzy, and Ventura’s defense counsel pressured the district attorney into reopening the investigation.¹⁹ Four years later,

Cultural Barriers at Different Stages of a Criminal Proceeding, 19 W. NEW ENG. L. REV. 193, 196 (1997). Courts have acknowledged the difficulties attending non-verbal, cross-cultural interpretation. See, e.g., *Apouviepsakoda v. Gonzales*, 475 F.3d 881, 897 (7th Cir. 2007) (Posner, J., dissenting) (“Reading the facial expressions or body language of a foreigner for signs of lying is not a skill that either we or [the trial judge] possess.”); *Zhen Li Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005) (suggesting that courts are insensitive to cross-cultural demeanor evidence); *Mak v. Blodgett*, 970 F.2d 614, 617 n.5 (9th Cir. 1992) (holding that counsel was ineffective when he failed to present evidence via expert testimony that could have explained his Chinese immigrant client’s apparent lack of emotion at trial as consistent with Chinese cultural expectations during sentencing in a death penalty case).

¹² See DeMuniz, *supra* note 7, at 4. “The Mixtec witnesses displayed a similar inability to look into the eyes of the deputy district attorney or judge when questioned. Jurors interpreted that characteristic and the witnesses’ linguistic problems as some sort of combined effort by Ventura and other Mixtecs to thwart the trial process.” *Id.* The Mixtecs gave answers “with blank faces or wild non sequiturs” that caused at least one juror to comment, “They all acted kind of guilty.” See Carlin, *supra* note 1.

¹³ See DeMuniz, *supra* note 7, at 234 n.7.

¹⁴ See *id.* at 4; Cole & Maslow-Armand, *supra* note 11, at 195–96; Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT’L L. 1, 29 (2008). Ventura’s demeanor certainly affected the investigating officer, who stated that he “was convinced without a doubt that [Ventura] was guilty.” See Carlin, *supra* note 1.

¹⁵ DeMuniz, *supra* note 7, at 3; Carlin, *supra* note 1; Ellis, *supra* note 1.

¹⁶ See Carlin, *supra* note 1.

¹⁷ See DeMuniz, *supra* note 7, at 3; Carlin, *supra* note 1.

¹⁸ See Ellis, *supra* note 1.

¹⁹ See Carlin, *supra* note 1. The case garnered nationwide attention after several jurors publicly expressed serious doubts about the accuracy of their decision. See *id.*; Ellis, *supra* note 1. The reinvestigation of the case showed that the state’s forensic evidence was deeply flawed and clearly established that someone else at the camp had killed Lopez that night in 1986. See Carlin, *supra* note 1. Additionally, a previously unexamined witness in the case

in January 1991, armed with new evidence and the support of an outraged public, Ventura succeeded in having the jury's verdict overturned by the trial court.²⁰

The adversarial model employed by the American justice system presupposes that a fact-finder can reach a reasonable conclusion about the truth based upon the information presented at trial by opposing parties.²¹ As the *Ventura* case demonstrates, however, that goal is frustrated by the evolving linguistic demography of the United States.²² Nearly twenty percent of the U.S. population over the age of five speaks a language other than English at home.²³ Forty-four percent of that population speaks English "less than very well."²⁴ Minorities speaking a primary language other than English compose a "discouraging proportion of offenders."²⁵ Thus, the demand for foreign language interpretation services has boomed in recent decades.²⁶ In the modern multilingual courtroom, interpreters are an essential tool for ensuring fundamental fairness at trial.²⁷ Nevertheless, courtroom interpretation suffers

testified that he saw a second car chase Lopez into the field that night, and that a man named Herminio Luna Hernandez confessed to Lopez's murder. *See id.* That night, Luna abandoned his family and fled. *See id.*

²⁰ *See* Carlin, *supra* note 1. The court found for Ventura in his suit for post-conviction relief because "no expert witnesses were called in his defense and because he had been denied his constitutional right to testify." *Id.* The district attorney did not express a belief in Ventura's innocence and implied that he would retry him if given the opportunity. *See id.*

²¹ *See* FED. R. EVID. 611(a); Miguel A. Méndez, *Lawyers, Linguists, Story-Tellers, and Limited English-Speaking Witnesses*, 27 N.M. L. REV. 77, 78 (1997).

²² *See* Méndez, *supra* note 21, at 78. *See generally* 2006-2008 American Community Survey 3-Year Estimates: Language Spoken at Home, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow "Origins and Language" hyperlink under "People"; then follow "Language Spoken at Home" hyperlink) (last visited Jan. 20, 2011) [hereinafter *American Community Survey*]; Hyon B. Shin & Rosalind Bruno, U.S. CENSUS BUREAU, *Language Use and English-Speaking Ability: 2000*, at 3 (Oct. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

²³ *See* *American Community Survey*, *supra* note 22.

²⁴ *See id.*

²⁵ *See* Joan Bainbridge Safford, *No Comprendo: The Non-English-Speaking Defendant and the Criminal Process*, 68 J. CRIM. L. & CRIMINOLOGY 15, 15 (1977).

²⁶ *See* SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 1 (2d ed. 2002). Importantly, interpretation is a distinct subfield within translation. *See* Karton, *supra* note 14, at 17. As one scholar describes it, "The word translation refers to the transfer of thoughts and ideas from one language (the source language) into another (the target language), in either written or oral form. Interpretation, on the other hand, encompasses only oral communication . . ." *See id.* (footnote omitted) (internal quotation marks omitted).

²⁷ *See* United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d. Cir. 1970). The U.S. Supreme Court has never decided the question of whether due process includes the right to an interpreter. *See* Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 183

from considerable, well-documented inadequacies.²⁸ Errors relating to vocabulary, syntax, and dialects abound and can vary in magnitude from innocuous to severe.²⁹ These inaccuracies may be compounded with “prejudicial misimpressions” of a party based upon his or her demeanor because he or she lacks a shared cultural consciousness with the fact-finder.³⁰ Yet, reversals on appeal for interpretation errors alone are rarely successful.³¹ As one scholar strongly stated, “Any assumption that interpreted testimony in our courtrooms today is largely adequate and accurate is a fiction.”³²

Misinterpretation and misapprehension can profoundly affect a fact-finder’s conclusions regarding the credibility of linguistic minorities.³³ In the American justice system, the jury serves as the “ultimate and exclusive finder of fact.”³⁴ Consistent with that role, courts have applied an ancient doctrine that prohibits any witness from “invading the province of the jury.”³⁵ This prohibition has been invoked at different times regarding various types of evidence, but over time much of the jury’s “protected province” has arguably been eroded.³⁶ Nevertheless, courts continue to apply this maxim vigorously in one particular

(1993). In the federal system, foreign language interpreters are guaranteed in criminal and civil cases under certain circumstances. See Court Interpreters Act, 28 U.S.C. § 1827 (2006). Most state courts recognize that non-English speaking criminal defendants have a right to an interpreter. See BERK-SELIGSON, *supra* note 26, at 241 (App. 1).

²⁸ See, e.g., BERK-SELIGSON, *supra* note 26, at 142–45; Karton, *supra* note 14, at 26–30; Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota’s Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 41–51 (2009); Shulman, *supra* note 27, at 184–87.

²⁹ See Cole & Maslow-Armand, *supra* note 11, at 194; Marina Hsieh, “Language-Qualifying” Juries to Exclude Bilingual Speakers, 66 BROOK. L. REV. 1181, 1189 (2001); Karton, *supra* note 14, at 26–27.

³⁰ See Cole & Maslow-Armand, *supra* note 11, at 196. Examples of such nonlinguistic cues include the failure of a witness or defendant to maintain eye contact with an interrogator or fact-finder, speaking in an unusually soft or loud voice, appearing emotionless, or the excessive and exaggerated use hand gestures. See *id.*

³¹ See BERK-SELIGSON, *supra* note 26, at 200. One such case was *People v. Starling*, in which an Illinois appellate court overturned an English-speaking criminal defendant’s conviction for robbery because a Spanish-speaking witness had testified, but neither the defendant nor any of the principal players in the trial understood Spanish. See 315 N.E.2d 163, 168 (Ill. App. Ct. 1974). It was obvious that the interpreter inaccurately translated the questions posed by the attorney and the witness’ answers, and the defendant placed objections on the record. See *id.*

³² Hsieh, *supra* note 29, at 1192.

³³ See Cole & Maslow-Armand, *supra* note 11, at 196; Karton, *supra* note 14, at 28.

³⁴ Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1013 (2006).

³⁵ See *id.* at 1020.

³⁶ See *id.* at 1018–27.

area: judgments regarding witness credibility.³⁷ Courts typically reason that the specific topic of witness credibility is so “inextricably intertwined” with the role of the fact-finder as to preclude any outside opinions on the matter, including those of expert witnesses.³⁸ Moreover, appellate courts typically review interpreter errors under the deferential abuse of discretion or plain error standards.³⁹

The common law prohibition “rests on the premise that the jury is adequately equipped to assess a witness’s credibility,” which renders an expert’s testimony unnecessary.⁴⁰ Despite its deep roots and consistent application, social science research shows that this long-standing judicial assumption is unfounded.⁴¹ The liberal thrust of the Federal Rules of Evidence favors the admissibility of “all relevant evidence” and relaxes traditional barriers to opinion testimony.⁴² There is no consensus that the Rules prohibit one witness from commenting on the credibility of another.⁴³ This is particularly true in the case of expert opinions, which are permitted if they are helpful to the trier of fact and based on “scientific, technical, or other specialized knowledge.”⁴⁴ It is unrealistic to harbor the belief that the use of expert witnesses can completely overcome the problems associated with interpretation and cross-cultural communication.⁴⁵ Nonetheless, where the testimony of a linguist or cultural expert could assist the jury in its fact-finding role, the

³⁷ See Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 1001 (2007); Simmons, *supra* note 34, at 1021, 1029.

³⁸ Simmons, *supra* note 34, at 1028.

³⁹ See Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 7 (2004). Where there is a timely objection placed on the record, the abuse of discretion standard of review is typically employed. *See id.* Where there is no objection, the court utilizes the plain error standard. *See id.* “Reversals based on plain error are rarely granted.” *Id.*

⁴⁰ Poulin, *supra* note 37, at 1001.

⁴¹ See Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of De-meanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1200 (1993).

⁴² See FED. R. EVID. 401; *see also* *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (stating that the Federal Rules of Evidence adopted a “general approach of relaxing the traditional barriers to ‘opinion’ testimony”).

⁴³ See Poulin, *supra* note 37, at 997. Judge Weinstein once suggested that the Federal Rules of Evidence permitted expert witnesses to express opinions on another witness’ truthfulness. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE* ¶ 608[4] (Joseph M. McLaughlin ed., 1996). Professor Graham, however, disagrees with this interpretation of the opinion rules: he considers testimony about the character of a witness for truthfulness inadmissible. *See* MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 608.1, at 130 n.3 (5th ed. 2001).

⁴⁴ See FED. R. EVID. 702.

⁴⁵ See Hsieh, *supra* note 29, at 1192.

testimony should be admitted at trial in order to preserve an individual's right to a fundamentally fair judicial proceeding.⁴⁶

This Note argues that courts should abandon their strict application of the "province of the jury" rule and allow expert opinions regarding a witness' credibility where non-English speaking parties or witnesses might otherwise be prejudiced.⁴⁷ Part I examines the linguistic demographics of the United States and the evolving composition of litigants in the American justice system. Part II briefly describes the right of trial participants to an interpreter and the mechanics of interpretation, and explores why the current system is insufficient. It describes the inadequacies of foreign language translation and their impact on a factfinder's credibility determinations. Part III examines the nature of credibility determinations in the American justice system and summarizes the federal law regarding opinion testimony at trial. Finally, this Note concludes in Part IV that the province of the jury rule regarding witness credibility is outmoded, and that where expert testimony would assist the trier of fact to assess the credibility of a linguistic minority at trial, it should be admitted.

I. THE LINGUISTIC DEMOGRAPHICS OF THE UNITED STATES

John Jay's statement in *The Federalist*, that Americans are "a people descended from the same ancestors, speaking the same language," is false.⁴⁸ America has always been a nation of linguistic pluralism.⁴⁹ Prior to the founding of the republic, the North American continent was a cacophony of more than one thousand different languages.⁵⁰ Colonization added Spanish, English, French, Dutch, and Swedish to the din.⁵¹ In the early twentieth century, an influx of European immigrants introduced the sounds of innumerable languages to the country's chorus of voices.⁵² America's embrace of multilingualism has been not only

⁴⁶ Cole & Maslow-Armand, *supra* note 11, at 196; Karton, *supra* note 14, at 28; Poulin, *supra* note 37, at 1068; Simmons, *supra* note 34, at 1064–65.

⁴⁷ See Cole & Maslow-Armand, *supra* note 11, at 196; Karton, *supra* note 14, at 28; Poulin, *supra* note 37, at 1068; Simmons, *supra* note 34, at 1064–65.

⁴⁸ THE FEDERALIST NO. 2, at 9 (John Jay) (George W. Carey & James McClellan eds., 2001); see ROSEANN DUEÑAS GONZÁLEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY AND PRACTICE 38–42 (1991); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 273, 285 (1992).

⁴⁹ See Perea, *supra* note 48, at 273.

⁵⁰ See *id.*

⁵¹ See *id.* at 274, 285.

⁵² See *id.* at 274.

cultural, but also institutional.⁵³ The Framers actively avoided declaring English to be the official language of the United States in the Constitution, and it was not until the nineteenth century that “English only” laws appeared.⁵⁴ During the country’s infancy, a number of Founding Fathers as well as several states embraced the country’s linguistic diversity.⁵⁵ Thus, although the English language maintains a special prominence in the United States, John Jay’s confident declaration that it is *the* language of the nation is, at best, misleading.⁵⁶

Despite America’s long history of linguistic diversity, the nation’s demography illustrates the strain that multilingualism places on its judicial system.⁵⁷ In 2008, at least fifty-four million people over the age of five spoke a language other than English at home.⁵⁸ Over the last three decades, this population has increased dramatically.⁵⁹ In 2008, forty-four percent of those speaking another language at home spoke English “less than very well.”⁶⁰ Therefore, at least twenty-four million people would require translation services if they found themselves in court.⁶¹ Moreover, the burden of providing interpreters for linguistic

⁵³ See *id.* at 309–28 (describing the “rich legal histor[y] of multilingualism” in the United States and the official recognition of multiple languages in Pennsylvania, California, New Mexico, and Louisiana, along with several other states).

⁵⁴ See GONZÁLEZ ET AL., *supra* note 48, at 38. The rise of the “English Only” movement is associated with the dramatic increase in the immigrant population at that time, which was met with intolerance for both foreign language and culture. See *id.* For example, in the late nineteenth century, Native American children were effectively prohibited from speaking their indigenous languages and were forced to attend English language boarding schools. See Michael DiChiara, Note, *A Modern Day Myth: The Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L.J. 101, 103 (1997).

⁵⁵ See Perea, *supra* note 48, at 287–92 (comparing the views of Benjamin Franklin, Thomas Jefferson, and Benjamin Rush on multilingualism); *supra* note 53.

⁵⁶ See THE FEDERALIST, *supra* note 48, at 9; Perea, *supra* note 48, at 273, 276. The reality of linguistic diversity does not undercut the significance of the English language in the United States. See Perea, *supra* note 48, at 276 (“English is, without question, the dominant language of America and a key characteristic of America’s core culture.”).

⁵⁷ See *American Community Survey*, *supra* note 22; Shin & Bruno, *supra* note 22, at 3.

⁵⁸ See *American Community Survey*, *supra* note 22.

⁵⁹ See Shin & Bruno, *supra* note 22, at 4. In 1990, there were an estimated 31.8 million non-English speakers in the United States; in 2000, that number increased to 46.9 million. See *id.* In 2008, there were about fifty-five million non-English speakers in the United States. See *American Community Survey*, *supra* note 22. This rate is far higher than was predicted just twenty years ago. See GONZÁLEZ ET AL., *supra* note 48, at 21 (predicting that the number of limited- or non-English speaking individuals in the United States would reach fifty million by 2020).

⁶⁰ See *American Community Survey*, *supra* note 22.

⁶¹ See *id.* Pursuant to the Court Interpreters Act, courts must employ interpreters whenever a party or witness “speak[s] only or primarily a language other than the English language.” See Court Interpreters Act, 28 U.S.C. § 1827 (2006); *infra* Part II.A.1. State

minorities is not equally distributed across the country: nearly one-third of all non-English speaking individuals live in the West.⁶²

The variety of languages spoken in the United States constitutes an additional burden.⁶³ As of 2009, Americans spoke approximately 364 different languages.⁶⁴ Spanish is the most common non-English language spoken in the United States; thus, it is also the most frequently used in courtroom interpretation.⁶⁵ However, there are at least nineteen distinct Spanish dialects.⁶⁶ Currently, the U.S. federal courts certify interpreters in only three languages: Spanish, Navajo, and Haitian-Creole.⁶⁷

II. COURTROOM INTERPRETATION: RIGHTS, MECHANICS & INADEQUACIES

A. *The Right to an Interpreter*

1. The Federal System

The U.S. Supreme Court has never decided the question of whether a non-English speaking individual enjoys a right to a courtroom interpreter.⁶⁸ Several Circuit Courts of Appeals, however, have ruled that criminal defendants may claim a right to an interpreter in

courts provide various standards for the appointment of interpreters. See BERK-SELIGSON, *supra* note 26, at 26–33; *infra* Part II.A.2.

⁶² See Shin & Bruno, *supra* note 22, at 3–4. “The West region includes the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.” See *id.* at 3. The city of Hialeah, Florida, however, has the highest percentage of non-English speakers at almost ninety-three percent. See *id.* at 9. Nearly all of Hialeah’s residents speak Spanish, and almost sixty percent speak English “less than very well.” See *id.*

⁶³ See ETHNOLOGUE: LANGUAGES OF THE WORLD (M. Paul Lewis ed., 16th ed. 2009), available at http://www.ethnologue.com/ethno_docs/distribution.asp?by=country.

⁶⁴ See *id.*

⁶⁵ See BERK-SELIGSON, *supra* note 26, at 3; Shin & Bruno, *supra* note 22, at 4.

⁶⁶ See Alexandre Rainof, *How Best to Use an Interpreter in Court*, 55 CAL. ST. B.J. 196, 196–97 (1980) (discussing the nineteen major Spanish dialects and providing various examples).

⁶⁷ See *Three Categories of Interpreters*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters.aspx> (last visited Jan. 20, 2011). For Navajo, Haitian-Creole, and other languages, local federal district courts determine whether the interpreter has sufficient skills to serve on a case-by-case basis. See *id.* To become a certified federal court interpreter in Spanish, an individual must pass a two-part examination testing both written and oral skills across a wide variety of speech registers and vocabulary ranges. See *Federal Court Interpreter Certification Examination (FCICE) Information*, NAT’L CENTER FOR ST. CTS, http://www.ncsconline.org/d_research/fcice_exam/about.htm (last visited Jan. 20, 2011).

⁶⁸ See Shulman, *supra* note 27, at 183.

connection with the Confrontation Clause of the Sixth Amendment.⁶⁹ In the seminal case, *United States ex rel. Negron v. New York*, the Second Circuit held that, where a court is on notice of a criminal defendant's inability to understand English, it is required to "make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial."⁷⁰ Because Negron lacked the ability to comprehend the testimony of witnesses against him, his Confrontation Clause rights were violated.⁷¹ More importantly for the court, he was constructively absent from his own trial because of his inability to consult with his attorney "with any reasonable degree of rational understanding."⁷²

Unsatisfied with the rulings of the judiciary, public pressure for a federal statutory right to an interpreter began to mount in the 1960s.⁷³ The desire for "equal access" to the justice system for linguistic minorities was realized on October 28, 1978, when Congress passed the Court Interpreters Act (the "Act").⁷⁴ The Act requires the use of "qualified interpreters" in any criminal or civil action initiated by the United States if any party or witness "speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony."⁷⁵ The benefits of the Act were threefold: (1) it mandated the use of interpreters in courts of

⁶⁹ See, e.g., *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) ("The right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."); *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d. Cir. 1970).

⁷⁰ See *Negron*, 434 F.2d at 391. Negron was an indigent, Spanish-speaking defendant accused of fatally stabbing his housemate during a drunken brawl. See *id.* at 387-88.

⁷¹ See *id.* at 389.

⁷² See *id.* The Court of Appeals strongly rebuked the trial court:

Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.

Id. at 390.

⁷³ See BERK-SELIGSON, *supra* note 26, at 1; GONZÁLEZ ET AL., *supra* note 48, at 41-42.

⁷⁴ See Court Interpreters Act, 28 U.S.C. § 1827 (2006). The passage of the act was "one seminal event [that] can be seen as the driving force behind the current growing trend toward greater use of court interpreting in American courtrooms . . ." BERK-SELIGSON, *supra* note 26, at 1; see also GONZÁLEZ ET AL., *supra* note 48, at 60 (describing the "ripple effect" of the Court Interpreters Act throughout the states).

⁷⁵ See 28 U.S.C. § 1827(d) (1).

the United States; (2) it appreciated the defendant's need to comprehend the proceedings and assist in his or her defense; and (3) it recognized the need for qualified interpreters, for which it established an objective certification program.⁷⁶ "By passing this legislation, Congress affirmed the existence of inequality based on language, thus marking an important step in the history of political access rights based on language remedies."⁷⁷ The Act was far from perfect, however, and has been criticized for its failure to articulate the necessary qualifications of interpreters and for its overreliance on judicial discretion.⁷⁸

2. State Court Systems

In the wake of the Court Interpreters Act, many states began addressing the issue of courtroom interpretation.⁷⁹ California led the way in November 1974 by passing a constitutional amendment recognizing that criminal defendants unable to speak English possess a right to an interpreter.⁸⁰ Constitutional amendments, however, are rare; most states guarantee some form of interpretive service either by statute or through administrative and judicial regulations.⁸¹ Today, in one way or another, most states recognize that non-English speaking criminal defendants have a right to an interpreter.⁸² Despite advances, change has been slow: according to one study, court officials doubt "that they have the obligation to bridge the linguistic barrier faced by non-English speaking individuals" and, "having been required to nevertheless bridge that barrier, they have done so in a highly formalistic fashion, committing as little of their time, effort, and budget as possible . . ."⁸³

⁷⁶ See GONZÁLEZ ET AL., *supra* note 48, at 57.

⁷⁷ *Id.* at 42.

⁷⁸ See *id.* at 61–63.

⁷⁹ See *id.* at 71.

⁸⁰ See CAL. CONST. art. 1, § 14 ("A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings."); GONZÁLEZ ET AL., *supra* note 48, at 73. Notably, New Mexico's constitution has provided for court interpretation since 1911. See N.M. CONST. art. 2, § 14 ("In all criminal prosecutions, the accused shall have the right . . . to have the charge and testimony interpreted to him in a language that he understands . . ."); GONZÁLEZ ET AL., *supra* note 48, at 74.

⁸¹ BERK-SELIGSON, *supra* note 26, at 27.

⁸² *Id.* at 241 (App. 1); Shulman, *supra* note 27, at 178.

⁸³ See Carlos A. Astiz, *But They Don't Speak the Language: Achieving Quality Control of Translation in Criminal Courts*, 25 JUDGES' J. 32, 56 (Spring 1986).

B. Courtroom Interpretation Practices

Interpretation is “the transfer of meaning from a source language to a receptor or target language, [and] allows oral communication between two or more persons who do not speak the same language.”⁸⁴ The role of the courtroom interpreter is “to place the non-English speaker, as closely as is linguistically possible, in the same situation as an English speaker in a legal setting.”⁸⁵ In the delivery of his or her services, an interpreter is expected to refrain from providing defendants or witnesses with any unfair advantage.⁸⁶ In practice, courtroom interpretation occurs in one of three main ways: sight translation, simultaneous interpretation, and consecutive interpretation.⁸⁷ The consecutive mode is preferable for in-court interpretation.⁸⁸ In the course of this process, interpreters must practice “attending,” a concentrated form of listening that “requires a concerted effort to process the incoming message.”⁸⁹ In addition to these responsibilities, interpreters’ work must be speedy.⁹⁰ Simply put, language interpretation is difficult.⁹¹

⁸⁴ Elena M. de Jongh, *Foreign Language Interpreters in the Courtroom: The Case for Linguistic and Cultural Proficiency*, 75 MODERN LANGUAGE J. 285, 288 (Autumn 1991).

⁸⁵ GONZÁLEZ ET AL., *supra* note 48, at 155.

⁸⁶ *See id.* at 155–56. Ironically, as the *Ventura* case demonstrates, witnesses and defendants are more often than not disadvantaged by the use of a courtroom interpreter. *See generally* Carlin, *supra* note 1; Ellis, *supra* note 1.

⁸⁷ *See* de Jongh, *supra* note 84, at 288. There are significant differences between the three modes of interpretation. *See* GONZÁLEZ ET AL., *supra* note 48, at 163–66. One scholar compares them as follows:

Sight translation is the oral rendition into the target language of material written in a source language *Consecutive interpretation* requires that that the source language speaker pause at regular intervals to allow the interpreter to convey the target language interpretation and is used for on-the-record testimony The *simultaneous mode* . . . demands that the interpreter listen and speak concurrently with the primary speaker whose monologue is being translated.

de Jongh, *supra* note 84, at 288.

⁸⁸ GONZÁLEZ ET AL., *supra* note 48, at 164–66. Consecutive interpretation allows for “thought-wholeness,” increased control, and may in some cases be more efficient. *See id.* at 164.

⁸⁹ Karton, *supra* note 14, at 21. “The difference [between hearing and attending] is that hearing is a passive process involving an involuntary reaction of the senses and the nervous system, while listening is a voluntary, conscious effort to process the input selectively. Attending is the most alert, deliberate form of listening.” GONZÁLEZ ET AL., *supra* note 48, at 380.

⁹⁰ *See* Karton, *supra* note 14, at 21.

⁹¹ *See* Patricia Walther Griffin, *Beyond State v. Diaz: How to Interpret “Access to Justice” for Non-English Speaking Defendants?*, 5 DEL. L. REV. 131, 134 (2002); *see also* Shulman, *supra* note 27, at 186 (“Foreign language interpretation is one of the most difficult tasks a human being can perform.”).

C. *Interpreted Language: What's Lost in Translation?*

Courts have historically clung to the “conduit theory” of interpretation, which “views the interpreter as a machine into which one language enters and another language exits.”⁹² This theory is premised on a number of false assumptions.⁹³ “It is a truism of linguistics that all language is inherently ambiguous.”⁹⁴ Diversity of syntax and vocabulary provide a constant challenge for courtroom interpreters.⁹⁵ Even innocuous alterations in the formality of speech have a demonstrable impact on the perception of trial participants.⁹⁶ Compounded with pure human error are the inevitable challenges posed by cross-cultural communication.⁹⁷ Each of these factors significantly affects the ability of the trier of fact to assess the weight and credibility of particular testimony.⁹⁸ In Mr. Ventura’s case, these factors undeniably contributed to his wrongful conviction.⁹⁹

1. Tongue Tied: Vocabulary, Dialect, and Inaccurate Interpretation

The misinterpretation of words and idioms can easily prejudice a non-English speaking party in court.¹⁰⁰ Neither the vocabularies nor syntax of different languages are necessarily equivalent.¹⁰¹ Although empirical studies are lacking, there is a substantial amount of dramatic anecdotal evidence involving egregious misinterpretation.¹⁰² For example, in a New York federal court, a Cuban defendant stated over an undercover wire, “*Hombre, ni tengo diez kilos!*”¹⁰³ In light of its context and the defendant’s native dialect, the term “kilo” should have been interpreted

⁹² McKeown & Miller, *supra* note 28, at 41.

⁹³ *See id.* at 42 (“The presumption that linguistic accuracy is sufficient to properly convey meaning has been soundly rejected by linguists and communication scholars.”).

⁹⁴ *See* Muncer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1032 (2007).

⁹⁵ Karton, *supra* note 14, at 26.

⁹⁶ *See id.* at 27–29.

⁹⁷ *See* Ahmad, *supra* note 94, at 1033; de Jongh, *supra* note 84, at 290–92.

⁹⁸ *See* Karton, *supra* note 14, at 26–27; Hsieh, *supra* note 29, at 1189.

⁹⁹ *See* Carlin, *supra* note 1.

¹⁰⁰ *See* BERK-SELIGSON, *supra* note 26, at 118; Cole & Maslow-Armand, *supra* note 11, at 195–96.

¹⁰¹ *See* Karton, *supra* note 14, at 26–27. The term syntax denotes “the arrangement of word forms to show their mutual relationship in a sentence.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2321 (Philip Babcock Grove ed., 1986).

¹⁰² *See* Hsieh, *supra* note 29, at 1189.

¹⁰³ *See* Shulman, *supra* note 27, at 176; Alain Sanders et al., *Libertad and Justicia for All*, TIME, May 29, 1989, at 65.

to mean a form of Cuban currency, or in English, “cents.”¹⁰⁴ Instead, the phrase was mistakenly interpreted as, “Man, I don’t even have ten kilos,” where “kilo” referred to kilograms of drugs.¹⁰⁵ Similar errors abound.¹⁰⁶

Even more subtle forms of misinterpretation can significantly affect a fact-finder’s evaluation of the evidence.¹⁰⁷ In one study, 551 mock jurors, nearly forty percent of whom were Hispanic and spoke Spanish, heard recordings of testimony by a Spanish-speaking witness.¹⁰⁸ One group of jurors heard a recording in which the interpreter would use “politeness markers.”¹⁰⁹ For example, the interpreter would render “sí, señor” using the polite address form “yes, sir.”¹¹⁰ In the recording heard by the other group, the interpreter would simply render the witness’ response as “yes.”¹¹¹ This seemingly minor difference in politeness caused non-Spanish speaking members in the second group, those relying solely on the interpreter, to find that the witness’ testimony was less convincing, less competent, less intelligent, and less trustworthy.¹¹² On the contrary, Spanish speakers who heard the witness’ original, polite response found the witness both more convincing and more trustworthy.¹¹³

There are few, if any, safeguards to prevent these inaccuracies.¹¹⁴ Even the most experienced and well-trained interpreters inevitably make mistakes, but unless another foreign language speaker is in the courtroom, an interpreter’s accuracy is subject to virtually no scru-

¹⁰⁴ See Shulman, *supra* note 27, at 176, n.3; Sanders et al., *supra* note 103, at 65.

¹⁰⁵ See Shulman, *supra* note 27 at 176.

¹⁰⁶ See, e.g., Hsieh, *supra* note 29, at 1189; Joanne I. Moore & Ron A. Mamiya, *Interpreters in Court Proceedings*, in IMMIGRANTS IN COURTS, *supra* note 7, at 29, 39. In one pivotal exchange during a prosecution of two men for rape, the victim was asked, “Do you remember the day [the defendant] sexually assaulted you?” See Hsieh, *supra* note 29, at 1189. The interpreter rendered the attorney’s question as, “Do you remember the day [the defendant] made love to you?” See *id.* Similarly, in a Washington murder trial, an interpreter rendered the statement, “I will aim at you,” as “I will kill you.” See Moore & Mamiya, *supra*, at 39.

¹⁰⁷ See BERK-SELIGSON, *supra* note 26, at 169.

¹⁰⁸ See *id.* at 155, 158.

¹⁰⁹ See *id.* at 155.

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See BERK-SELIGSON, *supra* note 26, at 165.

¹¹³ See *id.* at 164.

¹¹⁴ See Shulman, *supra* note 27, at 186.

tiny.¹¹⁵ The best way to prevent inaccurate interpretation is interpreter certification, but few states provide such programs.¹¹⁶ If states are unwilling to shoulder the burden of ensuring equal access to justice by providing qualified interpreters for linguistic minorities, then the judicial system should intervene and empower non-English speaking individuals to protect themselves against inaccurate interpretation.¹¹⁷

2. Mixed Signals: Cross-Cultural Communication

Words alone do not create understanding.¹¹⁸ Subjects, nouns, and verbs strung together as sentences are “merely signs, cues, or hints as to what a speaker intends the listener to understand.”¹¹⁹ Because interaction between speakers creates meaning, linguistic communication is best understood as a “social process . . . rather than a static code.”¹²⁰ It is a metaphor for culture, and rests on a foundation of assumptions that may be similar or starkly different.¹²¹ This is particularly evident in the legal field: even if a lawyer and her client speak the same language, conveying meaning is difficult.¹²² Thus, contrary to the underlying assumptions of conduit theory, the problems of language difference are not susceptible to a mechanical solution.¹²³ “*How* something is said may at times be more important than *what* is actually said.”¹²⁴

This fact is all the more apparent in light of the tremendous challenges posed by cross-cultural communication.¹²⁵ Intonation, pitch,

¹¹⁵ See Hsieh, *supra* note 29, at 1187; Shulman, *supra* note 27, at 186 (“Typically, errors in interpretation are corrected only when another interpreter or other courtroom personnel fluent in that language are present.”).

¹¹⁶ See Hsieh, *supra* note 29, at 1187; Moore & Mamiya, *supra* note 106, at 40. “With the exception of the few states that require interpreters to be certified, no state provides judges with criteria by which to evaluate an interpreter other than stating that he must be ‘qualified’ or ‘competent.’” Shulman, *supra* note 27, at 179, n.21. Although not as effective, an even simpler, more cost-effective solution would be to require the tape recording of all interpreted testimony for subsequent review. See Moore & Mamiya, *supra* note 106, at 40.

¹¹⁷ See discussion *infra* Part IV.

¹¹⁸ See Ahmad, *supra* note 94, at 1032–33.

¹¹⁹ *Id.* at 1033 (footnote omitted).

¹²⁰ *Id.*

¹²¹ See de Jongh, *supra* note 84, at 288.

¹²² See *id.* at 290 (analyzing the many possible interpretations of the word “charged” in the legal context).

¹²³ See *id.*; McKeown & Miller, *supra* note 28, at 41–42; see also David Bellos, Op-Ed., *I, Translator*, N.Y. TIMES, Mar. 21, 2010, at A20 (noting that statistical machine translation, despite recent improvements, is still wrought with inaccuracies).

¹²⁴ de Jongh, *supra* note 84, at 292.

¹²⁵ See Cole & Maslow-Armand, *supra* note 11, at 195–96; de Jongh, *supra* note 84, at 290–91.

body language, and nonverbal gestures are not necessarily fungible between cultures.¹²⁶ Thus, in monolingual and monocultural courtrooms, a fact-finder's unguided reliance on demeanor evidence based upon the conduct of a limited- or non-English speaking individual is dangerous.¹²⁷ A common example of this phenomenon is the gaze pattern.¹²⁸ In American culture, "observers impute less credibility to persons who avoid eye contact during a conversation."¹²⁹ Social science research demonstrates, however, that gaze patterns vary among cultures.¹³⁰ Like the Mixtec witness, "when a Haitian witness looks at the floor when asked a question by the judge, he or she may not be doing so out of guilt but rather as a result of a culturally learned respect for the judge as an authority figure."¹³¹ Moreover, one recent study suggests that interpreters can be as harmful as they are helpful in dealing with cross-cultural communication issues.¹³² Ultimately, the ability of limited- or non-English speaking individuals to present evidence to the court is undermined because the failure to engage in accurate cross-cultural communication may affect the weight fact-finders assign to the testimony of non-English speaking witnesses.¹³³

¹²⁶ See de Jongh, *supra* note 84, at 290, 292; see also John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1395 (concluding that even "relatively subtle variations in courtroom speaking styles can influence jurors' reactions and deliberations").

¹²⁷ See Karton, *supra* note 14, at 29.

¹²⁸ See de Jongh, *supra* note 84, at 292; Neal P. Pfeiffer, Note, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 TEX. INT'L L.J. 139, 144 (1988); *supra* note 30.

¹²⁹ Pfeiffer, *supra* note 128, at 144.

¹³⁰ See de Jongh, *supra* note 84, at 292; Pfeiffer, *supra* note 128, at 144.

¹³¹ de Jongh, *supra* note 84, at 292.

¹³² See BERK-SELIGSON, *supra* note 26, at 196 (noting that "the court interpreter in the examination of a witness affects the impressions of that witness" and that "perceptions of some of the witness's social/psychological attributes—namely convincingness, truthfulness, intelligence, and competence—are affected by pragmatic alterations made by the interpreter").

¹³³ See Cole & Maslow-Armand, *supra* note 11, at 195–96. This fact cannot be understated: a recent study comparing Spanish-speaking witnesses' answers with interpreters' renditions into English concluded that, although the competence of the interpreter was a significant factor, "[w]hat is indisputable . . . is that all interpreters tended to omit those seemingly unimportant features of speech style that can impinge on the evaluation of witnesses' speech by those judging them. The interpreter's stylistically inaccurate renditions can therefore potentially alter the outcome of the case." Sandra Hale, *How Faithfully Do Court Interpreters Render the Style of Non-English Speaking Witnesses' Testimonies? A Data-Based Study of Spanish-English Bilingual Proceedings*, 4 DISCOURSE STUD. 25, 44 (2002). The study specifically found that alterations by interpreters tend to be "detrimental to the evaluation of witnesses' character and credibility." See *id.* at 43–44.

III. CREDIBILITY DETERMINATIONS: THE LEGACY OF THE COMMON LAW

All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or of evasiveness—may furnish valuable clues to his reliability. Such clues are by no means impeccable guides, but they are often immensely helpful. So the courts have concluded.

—Jerome Frank¹³⁴

For nearly three thousand years, jurists have held fast to the notion that observing an individual's demeanor is of the utmost importance in the determination of his or her credibility as a witness.¹³⁵ This principle has wound its way through the jurisprudence of nations; in the United States, demeanor evidence has been "endowed . . . with precedential value to the extent that the concept is reified in both case law and the Federal Rules of Evidence."¹³⁶ Accordingly, immense discretion has been conferred upon fact-finders relying on oral testimony.¹³⁷ Regard-

¹³⁴ JEROME FRANK, COURTS ON TRIAL: MYTHS AND REALITY IN AMERICAN JUSTICE 21 (3rd prtg. 1973).

¹³⁵ See *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487–88 (2d. Cir. 1952) (tracing the history of demeanor evidence); FRANK, *supra* note 134, at 21; Blumenthal, *supra* note 41, at 1158.

¹³⁶ Blumenthal, *supra* note 41, at 1158 (footnotes omitted).

¹³⁷ *Dinion*, 201 F.2d at 488. Regarding in-court interpretation, this discretion has been circumscribed by a small degree: in most jurisdictions, jurors are allowed to consider only the testimony of a non-English speaking witness rendered by the interpreter into English as evidence; they must disregard anything said in the original language. See *Hernandez v. New York*, 500 U.S. 352, 379 (1991) (Stevens, J., dissenting); Hsieh, *supra* note 29, at 1193. Moreover, bilingual jurors who speak the same language as the witness are typically instructed to disregard all interpreting errors they think may have been made. See WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 132 (1995). Controversy over the validity of this rule and the fairness of allowing bilingual jurors to serve came to a head in *Hernandez v. New York*, where the Court found that a prosecutor's peremptory strike of a bilingual juror whom the lawyer suspected was unable to rely solely on the interpreter's English rendering of the testimony was a "valid for-cause challenge." See 500 U.S. at 362–63 (majority opinion). Scholars have attacked the basis of this ruling, arguing that scientific evidence and common sense demonstrate that it is inherently impossible for a bilingual juror to turn off one of his or her language inputs. See Hsieh, *supra* note 29, at 1194; see also Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1436 (2004) ("All of the opinions in *Hernandez* made erroneous assumptions about bilinguals. . . . Bilinguals understand and think in two languages simultaneously and interdependently; it is how their brains work. The prosecutor in *Hernandez* was asking the impossible when he asked the bilingual jurors to ignore the Spanish-language testimony . . ."). Allowing peremptory strikes in a heavily bilingual area arguably disenfranchises an entire ethnic group. See Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 805. Therefore, at least one scholar proposes allowing bilingual jurors to acknowledge both the original foreign language testi-

less of accuracy, a fact-finder may choose to weigh the telltale indicators of a witness' veracity more heavily than the testimony itself.¹³⁸ In the mid-1800s, this concept began to take shape as the so-called "province of the jury" rule.¹³⁹ In short, the subject of witness credibility is simply off-limits to any trial participant other than the fact-finder.¹⁴⁰ Despite strong evidence suggesting that the underlying assumptions of the doctrine are false, courts "tenaciously cling" to this last outpost of the jury.¹⁴¹ The following section details the substance of the province of the jury rule, the degree to which the doctrine has been incorporated into the Federal Rules of Evidence, and how its theoretical supports have been steadily eroded by social science analysis.¹⁴²

A. *The Province of the Jury: A Legal Landscape*

An examination of the history of the province of the jury rule reveals the maxim's peculiar relationship to expert opinion testimony and suggests that modern courts have expanded the doctrine's application beyond its traditionally narrow scope.¹⁴³ Originally, "invading the province of the jury" referred not to the relationship between the jury and witnesses at trial, but rather to the sacred boundary that exists between the jury and the judge.¹⁴⁴ The maxim continues to be invoked in its traditional sense where a trial judge improperly rules on issues of fact or an appellate court incorrectly overturns a verdict supported by facts in evidence.¹⁴⁵ Thus, the scope of the province of the jury rule was initially

mony and its English interpretation to "enhance the truth-seeking function of the proceedings, give jurors the full respect and power due their office, and bypass the constitutional thicket of racial discrimination that every strike of a bilingual juror must now attempt to skirt." Hsieh, *supra* note 29, at 1199.

¹³⁸ See *Virgin Islands v. Aquino*, 378 F.2d 540, 548 (3rd Cir. 1967).

¹³⁹ See *Simmons*, *supra* note 34, at 1018–19.

¹⁴⁰ See *id.* at 1021.

¹⁴¹ See Poulin, *supra* note 37, at 1001 n.40 (citing numerous cases emphasizing the jury's unique role in making credibility determinations); see also Blumenthal, *supra* note 41 at 1192–1203 (comparing the actual physical cues associated with deception with commonly perceived ones); Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 178–87 (1990) (describing the psychological data refuting a juror's ability to judge a witness' memory and sincerity); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 6–16 (2000) (detailing inaccuracies associated with cross-racial credibility determinations).

¹⁴² See *infra* Part III.A.

¹⁴³ Poulin, *supra* note 37, at 1004–08; *Simmons*, *supra* note 34, at 1018–23.

¹⁴⁴ See *Simmons*, *supra* note 34, at 1020–21.

¹⁴⁵ See, e.g., *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 576 (1951) ("[I]t is the jury's function to credit or discredit all or part of the testimony."); *Cole v. Ralph*, 252 U.S.

limited to the context of “determining the interplay between [a] judge’s instructions and the jury’s decisions” regarding matters of credibility, and did not touch on the substance of a witness’ actual testimony.¹⁴⁶

In the United States, *Phillips v. Kingfield* is regarded as the first application of the province of the jury prohibition to the substantive testimony of one witness regarding the credibility of another.¹⁴⁷ In *Phillips*, an attorney attempted to elicit from one witness whether “he would believe” the testimony of the individual he was called to impeach.¹⁴⁸ The court distinguished testifying to an individual’s reputation for truthfulness with a direct opinion on credibility, and held:

To permit the opinion of a witness, that another witness should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions, and feelings of that witness, to form, in part at least, the elements of their judgment. To authorize the question to be put, whether the witness would believe another witness on oath . . . is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it.¹⁴⁹

Thus, the court’s holding broadened the application of the province of the jury rule beyond its roots to encompass the witness-jury relationship.¹⁵⁰ Fear that the jury will abandon its duty to weigh witness credibility has led courts to apply the reasoning articulated in *Phillips* aggressively, particularly in the case of expert witnesses.¹⁵¹ As stated by the Pennsylvania Supreme Court, most courts find that such testimony “would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment.”¹⁵²

286, 302 (1920) (“[T]he evidence presented several disputable questions of fact which it was the province of the jury to determine.”).

¹⁴⁶ See Simmons, *supra* note 34, at 1020 n.40.

¹⁴⁷ See *Phillips v. Kingfield*, 19 Me. 375, 379 (1841); Simmons, *supra* note 34, at 1018.

¹⁴⁸ See *Phillips*, 19 Me. at 375.

¹⁴⁹ See *id.* at 379.

¹⁵⁰ See *id.*; Poulin, *supra* note 37, at 1005; Simmons, *supra* note 34, at 1020 n.40.

¹⁵¹ See Poulin, *supra* note 37, at 1002–03. Interestingly, Wigmore drew an express distinction between the “province of the jury” to decide facts and the admission of helpful expert opinion testimony. See 7 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1917 (Chadbourn rev. 1978); Simmons, *supra* note 34, at 1024–25.

¹⁵² *Commonwealth v. O’Searo*, 352 A.2d 30, 32 (Pa. 1976). In *United States v. Johnson*, the U.S. Supreme Court came to a notably different conclusion. See 319 U.S. 503, 519–20 (1943). The Court found that the province of the jury rule did not prohibit an expert

B. *Testimony in Context: The Federal Rules of Evidence*

Since 1975, the Federal Rules of Evidence have governed the admissibility of testimony in federal court.¹⁵³ The rules favor the admissibility of all relevant evidence and, consistent with this liberal thrust, relax many of the common law restrictions on opinion testimony.¹⁵⁴ In particular, the rules abandoned the stringent common law requirements for the admissibility of expert testimony.¹⁵⁵ Rule 702 provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion”¹⁵⁶ In addition, Rule 704 states that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”¹⁵⁷

Dean Wigmore suggested, “If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it.”¹⁵⁸ Facially, Rules 702 and 704 open the door to expert testimony bearing on credibility and invite courts down the path that Wigmore described.¹⁵⁹

from testifying on any particular subject so long as the jury was properly instructed so that they could not “possibly have been misled into the notion that they must accept [the opinion].” *See id.* at 519. The Court concluded: “[W]e ought not to be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules.” *See id.* at 519–20. Nevertheless, the province of the jury rule’s prohibition on credibility experts is well-documented. *See* Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 916–17 (2005) (citing numerous cases barring credibility experts).

¹⁵³ *See* Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, § 101, 88 Stat. 1926 (1975) (codified in 28 U.S.C. app.). Since the Federal Rules of Evidence were enacted, most of the states have adopted rules of evidence modeled on the Federal Rules. *See* Edward J. Imwinkelried, *The Silence Speaks Volumes: A Brief Reflection on the Question of Whether it Is Necessary or Even Desirable to Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness’s Credibility*, 1998 U. ILL. L. REV. 1013, 1017. Therefore, this Note shall focus on the federal rules and their relationship to opinion testimony regarding credibility. *See id.*

¹⁵⁴ *See* FED. R. EVID. 402; Imwinkelried, *supra* note 153, at 1019 (“There is only an inkling left of the general rule [against bolstering] in Federal Rule 608(a)(2).”).

¹⁵⁵ Poulin, *supra* note 37, at 999.

¹⁵⁶ FED. R. EVID. 702.

¹⁵⁷ FED. R. EVID. 704. The Advisory Committee characterized the argument that the ultimate issue rule prevented witnesses from “usurping the power of the jury” as merely “empty rhetoric.” *See id.* advisory committee’s note.

¹⁵⁸ 3a WIGMORE, *supra* note 151, § 875 n.1.

¹⁵⁹ *See* Poulin, *supra* note 37, at 1000.

Nevertheless, courts persistently raise the province of the jury prohibition to justify exclusion of this type of expert testimony at trial.¹⁶⁰ Thus, fact-finders are left to weigh credibility based purely upon their own experiences and common sense notions of veracity.¹⁶¹

C. Debunking the Myth of Demeanor Evidence

When expert testimony regarding credibility is excluded pursuant to the province of the jury rule, the court necessarily assumes that jurors are adequately equipped to make accurate judgments about individuals' truthfulness.¹⁶² For centuries, the observation of demeanor evidence has been considered critical to this function.¹⁶³ Moreover, in the United States, "physical confrontation, whenever possible, is considered crucial to the Confrontation Clause."¹⁶⁴ The legal perspective presumes that a rational observer knows what to look for in evaluating credibility, and that those indicators accurately reflect whether a witness is telling the truth.¹⁶⁵ Over the last several decades social scientists have probed this premise, and a large number of experiments involving thousands of subjects have produced clear results: ordinary people possess no greater capacity for the detection of falsehood than pure chance.¹⁶⁶ Therefore, continuing to allow unguided reliance on demeanor evidence only "promotes faulty judgments and greatly diserves

¹⁶⁰ See *id.* at 1000–01; Simmons, *supra* note 34, at 1028.

¹⁶¹ See Simmons, *supra* note 34, at 1037.

¹⁶² See Poulin, *supra* note 37, at 1001. The Supreme Court explicitly reinforced this notion in *United States v. Scheffer*, where it upheld the exclusion of polygraph evidence in military trials. See 523 U.S. 303, 312–13 (1998) ("A fundamental premise of our criminal trial system is that 'the jury is the lie detector.'").

¹⁶³ See Blumenthal, *supra* note 41, at 1165–66. What attorneys and judges commonly call "demeanor" has been broken down by researchers into three channels of communication: facial expression, body language, and voice. See Rand, *supra* note 141, at 8; Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078 (1991). Paul Ekman and Wallace Friesen, pioneers in the field of deception research, developed this model and devised a method to analyze each of these channels for cues of deception. See Blumenthal, *supra* note 41, at 1189 (citing Paul Ekman & Wallace V. Friesen, *The Repertoire of Nonverbal Behavior: Categories, Origins, Usage, and Coding*, 1 SEMIOTICA 49 (1969)).

¹⁶⁴ Blumenthal, *supra* note 41, at 1182.

¹⁶⁵ *Id.* at 1193. Reliance on demeanor evidence in the American judiciary extends beyond a party's truthfulness; the prevailing belief is that demeanor is "probative of [a party's] truthfulness and his entire ethos, and can and should be used in determining his prospects for rehabilitation or even whether his sentence warrants an increase." *Id.* at 1188–89.

¹⁶⁶ See Wellborn, *supra* note 163, at 1078–88, 1105 (surveying the extensive history of empirical studies examining the ability of lay persons to detect deception or inaccuracy through observation of nonverbal behavior).

the truth-seeking process."¹⁶⁷ Ignoring this overwhelming evidence harms the integrity of the judicial system.¹⁶⁸

There are three basic misconceptions that undercut any meaningful reliance on demeanor evidence: the sender fallacy, the observer fallacy, and the accuracy fallacy.¹⁶⁹ The sender fallacy is the erroneous belief that "an average deceptive speaker will give off certain cues to his deception in his physical mannerisms."¹⁷⁰ Years of research have shown that there is little support for believing that liars change facial expression, shift their posture, gesture, or otherwise exhibit the kind of furtive movements that have concerned Judge Jerome Frank and much of the judiciary for centuries.¹⁷¹ Second, observers tend to focus on the wrong cues when evaluating another person's truthfulness and to ignore those that are most important.¹⁷² For example, observers tend to attach deeper meaning to possible manifestations of nervousness and stress.¹⁷³ Lastly, there is the ultimate fallacy of accuracy: experiments have consistently found that observers simply cannot detect deception with any significant degree of reliability; most studies conclude that individuals accurately detect deception only forty-five to sixty percent of the time.¹⁷⁴

This "demeanor gap" widens significantly when jurors confront witnesses of different races and cultures.¹⁷⁵ The first study of cross-cultural lie detection involved a comparison of university students from the United States and Jordan, and evaluated their relative ability to detect deceit in one another as well as the cues they relied upon when

¹⁶⁷ See Blumenthal, *supra* note 41, at 1189.

¹⁶⁸ See *id.* at 1163 ("The integrity of the truth-seeking process is irremediably violated when a capricious or even uninformed judgment is made or perpetuated as to how a particular factor serves the ends of that process.").

¹⁶⁹ See Rand, *supra* note 141, at 7-16.

¹⁷⁰ *Id.* at 11. Studies of these phenomena have developed into the concept known as "differential controllability." See *id.* Succinctly stated, it is the understanding that liars can control the communication channels of facial expression and body language more precisely than vocal intonation. See Bella M. DePaulo et al., *Deceiving and Detecting Deceit*, in *THE SELF AND SOCIAL LIFE* 323, 328-29 (Barry R. Schlenker ed., 1985).

¹⁷¹ See DePaulo et al., *supra* note 170, at 340; Miron Zuckerman et al., *Verbal and Non-verbal Communication of Deception*, in 14 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 1, 12 (Leonard Berkowitz, ed., 1981).

¹⁷² See DePaulo et al., *supra* note 170, at 343-44.

¹⁷³ See Zuckerman et al., *supra* note 171, at 19. This erroneous conclusion has been called the "Othello error" because "it is excellently illustrated by Othello's mistaken interpretation of Desdemona's distress and despair in response to his accusation of infidelity." Wellborn, *supra* note 163, at 1080; see also Rand, *supra* note 141, at 7 n.20.

¹⁷⁴ See Zuckerman et al., *supra* note 171, at 26.

¹⁷⁵ See Rand, *supra* note 141, at 4.

trying to recognize truthfulness.¹⁷⁶ The results of the study were staggering: in the cross-cultural encounters, the accuracy rate for the detection of deception was less than fifty percent; the observers—both Jordanian and American—had a better chance of accurately predicting whether their subject was telling the truth by flipping a coin.¹⁷⁷ Even when subjects were instructed to try and telegraph their deception by sending nonverbal cues to their observers, accuracy rates only improved by about two percent.¹⁷⁸ The study concluded that these persistent inaccuracies stemmed from the different sets of actual and perceived deception cues in American and Jordanian culture.¹⁷⁹

Beyond jurors' inherent inability to evaluate credibility accurately, a court's instructions regarding demeanor evidence may actually increase the likelihood of inaccurate juror evaluations.¹⁸⁰ Research has shown that when jurors are instructed to presume that a witness is testifying truthfully, as is the common practice, it has the effect of focusing jurors on the least reliable indicator of deception: facial expressions.¹⁸¹ Mock jurors given the equivalent of a common demeanor instruction "performed no better than those who were given no instructions at all and markedly worse than those who were instructed to focus on vocal or paralinguistic cues."¹⁸² When instructed as to paralinguistic characteristics such as tone of voice, however, observers' abilities to detect deception improved.¹⁸³ Thus, rather than encouraging the jury to abdicate its fact-finding responsibilities, specific instructions and information from a source beyond the province of the jury may actually enhance its ability to accurately determine the credibility of witnesses presented at trial.¹⁸⁴

¹⁷⁶ See Charles F. Bond et al., *Lie Detection Across Cultures*, 14 J. NONVERBAL BEHAV. 189, 191 (1990).

¹⁷⁷ See *id.* at 197. The accuracy rate was higher, though not dramatically so, when observers viewed subjects from their own culture. See *id.* at 195. When observing their fellow countrymen, American observers had an accuracy rate of 54.9%; Jordanian observers, by comparison, correctly gauged truthfulness 57.18% of the time. See *id.*

¹⁷⁸ See *id.* at 197.

¹⁷⁹ See *id.* at 196–97.

¹⁸⁰ See Blumenthal, *supra* note 41, at 1197.

¹⁸¹ See *id.* at 1197–98.

¹⁸² See *id.* at 1199.

¹⁸³ See *id.* The paralinguistic aspects of communication include "the emotional content and background of utterances, as expressed through the speaker's body language, linguistic style and nuance, pauses, hedges, self-corrections, hesitations, and displays of emotion." Karton, *supra* note 14, at 24.

¹⁸⁴ See Blumenthal, *supra* note 41, at 1199.

IV. THE EXPERT WITNESS: BRIDGING THE GAP

“[J]uries are composed entirely of untrained observers who receive no special instructions regarding lie detection or the misleading aspects of demeanor.”¹⁸⁵ When linguistic minorities testify, the rift between the witness and the fact-finder only widens.¹⁸⁶ Although the use of courtroom interpreters is aimed at alleviating some of these difficulties, the effect of interpreted testimony can be more detrimental than advantageous.¹⁸⁷ Nevertheless, despite sound behavioral studies demonstrating the inaccuracies associated with demeanor evidence and the particular prejudice it inflicts on non-English speakers, courts continue to cling white-knuckled to the province of the jury rule.¹⁸⁸ In the words of one scholar, “It is unforgivable that the legal system deliberately ignores demonstrated, relevant findings . . . and willfully adheres to an ineffectual traditional approach.”¹⁸⁹ The roots of the ancient common law doctrine are choking off meaningful access to justice without cause; therefore, courts should abandon the province of the jury rule and allow expert opinion testimony regarding credibility where non-English speaking parties or witnesses would otherwise suffer prejudice.¹⁹⁰

A. *Factors Favoring the Admissibility of Expert Testimony*

Expert opinion testimony touching on the credibility of non-English speaking witnesses falls within the framework established by the Federal Rules of Evidence.¹⁹¹ Expert testimony is generally admissible so long as it

will assist the trier of fact to . . . determine a fact in issue . . .
[and] if (1) the testimony is based on sufficient facts or data,
(2) the testimony is the product of reliable principles and me-

¹⁸⁵ See Rand, *supra* note 141, at 14.

¹⁸⁶ See Cole & Maslow-Armand, *supra* note 11, at 196; Karton, *supra* note 14, at 28; Rand, *supra* note 141, at 4.

¹⁸⁷ See Cole & Maslow-Armand, *supra* note 11, at 195–96; Hsieh, *supra* note 29, at 1189–92; Shulman, *supra* note 27, at 176.

¹⁸⁸ See Poulin, *supra* note 37, at 1002.

¹⁸⁹ See Blumenthal, *supra* note 41, at 1204.

¹⁹⁰ See Poulin, *supra* note 37, at 1068; Rand, *supra* note 141, at 74; Simmons, *supra* note 34, at 1065–66.

¹⁹¹ See FED. R. EVID. 702, 704.

thods, and (3) the witness has applied the principles and method reliably to the facts of the case.¹⁹²

Simply put, the expert's opinion must be helpful and reliable.¹⁹³ As decades of behavioral research have demonstrated, ordinary jurors simply do not have the innate capacity to detect falsehood accurately that the legal community consistently attributes to them.¹⁹⁴ The consequences of this inadequacy are most acute where cross-cultural communication is required.¹⁹⁵ Therefore, where a party offers the testimony of a qualified linguist or cultural expert with specialized knowledge of cultural behavioral cues relevant to the credibility of a party or witness, his or her testimony should be admitted because it is undeniably helpful to the trier of fact.¹⁹⁶

Courts have opened the door to expert witness testimony on issues of credibility in the context of eyewitness identification testimony based upon a similar rationale.¹⁹⁷ For instance, experiments have long shown that eyewitness identifications are surprisingly inaccurate, even when there is a relatively short lapse of time between initial perception and recall.¹⁹⁸ Until the 1980s, courts uniformly rejected any attempt by de-

¹⁹² FED. R. EVID. 702. Rule 702 codifies the Supreme Court's rulings regarding the specific requirements for the admissibility of expert testimony. *See id.* advisory committee's note. Specifically, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court made trial judges the "gatekeepers" of expert testimony by entrusting them with the responsibility for determining its reliability. *See* 509 U.S. 579, 589 (1993). The non-exclusive factors trial judges are to consider in assessing an expert's reliability include: (1) whether the technique or theory is testable; (2) whether it has been subject to peer review; (3) the technique or theory's rate of error; (4) the existence of standards and controls; and (5) whether the technique or theory has gained general acceptance in the relevant scientific community. *See id.* at 593-95. In *Kumho Tire Co. v. Carmichael*, the Court clarified that the ruling in *Daubert* applied to all proffered expert testimony, including that from non-scientists. *See* 526 U.S. 137, 147 (1999). In the last of the so-called "trilogy" cases, *General Electric Co. v. Joiner*, the Court clarified that a judge's decision to admit or reject expert testimony would be reviewed under the deferential "abuse of discretion" standard. *See* 522 U.S. 136, 142 (1997).

¹⁹³ *See* FED. R. EVID. 702; *see also* *United States v. Shay*, 57 F.3d 126, 132-33 (1st Cir. 1995) (identifying Rule 702's three distinct requirements as helpfulness, qualification, and expertise or specialized knowledge).

¹⁹⁴ *See* Wellborn, *supra* note 163, at 1104.

¹⁹⁵ *See* Bond et al., *supra* note 176, at 196-97; Cole & Maslow-Armand, *supra* note 11, at 196; Karton, *supra* note 14, at 28.

¹⁹⁶ *See* FED. R. EVID. 702; Rand, *supra* note 141, at 71-74 (discussing the admissibility of expert testimony for cross-racial testimony of African Americans).

¹⁹⁷ *See* Poulin, *supra* note 37, at 1028.

¹⁹⁸ *See id.* at 1030-31. In one experiment, subjects were shown four slides of a "target" human face for about thirty seconds. *See* Kenneth R. Laughery et al., *Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph*, 55 J. APPLIED PSYCHOL. 477, 477 (1971). After only eight minutes, they were asked to pick out

fense attorneys to introduce expert witnesses to testify as to the credibility of eyewitness identifications, often invoking the province of the jury prohibition.¹⁹⁹ Over the last several decades, however, courts of appeals have generally accepted that, at least in some cases, such testimony is indeed helpful to the jury.²⁰⁰ Although expert testimony regarding an eyewitness' credibility is typically allowed only under narrow circumstances, one such circumstance is that of cross-racial identification.²⁰¹ According to one scholar, "unless we assume that every jury is familiar with the psychological experiments and scientific conclusions about factors that affect eyewitness reliability, we should conclude that eyewitness reliability experts have something probative to say about nearly every eyewitness identification."²⁰² The factors involved in a jury's consideration of a non-English speaking witness' testimony are no different: social science research openly refutes the argument that the common sense of the average juror is so extensive as to include knowledge about other cultures' cues of deception.²⁰³ Therefore, as in the case of cross-racial identifications, expert testimony should be allowed.²⁰⁴

B. Addressing Arguments Against Admissibility

1. Rule 403: Balancing Probative Value Against Prejudice

One foreseeable objection to abolishing the province of the jury rule regarding matters of credibility is that jurors will give too much weight to the expert's opinion.²⁰⁵ Even if the testimony is probative, Rule 403 permits a court to exclude otherwise relevant evidence if "its probative value is substantially outweighed by the danger of unfair pre-

the individual's image from an array of 150 photos. *See id.* Only fifty-two percent of subjects were capable of identifying the correct photo. *See id.*

¹⁹⁹ *See* Poulin, *supra* note 37, at 1032. For example, in *United States v. Amaral*, the Court of Appeals for the Ninth Circuit rejected testimony attacking the credibility of an eyewitness' identification because "it would not be appropriate to take from the jury their own determination as to what weight or effect to give to the evidence of the eye-witness." *See* 488 F.2d 1148, 1153 (9th Cir. 1973).

²⁰⁰ *See* Poulin, *supra* note 37, at 1032.

²⁰¹ *See* Simmons, *supra* note 34, at 1036.

²⁰² *Id.* at 1037.

²⁰³ *See, e.g.,* Bond et al., *supra* note 176, at 196-97.

²⁰⁴ *See* Poulin, *supra* note 37, at 1068; Rand, *supra* note 141, at 74; Simmons, *supra* note 34, at 1065-66.

²⁰⁵ *See* Simmons, *supra* note 34, at 1053.

judice.”²⁰⁶ Some courts are concerned that “jurors will be dazzled and overpowered by the qualifications of the expert and the scientific sheen of the technique and give the testimony more weight than it deserves.”²⁰⁷ Again, numerous studies have demonstrated that this fear is baseless.²⁰⁸ Even if there is some effect on the jury’s decision making, it hardly rises to the “substantial” prejudice required to exclude evidence under Rule 403.²⁰⁹ Moreover, excluding this one particular subject, as opposed to expert opinion per se, implies that credibility is qualitatively different from other topics of expert testimony.²¹⁰ Like testimony about polygraph evidence or eyewitness identification, there is nothing particularly flashy or awe-inspiring about cultural behavioral cues or linguistics that would likely sway a jury through an improper appeal to emotion.²¹¹ Testimony of this nature plainly possesses no “aura of infallibility” that encourages jurors to relinquish their duty.²¹² Additionally, courts regularly admit expert testimony based on far more complicated and technical issues to which jurors must inevitably give substantial weight.²¹³ As one scholar summarizes:

[T]he battle to allow experts to present their opinion in court has already been fought [V]ictory was followed by the logical and inexorable (if inconsistent) broadening of that ability to every reliable field of expertise; witness credibility is simply the last such field that remains to be covered.²¹⁴

²⁰⁶ See FED. R. EVID. 403. “‘Unfair prejudice’ [in this] context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” See *id.* advisory committee’s note.

²⁰⁷ See Simmons, *supra* note 34, at 1053 (discussing one court’s finding that such testimony is “‘likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi’”).

²⁰⁸ See, e.g., Stephen C. Carlson et al., *The Effect of Lie Detector Evidence on Jury Deliberations: An Empirical Study*, 5 J. POLICE SCI. & ADMIN. 148, 153 (1977) (concluding that jurors would not be unduly swayed by the introduction of polygraph testimony); Alan Markwart & Brian E. Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-Making*, 7 J. POLICE SCI. & ADMIN. 324, 331 (1979) (finding that few jurors approached polygraph testimony uncritically and that most jurors found it less significant than other evidence presented).

²⁰⁹ See FED. R. EVID. 403; Carlson et al., *supra* note 208, at 151 (finding that nearly sixty percent of jurors would not change their vote based on the presence or absence of expert polygraph testimony).

²¹⁰ Simmons, *supra* note 34, at 1054.

²¹¹ See FED. R. EVID. 403 advisory committee’s note; Simmons, *supra* note 34, at 1054.

²¹² See *United States v. Scheffer*, 523 U.S. 303, 314 (1998); Simmons, *supra* note 34, at 1056.

²¹³ Simmons, *supra* note 34, at 1053 (stating that courts routinely admit fingerprint, DNA, and ballistics evidence).

²¹⁴ See *id.* at 1054.

Thus, even if a court engages in Rule 403 balancing regarding credibility testimony by experts, it should conclude that the testimony is admissible.²¹⁵

2. Quality Control of Expert Witnesses

A second argument against ending the province of the jury prohibition is that it will “open the door to hundreds of different kinds of witnesses claiming to be ‘credibility experts’” with no method of discerning who the real experts are.²¹⁶ Weeding out experts relying on unreliable methods could strain the court’s time and limited resources.²¹⁷ The concern is legitimate, but the answer is easily contained within Rule 702 itself: only individuals with “specialized knowledge” based on “skill, experience, training, or education” may render an expert opinion in court.²¹⁸ Concerning the specific issue of the credibility of non-English speaking witnesses, the burden is on the party offering the expert opinion to show that the individual is qualified as an expert on linguistics or on a particular culture’s behavior.²¹⁹ Thus, courts would not need to expend needless energy on a searching inquiry.²²⁰

3. The Symbolic Function of Fact-Finding

The third and most compelling argument in favor of retaining the province of the jury rule is that it “represents the final step of the professionalization of fact-finding in our courts.”²²¹ Rather than suggesting that jurors will lend too much weight to the expert’s testimony, this objection suggests that jurors will become entirely disenfranchised from

²¹⁵ See Poulin, *supra* note 37, at 1032; Simmons, *supra* note 34, at 1057.

²¹⁶ See Simmons, *supra* note 34, at 1057.

²¹⁷ See *id.*

²¹⁸ See FED. R. EVID. 702.

²¹⁹ See *id.* advisory committee’s note. The Advisory Committee noted:

In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.

See *id.* (citations omitted).

²²⁰ See Simmons, *supra* note 34, at 1058.

²²¹ See *id.* at 1057.

their role in the trial process.²²² The Oregon Supreme Court expressed this very concern:

The cherished courtroom drama of confrontation, oral testimony, and cross-examination is designed to let a jury pass judgment on [witnesses'] truthfulness and on the accuracy of their testimony. The central myth of the trial is that truth can be discovered in no better way, though it has long been argued that the drama really serves symbolic values more important than reliable fact finding. One of these implicit values surely is to see that parties and the witnesses are treated as persons to be believed or disbelieved by their peers rather than as electrochemical systems to be certified as truthful or mendacious by a machine.²²³

Advocates desiring to maintain inviolate the province of the jury submit that the result of abandoning the rule "is not a trial by peers, but a trial by experts (or by machines) that is rubber-stamped by peers."²²⁴

This objection is both overly alarmist and overly sentimental.²²⁵ Allowing testimony regarding credibility does not relieve the jury of its burden of reconstructing the past or applying the law to the facts of the case.²²⁶ Although the jury's role would inevitably be reduced by some degree, it is in a capacity in which, by all objective measurement, jurors perform poorly.²²⁷ Moreover, abandoning this outmoded rule does not undercut "the cathartic effect and sense of procedural justice felt by parties and victims when their story can be told in a public tribunal."²²⁸ Given the potentially dire consequences of an adverse judgment on credibility—as in the *Ventura* case—concerns about accuracy and fairness should outweigh the symbolic social benefits afforded by the province of the jury prohibition.²²⁹

²²² See *id.*

²²³ *State v. Lyon*, 744 P.2d 231, 240 (Or. 1987) (Linde, J., concurring) (citation omitted).

²²⁴ See *Simmons*, *supra* note 34, at 1061.

²²⁵ See *id.* at 1061, 1063.

²²⁶ See *id.* at 1062.

²²⁷ See *id.*

²²⁸ *Id.*

²²⁹ See *Simmons*, *supra* note 34, at 1062.

CONCLUSION

In the modern multilingual courtroom, linguistic minorities stand at a distinct disadvantage compared to English speakers. Unable to communicate directly with the trier of fact, non-English speaking witnesses and parties must rely on courtroom interpreters to deliver their messages to the jury. Although interpreters are an essential tool for ensuring at least a modicum of fairness at trial, the inadequacies associated with courtroom interpretation are considerable. Misinterpretation is common, and even seemingly innocuous alterations have a demonstrable impact on trial participants. Simple errors in vocabulary and syntax are compounded with the inevitable problems associated with cross-cultural communication and the misapprehension of behavioral cues. As research has shown, the already mediocre ability of jurors to make accurate assessments of witnesses' credibility decreases dramatically when the speaker is from a different culture.

The prejudice faced by linguistic minorities in the multilingual courtroom is only further enhanced by courts' reluctance to abandon the archaic province of the jury rule. The prohibition rests on an unsupported premise that jurors are adequately equipped to make credibility determinations without outside assistance. Countless studies have demonstrated that ordinary jurors are simply unable to make an accurate assessment of a witness' credibility in any consistent manner. Expert opinion testimony touching on the credibility of non-English speaking witnesses would particularly assist the trier of fact and falls easily within the boundaries established by the Federal Rules of Evidence. Therefore, courts should abandon their strict application of the province of the jury rule and allow expert opinion testimony regarding credibility in order to ensure fundamental fairness at trial for linguistic minorities.