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Citation for final published version:

Griffin, David T. 2016. Lingua Fracas: Legal Translation in the United States and the European Union. Boston University International Law Journal 34 (2) , pp. 355-382.

Publishers page: https://www.bu.edu/ilj/files/2016/06/BIN205.pdf

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LINGUA FRACAS: LEGAL TRANSLATION IN THE UNITED STATES AND THE EUROPEAN UNION

David T. Griffin*

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Abstract

Legal translation is a complex process requiring a translator to be fully proficient not just in multiple languages, but also in both translation theory and the legal systems involved in a given text. Despite this, legal translation in the United States is completely unregulated. The European Union, by contrast, is committed to producing an equally authentic version of all of its major documents in each of its twenty-four official languages, and, as a result, has developed a highly specialized system for performing legal translations. In this Note, I examine translation theory, both in general and in the legal context, and look at the United States' and European Union's systems as they currently exist. Finally, I consider what the United States can learn from the European Union's policies, as well as how those policies

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could influence a proposal for an American federal court translator certification program.

INTRODUCTION

An American lawyer in Madrid is meeting a group of Spanish friends for dinner. As the group is exchanging pleasantries before the meal, one of the Spaniards asks the American, "*¿Cómo llegaste*?" ("How did you get here?"). The American, who has studied Spanish, is able to appropriately respond, "*Cogí el tren*," ("I took the train") and the conversation moves to more exciting subjects.

Some time later, that same American is meeting with a different group of friends, this time in Mexico City, when the same question is posed. The American gives an identical response, "*Cogí el tren*," but instead of moving on, the group of friends responds with a mixture of stunned silence and snickering. What changed?

What the American did not know is that the Spanish verb "coger," while completely innocuous in Spain (where it means "to take" or "to catch"), is actually obscene in Mexico. As a Spanish friend once explained to me, "*En España, cogimos el autobús; en México, no cogen en público*," which is to say that, "In Spain, we 'coger' the bus; in Mexico, they don't 'coger' in public."

Even in the most informal of settings, working effectively across languages and cultures is no easy task. As far as the American in the preceding example was concerned, she had given the same response both times. There were no grammatical or structural errors in what she said, no problems with subject-verb agreement, and no conjugation errors. Nevertheless, the perfect response in one setting was completely inappropriate in another nearly identical situation.

It should come as no surprise that these language issues are only compounded in a legal context. To begin with, it has been suggested that even in a monolingual context, the legal process is inherently one of translation.[1] Introducing a foreign language into the mix, then, should only be done with the utmost care. Take a relatively straightforward example: the meaning of the French word "*contrat*" includes what an American lawyer would consider "conveyances" or "trusts," (which is to say, concepts not included in the English word "contract") while exclud-

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[1] *See generally* Clark D. Cunningham, *Legal Storytelling: A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459 (1989). *See also id.* at 2490 ("By thinking of herself as a translator, the lawyer becomes aware of how, in the process of representing a client to others, meaning is created and lost."); Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L. Q. 1263, 1269, 1286 (1995) (explaining that the legal process has been described "as *translation*, as the rendering of ordinary, nonlegal language into the patois of the legal system," and that "[l]earning the law is like learning a language").

ing other concepts that *are* included in "contract."[2] Even in this case, the potential for serious error is obvious. Practically speaking, unfortunately, problems of translation and the law are rarely that simple, nor are they new. To see just how crucial proper translation has always been, consider *Foster v. Nielson*, an 1829 Supreme Court decision where Chief Justice Marshall was waylaid by an incredibly subtle translation problem.[3]

In *Foster*, the Court considered which of two claims to a single tract of land in the newly acquired Florida territory would win out: a grant issued by the King of Spain before the territory was transferred to the United States, or a competing claim issued by the United States after its acquisition of the territory.[4] The heart of the matter was Article 8 of the Adams-Onís Treaty, which was the instrument that had officially transferred ownership of Florida from Spain to the United States.[5] In the English version of the treaty, the relevant portion of that Article reads:

> All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty.[6]

In his opinion, Marshall focused on the phrase "shall be ratified and confirmed," and read the Article to mean two things: first, that the land grants in question had to be ratified before they were official, and second, that the Adams-Onís Treaty did not by itself ratify them.[7] Once he had reached those two conclusions, Marshall reasoned, "[T]he ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject."[8] Accordingly, he found that the grant issued by the United States, rather than the one issued by the King of Spain, controlled.[9]

The problem with the *Foster* decision stems from the fact that the Court relied solely on the English version of the Treaty. In the Spanish version, Article 8 says that the grants of land "quedarán ratificadas y

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[2] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1, 12-13 (1991).

[3] Foster v. Neilson, 27 U.S. 253 (1829).

[4] *Id.* at 299-300.

[5] *Id.* at 314 (finding that "sound construction of the eighth article" is the key to the decision).

[6] Treaty of Amity, Settlement, and Limits Between the United States of America and his Catholic Majesty, U.S.-Spain, art. 8, Feb. 22, 1819-Oct. 29, 1820, 8 Stat. L252 [hereinafter Adams-Onís].

[7] *Foster*, 27 U.S. at 314-15.

[8] *Id.* at 315.

[9] *Id.*

reconocidas," which would be more accurately translated as "*will remain* ratified and confirmed."[10] In technical terms, Marshall had read a deontic modality into the word "shall" that did not exist in the Spanish version of Article 8.[11] Fortunately, only four years later, the Court had the opportunity to revisit this exact issue.

Just as in *Foster*, in *United States v. Percheman*, the Court had to decide the validity of a land grant by the Spanish crown during the period immediately prior to United States' acquisition of Florida.[12] This time, however, the Court looked at both versions of the Adams-Onís Treaty, and, realizing the distinction between the English and Spanish versions of Article 8, decided to uphold the Spanish grant.[13] Again writing for the Court, Justice Marshall addressed the discrepancy with the *Foster* decision:

> The treaty was drawn up in the Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical. . . . In [*Foster*] . . . [t]he Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument. . . . Had this circumstance been known, we believe it would have produced the construction which we now give to the article.[14]

While that realization came several years too late for Mr. Foster, taken together, these two cases demonstrate the essential role that legal translation has played in American courts since the very beginning of the republic.

As important as legal translation was in the 19th century, it can only be considered more so today. As of 2011, over 300 languages were spoken in the United States, and the number of people who speak a language other than English at home had increased by more than 150% since 1980.[15] Despite the incredible linguistic diversity of the United States, to

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[10] Adams-Onís, *supra* note 6, art. 8.

[11] The deontic mode expresses that a given action is either required or permitted, but not yet complete. Modal verbs such as "can," "may," "will," and "shall" do not exist in Spanish in the same way that they do in English, and, because of that, Marshall's reading of Article 8, while reasonable when looking only at the English version of the treaty, is incompatible with the Spanish version (to be clear, the problem with the *Foster* decision stems from Justice Marshall's reliance upon the improper translation, not his reasoning). For additional explanation of modal verbs, see Rodney Huddleston, *A Short Overview of English Syntax*, UNIV. OF EDINBURGH, www.lel.ed.ac.uk/grammar/overview.html at 6.5 (last visited Jan. 1, 2016).

[12] United States v. Percheman, 32 U.S. 51, 82-83 (1833).

[13] *Id.* at 88-89.

[14] *Id.*

[15] U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2011 4, 5 (August 2013), www.census.gov/prod/2013pubs/acs-22.pdf.

date there has been surprisingly little in the way of formal study of its legal translation policies.[16]

Legal translation is an incredibly complex process requiring a translator to be fully proficient not just in multiple languages, but also in both translation theory and at least one legal system (and possibly more when working in international legal contexts).[17] Despite this, legal translation in the United States remains unregulated.[18] The European Union, by way of contrast, lies on the other end of the translation regulation spectrum: its Multilingual Policy obligates it to create twenty-four co-official versions of all its major documents.[19] In this Note, I will examine both the United States' and European Union's systems as they currently exist and consider what the United States can learn from the European Union's translation policies, as well as how the United States could adapt those policies to create a federal court translation certification system.[20]

In Part I, I will examine the nature of translation, both generally and specifically in the legal context, and I will outline some of the basic elements of translation theory and common difficulties that arise while translating. In Part II, I will look at existing language legislation in the United States and the current state of American legal translation, after which I will suggest why the status quo is in need of change. In Part III, I will perform a similar analysis of the language policies of the European Union, paying particular attention to the Union's Multilingualism Policy, and its concept of the "Lawyer-Linguist." Finally, in Part IV, I will consider how the United States could combine its existing policies and the European Union policies discussed in Part III for use in federal courts.

I. What Is Translation?

A. *Translation Is Not . . .*

It may be best to begin by explaining two things that translation is not. First, translation is not a simple mechanical process; even the most brilliant of monolingual English speakers armed with the highest quality Spanish-to-English dictionaries available would never be able to produce a completely accurate translation of a document like the Adams-Onís

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[16] *See* Peter W. Schroth, *Legal Translation*, 34 Am. J. Comp. L. Supp. 47, 47 (1986) ("Despite its great practical importance, legal translation is little discussed.").

[17] *See* Sacco, *supra* note 2, at 11-12.

[18] *See* Grace Leonard, *Patents and Translation*, 76 J. Pat. & Trademark Off. Soc'y 561, 568 (1994) ("In the U.S., translation is an unregulated field.").

[19] *See Translation and the European Union,* European Commission (Nov. 26, 2014), http://ec.europa.eu/dgs/translation/translating/index_en.htm [hereinafter *Translation and the European Union*].

[20] While the translation regulations proposed in this Note could, and arguably should, be similarly applied at the state level, for simplicity's sake, I will limit my discussion to federal policy.

Treaty.[21] The U.S. Supreme Court addressed this problem in *Eastern Airlines v. Floyd* when it "recognize[d] that dictionary definitions may be too general for purposes of [interpreting the French-language Warsaw Convention]."[22] At least some training in a foreign language is required before one can effectively use a bilingual dictionary, as they generally list only the most basic forms of words (i.e. "walk," but not its conjugated forms, such as "walks," "walked," or "walking;" or, to return to *Foster* and *Percheman*, "quedar" but not "quedarán").[23] This is to say nothing of the complications that can arise from syntactical differences between two languages, such as differences in word order and sentence structure, or the problem of homographs, which are two or more words that are spelled alike, such as "bear" ("to support") and "bear" (the animal).[24] If one needs only to get a general sense of a text, then this method can work wonders. However, given the precision of meaning that is essential in legal settings, it is not appropriate for legal translation.

Second, though the two terms are often used interchangeably,[25] translation is not the same as interpretation. Even the federal government seems at times confused about the distinction: Federal Rule of Evidence 604 states that, "[a]n interpreter must be qualified and must give an oath or affirmation to make a true translation."[26] Generally speaking, translation deals with written communication, and interpretation deals with spoken communication.[27] Put another way, translation can be thought of as "the process of transferring ideas expressed in writing from one language to another," while interpretation "is the process by which the spoken word is used when transferring meaning between languages."[28] Thus, someone serving as an intermediary in a conversation between a lawyer

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[21] *See generally* Gerard-Rene de Groot & Conrad J.P. van Laer, *The Dubious Quality of Legal Dictionaries*, 34 INT'L J. LEGAL INFO. 65 (2006). For an amusing demonstration of just how ineffective this brute force method of translation can be, see JOSÉ DA FONSECA & PEDRO CAROLINO, ENGLISH AS SHE IS SPOKE, OR A JEST IN SOBER EARNEST (1884), http://www.gutenberg.org/cache/epub/30411/pg30411-images.html. This famously (and accidentally) bad Portuguese-to-English phrasebook was prepared by "translating" a Portuguese-to-French phrasebook with a French-to-English dictionary, and includes such useful phrases as, "What news tell me? All hairs dresser are newsmonger," and "I was no came that to know how you are."

[22] 499 U.S. 530, 537 (1991).

[23] Sarah Yates, *Scaling the Tower of Babel Fish: An Analysis of the Machine Translation of Legal Information*, 98 LAW LIBR. J. 481, 482 (2006).

[24] *Id.* at 484-85.

[25] *See, e.g.*, David Zachary Kaufman, *What Did You Say? The Perils of Clients Who Don't Speak English*, 24 GPSOLO 22 (2007).

[26] FED. R. EVID. 604.

[27] Nina L. Ivanichvili, *Considerations in Selecting Interpreters and Translators*, COLO. LAW., Sept. 2010, at 39, 40.

[28] *On Choosing A Language Access Provider,* LIMITED ENGLISH PROFICIENCY (LEP), www.lep.gov/resources/leptatool.pdf (last visited Jan. 1, 2016).

and a client is an interpreter, rather than a translator.[29] Even if during the conversation, that person were asked to explain the meaning of a foreign language document, so long as he was giving an oral response, he would still be interpreting, rather than translating.[30]

B. *A Technical Definition*

Translation occurs between a "language pair," which consists of both a "source language" and a "target language."[31] The source language is the language in which a given document was originally written, and the target language is the language into which that document is being translated.[32] The "direction" in a given language pair is determined by which language is the source and which is the target.[33] A translator working from Spanish to English is working in one direction, for example, and another working from English to Spanish can be thought of as working in the opposite direction. Most translators do not work in both directions in a language pair, but rather work from a non-native language into their native language.[34] With those component parts in mind, it is time to define what translation actually is.

Lawrence Lessig offers the following technical definition: "Translation is the process by which texts in one language are transformed into texts of another language, by constructing a text in the second language with the same meaning as the text in the first."[35] According to Lessig, this happens via a two-step process: first, a translator must come to a complete understanding of the material in the source language (which he deems "familiarity"), and second, the translator must find an equivalent meaning in the target language (which he deems "equivalence").[36]

In order to achieve familiarity with a document, a translator must understand not only its literal meaning, but also its meaning in context,

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[29] *See, e.g.*, *FAQs*, CALIFORNIA COURTS, www.courts.ca.gov/2683.htm (last visited March 14, 2016) ("[C]ourt interpreters interpret in civil or criminal court proceedings . . . for witnesses or defendants who speak or understand little or no English.").

[30] Unlike legal translators, court interpreters in the United States are already regulated by the federal government, and as such, interpretation falls generally outside of the scope of this Note. However, given how closely related the two practices are, interpretation will be discussed in at least some detail. *See* Court Interpreters Act, 28 U.S.C. § 1827 (2012).

[31] Leonard, *supra* note 18, at 569.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1189 (1993). *See also* Sacco, *supra* note 2, at 13-14 ("To translate, one must establish the meaning of the phrase to be translated and find the right phrase to express the meaning in the language of the translation.").

[36] Lessig, *supra* note 35, at 1194.

and how that meaning relates to the end goal of the translation.[37] A translator achieves familiarity when he or she "knows . . . [a document's] purpose, the assumptions that underlie it, the scope of its reach, and theories it embraces."[38] Obviously, this is no easy task, nor is it one that can be accomplished with only knowledge of the languages involved. A translator must understand not only the "what" of a document, but also the "why" and the "how."

Once a translator has achieved the requisite familiarity, the next step is to find the document's equivalent meaning in the target language.[39] There are a number of schools of thought as to the best way to find this equivalence, but for legal translation purposes, the goal is essentially to "construct in the target language what the author in the source language would have written, had the author been in the target context."[40] To return to an earlier example, this means that when translating a document from French to English, the translator would want to make sure of the sense in which the word "*contrat*" was being used before simply translating it into English as "contract."[41]

C. *Common Translation Problems and Their Solutions*

That example shows the principal difficulty of legal translation: a legal translator works not simply across languages, but across *legal* languages, which are subsets of languages that take their meaning from specific legal systems.[42] A language contains as many legal languages as there are legal systems operating in that language;[43] thus, the legal language of the United States is not the same as the legal language of the United Kingdom, though proceedings in both countries occur in English. Often, a word in a legal language may appear identical to a word in the non-legal version of that language but have its own specific meaning. The concepts of death and personhood, for example, have highly specific technical meanings attached to them in legal languages that do not exist in their common usage.[44] While a word may have what is on its face an obviously equivalent term in a target language (such as "contract" for "*contrat*"), a legal translator must have an in-depth understanding of both the source

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[37] *Id.* at 1196.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Sacco, *supra* note 2, at 12-13. *See also* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 927 (1990) (examining multiple potential translations of the word "force" in English, German, and French).

[42] *See* de Groot & van Laer, *supra* note 21, at 66.

[43] *Id. See also* Sacco, *supra* note 2, at 11 ("The French language, for example, combines the legal language of France, of Quebec, and of Switzerland.").

[44] *See* Edgardo Rotman, *The Inherent Problems of Legal Translation: Theoretical Aspects*, 6 IND. INT'L & COMP. L. REV. 187, 195 (1995).

and target legal systems in addition to the source and target languages before she can decide whether that term really is appropriate.[45]

Most problems in the translation process (legal or otherwise) occur when there is a "gap" between the source language and the target language.[46] These gaps arise when information is presented in a document that does not easily transfer to the target language, or when information is required in the target language that is not presented in the document.[47] Consider the Spanish word "amiga," which means "a female friend." Translating "amiga" into English with only the word "friend" loses some of the original meaning, while translating "amiga" as "female friend" or "friend who is female" sounds awkward, and translating it as "girl friend" seems to mean something else entirely. Conversely, the English word "friend" on its own is missing some of the information required to properly translate it from English into Spanish (namely, the gender of the person in question).[48]

In a perfect world, each word in a source document would map precisely onto a word in the target language. In practice, that is unlikely to ever happen. When no equivalent term exists for a given word or phrase in the target language, translators have three basic options:[49]

1. Preserve the source term: The translator can either keep the term as it is in the source language or provide a literal translation, clarifying its meaning via a parenthetical statement or a footnote. This is best done sparingly, to avoid "making the translation into a collection of foreign words glued together by prepositions, adverbs, and verbs from the target language."[50]
2. Paraphrase: The translator can attempt to simply write around the linguistic gap, describing the source term rather than translating

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[45] Lessig, *supra* note 35, at 1194.

[46] *See id.* at 1201.

[47] *Id.*

[48] Clark Cunningham gives the following description of the gap problem in monolingual legal contexts: "[T]he lawyer as translator must creatively bridge at least two gaps. First, the lawyer must identify and cross the gap between what the client says and what can be said in the language of the law. . . . [T]he lawyer must also deal with the gap in meaning in the other direction, from what is said by the judge or other lawyers back to the client. [The lawyer is thus challenged] to a constant process of educating herself, her client, and the other legal actors to the ways in which both lay and legal language diminish and expand what we know about experience." Cunningham, *supra* note 1, at 2491-92.

[49] *See* de Groot & van Laer, *supra* note 21, at 68-71; Sacco, *supra* note 2, at 19-20.

[50] *See* de Groot & van Laer, *supra* note 21, at 68; Sacco, *supra* note 2, at 19 ("When a [translator] . . . cannot refer to a definition provided explicitly or implicitly by the legislator or the case law . . . he may prefer not to translate.").

it. This strategy works best when the paraphrase is succinct and used relatively infrequently.[51]

3. Coin a neologism: The translator can use a term from outside of the normal scope of the target language. While this may seem like the most attractive option at first, in many ways it requires the greatest deal of care to ensure that the neologism being coined does not already have its own meaning in the target language. The French "*droit commun*" would be a poor choice to translate the term "common law," for example, as it already has its own distinct significance.[52]

In the end, the individual translator determines the best way to bridge a linguistic gap, and for that reason, translation can be considered almost as much an art as it is a science. Therefore, it is particularly important that a legal translator be an expert not just in the source and target languages, but also in any legal systems involved in a translation. When translating literature, some loss of "flavor" may be inevitable given how closely the placement of words can be related to the overall aesthetic value of a given work.[53] When translating a legal document, however, any such loss of meaning is clearly unacceptable.[54] It is the legal translator's job to ensure that does not happen.

II. Language Policy in the United States

A. *The Current Legislative Landscape*

While the United States does not have an official language at the federal level,[55] thirty-one states have declared English their official state lan-

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[51] *See* de Groot & van Laer, *supra* note 21, at 70; Sacco, *supra* note 2, at 19 ("[A translator] may pick the closest term available to him in the language he is using, identifying the differences between it and the term in the original language, and then taking care that these problems are irrelevant from the standpoint of the problem he is addressing.").

[52] *See* de Groot & van Laer, *supra* note 21, at 70; Sacco, *supra* note 2, at 20 ("[A translator] may create a special neologism in his own language.").

[53] *See* Rotman, *supra* note 44, at 189.

[54] *See* Schroth, *supra* note 16, at 57 ("A translator of a novel has the luxury of making up for what is omitted here by developing it there. But in translating a treaty or a contract, one must consider the very likely possibility of interpretation of a sentence or a section out of context. Hence whatever clarification there is to be must accompany the very passage to be clarified.").

[55] One semi-exception is the Jones Act, which states that, "all pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." 48 U.S.C. § 864 (2012). Additionally, the Immigration and Nationality Act ("INA") requires all immigrants to the U.S. to demonstrate "an understanding of the English language," via the ability to "read and write simple [English] words and phrases" prior to their naturalization. 8 U.S.C. § 1423(a)(1) (2012). However, as neither the Jones Act nor the INA mandate

guage.[56] These declarations range in form and effect from simple acknowledgements to active restrictions on state action in any other language.[57] In Illinois, the adoption of English as the official state language is completely symbolic: the entirety of the relevant law reads, "The official language of the State of Illinois is English,"[58] and the Seventh Circuit has noted that, "[t]his statute (which appears with others naming the state bird and the state song) has never been used to prevent publication of official materials in other languages. In fact, various state and city agencies publish materials and provide many services in Spanish."[59] For more than four decades before that law was passed, the official state language had been "American,"[60] so it would seem the state has never considered its "official language" a particularly practical matter.[61] That is not the case in Iowa, however.[62] The significantly more substantive "Iowa English Language Reaffirmation Act," provides in part that, "All official documents, regulations, orders, transactions, proceedings, programs, meetings, publications, or actions taken or issued, which are conducted or regulated by, or on behalf of, or representing the state and all of its political subdivisions shall be in the English language."[63] In 2008, a state court held that this Act made it illegal to publish official voter registration forms in any language other than English.[64] Clearly, then, these laws are not all amusing political curios; they can and do have significant real-world consequences.

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methods of translation or interpretation in the courts, for the purposes of this Note, they will not be considered further.

[56] *U.S. States with Official English Laws*, U.S. ENGLISH, www.us-english.org/view/13 (last visited Jan. 1, 2016). For a fantastic (but slightly dated) summary of American language legislation circa 2012, see *Language Legislation in the U.S.A.*, LANGUAGE POLICY (Feb. 1, 2012), www.languagepolicy.net/archives/langleg.htm.

[57] *See* Evan L. Seite, Note, *Language Legislation in Iowa: Lessons Learned from the Enactment and Application of the Iowa English Language Reaffirmation Act*, 95 IOWA L. REV. 1369, 1389-90 (2010) (explaining the difference between "symbolic" and "non-symbolic" language legislation).

[58] 5 ILL. COMP. STAT. 460/20 (2014).

[59] Puerto Rican Org. for Pol. Action v. Kusper, 490 F.2d 575, 577 (7th Cir. 1973).

[60] "American," I should point out, is not an actual language.

[61] *See* Dennis Baron, *Language Laws and Related Court Decisions*, UNIV. OF ILLINOIS, URBANA-CHAMPAIGN, http://www.english.illinois.edu/-people-/faculty/debaron/essays/langlaw.htm (stating that the 1923 law was repealed in 1969).

[62] *See* IOWA CODE § 1.18 (2014).

[63] *Id.*

[64] King v. Mauro, No. CV6739, slip op. at 31 (D. Iowa Mar. 31, 2008) ("[T]he Respondents are enjoined from using languages other than English in the official voter registration forms of this state.").

At the national level, beginning in 1981, a number of unsuccessful efforts have been made to grant English "official language" status.[65] The movement's supporters insist that requiring the use of English would both help to better integrate immigrants into American public life and cut back on unnecessary government spending.[66] Its opponents claim that such a policy would unfairly penalize recent immigrants and others of limited English proficiency,[67] and point out that the founding fathers themselves understood the importance of communicating across multiple languages.[68] The debate over these so-called "Official English" laws has been raging for decades and is already shaping policy in states like Iowa; clearly this is an issue of great practical importance.

B. *The Court Interpreters Act*

Although the United States does not currently regulate translation of any kind, there is a system in place for certifying interpreters for use in the federal courts.[69] The Court Interpreters Act obliges the Director of the Administrative Office of the United States Courts to "establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States."[70] The Administrative Office divides interpreters into three classes:[71]

1. Certified Interpreters: Certified interpreters have passed the Administrative Office's rigorous certification examination pro-

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[65] For a summary of early "Official English" efforts, see Jose Roberto Juarez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a "Known Tongue,"* 13 LAW & INEQ. 443, 450 n.21 (1995).

[66] *See* Brandon Brice, *Why English Should Be the Official Language of the United States*, WASH. TIMES (Dec. 31, 2014), http://www.washingtontimes.com/news/2014/dec/31/why-english-should-be-official-language-united-sta/.

[67] *See ACLU Backgrounder on English Only Policies in Congress*, ACLU, http://www.aclu.org/immigrants-rights/aclu-backgrounder-english-only-policies-congress (last visited Jan. 1, 2016). *See generally* Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. Rev. 285 (1996) (concluding that the Official English movement is "ill-conceived and unwarranted").

[68] Adriana Resendez, Comment, *The Spanish Predominant Language Ordinance: Is Spanish on the Way In and English on the Way Out?*, 32 ST. MARY'S L.J. 317, 327-28 (2001) ("Throughout the colonial struggle, American revolutionary leaders understood the importance of multilingual communication in gaining independence from Great Britain. For example, the Continental Congress published excerpts of declarations, articles and other documents in both German and English. More notably, early colonial leaders distributed the Articles of Confederation and other political materials in French and English.").

[69] *See* Court Interpreters Act, 28 U.S.C. § 1827 (2012).

[70] *Id.*

[71] *Three Classes of Interpreters,* ADMIN. OFFICE OF U.S. COURTS, http://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-categories (last visited Jan. 1, 2016).

cess. Certification programs exist for Spanish, Navajo, and Haitian Creole, though only the Spanish certification program is still administered. This is the highest-level classification of interpreter.[72]

2. Professionally Qualified Interpreters: This qualification exists for all languages without any current Certified Interpreters. Credentials are established by having passed the State Department interpreter test in a language pair that includes English and the target language, having passed the United Nations interpreter test in a language pair that includes English and the target language, or by being a member in good standing of the Association Internationale des Interprètes de Conférence or the American Association of Language Specialists.[73]
3. Language Skilled/*Ad Hoc* Interpreters: An interpreter who does not qualify as a Professionally Qualified interpreter but demonstrates to the satisfaction of the court their ability to interpret court proceedings from English into a designated language and from that language into English is considered a language skilled/*ad hoc* interpreter.[74]

The federal government, via the Administrative Office of the United States Courts, is clearly capable of crafting a sensible foreign language-related policy, which bodes well should it ever turn its attention to tackling the issue of translation.

C. *Translation in the Courts*

As mentioned above, Federal Rule of Evidence 604 states that, "[a]n interpreter must be qualified and must give an oath or affirmation to make a true translation."[75] The Rule is at best ambiguous as to whether it means to apply to translators. In practice, courts consider both translators and interpreters to be expert witnesses,[76] as both must be "qualified . . . by knowledge, skill, experience, training, or education" to perform their functions.[77]

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] FED. R. EVID. 604.

[76] *See* Clifford S. Fishman, *Recordings, Transcripts, and Translations as Evidence*, 81 WASH. L. REV. 473, 503 (2006) (explaining that translators are "governed by the rules regulating expert opinion testimony"); Edward J. Imwinkelried, *The Taxonomy of Testimony Post-Kumho: Refocusing on the Bottomlines of Reliability and Necessity*, 30 CUMB. L. REV. 185, 211 n.150 (2000) (noting that translators as well as interpreters are considered experts). On linguists serving as expert witnesses in other contexts, see generally Judith Levi, *Language as Evidence: The Linguist as Expert Witness in North American Courts*, 1 INT'L J. SPEECH, LANGUAGE & L. 1 (1994).

[77] FED. R. EVID. 702.

While parties to a lawsuit will produce official-sounding "certified translations" of their foreign language documents, this designation simply means that these documents contain a notarized statement by the translator or translating organization stating that they believe the translation "to be accurate and complete."[78] As one commentator noted, "[a]nyone can claim to be a translator, buy business cards, and write a resume supporting the claim. There are no regulations requiring certification, accreditation, or licenses."[79] A certified translation, therefore, is only worth as much as the translator who certified it.

The bottom line is that the reliability and accuracy of a certified translation can vary wildly, and that translation in the courts is therefore at the mercy of the adversarial system: if one party submits a translation that the other party finds inadequate, then the objecting party must submit its own translation and allow the fact-finder to decide the matter.[80] Under Federal Rule of Evidence 706, judges have the authority to appoint their own expert witnesses, and so could theoretically order their own translation of a document.[81] The exercise of this appointment power has been highly criticized, however, and rightly so; in a subject as complex as legal translation, adding another opinion to the fray is as likely as not to confuse matters further, especially without a well-established way of determining the legitimacy of a translator's qualifications and ability.[82]

Given the degree of expertise needed to notice an error such as the "shall" problem Justice Marshall struggled with in *Foster*,[83] placing the onus on either the opposing party or the judge to spot problems in a translation is clearly problematic. When considering the increasing number of Americans who do not speak English well (or at all),[84] the need for an effective and reliable system of translation regulation in the United States should be clear. Failing to address this problem will restrict the access of low-income and limited-English-proficiency Americans to the courts, effectively transforming them into second-class citizens.[85] One solution is to establish what could be thought of as a "Federal Translation

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[78] Ivanichvili, *supra* note 27, at 42.

[79] Leonard, *supra* note 18, at 568.

[80] *See* Fishman, *supra* note 76, at 501-03.

[81] FED. R. EVID. 706.

[82] *See generally* Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59 (1998) (arguing that this practice blurs the line between Judge and advocate); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113 (1991) (finding that expert evidence often makes poor use of specialized knowledge, and at great cost to the parties and the legal system).

[83] *See supra* Introduction.

[84] *See* Rotman, *supra* note 44, at 192.

[85] Paul Connor Hale, Note, *Official, National, Common or Unifying: Do Words Giving Legal Status to Language Diminish Linguistic Human Rights?*, 36 GA. J. INT'L & COMP. L. 221, 223 (2007).

Certification" program, drawing on the system now in place for Federal Court Interpreters.[86] However, such a program could not simply be grafted on to the existing process. For one thing, the actual act of translation would be taking place outside of the courtroom, rather than within it, as in the case with interpretation. For another, while they are admittedly related, translation is a distinct process from interpretation.[87] In the courts, the focus of interpretation is on rapidly transferring the meaning of what is said from one language to another to facilitate the proceedings; by contrast, the speed with which a translation is performed (so long as it is carefully done) is irrelevant to the final product, as that is all that the courts will see.[88] Accuracy is important in courtroom interpretation, of course, but not in the same way that it is in translation. Given that the ideal legal translator will have both legal and linguistic expertise, a courtroom translation regulation system should take that into account. For ideas as to how to best handle such a large-scale translation program, I turn now to the European Union, which has acquired a certain degree of expertise in the matter.

III. Language Policy in the European Union

With the entry of Croatia in 2013, the European Union now has twenty-eight member states and twenty-four official languages.[89] Unlike in the Illinois example above,[90] where English's official status has no real world impact, a language's status in the European Union means a great deal.[91] Under its "Multilingualism Policy," the Union is obligated to produce an official version of all regulations and other legislative documents

[86] A particular advantage would be the ease with which such a certification program could be adapted to provide translators for use in state courts, as well.

[87] *See supra* Part I(A).

[88] *See* California Courts, *supra* note 29 ("Court interpreters shift between two different languages, in real time").

[89] There are fewer official languages than member states because several member states share official languages. *EU Member Countries*, European Union, http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Jan. 1, 2016); *Official EU Languages,* European Commission (Mar. 3, 2015), ec.europa.eu/dgs/translation/translating/officiallanguages/index_en.htm [hereinafter *Official EU Languages*].

[90] *See supra* Part II(A).

[91] *See* Nathaniel Berman, *Nationalism Legal and Linguistic: The Teachings of European Jurisprudence*, 24 N.Y.U. J. Int'l L. & Pol. 1515, 1517 (1992) ("[F]or over a century [language] has been a crucial element, often *the* crucial element, in European Nationalists' understanding of identity").

in each of the official languages.[92] This policy is unique in scope and ambition across all international organizations.[93]

A. *The Evolution of the Multilingualism Policy*

The Multilingualism Policy has been a part of the European Union from the very beginning. While the 1957 Treaty Establishing the European Economic Community, also known as the Treaty of Rome, did not explicitly create the policy, it opened the door by stating that, "The rules governing the languages of the institutions of the Community shall . . . be determined by the Council, acting unanimously."[94] The Treaty also made a point of noting that it was "drawn up in a single original in the Dutch, French, German and Italian languages, [with] all four texts being equally authentic."[95] There was nothing novel about that in the context of multilingual treaties,[96] but it serves to further underline how, from its inception, the very identity of the European Union has been tied to multilingualism.

The following year, in 1958, the very first Regulation of the Council of the European Economic Community formally laid the groundwork for the Multilingualism Policy.[97] It declared that "[t]he official languages and the working languages of the institutions of the Community shall be Dutch, French, German and Italian,"[98] and required, among other things, both that "Regulations and other documents of general application shall

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[92] *See Multilingualism*, EUROPEAN UNION (Jan. 22, 2015), europa.eu/pol/mult/index_en.htm [hereinafter *Multilingualism*]; *Translation and the European Union*, *supra* note 19. Currently, only regulations adopted by *both* the EU Council and the European Parliament are translated into Irish, though this is a temporary arrangement. *Id.* For more information on the current status of Irish, see Samuel Morgan, *Irish to be Given Full Official EU Language Status*, EURACTIVE (Dec. 10, 2015), https://www.euractiv.com/section/languages-culture/news/irish-to-be-given-full-official-eu-language-status/.

[93] *See* Theodor Schilling, *Language Rights in the European Union*, 9 GERMAN L.J. 1219, 1223 (2008) ("The language regimes of traditional International Organisations are quite different [from that of the EU]. To give but a few examples, the United Nations . . . has only five Charter languages, . . . [t]he World Trade Organization . . . makes do with three official languages . . . [and] [t]he Council of Europe . . . contents itself with . . . two official languages.").

[94] EEC Treaty art. 217 (as in effect 1958) (now TFEU art. 342), ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf.

[95] *Id.*

[96] For example, Justice Marshall's opinion in *United States v. Percheman*, discussed in the introduction, discussed this concept in the context of the Adams-Onís Treaty. *See* 32 U.S. 51, 88 (1833) ("The treaty was drawn up in the Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical.").

[97] Council Regulation 1, determining the languages to be used by the European Economic Community, 1958 O.J. 385/58 (EC).

[98] *Id.* art 1.

be drafted in the four official languages,"[99] and that "The Official Journal of the Community shall be published in the four official languages."[100] That Resolution has been regularly amended to add the official language of each subsequent member state to the list,[101] and every EU citizen has the right to both communicate with the major EU institutions in any of the official languages, and receive a response in the language in which they initiated that communication.[102] The Council has repeatedly stressed the importance of foreign language education for EU citizens,[103] and has expressed its desire for every citizen to be able to speak two languages in addition to their mother tongue.[104]

The importance of multilingualism is evident throughout the European Union's foundational documents. The Treaty on European Union stresses the need for the EU to "respect its rich cultural and linguistic diversity,"[105] and the Charter of Fundamental Rights of the European Union includes among its provisions "respect [for] cultural, religious, and linguistic diversity."[106] It is not an accident that the Charter places language in the same section as concepts as fundamental as "religion" and "culture"; it is a clear acknowledgement of the critical role that multilingualism plays in the European Union.

Unsurprisingly, having twenty-four official languages and a mandate to produce a wide range of documents in each of them results in an incredible workload. The exponential formula (n^2-n) yields the number of language pairs resulting from *n* languages;[107] for the present day European

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[99] *Id.* art. 4.

[100] *Id.* art. 5.

[101] *See* Council Regulation 920/2005, art. 1, 2005 O.J. (L 156) 3 (updating Article 1 of the Regulation to say, "The official languages and the working languages of the institutions of the European Union shall be Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish," and updating the rest of the articles to refer to the "21 official languages."); Council Regulation 1791/2006, art. 1, 2006 O.J. (L 363) (updating the list to include Bulgarian and Romanian); Council Regulation 517/2013, art. 1, sec. 1 (p), 2013 O.J. (L 158) 1 (updating the list to include Croatian).

[102] Consolidated Version of the Treaty on the Functioning of the European Union art. 24, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

[103] *See generally* Council Resolution of 31 March 1995 on improving and diversifying language learning and teaching within the education systems of the European Union; Council Resolution of 16 December 1997 on the early teaching of European Union languages, 1998 O.J. (C 1) 2s.

[104] *Multilingualism*, *supra* note 92.

[105] TFEU art. 3.

[106] Charter of Fundamental Rights of the European Union art. 22, Dec. 18, 2000, 2000 O.J. (C 364) 1.

[107] *See* Jonathan Yim, Note, *Feasibility of the Language Policy of the European Union*, 41 INT'L LAW. 127, 129 (2007).

Union, with an *n* of twenty-four, there are five hundred fifty-two potential language pairs in play.[108] Things are not quite as complicated as that would imply, however; while the various bodies of the Union technically *could* choose to work in any of the official languages, they draft almost exclusively in English or French, meaning that fewer than fifty language pairs are likely to come up in ordinary contexts.[109] Nevertheless, the translation needs of the European Union are massive, and to meet those needs, the major EU bodies all have their own in-house translation departments (for example, the Directorate General for Translation, which handles the translation needs of the European Commission), and the various EU agencies share a translation center in Luxembourg.[110]

The amount of manpower and resources required by the Multilingualism Policy is staggering: in 2002, when the Union had a relatively small *n*-value of eleven (and so only one hundred ten potential language pairs), about one in every eight officials working for the European Union was a translator.[111] In 2004, with an *n*-value of twenty (and thus three hundred eighty potential language pairs),[112] an incredible one in three European Union officials were translators or interpreters.[113] In 2002, it was estimated that all EU institutions combined translated more than 3 million pages per year;[114] in 2014, the Directorate General for Translation *alone* (which is to say, only one of the seven major EU translation bodies)

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[108] *Official EU Languages*, *supra* note 89.

[109] Samantha Hargitt, *What Could Be Gained in Translation: Legal Language and Lawyer-Linguists in a Globalized World*, 20 IND. J. GLOBAL LEGAL STUD. 425, 439 (2013) ("The European Union writes directives in either French or English and then must translate them into each of the official national languages of the member States"); Olga Łachacz & Rafał Mańko, *Multilingualism at the Court of Justice of the European Union: Theoretical and Practical Aspects*, 34(47) STUD. LOGIC, GRAMMAR & RHETORIC 75, 80 ("Approximately 95% of legal texts adopted in co-decision procedures are drafted, scrutinised and revised in English. For practical reasons English has become a primary language used in the daily work of the institutions . . . except for the [Court of Justice of the European Union], where for the same reasons French dominates."); Gerd Toscani, *Translation and Law – The Multilingual Context of the European Union Institutions*, 30 INT'L J. LEGAL INFO. 288, 294 (2002) ("A great deal of the daily administrative paperwork and much of the preparatory work for legislation is drafted and discussed by officials in-house in only one or two procedural or working languages, in practice English and/or French, with an increasing tendency towards English."). *See also* Yim, *supra* note 107, at 129 (explaining that the unofficial hierarchy of languages within the EU is, "in order of importance, English, French, German, and 'the rest.'").

[110] *Translation and the European Union*, *supra* note 19.

[111] Toscani, *supra* note 109, at 292.

[112] *Official EU Languages*, *supra* note 89.

[113] Yim, *supra* note 107, at 129.

[114] Toscani, *supra* note 109, at 295.

translated 2.3 million pages at an estimated cost of €330 million.[115] In 1999, the EU spent roughly €685.9 million on translation and interpretation services.[116] Today, the total cost of translation services alone across all EU institutions is estimated to be around €2 per citizen.[117] When multiplied by the current population of the European Union (about 503 million),[118] that leads to the conclusion that the EU now spends over €1 billion per year on translation services, or more than $1.09 billion US.[119]

B. *The Rise of the Lawyer-Linguist*

Originally, the European Union dealt with questions of legal drafting and translation separately, but it quickly found that there was often a significant disconnect between policymakers and translators which raised concerns about the quality of the translated texts, in particular regarding the lack of equivalence between the multiple supposedly identical translations of a given document.[120] To address those concerns, the EU began recruiting lawyers skilled in multiple languages to compare documents across their official translations. These specialists came to be known as "lawyer-linguists,"[121] because, as the title implies, they are trained to work on both legal and linguistic matters. A recruitment brochure for English-language lawyer-linguists at the Court of Justice of the European Union in Luxembourg listed the following among the necessary qualifications:

- Perfect command of English;
- Thorough knowledge of French;

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[115] *Frequently Asked Questions About DG Translation*, EUROPEAN COMMISSION (Oct. 28, 2015), ec.europa.eu/dgs/translation/faq/index_en.htm [hereinafter *Frequently Asked Questions*]; *Translation and the European Union*, *supra* note 19 (listing the major EU translation bodies).

[116] Toscani, *supra* note 109, at 294-95.

[117] *Frequently Asked Questions*, *supra* note 115 ("According to certain very rough estimates, the cost of all language services in the all EU institutions amounts to . . . around €2 per person per year.").

[118] *Living in the EU*, EUROPEAN UNION, europa.eu/about-eu/facts-figures/living/index_en.htm (last visited Jan. 1, 2016) ("The EU . . . has 503 million inhabitants.").

[119] *EURO-US DOLLAR Exchange Rate*, BLOOMBERG (Dec. 31, 2015, 5:07:10 PM), www.bloomberg.com/quote/EURUSD:CUR (listing €1 as equivalent to $1.0856).

[120] Colin Robertson, *Legal-linguistic Revision of EU Legislative Texts*, *in* 117 LINGUISTIC INSIGHTS: STUDIES IN LANGUAGE AND COMMUNICATION, LEGAL DISCOURSE ACROSS LANGUAGES AND CULTURES 51, 52 (Maurizio Gotti & Christopher Williams eds., 2010).

[121] *Id.* *See also* Council of the EU, *A Day in the Life of the Lawyer-Linguists*, YOUTUBE (Mar. 1, 2013), www.youtube.com/watch?v=n3c80Xpords; EU Careers, *Inside EU Careers: Law / Lawyer-Linguist*, YOUTUBE (Feb. 29, 2012), www.youtube.com/watch?v=vY1KKtEk1_k.

- Thorough knowledge of a third official language of the European Union;
- Successful completion of a suitable course in law, such as a degree in law, or its equivalent, awarded in the UK or Ireland or having qualified as a barrister, advocate or solicitor in the UK or Ireland;
- Adequate knowledge of Community/EU law; and
- The ability, though not necessarily from experience, to translate complex, legal texts.[122]

Though the exact requirements for a lawyer-linguist position can vary depending on the EU institution or agency that is hiring, the fundamental requirements are knowledge of three official EU languages and a relevant law degree.[123]

Lawyer-linguists work in teams of four or five per language, and are involved throughout the entire drafting process.[124] Under the "Co-decision" procedure (now known as "ordinary legislative procedure" under the Treaty on the Functioning of the European Union),[125] lawyer-linguists advise both the European Parliament and Council as they develop legislation, up to the final moment of adoption.[126] Colin Robertson, a lawyer-linguist working for the Council of the European Union, has described the role of multilingualism in the EU's legislative process as follows:

> [T]he Commission drafts; other institutions are involved to give an opinion, amend, approve, and then the text is considered satisfactory and ready for finalization. Drafting takes place on one language version, but that does not mean that language remains the basis for negotiation and drafting throughout. An important feature of EU procedures is that the language versions can to some extent become interchangeable. Thus the Commission might draft in French and the Council Presidency select the English translation for negotiation and amendment in the Council. In that case the French text becomes like a translation and is aligned on the revised English model. Or it may be the other way round. Or maybe there is a German original text, translated, worked on in French, then in English. . . . This interchangeability has linguistic implications and it is the task of transla-

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[122] EUROPEAN COURT OF JUSTICE, WORKING AS AN ENGLISH-LANGUAGE LAWYER LINGUIST AT THE COURT OF JUSTICE OF THE EUROPEAN UNION, LUXEMBOURG, curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/brochure_en.pdf.

[123] Robertson, *supra* note 120, at 53 ("[B]roadly, the requirement is to possess a law degree and at least two foreign languages in addition to [the] mother tongue.").

[124] *Id.* at 52. For a brief video of the drafting process in action, see *A Day in the Life of the Lawyer-Linguists*, *supra* note 121.

[125] *Legislative Powers*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers (last visited Jan. 1, 2016).

[126] Robertson, *supra* note 120, at 60-61.

> tors and revisers to be aware – and here it is appropriate to emphasize that the translators and linguistic revisers play a fundamental role in the quality of the EU legislative texts since their texts are those which are being seen by the negotiators and form the basis on which legal-linguistic revision later takes place.[127]

It is important to keep in mind that lawyer-linguists rely just as much on the first half of their title as they do on the second; it is their specialized legal knowledge, after all, that separates them from traditional translators and makes them essential to the complex multilingual drafting process just described.[128] With that said, a lawyer-linguist is not necessarily an expert on the subject matter of a document that they are translating,[129] and is not supposed to make substantive textual changes.[130] As Robertson explains, lawyer-linguists exist to facilitate the legislative process, but are not themselves the ones doing the legislating.

While working on a document, lawyer-linguists adhere to the principles of translation discussed above.[131] According to Robertson, the process of "legal-linguistic revision," which is one of the final steps in the EU legislative process, has two basic stages.[132] First, the most recent version of the source text is "settled," a process that includes standardizing its layout, double-checking its facts, consulting with relevant experts, and generally making sure it is as close to a final version as possible.[133] Second, the source text is made available to all lawyer-linguists who will be translating it, who, after requesting any necessary explanations or clarifications of the source text, conform their language versions to it.[134] This is essentially the same as Lessig's description of the translation process, in which a translator first achieves "familiarity" with a source text and then finds its "equivalence" in the target language.[135] In "settling" a text, the lawyer-linguists achieve "familiarity" with it, and they necessarily find its "equivalence" as they conform the other language versions to the source.

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[127] *Id.* at 61-62. For Robertson's biography, see PETER LANG, LINGUISTIC INSIGHTS: STUDIES IN LANGUAGE AND COMMUNICATION, LEGAL DISCOURSE ACROSS LANGUAGES AND CULTURES 338 (Maurizio Gotti & Christopher Williams eds., 2010).

[128] *See Inside EU Careers: Law / Lawyer-Linguist*, *supra* note 121 ("Lawyer linguists are often confused for translators. We're not translators; we are responsible . . . for the quality of legislation.").

[129] Robertson, *supra* note 120, at 68 ("The legal-linguistic reviser is not a policy expert and in general has no background knowledge of the field or text in question.").

[130] *Id.* at 70-71 ("The text worked on has been agreed by the negotiators as reflecting what they want and is *politically agreed*. This must be respected.").

[131] *See supra* Part I(B).

[132] Robertson, *supra* note 120, at 62-64.

[133] *Id.*

[134] *Id.*

[135] Lessig, *supra* note 35, at 1194.

C. *Criticism of the Multilingualism Policy*

It would be reasonable to assume that the existence of twenty-four "equally authentic" versions of the same regulation would serve only to complicate the judicial process;[136] after all, in the United States, dealing with the ambiguities of legislation written in only one language is already quite a daunting task.[137] However, multiple commentators have suggested that the opposite may be true, and that having a number of official versions of a given statute actually aids the Court of Justice of the European Union ("CJEU")[138] in making its decisions by giving the court a broader view of the intentions of the legislature.[139]

In its seminal *CILFIT v. Ministry of Health* decision, the CJEU stated that, "it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions."[140] When dealing with an ambiguous statute, the CJEU will often explicitly examine the text across its multiple official translations in an attempt to deduce the statute's underlying purpose.[141] Take, for example, the following excerpt from the 1985 case of *Commission v. United Kingdom*, in which the CJEU looked at multiple translations of a Regulation in an attempt to

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[136] *See* Schilling, *supra* note 93, at 1240 ("When all . . . language versions are equally authentic, and not all of them, considered each on its own, have the same meaning, it follows that different meanings are equally authentic.").

[137] *See, e.g.*, United States v. Santos, 553 U.S. 507 (2008) (deciding whether "proceeds" means "receipts" or "profits" for the purposes of the federal money-laundering statute), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, 18 U.S.C. § 1956(c)(9); Babbitt v. Sweet Home Chapter Cmty's for Great Or., 515 U.S. 687 (1995) (examining whether the Secretary of the Interior had appropriately interpreted the word "take" for the purposes of the Endangered Species Act of 1973).

[138] The CJEU is sometimes also referred to as the "European Court of Justice" or the "ECJ," but for consistency's sake, I will use "CJEU" throughout this Note. *See, e.g.*, *European Court of Justice*, CITIZENS INFORMATION (Aug. 27, 2013), http://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_institutions/european_court_of_justice.html.

[139] *See generally* Lawrence M. Solan, *The Interpretation of Multilingual Statutes by the European Court of Justice*, 34 BROOK. J. INT'L L. 277 (2009); *see also* Jan Engberg, *Symposium: Creating and Interpreting Law in a Multilingual Environment: Panel II: Multilingual Regulation – The EU Experience: Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation*, 28 BROOK. J. INT'L L. 1135 (2004).

[140] CILFIT v. Ministry of Health, Case No. 238181, 1982 E.C.R. 3415 ¶18.

[141] *See* Solan, *supra* note 139, at 283 (noting that, for the CJEU, "language provides a somewhat unique kind of evidence of purpose," and that it regards it specially for that reason).

determine how it would tax fish obtained in a joint British-Polish fishing venture:

> [I]t should be noted that the phrase 'extraits de la mer' or its equivalent is employed in the Greek, French, Italian and Dutch versions of Regulation No 802/68 and is capable of meaning both 'taken out of the sea' and 'separated from the sea.' Even allowing that the English version, which uses the phrase 'taken from the sea', has the significance attributed to it by the United Kingdom ('complete removal from the water'), the German version of the regulation employs the term 'gefangen,' meaning 'caught,' as the United Kingdom itself acknowledges, claiming that 'it seems . . . to be an inappropriate term to use.'[142]

In the end, the CJEU found that a purely semantic examination of the Regulation proved ambiguous, and decided the case on policy grounds.[143] Even if the multiple language versions of a statute do not provide a decisive answer, they provide at least a useful starting point for statutory interpretation. For this reason, the court's general policy is "to start . . . with a reading of the . . . various language versions . . . [while ultimately giving] clear preference to policy-oriented interpretation over linguistic interpretation."[144] At worst, multilingual legislation can be considered to be a non-factor in the CJEU's process. It certainly does not seem to be harmful, and if the vast majority of official translations point towards or away from a proposed interpretation, then it has the potential to aid judges in their decision-making.

For the purposes of this Note, the most relevant criticism of the Multilingualism Policy is that it does not sufficiently acknowledge speakers of "minority languages," which are the various non-dominant languages spoken throughout the EU member states.[145] The EU neither funds nor directly supports minority languages, despite the fact that a number of them are more widely spoken than official European languages.[146] For example, the official EU languages of Irish and Maltese have about 275,000 and 520,000 speakers worldwide,[147] while Basque, Galician, and

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[142] Comm'n v. United Kingdom, Case No. 100/84 1985 E.C.R. 1169 ¶15.

[143] *Id.* ¶¶ 16-18.

[144] Łachacz & Mańko, *supra* note 109, at 82-83.

[145] *See* Schilling, *supra* note 93, at 1241 ("The conclusion of all this is quite clear: there is no general principle of Community law requiring the respect of [minority] language rights."); Yim, *supra* note 107, at 133 ("The current policy does not serve the purposes of multilingualism because it is merely reinforcing the privileged position of particular languages.").

[146] *Multilingualism*, *supra* note 92 ("[N]ational governments . . . determine [minority] languages' legal status and the extent to which they receive support.").

[147] *Irish*, ETHNOLOGUE, www.ethnologue.com/language/gle (last visited July 5, 2015); *Maltese*, ETHNOLOGUE, www.ethnologue.com/language/mlt (last visited July 5, 2015).

Catalan, minority languages found primarily in Spain, have worldwide speakership totals of about 540,000, 2.4 million, and 4 million.[148] Additionally, Galician, Basque, and Catalan even have official language status within Spain; they are co-official with Spanish in the Autonomous Communities of Cataluña, the Basque country, and Galicia, respectively.[149] Despite this, native speakers of these "minority languages" are not entitled to communicate with nor receive a response from the European Union without learning a second language.[150] The EU already fully accommodates Irish and Maltese, each of which can be objectively considered more of a "minority" language in terms of overall number of speakers than any of the other three languages just discussed. The EU's refusal to recognize widely spoken non-dominant languages seems at best inconsistent with the lofty representative goals of the Union's Multilingualism Policy.

Of course, there are a number of reasons for the EU not to throw open the doors of its Multilingualism Policy to the sixty minority languages currently spoken across Europe.[151] Most practically, it would be prohibitively expensive. At the moment, the EU has twenty-four official languages and spends more than €1 billion per year on translation; increasing the number of official languages to eighty-four (which would be the logical conclusion of a fully inclusive European Multilingualism Policy) would result in 6,972 potential language pairs and untold billions of euros more in administrative costs. Even if the EU were to explicitly restrict its drafting languages to solely English and French, so long as it was required to produce official translations of all major documents in each official language, the number of commonly used language pairs would be greater than one hundred sixty. Suffice it to say that while the ambition and scope of the EU's Multilingualism Policy are admirable, and the lawyer-linguist system is a fantastic innovation, the Multilingualism Policy in its current state is open to a number of legitimate representational criticisms.[152]

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[148] *Basque*, ETHNOLOGUE, www.ethnologue.com/language/eus (last visited July 5, 2015); *Galician*, ETHNOLOGUE, www.ethnologue.com/language/glg (last visited July 5, 2015); *Catalan*, ETHNOLOGUE, www.ethnologue.com/language/cat (last visited July 5, 2015).

[149] *See* M. TERESA TURELL, MULTILINGUALISM IN SPAIN: SOCIOLINGUISTIC AND PSYCHOLINGUISTIC ASPECTS OF LINGUISTIC MINORITY GROUPS 1 (2000).

[150] The EU only recognizes the right to communicate with its institutions in its official languages. *See* TFEU arts. 20, 24.

[151] *Multilingualism*, *supra* note 92.

[152] For more information on the status of minority languages, both in Europe and around the world, see generally Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719 (2001); Stella Burch Elias, *Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe*, 28 BERKELEY J. INT'L L. 261 (2010); Moria Paz,

IV. An American Legal Translation Policy

A. *US and EU Translation Policy Compared*

As discussed above, there is no regulation of translation (legal or otherwise) in the United States.[153] There are a number of reasons, including access to justice and evidentiary concerns, that the US should oversee the legal translation process to at least some degree.[154] The European Union's Multilingualism Policy presents a uniquely well-developed and far-reaching example of a governmental translation regime,[155] and there is much that the US can learn from it.

The most important takeaways from the EU's experience are that, unsurprisingly, legal translation works best when the translator is trained in both the law and in translation, and more generally that developing an effective, wide-ranging translation policy is possible. That is not to say that the US should (or even could) adopt the EU system root and branch. The lack of any official national language makes a direct transplant impossible, for one, and with over three hundred languages spoken across the United States,[156] giving official recognition to any of them has the potential to create issues of minority language representation even greater than those present in the EU. Additionally, as seen in the European Union discussion above, the costs that would be involved in implementing and maintaining a system requiring mandatory translation of all major governmental documents into even one or two additional languages would be astronomical.[157]

The lack of an official US language actually simplifies the situation quite a bit, as it places all languages (at least theoretically) on an equal footing. While English may be the *de facto* official language of the United States, since that status is not *de jure* at the federal level, there are no official benefits afforded to it that would need to be extended to languages officially recognized by a federal translation regime.

B. *An American Translation Policy Proposal*

The Administrative Office of the United States Courts' federal interpreter certification program provides a good model from which to start.[158] An obvious advantage of the program is its flexibility – its three tiers allow for a large number of people to serve as court interpreters while showing a clear preference for more experienced candidates. Addi-

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The Failed Promise of Language Rights: A Critique of the International Language Rights Regime, 54 Harv. Int'l L.J. 157 (2013).

[153] *See supra* Part II.

[154] *Id.*

[155] *See supra* Part III.

[156] U.S. Census Bureau, *supra* note 15, at 4.

[157] *See supra* Part III(C).

[158] *See supra* Part II(B); Admin. Office of U.S. Courts, *supra* note 71.

tionally, it can be thought of as being "language-neutral," by which I mean that a speaker of any language could potentially serve as either a Professionally Qualified or *Ad Hoc* Interpreter depending upon their qualifications.

With that in mind, I suggest that the United States implement a translation regulation system for the federal courts along the lines of the federal interpreter certification program, keeping in mind what the EU has learned about the importance of employing individuals with both legal and linguistic expertise.[159] Such a system should be "language-neutral" and permit translators of a variety of skill levels to operate within the system. A three-tiered system along those lines would look something like this:

1. Certified Translators: These would be the American equivalent of the European Union's lawyer-linguists, and the highest level of certification available. To qualify as a Certified Translator, an individual would have to pass a government issued translation exam and possess a law degree. As shown by the EU's experience, the law degree is essential to ensure quality translation of complex legal documents.
2. Professionally Qualified Translators: Of course, the government cannot be expected to create translation certification exams for every language used in the United States, and not all otherwise well-qualified translators will possess law degrees. A person could qualify for this level of certification by having been certified by the American Translator's Association[160] or a similar trade group.
3. Language Skilled/*Ad Hoc* Translators: One of the advantages of the current lack of regulation is the relative ease with which a certified translation can be prepared, and at least at this lowest level, it makes sense to largely preserve that. However, translators should be required to do more than simply sign off on their work in front of a notary; since a Language Skilled/*Ad Hoc* translator will likely not be appearing in court and their facility with translation will not necessarily be apparent to a judge, a translation at this level should at least be accompanied by a form including relevant information such as how to contact the translator and his or her relevant language experience.

Just as the courts prefer Certified Interpreters under the current system for interpretation,[161] there would be a similar preference for Certified

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[159] *See supra* Part III(A).

[160] *See Certification*, AM. TRANSLATORS ASSOC., www.atanet.org/certification/landing_about_certification.php (last visited Jan. 1, 2016).

[161] *See* Court Interpreters Act, 28 U.S.C. §1827(d) (2012) ("The presiding judicial officer . . . shall utilize the services of the most available certified interpreter, or when

Translators under this proposed system. Given that not all translations provided to a court are equally important, however, exceptions to that rule could exist for short, simple documents whose translation is not at issue. However, it would obviously be preferable for a Certified or Professionally Qualified Translator to provide the translation of a disputed document or a document that would affect someone's legal status or the status of his or her property (e.g. birth certificates, deeds, etc.).

The issue of minority language representation in the European Union, discussed above, shows how complicated the decision of which languages to include in a translation policy can be.[162] However, there is an obvious administrative value in courts relying upon government-certified translators rather than those certified by third parties, and for the government to certify translators, it will need to develop instruments with which to do so. Practically speaking, the greatest need in the courts is likely for Spanish-to-English translators,[163] but that should not be taken for granted, and it certainly is not the only translation certification program that should be developed.

Ideally, the language demographics of the United States would be regularly monitored to ensure that the proposed translation policy is able to respond to the country's changing language needs and develop appropriate translation certification exams accordingly. Interestingly, such a monitoring apparatus already exists in the Voting Rights Act of 1965, which requires the publication of voting materials in multiple languages "where the Director of the Census determines that more than five per centum of the citizens of voting age residing in [a] State or political subdivision are members of a single language minority."[164] By developing certification exams along these lines (that is, focusing on languages spoken by a percentage of citizens above a certain threshold), the government would avoid the EU's Irish and Maltese problem, where some relatively little-spoken languages are accommodated at the expense of other, more widely spoken languages.

Conclusion

The effects of an improper legal translation can be at once very subtle and incredibly far-reaching, as the "shall" problem in *Foster* and

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no certified interpreter is reasonably available . . . the services of an otherwise competent interpreter. . . .").

[162] *See supra* Part III(C).

[163] In 2011, 60.5 million Americans reported speaking a language other than English at home. Of this group, 37.5 million spoke Spanish instead, and more than 25% of people who spoke Spanish at home did not speak English well or at all. The next most widely reported language used at home was Chinese, with 2.8 million speakers, just under 30% of whom were not able to speak English well or at all. U.S. Census Bureau, *supra* note 15, at 3, 5.

[164] 52 U.S.C. §10303(f)(3) (2012).

Percheman demonstrated. In order to avoid these unintended consequences, a legal translator should be fully proficient not just in the languages he or she works in, but also in translation theory and every legal system involved in a given document. Despite the risks of relying upon a bad translation, legal translation in the United States is currently completely unregulated. By looking to the European Union's Multilingualism Policy and to the current system for certifying United States federal court interpreters, it is possible to sketch out an American legal translation regulation policy that would both be sufficiently flexible and allow for more reliable legal translations. Regardless of whether the system proposed above is implemented, it is my hope that in the future this critical yet understudied area of United States legal culture will receive the attention it deserves.