Clogged Conduits: A Defendant's Right to Confront His Translated Statements

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A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Justice Oliver Wendell Holmes[1]

INTRODUCTION

Recall the childhood game "telephone." Children are arranged in a large circle, and one child whispers a short phrase to the child on his or her left. That child then whispers what he or she heard to the child on his or her left, and so on. The game ends when the child to the original child's right receives the message and announces what he heard. Inevitably, what the final child announces bears little, if any, resemblance to the original child's message.

Rather than a large circle of children, imagine only four children, and compare this to the following situation: A non-English-speaking defendant, in a police interview, answers a police officer's questions through a foreign-language interpreter. The interpreter translates the defendant's—the original child's—statements for the police officer. At trial, the police officer relays the defendant's statements—initially conveyed to the police officer by the translator—to the jury to be considered as evidence. The final child to hear the message, for whom the original message is most distorted, is the jury.

The telephone game warps the original child's message. Typically, the hearsay rules of the Federal Rules of Evidence (FRE) prevent potential distortion by excluding hearsay testimony. When a person's testimony includes out-of-court statements

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1 *Towne v Eisner*, 245 US 418, 425 (1918).

made by another person who does not testify, and when those statements are meant to prove the truth of the matter asserted, the testimony is ordinarily inadmissible under the hearsay rules.[2] When hearsay is admissible in a criminal proceeding under a hearsay exception, however, the Sixth Amendment's Confrontation Clause provides a defendant the right to confront witnesses who testify against him.[3] Thus, the defendant may cross-examine the person who made the out-of-court statement(s). This right is limited by the defendant's prior opportunities to cross-examine witnesses.[4] Logically, this applies to the defendant's own statements—he is allowed to take the stand at trial and testify to his prior statements made to the police. The relationship between hearsay and the Confrontation Clause is complex, however, and is in something of a state of flux.[5]

In the telephone game, it is unclear whether the original child may confront the various children in the circle. When a person testifies to a defendant's own statements for use against the defendant, the statements are not hearsay, and the out-of-court person is not subject to cross-examination.[6] In the game, are the statements appropriately considered the original child's own after they have been communicated around the circle, or should each child be considered a separate declarant? If the latter, the final child's announcement would be considered hearsay, and the other children in the circle would be subject to cross-examination. Analogously, it is unclear whether the criminal defendant has a constitutional right to confront the foreign-language interpreter—the second child in the four-person hypothetical—because it is unclear whether the foreign-language interpreter's out-of-court statements are hearsay.

Courts are divided on this issue. The vast majority have held that the final child's statements are equivalent to the original child's for the purpose of hearsay analysis. These courts

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2 See FRE 801(c), 802.

3 US Const Amend VI. See also Charles Alan Wright and Peter J. Henning, 2A *Federal Practice and Procedure* § 412 at 129 (West 4th ed 2009) ("In criminal cases, the Confrontation Clause provides an important additional barrier against admission of hearsay offered by the prosecution that might otherwise be admissible.").

4 See Michelle M. Weiner, Comment, *Corrosion of the Confrontation Clause in North Carolina: A Comparison of* State v. Brewing *and* State v. Ortiz-Zape *with* State v. Craven, 36 NC Cent L Rev 295, 298 (2014).

5 See *United States v Romo-Chavez*, 681 F3d 955, 962 & n 1 (9th Cir 2012) (Berzon concurring) (claiming that the Ninth Circuit's understanding of the hearsay rules rests on an outdated conception of the Confrontation Clause).

6 See FRE 801(d)(1). For a full discussion of the hearsay rules, see Part I.A.

have explained that, for a non-English-speaking defendant, a foreign-language interpreter acts as a "language conduit" or an agent for the defendant, so there is no hearsay issue—a defendant is not entitled to "confront himself."[7] The Eleventh Circuit, however, has taken a different approach:[8] because the interpreter necessarily engages in some independent analysis when translating the defendant's statements, the interpreter is considered a separate declarant.[9] Thus, the police officer's testimony concerning the interpreter's out-of-court statements is hearsay, entitling the defendant to confront the interpreter.[10]

This distinction has significant implications. Consider, for example, an officer's testimony that a Creole defendant admitted, via an interpreter during an interrogation, that "when she sat down [on the plane], she started reading the [official immigration travel authorization] document and she noticed that the document was illegal because it didn't fit her profile."[11] How did the interpreter determine that what the defendant said in Haitian Creole translates to "illegal" in English? Similarly, why did the interpreter describe the defendant's statements as not "fit[ting] her profile"? Without an opportunity to cross-examine the interpreter, it is impossible to say that the defendant knew that her immigration documents were illegal. Next, consider an officer's testimony that a Mexican defendant purportedly confessed, through an interpreter, to knowing that his vehicle was "loaded."[12] Did the defendant understand that the car was "loaded" with illegal drugs or simply with gasoline? Without an opportunity to cross-examine the interpreter, it is impossible to say that the defendant knew that his car was "loaded" with illegal drugs, rather than simply "loaded" with innocuous goods.

Finally, consider a situation in which a police officer *deliberately* misconstrues a defendant's translated statements.[13] When the subpoena power is limited, it is impossible—without cross-examining the interpreter—to know how an interpreter

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[7] *United States v Orm Hieng*, 679 F3d 1131, 1139 (9th Cir 2012), citing *United States v Nazemian*, 948 F2d 522 (9th Cir 1991).

[8] See generally *United States v Charles*, 722 F3d 1319 (11th Cir 2013).

[9] See id at 1324.

[10] See id.

[11] Id at 1321.

[12] *United States v Martinez-Gaytan*, 213 F3d 890, 891 (5th Cir 2000).

[13] See, for example, Matthew Walberg, *Inmate: Cop Coerced False Testimony*, Chi Trib 1.6 (Dec 25, 2010) (explaining accusations that a police officer falsely translated several Spanish-speaking suspects' statements).

arrived at a particular translation of a defendant's statements, let alone to ensure that a police officer accurately relayed the statements. Cross-examining an interpreter helps establish the accuracy of a foreign-language translation, including the basis for interpretive decisions; this is important because translated statements are often critical evidence.

This Comment explores the scope of Confrontation Clause rights when a foreign-language interpreter translates a defendant's statements to the police. It argues that these interpreters should be subject to confrontation—a position very much aligned with linguistic theory and Supreme Court precedent. For example, in immigration proceedings, non-English-speaking immigrants regularly challenge translations, and courts have held that an inaccurate translation constitutes a violation of the Fifth Amendment's Due Process Clause.[14]

Whether a non-English-speaking defendant has an opportunity to confront his interpreter(s) is an increasingly important issue. In fiscal year 2013, district courts reported that they used interpreters more than 330,000 times to translate 117 languages.[15] Further, as of December 31, 2012, there were over 90,000 non-US-citizen inmates in federal and state prisons,[16] and between October 1, 2009, and September 30, 2010, 48.1 percent of convicted offenders (37,428 individuals) were non–US citizens.[17] This reflects a broader societal trend in the United States: in the 2010 national census, over 60 million individuals reported speaking a language other than English at home, and over 22 percent of those individuals (over 13 million individuals) reported speaking English "not well" or "not at all."[18]

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14 See, for example, *Tun v Gonzales*, 485 F3d 1014, 1026 (8th Cir 2007); *Giday v Gonzales*, 434 F3d 543, 549 & n 2 (7th Cir 2006) (noting pervasive translation errors from Tigrean to English).

15 *Public Accessibility and Service*, Director's Annual Report (Administrative Office of the US Courts 2013), online at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2013/the-courts/public-accessibility-and-service.aspx (visited Nov 3, 2014).

16 E. Ann Carson and Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases, 1991–2012* *41 (DOJ Dec 2013), online at http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf (visited Nov 3, 2014).

17 Mark Motivans, *Federal Justice Statistics 2010—Statistical Tables* *20 (DOJ Dec 2013), online at http://www.bjs.gov/content/pub/pdf/fjs10st.pdf (visited Nov 3, 2014).

18 Camille Ryan, *Language Use in the United States: 2011* *3 (US Census Bureau Aug 2013), online at http://www.census.gov/prod/2013pubs/acs-22.pdf (visited Nov 3, 2014).

This Comment proceeds in three parts. Part I addresses how hearsay and the Confrontation Clause intersect, focusing on the Supreme Court's jurisprudence following *Crawford v Washington*.[19] Part II examines how courts have split over whether a foreign-language interpreter should be considered a language conduit or whether his or her out-of-court statements should be considered hearsay. Part III demonstrates that the language-conduit reasoning is fundamentally flawed and proposes a clear rule: foreign-language interpreters must always be subject to Confrontation Clause analysis unless an agency relationship can be affirmatively proven.

I. Hearsay and the Confrontation Clause

This Part outlines the relationship between hearsay, as defined in the FRE, and the Confrontation Clause. When a witness testifies to another person's out-of-court statements, a hearsay issue must be shown to exist for courts to consider whether the Confrontation Clause applies. If the Confrontation Clause applies, the nontestifying person is subject to the subpoena power, but this right is limited.[20] A subpoena may be quashed if the court determines that it is unduly burdensome, unreasonable, or oppressive.[21] In the case of the Creole defendant presented in the Introduction, for example, the police employed a telephonic interpreter, engaged pursuant to a government contract, who may have been hundreds of miles away from the defendant's interrogation at Miami International Airport.[22] It is easy to imagine the court determining that a subpoena for a geographically distant interpreter would be unduly burdensome, precluding the defendant from cross-examining the interpreter. If the Confrontation Clause applied to the interpreter, however, the interpreter's translation of the defendant's statements would be admissible only if the interpreter testified at trial.

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19 541 US 36 (2004).

20 See FRCrP 17.

21 See FRCrP 17(c)(2). See also Laura Dietz, et al, 81 Am Jur 2d Witnesses § 25 at 78–79 (West 2004).

22 See Brief of the Appellant Manoucheka Charles, *United States v Charles*, No 12-14080-CC, *6–7 (11th Cir filed Oct 24, 2012) (available on Westlaw at 2012 WL 5457595). In this case, an interpreter from the firm Lazar & Associates Translating and Interpreting Services was employed; the firm is headquartered in Los Angeles, California. See Lazar & Associates Translating and Interpreting Services, *Contact Us* (Lazar and Associates 2009), online at http://www.lazar.com/contactus.html (visited Nov 3, 2014).

First, this Part introduces the FRE hearsay rules. Second, it provides a brief introduction to the Confrontation Clause's storied tradition and analyzes the Supreme Court's evolving standards to determine whether a nontestifying person's statements confer the right to cross-examine the nontestifying person under the Confrontation Clause. As will be shown, when "testimonial" hearsay is admitted into evidence, the evidence's admission is still contingent on subjecting the witness providing the hearsay to cross-examination, a right afforded by the Confrontation Clause.

A. Hearsay at the Threshold

The FRE define "hearsay" as "a statement that: (1) the declarant does not make while testifying . . . and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."[23] This definition may be decomposed into four parts. First, a "statement" is an oral or written assertion or nonverbal conduct that the person intended as an assertion.[24] Second, a "declarant" is "the person who made the statement."[25] Third, the statement must be made out of court.[26] Fourth, the statement must be offered to prove the truth of the matter asserted in the statement.[27]

Sir Walter Raleigh's 1603 trial for treason provides one of the earliest recorded examples of hearsay.[28] One witness, a sailor named Dyer, testified that a "Portuguese gentleman" told him that Raleigh, in a conspiracy with Lord Cobham, had a plot to kill the English king.[29] The Portuguese gentleman did not testify at trial—his out-of-court statements to the testifying witness were hearsay.[30] Hearsay rules are meant, in part, to ensure evidence's reliability. One treatise explains, "The rule against hearsay seeks to eliminate the danger that evidence will lack reliability

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[23] FRE 801(c).

[24] See FRE 801(a).

[25] FRE 801(b).

[26] See FRE 801(c)(1).

[27] See FRE 801(c)(2).

[28] See David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 S Ct Rev 1, 38; *Crawford*, 541 US at 44.

[29] See Bruce Williamson, *Sir Walter Raleigh and His Trial: A Reading Delivered before the Honourable Society of the Middle Temple November 13, 1935* 20–21 (Pitman 1936).

[30] See id at 21 (recounting that Raleigh protested at his trial, "I may be massacred by mere hearsay").

because faults in the perception, memory, or narration of the declarant will not be exposed."[31] In Raleigh's case, for example, it would have been impossible, without cross-examination, to know whether the Portuguese gentleman intended to inculpate Raleigh and thus had motivation to lie to or mislead Dyer. That is, without confronting the Portuguese gentleman, it would have been impossible to discern the objective truth and probative value of his statements.[32]

Contrary to Raleigh's trial—in which the witness's hearsay testimony led, in part, to Raleigh's conviction for treason—hearsay is inadmissible as evidence today unless a federal statute, a contravening Supreme Court rule, or the FRE provide otherwise.[33] Certain statements that meet the four criteria discussed above are not hearsay and thus are admissible: a declarant-witness's prior statements[34] and statements offered against an opposing party.[35] Other statements are considered hearsay but may be admissible under a hearsay exception. This distinction is important: in criminal proceedings, it determines which evidence is subject to the Confrontation Clause. The Confrontation Clause allows a defendant to cross-examine a person providing testimonial hearsay offered against him, but this right does not attach to admitted evidence that is not hearsay, including evidence that falls within FRE 801(d) despite meeting the four elements of FRE 801(a)–(c).[36] The FRE divide the hearsay exceptions into three categories: when the declarant's availability is immaterial,[37] when the declarant is unavailable,[38] and a residual exception.[39] On admission, a fact finder is entitled to

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31 Jack B. Weinstein and Margaret A. Berger, 5 *Weinstein's Federal Evidence* § 802.02[3] at 802-6 to -7 (Matthew Bender 2013).

32 See Williamson, *Sir Walter Raleigh and His Trial* at 20 (cited in note 29) (noting "how far" the judges in Raleigh's trial went to accept "utterly worthless evidence").

33 See FRE 802. See also Williamson, *Sir Walter Raleigh and His Trial* at 12 (cited in note 29) (clarifying that Raleigh's trial was markedly "contrary to modern practice").

34 See FRE 801(d)(1).

35 See FRE 801(d)(2). This is frequently termed the "party-opponent" rule. See Michael H. Graham, 30B *Federal Practice and Procedure: Federal Rules of Evidence* § 7015 at 183 (West 2d ed 2011).

36 For a discussion of the Supreme Court's Confrontation Clause jurisprudence, see Part I.B.

37 FRE 803 (including exceptions for present sense impression, excited utterances, public records, and judgment of a prior conviction, among others).

38 FRE 804 (including exceptions for when the declarant is unavailable as a witness, and for statements made under the belief of imminent death, against the declarant's interest, or about the declarant's personal or family history, among others).

39 FRE 807:

treat hearsay's probative value as equivalent to the testimony of a witness in court.[40] These exceptions are largely not germane to this Comment, save the residual exception, which is discussed in Part III.C.

Recall the four-party situation from the Introduction involving a non-English-speaking defendant, a foreign-language translator, an interrogating police officer, and a jury. When the police officer testifies about out-of-court statements made by the non-English-speaking defendant, and a foreign-language interpreter translated the defendant's statements for the officer, there is a question of which person is considered the "declarant" under FRE 801(b). If the translator is the declarant, the officer's statements would be inadmissible hearsay and the translator would be subject to the Confrontation Clause.[41] But if the non-English-speaking defendant is the declarant, the statement may be admissible as the statement of a party-opponent.[42] As explained above, this would not be hearsay. When the defendant is considered the declarant, the interpreter may be considered the defendant's agent or a language conduit for the defendant's statements.[43] In that case, the interpreter's statements would not be hearsay and thus would not be subject to the Confrontation Clause.

Consider the following diagrams of this interaction. Each arrow represents a communication. In Figure 1, the non-English-speaking defendant is the declarant—there is no hearsay issue because the police officer's testimony is purportedly the defendant's own statement, with the interpreter as a supposed language

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

40 See Kenneth W. Graham Jr and Michael H. Graham, 30 *Federal Practice and Procedure: Federal Rules of Evidence* § 6322 at 23 (West 2013).

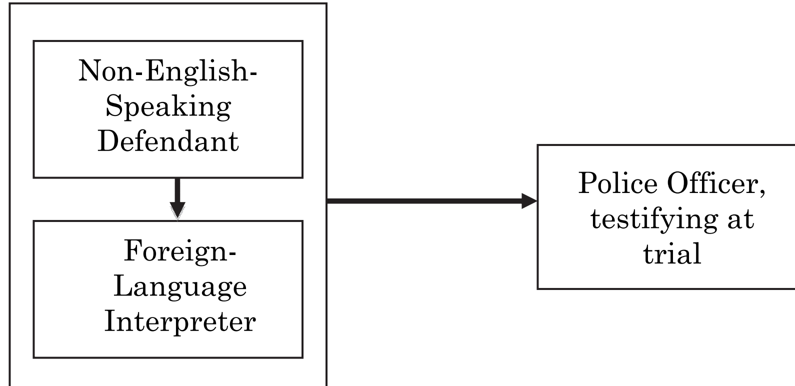
41 That is, the translator would be subject to cross-examination. For a detailed consideration of the Confrontation Clause, see Part I.B.

42 See FRE 801(d).

43 A party-opponent's statements and a witness's own prior statements are not considered hearsay. See FRE 801(d)(1)–(2). For a discussion of the language-conduit theory, see Part II.A.

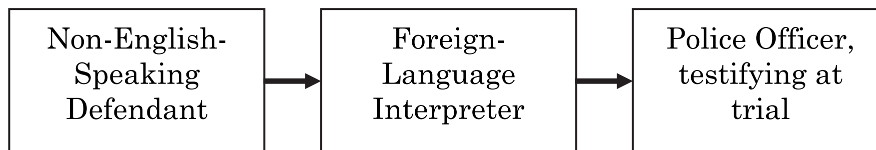
conduit or agent for the defendant.[44] Because there is not a hearsay issue, there is also not a Confrontation Clause issue.

FIGURE 1. DEFENDANT AS THE DECLARANT: NO HEARSAY ISSUE



By contrast, Figure 2 shows the interpreter as a declarant. Here, there is a double hearsay issue—both the defendant's statements to the interpreter and the interpreter's statements to the police officer are considered hearsay when the police officer testifies in court. Accordingly, the defendant would have a right to confront the interpreter's statements to the police officer.[45]

FIGURE 2. INTERPRETER AS THE DECLARANT: HEARSAY ISSUE



If the statements in question are hearsay, a court will either deny or grant their admission under a hearsay exception. When hearsay is admitted in a criminal proceeding, a court will then

[44] The box around the defendant and interpreter represents the hearsay exception. For hearsay purposes, the parties' statements stem from the same source.

[45] Of course, the defendant's statements to the interpreter are considered nonhearsay if the interpreter testifies because the testimony is based on the defendant's own statements. See FRE 801(d). See also R. Bruce W. Anderson, *Perspectives on the Role of Interpreter*, in Richard W. Brislin, ed, *Translation: Applications and Research* 208, 211 (Gardner 1976) (diagramming multiple interactions involving interpreters, including negotiations involving two interpreters and a translation to a crowd of listeners).

consider whether there is a Confrontation Clause issue.[46] The next Section describes the evolving Confrontation Clause standards: when a person's testimony is deemed admissible hearsay, these standards determine whether a defendant has a Sixth Amendment right to cross-examine a nontestifying person who made out-of-court statements.

B. The Right of Confrontation: A Historical Tradition and Modern, Evolving Standards

The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[47] A defendant's right to confront his accusers originated in Roman law,[48] and William Blackstone documented the right in his works on trials by jury.[49] The Founders memorialized this right in the Sixth Amendment's Confrontation Clause.[50] Professor Akhil Amar posits that the purpose of the Confrontation Clause is to "promote the truth."[51] Confronting one's accusers allows a defendant to identify a witness's perjurious statements, potential mistakes, and gaps in testimony, all of which the fact finder may consider in making credibility determinations.[52] The Supreme Court held that the Fourteenth Amendment carries the right into state criminal cases in *Pointer v Texas*.[53]

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[46] Recall that the Confrontation Clause inquiry applies to a defendant only in a criminal proceeding, whereas the hearsay rules apply to both civil and criminal proceedings. See text accompanying notes 33–34.

[47] US Const Amend VI.

[48] See *The Acts of the Apostles* 25:16–17 (Moffatt Testament Commentary) ("Romans were not in the habit of giving up any man until the accused met the accusers face to face and had a chance of defending himself against the impeachment."). For a comprehensive analysis of the early Roman and medieval history of the right to face one's accuser, which underpins the Confrontation Clause, see generally Frank R. Herrmann and Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va J Intl L 481 (1994).

[49] See William Blackstone, 3 *Commentaries on the Laws of England, in Four Books* 372 (Legal Classics 1983). See also Charles Alan Wright and Kenneth W. Graham Jr, 30 *Federal Practice and Procedure* § 6344 at 432–33 & n 796 (West 2013).

[50] See Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J Pub L 381, 390–95 (1959) (providing a comprehensive history of the Confrontation Clause in early colonial America).

[51] Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Georgetown L J 641, 688 (1996).

[52] See id at 688–89.

[53] 380 US 400, 403 (1965).

The Supreme Court's original test for admitting hearsay, set forth in *Ohio v Roberts*,[54] turned on whether a witness's testimony bore adequate "indicia of reliability."[55] In order to survive a Confrontation Clause challenge under *Roberts*, the witness had to be unavailable and the hearsay marked with certain badges of trustworthiness in order for the hearsay to be admitted.[56] By contrast, any witness who provided hearsay that a court deemed *un*reliable was subject to cross-examination under the Confrontation Clause.[57] Reliability could be inferred in established hearsay exceptions,[58] but otherwise, a party had to demonstrate a "particularized guarantee[ ] of trustworthiness" in order for the hearsay evidence to be admitted.[59]

Crawford fundamentally changed this inquiry. Under *Crawford*, *any* testimonial hearsay is subject to confrontation.[60] A witness's out-of-court testimonial hearsay may be admitted at trial only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[61] *Crawford* involved out-of-court statements of the defendant's wife to police officers: the wife's taped statement was played at trial.[62] The defendant had no opportunity to cross-examine the witness because she was not required to testify at trial under state marital privilege laws.[63] The Washington Supreme Court allowed the wife's testimony to be admitted under a *Roberts*-reliability analysis,[64] but the Supreme Court reversed, determining that her testimony was inadmissible under the new standard.[65]

Abrogating *Roberts*, the Court concluded that an inquiry into whether the Confrontation Clause applies is a procedural, rather

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[54] 448 US 56 (1980).

[55] Id at 65–66.

[56] See id at 65.

[57] See id.

[58] See, for example, FRE 803 (establishing hearsay exceptions for excited utterances, present sense impressions, and business records). See also notes 37–39 and accompanying text.

[59] *Roberts*, 448 US at 66.

[60] See *Crawford*, 541 US at 68.

[61] See id at 53–54 (noting that a prior opportunity for cross-examination might occur at a preliminary hearing, before a grand jury, or during a previous trial).

[62] Id at 38.

[63] Id at 38, 40, citing Wash Rev Code § 5.60.060(1) (1994).

[64] *State v Crawford*, 54 P3d 656, 663–64 (Wash 2002) (en banc).

[65] *Crawford*, 541 US at 69. Interestingly, Amar had recommended a *Crawford*-style approach several years earlier, suggesting that the Court "tak[e] the text seriously" and abandon the *Roberts* balancing test. Amar, 84 Georgetown L J at 690–91 (cited in note 51).

than a substantive, question.[66] Thus, a court's inquiry should look to the nature in which hearsay statements were tendered, not to the substantive "reliability" of such statements.[67] After an extensive foray into the origins of the Sixth Amendment,[68] the Court invoked "testimonial" as the relevant standard because the Sixth Amendment uses the term "witness"—that is, one who "bear[s] testimony."[69] The Court deliberately left "testimonial" undefined[70] but reasoned that the ambiguity was still superior to the "inherently . . . unpredictable" *Roberts* inquiry.[71] In *Whorton v Bockting*,[72] the Court explained that the Confrontation Clause has "no application" to nontestimonial hearsay statements.[73]

Since *Crawford*, the Supreme Court has both clarified and muddied the standard for hearsay testimony that falls under the Confrontation Clause. The critical question for post-*Crawford* Confrontation Clause analysis is whether a statement is testimonial.[74] In *Crawford*'s wake, the Court has examined this question in a variety of situations—for instance, those involving witnesses on 911 calls and forensic-report preparation by laboratory technicians.[75]

In *Davis v Washington*,[76] the statements at issue were made during a 911 reverse-dial call related to a domestic violence dispute (that is, after a person dialed 911 and prematurely terminated the

66 See *Crawford*, 541 US at 61.

67 See id.

68 See id at 43–50.

69 Id at 51, citing Noah Webster, 2 *An American Dictionary of the English Language* at cmvi (Converse 1828).

70 See *Crawford*, 541 US at 68.

71 Id at 68 n 10. Despite articulating a new standard, *Crawford* is not a "watershed" rule that allows retroactive application. See *Whorton v Bockting*, 549 US 406, 421 (2007).

72 549 US 406 (2007).

73 Id at 420 (permitting admission of *non*testimonial hearsay even if it lacks any "indicia of reliability"). The question whether a statement is "testimonial" is not, however, the focus of this Comment. Courts have split, instead, over the threshold inquiry to reach *Crawford*—that is, whether the statements in question are hearsay. See Parts II.B, II.C.

74 See text accompanying notes 60–61.

75 See generally, for example, *Bullcoming v New Mexico*, 131 S Ct 2705 (2011); *Melendez-Diaz v Massachusetts*, 557 US 305 (2009); *Davis v Washington*, 547 US 813 (2006). An issue has recently arisen over whether a foreign-language interpreter's out-of-court translation of a defendant's statements to a police officer constitutes hearsay and is subject to the Confrontation Clause. This issue is explored in the next Part. Before reaching this issue, however, the remainder of this Section explores the Supreme Court's Confrontation Clause jurisprudence post-*Crawford*.

76 547 US 813 (2006).

call, the 911 emergency operator "reversed" the call to reach the person). The Court clarified that statements that are made to police officers in the course of an emergency, whose primary purpose is to enable police to mitigate an ongoing emergency,[77] are nontestimonial hearsay and therefore are not subject to the Confrontation Clause.[78] The Court listed additional characteristics that suggest that a statement is testimonial: describing past events, rather than speaking about events as they happen; making statements to assist a criminal investigation, rather than to ameliorate an ongoing emergency; or presenting statements in a formal setting, as in a police interrogation room, rather than hurriedly, as during a 911 call.[79]

A subsequent pair of cases declared that scientific reports prepared for trial are testimonial hearsay, thereby subjecting the forensic analysts who compiled the reports to the Confrontation Clause. *Melendez-Diaz v Massachusetts*[80] involved "certificates of analysis" for tests performed on substances containing cocaine that were seized from the defendant.[81] *Bullcoming v New Mexico*[82] involved a forensic laboratory report certifying the defendant's blood alcohol concentration for an aggravated driving while intoxicated charge.[83]

In each case, the Court emphasized the need to cross-examine the expert about the underlying basis for his or her conclusion. The *Melendez-Diaz* Court stressed that the Confrontation Clause enables inquiry into the specific analytic technique, methodology, and reliability of forensic evidence, which is necessary in a fact finder's credibility determination.[84] Similarly, the *Bullcoming* Court clarified the importance of cross-examining data analysts: "[R]epresentations, relating to past events and human actions *not* revealed in raw, machine-produced data, are *meet* for cross-examination."[85] *Bullcoming* specifically included a "note-taking" witness within the scope of the Confrontation Clause—that is, one witness's recitation of

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77 See id at 822 & n 1.
78 See id.
79 See id at 827.
80 557 US 305 (2009).
81 Id at 308.
82 131 S Ct 2705 (2011).
83 Id at 2710–11.
84 See *Melendez-Diaz*, 557 US at 319–21 (quoting a National Academy of Sciences report that noted the "wide variability across forensic science disciplines").
85 *Bullcoming*, 131 S Ct at 2714 (emphasis added), citing *Davis*, 547 US at 826.

another out-of-court person's transcribed notes is testimonial hearsay subject to confrontation.[86]

Justice Anthony Kennedy dissented in both *Melendez-Diaz* and *Bullcoming*. In *Melendez-Diaz*, Kennedy asserted that "scientific evidence" is not hearsay under the *Crawford-Davis* analysis.[87] Next, in *Bullcoming*, Kennedy surmised that there would be significant problems in applying the new Confrontation Clause standard because the Court had failed to articulate a clear standard for what constitutes testimonial hearsay.[88]

One commentator has attempted to synthesize these cases by articulating a standard for "surrogate testimony."[89] Jesse Norris claims that admission of surrogate testimony should turn on whether the underlying information or data is itself testimonial.[90] When the information is testimonial, "the surrogate would serve as the conduit for testimonial evidence."[91] When the surrogate introduces this testimony at trial, the defendant would be unable to question the validity of the testimony, as the surrogate merely communicated the substance of the evidence, not the manner in which the evidence was produced, which would violate the Confrontation Clause.[92]

Returning to the doctrine, in *Michigan v Bryant*,[93] the Supreme Court clarified the "primary purpose" standard articulated in *Davis*: in order for a statement to be considered testimonial hearsay subject to confrontation, the statement's primary purpose must be for use at trial.[94] The Court also refined its approach to determining whether statements were issued in the course of an emergency and were thus nontestimonial: the

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86 *Bullcoming*, 131 S Ct at 2714–15, citing *Davis*, 547 US at 826.

87 *Melendez-Diaz*, 557 US at 343–44 (Kennedy dissenting).

88 See *Bullcoming*, 131 S Ct at 2725–26 (Kennedy dissenting).

89 See Jesse J. Norris, *Who Can Testify about Lab Results after* Melendez-Diaz *and* Bullcoming*? Surrogate Testimony and the Confrontation Clause*, 38 Am J Crim L 375, 428–32 (2011). "Surrogate testimony," in which a testifying witness acts as a surrogate for another witness, is not explicitly defined by the Court in *Bullcoming*. See *Bullcoming*, 131 S Ct at 2710.

90 See Norris, 38 Am J Crim L at 428–32 (cited in 89).

91 Id. Note that "conduit," per Norris, is slightly different from the "language conduit" that is the focus of this Comment, but the notion is the same: acting as a mere courier of information.

92 See id at 428. Norris also argues against allowing surrogate testimony even when the surrogate applies *independent* analysis—a defendant must still have access to the initial analyst. See id at 409. This is consistent with lower courts' analyses, which are discussed in Part III.A.

93 131 S Ct 1143 (2011).

94 Id at 1155.

statements and actions of both the witness and the interrogators must be examined to determine whether the "primary purpose" of the statements was to mitigate an emergency.[95] In *Bryant*, a witness, lying in a parking lot, provided information to the police about the defendant shortly after being shot.[96] The Court determined that the witness's statements were made in the course of an ongoing emergency and thus were nontestimonial.[97]

The most recent Supreme Court case on point, *Williams v Illinois*,[98] obscured the analysis for identifying testimonial hearsay—a flurry of opinions left the Court without majority reasoning. In the defendant's trial for rape, an expert testified to matching semen from the victim's vaginal swab to the defendant, without having prior knowledge that the swab was taken from the victim.[99] In a bench trial, the judge convicted the defendant on the basis of other evidence: expert testimony that the two DNA profiles matched.[100] The State provided substantial circumstantial evidence to establish the reliability of the DNA sample taken from the victim.[101] Accordingly, a Supreme Court plurality considered the expert's testimony irrelevant to the defendant's conviction and held that the Confrontation Clause does not bar the admission of irrelevant testimony.[102] The Confrontation Clause does not apply to irrelevant evidence because *Crawford* applies only "to out-of-court statements that are 'use[d]' to 'establis[h] the truth of the matter asserted'"—that is, hearsay.[103]

Justice Elena Kagan dissented, mentioning the similarity of the facts with those previously reviewed in *Bullcoming*, in which the Confrontation Clause was applied to a laboratory-test analysis.[104] Kagan attempted to clarify why the expert's testimony

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95 Id at 1160. See also 1156–59.

96 Id at 1150.

97 *Bryant*, 131 S Ct at 1165–66. Justice Scalia dissented, however, concluding that the Court deviated from *Crawford* by attempting to use a "resurrected interest in reliability" and by conducting "open-ended balancing tests" on the "totality of the circumstances bearing upon reality." Id at 1175–76 (Scalia dissenting).

98 132 S Ct 2221 (2012).

99 Id at 2235–36 (Alito) (plurality).

100 Id at 2239 (Alito) (plurality).

101 See id (Alito) (plurality).

102 *Williams*, 132 S Ct at 2238 (Alito) (plurality).

103 Id at 2240 (Alito) (plurality), citing *Crawford*, 541 US at 59–60 & n 9. See also FRE 801(c) (defining hearsay).

104 See *Williams*, 132 S Ct at 2266–67 (Kagan dissenting) ("Th[e] report is identical to the one in *Bullcoming* (and *Melendez-Diaz*) in all material respects.").

should be subject to the Confrontation Clause, noting that the Confrontation Clause prevents the State from introducing reports into evidence except when the report's preparer testifies in court.[105] When the State merely introduces the *substance* of the report as part of an expert's conclusion and the preparer does not testify in court, the report's conclusions are considered hearsay and the Confrontation Clause adheres.[106]

Kagan noted the "significant confusion"[107] that the Court's opinions create and acknowledged that "[t]he Court [ ] disagrees [on the Confrontation Clause analysis], though it cannot settle on a reason why."[108] At least one commentator agrees, vitiating the divergent opinions for creating a "deeply muddled Confrontation Clause doctrine."[109] Despite the "muddled doctrine," empirical evidence of lower court decisions suggests convergence around clear standards in the wake of *Crawford*.[110] A survey of 278 statements made in 223 different cases demonstrates that lower courts rarely apply the Confrontation Clause to nonstate actors and lower courts infrequently find that statements to state actors are testimonial when made in the course of an emergency.[111]

Crawford articulated a new standard for Confrontation Clause analysis, which requires that any witness providing testimonial hearsay be cross-examined unless the defendant had a prior opportunity for cross-examination.[112] Subsequent cases clarified the meaning of testimonial and applied the standard to the laboratory reports of forensic analysts.[113] A circuit split has emerged in *Crawford*'s wake, however, over whether a foreign-language interpreter's out-of-court translation of a defendant's statements to a police officer constitutes testimonial hearsay

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105 See id at 2269 (Kagan dissenting).

106 See id at 2269–70 (Kagan dissenting).

107 Id at 2277 (Kagan dissenting).

108 *Williams*, 132 S Ct at 2265 (Kagan dissenting).

109 *The Supreme Court 2011 Term: Leading Cases*, 126 Harv L Rev 266, 272 (2012).

110 Dylan O. Keenan, Note, *Confronting* Crawford v. Washington *in the Lower Courts*, 122 Yale L J 782, 788 (2012).

111 See id at 812–18. For an extensive analysis of the Court's decisions from *Crawford* through *Williams*, including each justice's jurisprudence on this issue, see generally Michael A. Sabino and Anthony Michael Sabino, *Confronting the "Crucible of Cross-Examination": Reconciling the Supreme Court's Recent Edicts on the Sixth Amendment's Confrontation Clause*, 65 Baylor L Rev 255 (2013).

112 See text accompanying notes 60–61.

113 Lower courts have applied *Crawford* to a diverse array of situations beyond forensic reports. See Part III.A.

and is subject to the Confrontation Clause. This issue is explored in the next Part.

II. Foreign-Language Interpreters, Hearsay, and the Confrontation Clause

This Part examines hearsay issues surrounding foreign-language interpreters' translations of non-English-speaking criminal defendants' out-of-court statements. Various constitutional and statutory provisions outline requirements for foreign-language interpreters in criminal proceedings involving a non-English-speaking defendant, but a circuit split has arisen over whether a defendant has a right to confront his translated statements to the police when a police officer testifies to the defendant's translated statements in court. Recall the diagrams presented in Part I.A. Most courts have taken the position that there is no hearsay issue in this situation,[114] but the Eleventh Circuit disagrees.[115]

Constitutional and statutory provisions do not require interpreters at every step of the criminal investigative and adjudicative process, but an interpreter can be critical to ensure that a defendant adequately comprehends the substance and significance of his proceedings.[116] At the beginning of a criminal case, *Miranda v Arizona*[117] requires that a defendant understand his Fifth Amendment right against self-incrimination, his right to counsel, and his right to having counsel present during interrogation.[118] Subsequent case law has applied this constitutional right to non-English-speaking defendants: a foreign-language communicator must ensure that a non-English-speaking suspect understands these Fifth Amendment rights.[119] Once interrogation

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[114] See Figure 1 (diagramming the majority view).

[115] See Figure 2 (diagramming the Eleventh Circuit's view). See also text accompanying notes 9–10.

[116] See Paul J. De Muniz, *Introduction*, in Joanne I. Moore and Margaret E. Fisher, eds, *Immigrants in Courts* 3, 3–5 (Washington 1999) (providing a case study of a Mixtec-speaking defendant who was disadvantaged in the legal process partly on account of his inability to speak English).

[117] 384 US 436 (1966).

[118] Id at 444. See also *Duckworth v Eagan*, 492 US 195, 203 (1989).

[119] See, for example, *United States v Hernandez*, 93 F3d 1493, 1503 (10th Cir 1996) (finding that the *Miranda* warning was adequate, though the translation was imperfect in that it did not properly translate the word "waive"). Spanish translations of *Miranda* warnings vary substantially. See Richard Rogers, et al, *Spanish Translations of* Miranda *Warnings and the Totality of the Circumstances*, 33 L & Hum Behav 61, 63–64 (2009) (examining 121 Spanish translations of *Miranda* warnings).

begins, however, there is no constitutional requirement that a non-English-speaking suspect be afforded an interpreter.[120] At trial, 28 USC § 1827(d) requires a judge to determine whether a criminal defendant needs an interpreter to ensure full "comprehension of the proceedings . . . and the presentation of [ ] testimony."[121]

First, this Part explores the development of the language-conduit and agency theories in the pre-*Crawford* era, when courts reasoned that foreign-language interpreters' statements presented no hearsay issue and, accordingly, no Confrontation Clause issue. The conduit approach suggests that courts conceptualize translators as something similar to an online translation service, in which inputs from one language always yield the same outputs in another language. The agent approach instead suggests that an interpreter is an advocate for the defendant's interests. Second, this Part analyzes the language-conduit theory in the post-*Crawford* era. Third, it dissects the Eleventh Circuit's minority position post-*Crawford*, repudiating the language-conduit theory and finding that foreign-language interpreters' statements *are* hearsay subject to the Confrontation Clause.

A. Initial Development of the Language-Conduit Approach

In the 1973 case of *United States v Ushakow*,[122] the Ninth Circuit curtly decided that a defendant's statements translated by a foreign-language interpreter are not hearsay.[123] The court simply stated that a translator—here, not acting with any indicia of official capacity as a "qualified" translator (that is, without any form of certification)—was "merely a language conduit" between parties.[124] The court determined that, because an interpreter

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[120] See *United States v Silva-Arzeta*, 602 F3d 1208, 1216 (10th Cir 2010) (explaining that the three documents that the defendant cited as "support [for] a due-process standard for custodial interrogations of persons with limited English proficiency . . . suggest what 'best practice' may be, [but] due process does not require so much").

[121] 28 USC § 1827(d)(1). For the standards outlining appropriate qualifications of interpreters, see *Guide to Judiciary: Vol 5: Court Interpreting* §§ 310–20 (US Courts June 2011), online at http://www.uscourts.gov/uscourts/FederalCourts/Publications/Guide_Vol05.pdf (visited Nov 3, 2014).

[122] 474 F2d 1244 (9th Cir 1973).

[123] See id at 1245.

[124] Id. But see Michael J. Reddy, *The Conduit Metaphor—A Case of Frame Conflict in Our Language about Language*, in Andrew Ortony, ed, *Metaphor and Thought* 284, 288–90 (Cambridge 1979) (positing that while a *person* cannot be a conduit, *language* can be a conduit for ideas).

is a language conduit, his or her testimony may be classified as nonhearsay,[125] but the court did not discuss *why* an interpreter is a mere conduit. A later Second Circuit opinion adopted *Ushakow*'s language-conduit reasoning: the translated statement was not considered to be hearsay because the interpreter did not have a motive to mislead or to distort the defendant's statements, and there was no indication that the translation was inaccurate.[126] Though the Second Circuit did not anchor its language-conduit theory in a specific hearsay rule, it determined that there was no Confrontation Clause issue because the statements in question were sufficiently reliable.[127]

In *United States v Da Silva*,[128] the Second Circuit applied the Ninth Circuit's minimally reasoned language-conduit theory to the FRE.[129] The court determined that a translation is attributable to a defendant as his own statement and is properly characterized as nonhearsay under Rule 801(d)(2)(C) or (D). This Rule provides, in relevant part, that a statement is not hearsay if the statement is offered against a party, and it is a statement made by a person authorized by the original party or is a statement made by the original party's agent.[130]

The *Da Silva* court concluded that a "presumption of agency" attaches to an interpreter-defendant relationship unless circumstances exist so as to negate this presumption.[131] Such circumstances include a motive to mislead, a reason to believe that the translation is inaccurate, or a "substantial possibility" that the interpreter seeks to shift suspicion to the defendant and away from himself.[132] When the agency presumption exists, the translator is "no more than a language conduit," such that the declarant and the translator share a "testimonial identity" under Rule 801(d)(2)(C) or (D).[133] Even when the government provides a translator or when the translator is an employee of the government, an agency relationship may still exist.[134] Other

[125] See *Ushakow*, 474 F2d at 1245.

[126] See *United States v Koskerides*, 877 F2d 1129, 1135 (2d Cir 1989).

[127] See id at 1136.

[128] 725 F2d 828 (2d Cir 1983).

[129] See id at 831–32, citing *Ushakow*, 474 F2d at 1245.

[130] See *Da Silva*, 725 F2d at 831, quoting FRE 801(d)(2).

[131] *Da Silva*, 725 F2d at 831–32.

[132] Id, citing *Kalos v United States*, 9 F2d 268, 271 (8th Cir 1925). For cases discussing the difficulty of rebutting this presumption, see notes 173–74 and accompanying text.

[133] *Da Silva*, 725 F2d at 832, quoting *Ushakow*, 474 F2d at 1245.

[134] See *Da Silva*, 725 F2d at 832, citing *Restatement (Second) of Agency* § 392 (1958).

circuits subsequently adopted the agency approach, holding that an officer's statements based on an interpreter's translation of a defendant's statements are not hearsay because the translator is the defendant's agent.[135] Notably, in only one of these cases, *United States v Koskerides*,[136] did a court even consider the Confrontation Clause.[137] Applying the *Roberts* reliability test, the Second Circuit concluded that the testimony in question was sufficiently reliable to satisfy Sixth Amendment concerns.[138]

The Ninth Circuit clarified the Confrontation Clause issue, as well as the language-conduit and interpreter-as-agent approaches, in *United States v Nazemian*.[139] Under both approaches, an interpreter's statements are deemed not to be hearsay. Although the approaches are analytically the same, the justification for each is slightly different. As discussed in Part I.B, *Roberts* required that insufficiently "reliable" hearsay be subject to the Confrontation Clause. But the *Nazemian* court instead determined that, when out-of-court statements are a defendant's own, there is no hearsay as a threshold matter and, accordingly, a Confrontation Clause issue does not arise.[140] That is, a defendant cannot claim denial of the opportunity to cross-examine himself.[141]

Nazemian left the interpreter-as-agent approach fairly open-ended, declining to say whether a "presumption of agency" exists or which party bears the burden of proving agency.[142] Rather, the court synthesized prior courts' analyses and announced several factors that courts should consider to determine whether an interpreter's statements may be attributed to the defendant under a language-conduit theory. These factors include which party supplied the interpreter, whether the interpreter had any motive to mislead the defendant or distort his statements, the interpreter's qualifications and specific language skills, and whether actions taken after the conversation were consistent

135 See, for example, *United States v Beltran*, 761 F2d 1, 9–10 (1st Cir 1985); *United States v Alvarez*, 755 F2d 830, 859–60 (11th Cir 1985).

136 877 F2d 1129 (2d Cir 1989).

137 See id at 1136.

138 Id.

139 948 F2d 522 (9th Cir 1991).

140 See id at 526, 528.

141 See id at 525–26, citing *Poole v Perini*, 659 F2d 730, 733 (6th Cir 1981) (analogizing this analysis to an "adoptive admission," which does not give rise to a Confrontation Clause issue).

142 *Nazemian*, 948 F2d at 527.

with the statements as translated.[143] Courts balance these factors on a "case-by-case basis"—no single factor is dispositive—to determine whether the interpreter is appropriately characterized as a language conduit.[144]

Subsequently, other courts adopted *Nazemian*'s language-conduit multifactor analysis,[145] and no other court has fleshed out the interpreter-as-agent approach. When the *Nazemian* multifactor test is satisfied, courts find that there is no hearsay issue and thus do not reach a Confrontation Clause analysis. This is the source of a circuit split in *Crawford*'s wake: The Eleventh Circuit has rejected *Nazemian*, instead finding that an interpreter's out-of-court translations are hearsay and subjecting the interpreter to the Confrontation Clause.[146]

B. Courts Applying the Language-Conduit Approach Post-*Crawford*

The Supreme Court held in *Crawford* that all testimonial hearsay admitted against a defendant requires cross-examination or a prior opportunity to confront the witness. The Ninth Circuit and other courts continue to apply the *Nazemian* factors to determine whether an interpreter is appropriately characterized as a defendant's language conduit, denying the presence of hearsay and precluding application of *Crawford*. This Section first examines the Ninth Circuit's post-*Crawford* reasoning and then considers other courts' reasoning.

1. The Ninth Circuit: unusually resistant to abrogating circuit precedent.

The Ninth Circuit continues to apply its own circuit precedent unless the Supreme Court undermines the theory or reasoning of a prior Ninth Circuit opinion such that the cases are "*clearly irreconcilable*."[147] It is not enough that there exists simply

[143] See id (rejecting the defendant's claim that these factors "tilt[ed]" in her favor). See also Barbara E. Bergman and Nancy Hollander, 2 *Wharton's Criminal Evidence* § 8:7 at 433 (West 15th ed 2012).

[144] *Nazemian*, 948 F2d at 527.

[145] See, for example, *United States v Vidacak*, 553 F3d 344, 352 (4th Cir 2009); *Germano v International Profit Association*, 544 F3d 798, 802–03 (7th Cir 2008); *United States v Martinez-Gaytan*, 213 F3d 890, 892–93 (5th Cir 2000) (rejecting the defendant's Confrontation Clause objection); *United States v Cordero*, 18 F3d 1248, 1252–53 (5th Cir 1994) (declining to address the Confrontation Clause).

[146] See text accompanying note 10.

[147] *Miller v Gammie*, 335 F3d 889, 900 (9th Cir 2003) (en banc) (emphasis added).

"some tension" between the Supreme Court's reasoning and prior circuit precedent,[148] nor that the Supreme Court "cast[s] doubt" on circuit precedent[149]—the Supreme Court's decision must be "clearly inconsistent" with Ninth Circuit precedent.[150] It should not be surprising, then, that the Ninth Circuit continues to apply *Nazemian*'s analysis post-*Crawford*. As discussed above,[151] the Ninth Circuit did not even reach the Confrontation Clause issue in *Nazemian*.[152]

In three cases decided in May 2012, the Ninth Circuit explicitly denied that *Crawford*'s testimonial-hearsay rule applies to foreign-language interpreters, ruling that there was no hearsay issue in the first instance and instead applying the *Nazemian* multifactor analysis. In each case, Judge Marsha Berzon concurred, noting the tension between the majority's ruling and *Crawford* and suggesting that the circuit consider the issue en banc in the "appropriate case."[153]

In *United States v Orm Hieng*,[154] the Ninth Circuit narrowly construed *Crawford* and its progeny in two respects. First, rather formalistically, the court distinguished a laboratory analyst's certification of a report from an interpreter's certification of a defendant's statements.[155] The court determined that *Crawford* and its progeny do not address whether, when a speaker makes a statement through an interpreter, the Sixth Amendment requires the court to attribute the statement to the interpreter.[156] Second, the Ninth Circuit concluded that *Crawford* and its progeny are not "clearly irreconcilable" with the circuit's precedent because *Nazemian* can be applied without "running

[148] *Lair v Bullock*, 697 F3d 1200, 1207 (9th Cir 2012), quoting *United States v Orm Hieng*, 679 F3d 1131, 1140–41 (9th Cir 2012).

[149] *Lair*, 697 F3d at 1207, quoting *United States v Delgado-Ramos*, 635 F3d 1237, 1239 (9th Cir 2011).

[150] *Lair*, 697 F3d at 1207, quoting *Orm Hieng*, 679 F3d at 1141.

[151] See text accompanying notes 139–41.

[152] See *Nazemian*, 948 F2d at 525–26.

[153] *Orm Hieng*, 679 F3d at 1145 (Berzon concurring). See also Charles Alan Wright and Kenneth W. Graham, 30A *Federal Practice and Procedure: Evidence* § 6371.2 at 225 n 477 (West 2014) (noting that these cases are based on "questionable ruling[s]" and "cockamamie analys[es]"). For a thorough treatment of these Ninth Circuit cases and consideration of Berzon's string of concurrences, see generally John Kracum, Comment, *The Validity of* United States v. Nazemian *following* Crawford *and Its Progeny: Do Criminal Defendants Have the Right to Face Their Interpreters at Trial?*, 104 J Crim L & Criminol 431 (2014).

[154] 679 F3d 1131 (9th Cir 2012).

[155] See id at 1140.

[156] See id.

afoul" of *Crawford*.[157] When a statement may be "fairly attributed" to the original speaker—as through a language-conduit theory—the court engages in a *Crawford* analysis only with respect to the original speaker.[158] When this speaker is the defendant, he cannot claim that his own statements are hearsay, nor can he claim denial of the opportunity to confront himself.[159]

Similarly, in *United States v Romo-Chavez*,[160] the court explained that a police officer's testimony of the defendant's statements, made through a police translator, were the defendant's own statements—the translating officer was merely a "language conduit."[161] Accordingly, the police officer's testimony was not hearsay, and the Confrontation Clause was not violated. In *United States v Santacruz*,[162] an unpublished case involving substantially similar facts, the court also concluded that there was no hearsay and thus no Confrontation Clause violation.[163]

Berzon's concurrences in each case called the Ninth Circuit's analysis into question. It is worth noting that Berzon concurred rather than dissented as a result of the standards of appellate review.[164] That is, in each of these cases, the defendant did not raise a Confrontation Clause objection at trial: an appellate court will reverse a lower court's determination only upon a finding of "plain error."[165] Even so, Berzon noted that *Nazemian* rests, "at bottom, on a pre-*Crawford* understanding of the unity between hearsay concepts and Confrontation Clause analysis."[166]

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157 Id.

158 *Orm Hieng*, 679 F3d at 1140. The *Orm Hieng* court conflated the agency and language-conduit approaches in its analysis but ultimately employed the latter.

159 See id at 1139.

160 681 F3d 955 (9th Cir 2012).

161 Id at 961 (relying on FRE 801(d)(2) nonhearsay for adoptive admissions).

162 480 Fed Appx 441 (9th Cir 2012).

163 Id at 443 (relying in a similar manner on FRE 801(d)(2)(B) nonhearsay for adoptive admissions).

164 See *Orm Hieng*, 679 F3d at 1145 (Berzon concurring) (finding no plain error because the defendant had failed to raise a Confrontation Clause issue at trial); *Romo-Chavez*, 681 F3d at 966 (Berzon concurring) (finding harmless error in admitting the officer-translator's hearsay statements, which did not merit reversal); *Santacruz*, 480 Fed Appx at 443 (Berzon concurring) (finding that *Nazemian* "is not so 'clearly irreconcilable'" with *Crawford* as to allow the court to overrule *Nazemian*).

165 *United States v Marcus*, 560 US 258, 262 (2010), quoting *Puckett v United States*, 556 US 129, 135 (2009) (holding that an appellate court may correct an error not raised at trial only when an appellant demonstrates that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights . . . [;] and (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings") (quotation marks omitted).

166 *Orm Hieng*, 679 F3d at 1149 (Berzon concurring).

That is, shielding a translator's out-of-court statements from cross-examination appears to be in "great tension" with the Supreme Court's reasoning in *Melendez-Diaz* and *Bullcoming*.[167]

Berzon also noted the skill and discretion required for language interpretation: "Translation is an exacting task, for which professional translators train for many years. Even fully competent translators and interpreters disagree about the proper transformation of one language into another; that is why there are over ten translations of *War and Peace*, for example, listed for sale by Amazon."[168] This need for skill and discretion undermines the notion that a foreign-language translator is merely a conduit, suggesting instead that an interpreter is a separate declarant and that a police officer's testimony concerning the interpreter's statements is hearsay.

Thus, the Ninth Circuit continues to apply *Nazemian* despite its questionable legal foundation post-*Crawford*. This is partially due to the circuit's standard of clear irreconcilability for applying Supreme Court precedent over circuit court precedent. It is somewhat more surprising, then, that other courts continue to apply *Nazemian* even when there is not as strong a presumption in favor of applying circuit precedent.

2. Other courts: *Nazemian*'s surprising vitality.

Other courts often cite *Nazemian* in cases involving a defendant's out-of-court statements to foreign-language interpreters. These courts similarly find that an interpreter's translation of a defendant's out-of-court statements is not hearsay and thus frequently do not consider the Confrontation Clause. Unlike the Ninth Circuit,[169] these courts often do not recognize the tension between their reasoning and *Crawford*. Courts predominately

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167 Id (Berzon concurring). See also *Romo-Chavez*, 681 F3d at 964 (Berzon concurring); *Santacruz*, 480 Fed Appx at 443 (Berzon concurring).

168 *Romo-Chavez*, 681 F3d at 964 (Berzon concurring), citing Betty Lou Leaver and Boris Schekhtman, *Developing Professional-Level Language Proficiency* (Cambridge 2002). For an updated version of the 2011 Bureau of Labor Statistics data referenced by Berzon, see US Department of Labor, Bureau of Labor Statistics, *Interpreters and Translators: What Interpreters and Translators Do*, Occupational Outlook Handbook (June 26, 2012), online at http://www.bls.gov/ooh/Media-and-Communication/Interpreters-and-translators.htm#tab-2 (visited Nov 3, 2014).

169 See *Orm Hieng*, 679 F3d at 1140 ("We recognize that there is some tension between the *Nazemian* analysis and the Supreme Court's recent approach to the Confrontation Clause.").

rely on the language-conduit approach, considering the interpreter-as-agent approach only in passing.[170]

The Fourth Circuit in *United States v Shibin*[171] applied the language-conduit theory to an interpreter's translation of a defendant's statements to the police. The court did not inquire into a potential conflict with *Melendez-Diaz* or *Bullcoming* and concluded that there was no hearsay issue.[172] Similarly, a nonprecedential opinion in the Fifth Circuit referenced *Melendez-Diaz* and *Bullcoming* but still found *Nazemian* persuasive: "[E]xcept in unusual circumstances, interpreters may be considered language conduits, whose translations of the defendant's own statements are not hearsay and do not implicate defendant's confrontation rights."[173] Courts have not thoroughly explored these "unusual circumstances," allowing substantial deference for a finding that an interpreter is simply a conduit.[174]

Since *Crawford*, decisions in the Fourth,[175] Fifth,[176] and Eighth Circuits,[177] as well as in various district courts[178] have

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[170] See notes 128–44 and accompanying text.

[171] 722 F3d 233 (4th Cir 2013).

[172] See id at 248. Compare this result with *Romo-Chavez*, 681 F3d at 962 n 1 (Berzon concurring) (stating that "*Nazemian*'s holding does ultimately rest on a pre-*Crawford*-understanding" and noting tension with *Melendez-Diaz* and *Bullcoming*). For a discussion of *Melendez-Diaz* and *Bullcoming*, see notes 80–88 and accompanying text.

[173] *United States v Budha*, 495 Fed Appx 452, 454 (5th Cir 2012), citing *United States v Cordero*, 18 F3d 1248, 1252–53 (5th Cir 1994), *Nazemian*, 948 F2d at 526–27 (agreeing with the Ninth Circuit that the Supreme Court's Confrontation Clause decisions do not affect the language-conduit reasoning).

[174] One court has clarified what those circumstances might be. In a case in which the government provided the translator, the translator's skills and qualifications were not subject to cross-examination, and the defendant refused to sign a confession despite having allegedly confessed in a foreign language to an officer, the interpreter was deemed not sufficiently reliable to be considered a language conduit. See *Martinez-Gaytan*, 213 F3d at 892. For an example predating *Nazemian*, see *United States v Lopez*, 937 F2d 716, 724 (2d Cir 1991).

[175] See, for example, *Vidacak*, 553 F3d at 352; *United States v Stafford*, 143 Fed Appx 531, 533–34 (4th Cir 2005).

[176] See, for example, *Escalante v Clinton*, 386 Fed Appx 493, 498 (5th Cir 2010); *Hill v New Alenco Windows, Ltd*, 716 F Supp 2d 582, 590–91 (SD Tex 2009) (applying the language-conduit analysis in the civil context); *Barraza v United States*, 526 F Supp 2d 637, 642 (WD Tex 2007).

[177] See, for example, *United States v Sanchez-Godinez*, 444 F3d 957, 960–61 (8th Cir 2006) (noting that an interpreter is viewed as an agent of the defendant, but finding "harmless" hearsay concerns because the interpreter was not just a language conduit—he initiated some questions during interrogation).

[178] See, for example, *United States v Ghailani*, 761 F Supp 2d 114, 119–20 & nn 14–17 (SDNY 2011); *United States v Karake*, 443 F Supp 2d 8, 92 (DDC 2006); *United States v Dimas*, 418 F Supp 2d 737, 747 (WD Pa 2005) (noting the high standard of unusual circumstances required to characterize an interpreter as not acting as a language conduit).

reached substantially similar conclusions. That is, a foreign-language interpreter's translation of a defendant's out-of-court statements is not hearsay, so the Confrontation Clause is not implicated.

C. Courts Rejecting the Language-Conduit Approach

The Eleventh Circuit, by contrast, has applied *Crawford* to foreign-language interpreters. In *United States v Charles*,[179] the court held that an interpreter is a declarant of out-of-court statements, so a police officer's testimony concerning an interpreter's out-of-court statements is hearsay.[180] Thus, the court recognized the defendant's Sixth Amendment right to confront his interpreter.[181] In *Charles*, an interpreter translated the defendant's statements from Haitian Creole into English for a Customs and Border Protection (CBP) officer, who subsequently testified about the substance of these statements.[182] As an initial matter, the court found that the statements were testimonial under *Crawford*—they were offered to an investigating police officer in the course of a formal interrogation while the defendant was detained in the airport.[183]

The *Charles* court rejected the language-conduit hearsay analysis outright: "[C]ourts use the 'language conduit' theory *not* to establish the defendant as the declarant of the out-of-court statements but instead to establish the competence and trustworthiness of the interpreter so that the *interpreter's* out-of-court statements *on their own* can be admitted under the criteria of Rules 801(d)(2)(C) or (D)."[184] The court concluded that the *Nazemian* factors are immaterial to the core problem of allowing another witness to testify about translated statements conveyed by an interpreter—they do not change the fact that the "*interpreter* is the speaker (declarant) of out-of-court . . . statements . . . . And it is the *declarant* who is subject to the requirements of the Confrontation Clause."[185]

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179 722 F3d 1319 (11th Cir 2013).

180 Id at 1324.

181 Id. See also Bergman and Hollander, 2 *Wharton's Criminal Evidence* § 6:7 at 111–12 (cited in note 143) (citing state courts that reached the same conclusion as the *Charles* court).

182 *Charles*, 722 F3d at 1320–21.

183 Id at 1323–24.

184 Id at 1327 n 9.

185 Id (emphasis added).

In reaching this conclusion, the court emphasized that an interpreter's statements and a non-English-speaking defendant's statements are "not one and the same."[186] The absence of a "one-to-one correspondence" between languages was dispositive for the court.[187] Accordingly, the court analogized the facts of the case to *Bullcoming*—the CBP officer was the "surrogate" for the Creole-language interpreter, just like the forensic analyst who testified in *Bullcoming* was a "surrogate" for the forensic analyst who actually completed the analysis.[188] That is, surrogate testimony is hearsay and violates the Confrontation Clause when the source of the testimony is not cross-examined.

The Eleventh Circuit delineated the scope of a defendant's Confrontation Clause rights concerning foreign-language interpreters in a subsequent pair of cases:[189] so long as the defendant has an opportunity to cross-examine *one* interpreter involved with the translation of his statements, the Confrontation Clause is not violated.[190] In *United States v Curbelo*,[191] the Eleventh Circuit reiterated its departure from the language-conduit reasoning:

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[186] *Charles*, 722 F3d at 1324 ("[The defendant] is the declarant of her out-of-court Creole language statements and the language interpreter is the declarant of her out-of-court English language statements.").

[187] Id at 1324–25, citing Virginia Benmaman and Isabel Framer, *Foreign Language Interpreters and the Judicial System*, in Linda Friedman Ramirez, ed, *Cultural Issues in Criminal Defense* § 4.4 at 123, 153–54 (Juris 3d ed 2010) (discussing language interpretation as the process of transferring meaning from the "*source*" language to the "*target*" language); *Frequently Asked Questions about Court and Legal Interpreting and Translating* (National Association of Judiciary Interpreters and Translators), online at http://www.najit.org/certification/faq.php (visited Nov 3, 2014) ("Interpreters do not interpret words; they interpret concepts."); Muneer I. Ahmad, *Interpreting across Communities: Lawyering across Language Difference*, 54 UCLA L Rev 999, 1035–36 (2007) (claiming that many forces "frustrate the interpretation of semantic meaning," and that "much of the information required to determine the speaker's meaning . . . is supplied by the listener"). For an updated version of another source cited by the *Charles* court, see US Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook* (June 27, 2012), available at http://bls.gov/ooh/media-and-communication/interpreters-and-translators.htm (visited Nov 3, 2014) (noting that interpreters convert *concepts* between languages, rather than mechanically translating words). The Eleventh Circuit's emphasis on the absence of a one-to-one relationship between a defendant's statements and the interpreter's statements is consistent with linguistics literature. See Part III.B.

[188] *Charles*, 722 F3d at 1330.

[189] See generally *United States v Curbelo*, 726 F3d 1260 (11th Cir 2013); *United States v Sardinas*, No 08-16695, slip op (11th Cir 2010).

[190] See *Curbelo*, 726 F3d at 1274–75; *Sardinas*, No 08-16695, slip op at 33–34. For a summarized discussion of these three Eleventh Circuit cases, including *Charles*, see W. Randall Bassett, Simon A. Rodell, and Dmitry M. Epstein, *Evidence*, 65 Mercer L Rev 945, 946–53 (2014).

[191] 726 F3d 1260 (11th Cir 2013).

> When an interpreter or translator renders the French "*l'etat, c'est moi*" into "I am the state," he is not asserting *he* is the state, but rather that "I am the state" is an accurate rendering of what the speaker (or Louis XIV) said. It is this added layer—the translator or interpreter's implicit assertions about the meaning of words—that make [sic] the statements of the language interpreter and [the defendant] . . . *not* one and the same.[192]

The court carefully noted that a defendant does not necessarily have a Sixth Amendment right to confront *every* translator who contributes to a transcript.[193] Rather, the Confrontation Clause is satisfied when a defendant has the opportunity to confront the person who had the "ultimate say" on the translated testimony.[194] In addition, when an anonymous translator who certifies transcripts does not appear at trial but another translator appears to certify the transcript's accuracy, the transcript is persuasive only to the extent that the testifying translator claims that the transcript is accurate, rather than because of the anonymous translator's certification.[195] In this instance, the court will not find a Confrontation Clause violation under *Bullcoming* because the testifying translator does not testify to the anonymous translator's expertise or adherence to particular protocols—the translator simply confirms the transcript's accuracy.[196]

Independent of the Eleventh Circuit's analysis and despite the "prevailing view" of the language-conduit theory,[197] several state courts have required that defendants have an opportunity to cross-examine their interpreters, even pre-*Crawford*.[198] A

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[192] Id at 1273 n 8 (quotation marks omitted) (emphasis added). See also id at 1273 & n 9 (stating specific disagreement with the Ninth Circuit's language-conduit rationale and finding that a translator's implicit representation that transcripts are correct qualifies as hearsay for purposes of the Confrontation Clause).

[193] See id at 1275–76.

[194] Id, citing *Sardinas*, No 08-16695, slip op at 33–35. See also *Rodriguez v United States*, 2011 WL 2960224, *7–8 (SD Ind) (concluding that the Confrontation Clause was satisfied when the defendant had the opportunity to cross-examine the officer who certified the accuracy of a translation transcript, despite not cross-examining the officer who initially compiled the transcript).

[195] See *Curbelo*, 726 F3d at 1274.

[196] See id at 1275. Note that this method might be sufficient to include translated statements only when there is a written record.

[197] Clifford S. Fishman, 4 *Jones on Evidence* § 27:37 at 541 (West 7th ed 2000).

[198] Note, however, that state courts apply state rules of evidence, not the FRE. The FRE do not explicitly address translators, however, so it is unlikely that federal-state variance drives states' failure to adopt the language-conduit theory.

Washington state court pellucidly explained, "A witness may not testify to the content of another's extrajudicial statement if the testimony is based on a translation rather than the witness's understanding of the declarant's words."[199] An Illinois state court similarly determined that the State could not present a police officer's testimony based on statements from a non-English-speaking witness when the witness's wife had translated these statements to the police officer.[200] The court explained that the defendant must have the opportunity to cross-examine the witness's wife in her capacity as an interpreter.[201]

The Eleventh Circuit's rejection of the long-standing, prevailing language-conduit analysis comports with an overwhelming consensus in linguistic theory—scholars reject outright the notion that there are one-to-one equivalencies between languages.[202] Linguistic scholars posit that foreign-language translators contribute an element of analysis to a translated conversation—similar to the forensic analysts in *Melendez-Diaz* and *Bullcoming*—rendering the language-conduit theory illogical. In rejecting the Ninth Circuit's language-conduit analysis, the Eleventh Circuit opened a circuit split over whether a foreign-language translation of a defendant's out-of-court statements is hearsay and thus subject to the Confrontation Clause. The next Part provides a solution to this split: a foreign-language interpreter's translation of a defendant's out-of-court statements is appropriately characterized as hearsay. Therefore, contingent on the defendant's authorization, all foreign-language interpreters should be subject to the Confrontation Clause.

III. Refuting the Language-Conduit Approach

Though the language-conduit theory is the predominant approach among courts, this Comment argues that it must be abandoned. Courts have erred in concluding that a foreign-language interpreter is a language conduit. Rather, when another party introduces an interpreter's out-of-court statements at trial, the interpreter's statements must be viewed as hearsay, thereby affording the defendant a right to confront his interpreter under the Confrontation Clause.[203]

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199 *State v Garcia-Trujillo*, 948 P2d 390, 391 (Wash App 1997).

200 See *People v Bartee*, 566 NE2d 855, 857–58 (Ill App 1991).

201 See id.

202 See notes 226–31 and accompanying text.

203 See Figure 2 (diagramming this approach).

The Ninth Circuit is correct in acknowledging that, when an interpreter translates a defendant's statements, the interpreter's statements are based on the defendant's own. However, the Ninth Circuit's analysis ignores a key assumption that has received broad acceptance by linguistics scholars: language translation involves a great deal of *discretion*, in part because there is not a one-to-one relationship between languages.[204] This assumption calls into question the notion that courts should view an interpreter's statements as equivalent to the defendant's. Without a one-to-one relationship, the interpreter must be treated as a separate declarant under a hearsay inquiry, which, in turn, raises a Confrontation Clause issue.

Suppose that a forensic report is submitted at trial. There are two possibilities concerning the report's preparation. Either (1) the report is the result of a rote mechanical process, lacking any independent judgment by the report's preparer; or (2) the report relays an expert's independent judgment and conclusion. In the case of (2), testimony by anyone other than the expert who prepared the report would be considered hearsay—consistent with the Supreme Court's holdings in *Melendez-Diaz* and *Bullcoming*[205]—and only the expert who prepared the report may testify to substantiate the report's conclusions. On the other hand, in (1), a machine cannot be cross-examined, and there is no independent judgment to investigate. Accordingly, (1) presents no hearsay issue and no concomitant Confrontation Clause issue.

Examples (1) and (2) map onto the figures presented in Part I.A. Example (1) and Figure 1 represent the language-conduit or agency reasoning, while example (2) and Figure 2 represent the interpreter as a separate declarant who provides independent judgment and analysis. This Part aims to show how an interpreter undoubtedly falls within (2), thus raising a hearsay issue when another person testifies to the interpreter's out-of-court statements at trial.

This Part first shows how lower courts have interpreted Confrontation Clause rights in a variety of circumstances in *Crawford*'s wake. This analysis suggests that an interpreter must also fall within the Clause's scope. Courts have found that individuals who apply any judgment or inference to admitted evidence

[204] See Part III.B.1.
[205] See *Melendez-Diaz*, 557 US at 317–21; *Bullcoming*, 131 S Ct at 2713.

are subject to cross-examination because this judgment or inference is considered hearsay when a separate person testifies to its effect. Second, this Part categorically rebuts the language-conduit and interpreter-as-agent approaches with analyses from the fields of linguistics and agency law. Third, it offers a new approach to testimony involving translated statements—a clear rule that subjects all foreign-language interpreters to a *Crawford* analysis unless agency can be proven by a preponderance of the evidence.

A. *Crawford* in Other Contexts: Interpreters Fit within the Existing Schema

Post-*Crawford*, lower courts have grappled with how the Confrontation Clause applies to an expert's analysis of evidence. These cases intimate that one witness's testimony concerning another person's analysis—in which the latter has applied *any* judgment to the evidence—is hearsay and, in a criminal proceeding, is subject to a Confrontation Clause objection if it meets the *Crawford* testimonial test.

Consider a blood test for anemia, in which a machine measures hemoglobin and hematocrit levels in a blood sample. When an expert reads the results of this test—which merely displays levels of these factors—at trial, the results are not considered testimonial hearsay and thus are not subject to confrontation. However, if a technician analyzes the test results and determines that they indicate that the blood is anemic, another witness's testimony about this fact would be considered testimonial hearsay subject to confrontation.

This Section analyzes lower courts' interpretation of the Confrontation Clause in three similar contexts: cases involving forensic analysis, data-report compilation, and language analysis lacking a foreign-language component. These cases suggest that a foreign-language interpreter's translation of a defendant's out-of-court statements should also be subject to confrontation.[206]

First, in a series of cases involving forensic-analysis testimony, courts have distinguished test results that require no independent judgment from the diagnosis of a condition, as in

[206] See Part III.B.

making a determination of anemia in the blood test.[207] Machine-produced test results cannot logically be subject to cross-examination because "a machine [is not] a 'witness against' anyone."[208] A diagnosis, however, requires cross-examination of the expert who issued the diagnosis. Diagnosis involves an inference that a particular condition exists, given certain results,[209] and confrontation is afforded to determine the basis for the inference. In this circumstance, one person's testimony of another person's inference is hearsay. Similarly, medical examiners who prepare autopsy reports associated with a criminal investigation are subject to the Confrontation Clause,[210] as are chemists who compile drug reports.[211]

Second, courts have applied the Confrontation Clause to evidentiary reports beyond those involving forensic analysis. When a report is compiled for trial, pulled from financial reports or business activity, a defendant has a right to confront the specific individual who compiled the report.[212] The underlying logic is

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[207] See, for example, *United States v Moon*, 512 F3d 359, 362 (7th Cir 2008) (holding that a chemist did not violate the Confrontation Clause by testifying that the substance seized from the defendants was cocaine).

[208] Id.

[209] See id (analyzing the evidentiary implications of a blood test, as a result of which the physician inferred that the patient had diabetes).

[210] See, for example, *United States v Ignasiak*, 667 F3d 1217, 1231–32 (11th Cir 2012) (holding that the person who wrote the autopsy report that was admitted into evidence to show that the defendant physician had caused the death of patients was subject to the Confrontation Clause).

[211] See, for example, *United States v Ramos-Gonzalez*, 664 F3d 1, 6 (1st Cir 2011) (holding that a Confrontation Clause violation existed when a witness responded to the question, "say what are the results of the test," with, "[b]oth bricks were positive for cocaine"). See also *United States v Moore*, 651 F3d 30, 71–74 (DC Cir 2011) (addressing Drug Enforcement Agency contraband and autopsy reports). But see *United States v Turner*, 709 F3d 1187, 1190–92 (7th Cir 2013) (ruling that a supervisor's testimony on his analysts' work, describing procedures and safeguards that the employees take, does not violate the Confrontation Clause, even though the analysts did not testify); *United States v Richardson*, 537 F3d 951, 960 (8th Cir 2008) (holding that a chemist's testimony involving review of another chemist's DNA analysis does not violate the Confrontation Clause when the analyzing chemist does not testify); *United States v Washington*, 498 F3d 225, 232 (4th Cir 2007) (concluding that toxicology data from lab machines is not testimonial, so simple statements about the data are not subject to the Confrontation Clause). Perhaps scientific evidence is special, however. See Jennifer Mnookin and David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 S Ct Rev 99, 102–03 (claiming that scientific evidence production and research is a "collective, rather than an individual enterprise," thus requiring special treatment) (emphasis omitted).

[212] See *United States v Cameron*, 699 F3d 621, 643–47 (1st Cir 2012) (regarding a report by Yahoo! employees on Internet users' visits to child pornography sites); *United States v Norwood*, 603 F3d 1063, 1068 (9th Cir 2010) (regarding a report by a Department

precisely the same as that which applies to forensic analysts—the report's compilation requires an exercise of judgment, which triggers a right to cross-examination.

Third, a pair of cases can be seen as bookends for a spectrum of interpreters who exercise discretion and independent judgment: rote, conduit translation might not be subject to cross-examination, while decoding a secret language would be.[213] First, concerning the "rote-translation" bookend, a communications assistant employed in the Telecommunications Relay Service is an "even better" example of a language conduit, as the assistant facilitates telephone communications with the hearing impaired simply by repeating words when needed—that is, the assistant exercises no independent judgment.[214] The Seventh Circuit specifically contrasted the assistant with an interpreter—the assistant simply recites words to ensure comprehension, whereas an interpreter *selects* the "best word" to convey a particular meaning.[215] Second, concerning the "language-decoding" bookend, the Fourth Circuit concluded that someone who translates code words used in narcotics transactions—namely "tickets" and "T-shirts"—into plain English *is* subject to *Crawford* cross-examination.[216] The process of identifying otherwise-innocuous terms from "unusual pattern[s] of speech" formed the basis of the analysis.[217] Thus, courts consider linguistic analysis to be hearsay that triggers the right to confrontation;[218] by contrast, rote repetition of words is not hearsay because it requires no independent judgment.[219] This distinction tracks the "test results" versus "diagnosis" analogy for forensic analysis.

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of Employment Security employee certifying that there was no record of wages paid to the defendant during a particular period).

213 Compare *Germano v International Profit Association*, 544 F3d 798, 803 (7th Cir 2008), with *United States v Johnson*, 587 F3d 625, 634 (4th Cir 2009). Note, however, that neither of these cases involved foreign-language translation.

214 *Germano*, 544 F3d at 803.

215 Id (noting as an example that an English-to-French translation of "to know" could be either *savoir* or *connaître*).

216 *United States v Johnson*, 587 F3d 625, 634 (4th Cir 2009). See also Tom Mieczkowski, *Crack Lingo in Detroit*, 65 Amer Speech 284, 285–87 (1990) (cataloguing the incredible diversity of drug slang, including "black beauties," "oyster stew," "Haitian sensation," "kibbles and bits," and "How do you like me now?") (emphasis omitted).

217 *Johnson*, 587 F3d at 634 (quotation marks omitted).

218 See, for example, id (holding that drug-trafficking officers use independent judgment in decrypting a language and are thus subject to cross-examination).

219 See *Germano*, 544 F3d at 803 (holding that rote repetition by a communications assistant for the deaf is not hearsay).

These cases strongly suggest that foreign-language interpreters' translations of defendants' out-of-court statements should be considered hearsay because interpreters exercise discretion to convey a defendant's intended meaning. Whereas forensic analysts operate in controlled environments with clearly outlined procedures, have well-established academic credentials, and are subject to substantial peer review, foreign-language interpreters often operate independently in an incredible variety of contexts, in which there is often no peer review. Indeed, Judge Berzon has recognized this distinction: "Translation from one language to another is much *less* of a science than conducting laboratory tests, and so much more subject to error and dispute."[220]

Though a non-English-speaking defendant can testify to his own out-of-court statements, comparing translated *in*-court statements to previously translated *out*-of-court statements becomes a "he said, she said" inquiry—a battle of the interpreters[221]—in which the defendant is not able to cross-examine the prior interpreter's judgment. Recall the case of a police officer deliberately mistranslating statements.[222] It is easy to imagine an interpreter's translation falling within the category of activities involving independent judgment—after all, an interpreter clearly "appl[ies] his training and experience to the sources before him" to translate a defendant's statements.[223] This judgment or inference informs the basis for cross-examination in a variety of other circumstances, and the next Section provides further proof that foreign-language interpreters make judgments and inferences.

B. Renouncing the Interpreter as a Conduit or Agent

In the earliest mention of a translator serving as a "language conduit," the Ninth Circuit did not explain *why* an interpreter is "merely a language conduit."[224] Rather, the court made this claim in a conclusory fashion. Puzzlingly, later cases accepted the conduit characterization without question and confusingly

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220 *Orm Hieng*, 679 F3d at 1149 (Berzon concurring).

221 See, for example, *Kitchen v Tucker*, 2012 WL 7051038, *11 (ND Fla) ("[T]he Court has no method of determining which interpretation is correct."). See also *Ben Halim v Ashcroft*, 107 Fed Appx 1, 6 (7th Cir 2004) (noting the defendant's difficulty in overcoming a lower court's credibility determination despite discrepancies among competing translations).

222 See note 13.

223 *Johnson*, 587 F3d at 635.

224 *Ushakow*, 474 F2d at 1245.

adding the possibility that an interpreter could serve as the defendant's agent. No court, save the Eleventh Circuit, has questioned this theory or substantiated its conclusion to any extent.[225] As mentioned above, under the conduit approach, courts view translators as akin to an online translation service, in which inputs from one language always yield the same outputs in another language. The agent approach suggests that the interpreter is an advocate for the defendant's interests. This Section explains why each of these propositions is fictitious.

Linguists reject outright the notion that an interpreter is a language conduit: "[T]he idea of any sort of literal or 'word-for-word' translation [is] untenable."[226] Indeed, the importance of language in law makes it doubly odd that courts would be so cavalier in considering the ability of languages to interrelate.[227] The scope of certain rights often turns on the interpretation of only a few words.[228] Translators may disagree about a particular interpretation because there are many degrees of discretion:[229] an interpreter may use "more (or less) polite language; . . . inject or omit hesitation; use more formal . . . language; [ ] or introduce

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[225] See note 145 and accompanying text.

[226] Michèle Kaiser-Cooke, *Translatorial Expertise—A Cross-Cultural Phenomenon from an Inter-disciplinary Perspective*, in Mary Snell Hornby, Franz Pöchhacker, and Klaus Kaindl, eds, 2 *Translation Studies: An Interdiscipline* 135, 138 (John Benjamins 1994). See also Peter Ludlow, *Living Words: Meaning Underdetermination and the Dynamic Lexicon* 61 (Oxford 2014) (providing an example of a group of people who, when asked to generate a synonym for a given term from a list of twenty terms, selected the same term only 80 percent of the time).

[227] See Iulia Daniela Negru, *Acceptability versus Accuracy in Courtroom Interpreting*, in Davide Simone Giannoni and Celina Frade, eds, *Researching Language and the Law: Textual Features and Translation Issues* 213, 214 (Peter Lang 2010) ("No other domain, not even scientific discourse, gives as much importance to its linguistic vehicle as does the law.").

[228] See, for example, Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 Yale L J 992, 1002, 1025–37 (2008) (claiming that courts misconstrue the definition of "disability" in a federal statute, resulting in a substantial narrowing of the statute's scope). Consider, too, interpretation of the US Constitution's Commerce Clause; the construction of this fifteen-word clause has massive consequences for the structure of the American federal system. See US Const Art I, § 8, cl 3. Compare *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1, 37 (1937), and *Wickard v Filburn*, 317 US 111, 120 (1942), with Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va L Rev 1387, 1393–99, 1446–47, 1450–51 (1987) (rejecting the Supreme Court's broad construction of the Commerce Clause based on textual and structural constitutional interpretation).

[229] See Hans J. Vermeer, *Translation Today: Old and New Problems*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* 3, 3 (cited in note 226) (noting that translators are constantly faced with the challenge of adopting literal or contextual translations).

ambiguities."[230] Additionally, certain terms are interculturally untranslatable.[231]

"Translation" has been defined as "the replacement of textual material in one language [the source language] by equivalent textual material in another language [the target language]"; the "central problem" of translation is finding the "equivalents" in the target language.[232] This equivalency is a "complex concept"[233] that is not "mathematical or logical."[234] The concept of translation itself is a "misleading concept"—the target language is in a "*value relationship* to a certain 'subject' or topic expressed in [the source] . . . language."[235] Even speaking a target language "correctly," with appropriate grammar and vocabulary, does not necessarily imply "speaking" the target language—there is more to language than just the words. Consider, for example, a native English speaker speaking grammatically correct French without the correct phonology—that is, appropriate pronunciation and accent.[236] One can hardly imagine that native French speakers would affirm the native English speaker's ability to speak French.

This Section has two objectives: (1) to rebut the sparse reasoning that supports the language-conduit and agent approaches and (2) to explain how foreign-language interpreters make reasoned judgments that render the translation hearsay when offered by another person in court, in line with cases discussed in the prior Section. This Section demonstrates that translation involves subjectivity and discretion. First, it explains that there is not a one-to-one relationship between languages. Second, it makes clear that context is a key part of communication, showing that language is underdetermined (that is, words' meaning

[230] Negru, *Acceptability versus Accuracy in Courtroom Reporting*, in Giannoni and Frade, eds, *Researching Language and the Law* at 225 (cited in note 227).

[231] See Ellen Frances Saunders, *11 Untranslatable Words from Other Cultures*, Maptia Blog (Maptia Aug 21, 2013), online at http://blog.maptia.com/posts/untranslatable-words-from-other-cultures (visited Nov 3, 2014) (describing eleven words that cannot be translated directly into English, such as the German word *waldensamkeit*, which describes the feeling of being alone in the woods).

[232] J.C. Catford, *A Linguistic Theory of Translation: An Essay in Applied Linguistics* 20–21 (Oxford 1965) (emphasis omitted).

[233] Albrecht Neubert, *Competence in Translation: A Complex Skill, How to Study and How to Teach It*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* 411, 414 (cited in note 226).

[234] Id at 413–14.

[235] Id.

[236] See Catford, *A Linguistic Theory of Translation* at 12–13 (cited in note 232).

is dynamic, shifting according to context) and that translating legal concepts is particularly problematic, given the accuracy premium. Third, it illustrates that considering an interpreter a defendant's agent conflicts with core principles of agency law.

1. There is not a one-to-one relationship between languages.

"It is generally accepted that translation of any kind . . . involves some measure of approximation."[237] A translator's objective is *not* "linguistic transcoding."[238] Rather, a translator must convey the speaker's "meta-meaning" that "arises out of the [speaker's] intention to have communication established with someone else."[239] This conveyance involves inherent subjectivity and discretion because a translator chooses how best to communicate the speaker's message.

A number of factors make it difficult to directly translate between languages. Within language, there are different "ranks," or units, ranging from morpheme[240] to word to clause to phrase to sentence.[241] Ranks help establish equivalencies across languages,[242] but many languages do not share rank structures.[243] Professor Noam Chomsky disputes this notion, however, claiming that there are "condition[s] of generality" that are defined independently of any particular language, such that some features are universal to all languages.[244] Professor Estrella Durán

[237] Karen McAuliffe, *Translation at the Court of Justice of the European Communities*, in Frances Olsen, Alexander Lorz, and Dieter Stein, eds, *Translation Issues in Language and Law* 99, 105 (Palgrave MacMillan 2009).

[238] Vermeer, *Translation Today*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* at 11 (cited in note 226).

[239] Id. See also Gerhard Obenaus, *The Legal Translator as Information Broker*, in Marshall Morris, ed, 8 *Translation and the Law* 247, 248–49 (John Benjamins 1995) (noting the existence of varying levels of equivalencies between languages).

[240] A "morpheme" is "[t]he smallest meaningful morphological unit of language, one that cannot be analysed into smaller forms." *Oxford English Dictionary* 1091 (Oxford 2d ed 1989).

[241] See Catford, *A Linguistic Theory of Translation* at 24 (cited in note 232). See also Noam Chomsky, *Syntactic Structures* 11 (Mouton 7th ed 1968).

[242] See Catford, *A Linguistic Theory of Translation* at 32 (cited in note 232).

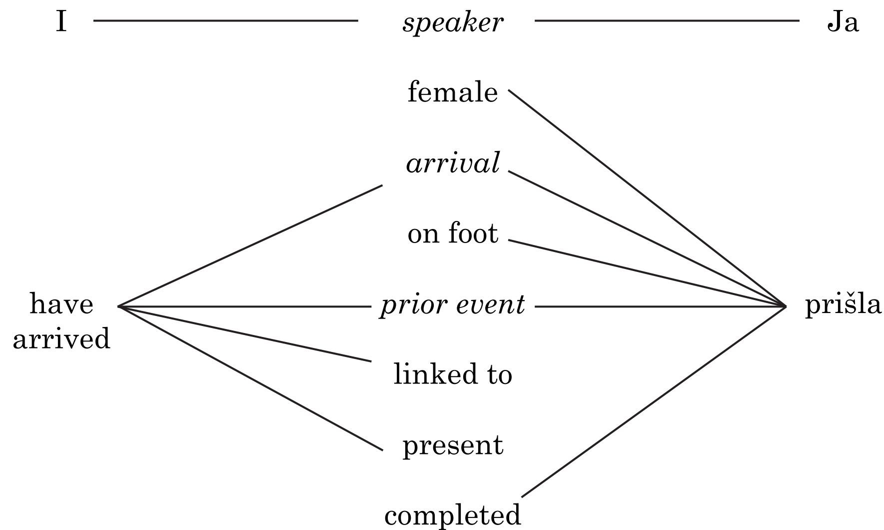
[243] See, for example, id at 33 (furnishing the example of Kabardian, which has only four ranks, compared to English's five).

[244] See Chomsky, *Syntactic Structures* at 49–50, 108 (cited in note 241) (noting that grammatical devices are used systematically across languages).

agrees.[245] She builds a historical argument to support the notion that "*if* p, *then* q" has been an "essential grammatical and cognitive mechanism" in codification of legal regimes since the time of Babylon.[246] These arguments consider language in the abstract, however, ignoring substantive variations between languages. Legal language relies on specificity and exactness, involving a much smaller level of granularity, and these features render Chomsky's and Durán's critiques less salient in the context of foreign-language interpreters.[247]

Indeed, these claims are undercut by a series of examples and case studies that effectively rebut any notion of a one-to-one language equivalency. First, Professor J.C. Catford gives a detailed explication of the translation of "I have arrived" from English to Russian, "*Ja prišla*,"[248] graphically representing the translation as follows:

FIGURE 3. TRANSLATING "I HAVE ARRIVED" FROM ENGLISH TO RUSSIAN



[245] See Estrella Montolío Durán, *Discourse, Grammar and Professional Discourse Analysis: The Function of Conditional Structures in Legal Writing*, in Giannoni and Frade, eds, *Researching Language and the Law* 19, 42 (cited in note 227).

[246] Id.

[247] See notes 228–29 and accompanying text. See also notes 290–308 and accompanying text.

[248] Catford, *A Linguistic Theory of Translation* at 37–39 (cited in note 232).

The connectors demonstrate meaning communicated by each phrase. For example, "I have arrived" communicates a present tense, while "*Ja prišla*" communicates that a woman is speaking.[249] Eight unique dimensions communicate meaning in this simple phrase, but English and Russian share only three of them—these dimensions are italicized. Though the phrases are formally equivalent, they communicate something slightly *different*. While an English speaker says, "I have arrived," a Russian speaker (translated to English) says, "I (a woman) have completed my arrival on foot." Consider, too, that Google translates "I have arrived" to *Ya priyekhal* in Russian.[250]

Different cultures may put a certain gloss on meaning as well, further undermining the notion of a one-to-one relationship between languages.[251] For example, a businessman in India might say, "Yes, we'll meet the deadline," but that may more accurately mean "I'll do my best."[252] Likewise, "to deceive" or "to cheat" in English has various Spanish translations, including the academic *dar gato por liebre*, the Mexican *hacerle guaje a uno*, and the Chilean *pasársela a uno*.[253] Indeed, the academic variant *dar gato por liebre* literally translates to "to give a cat for a hare." Similarly, idioms, which exist in every language, complicate translation—for example, the Spanish idiom *Para cada puerco hay su Sanmartín* is literally translated as "St. Martin's day comes for every pig," but the intended meaning is "[e]veryone gets their [ ] just desserts in the end."[254]

Several case studies of foreign-language translation further illustrate this point.[255] First, Professor Lawrence Venuti presents

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[249] Id at 38.

[250] Google, *Google Translate*, online at https://translate.google.com/#auto/ru/I%20have%20arrived (visited Nov 3, 2014). See also Paul Falla, ed, *The Oxford Russian Dictionary* 620 (Oxford 3d ed 2000) (providing additional, different Russian translations for "arrival by land transport" and "arrival by air").

[251] See David Bellos, *Is That a Fish in Your Ear? Translation and the Meaning of Everything* 77 (Faber & Faber 2011) ("[T]here are significant differences between cultures and languages in how people do things with words.").

[252] Ken Wollins, *Outsourcing Legal Services Overseas: Choosing the Solution That's Best for You*, 17 Bus L Today 60, 63 (2007) (noting that this example is borne out of a cultural tendency to avoid conflict and bad news).

[253] Carlos Castillo and Otto F. Bond, *The University of Chicago Spanish Dictionary* 246 (Chicago 4th ed 1987).

[254] Juan Serrano and Susan Serrano, *Spanish Proverbs, Idioms and Slang of Yesterday and Today* 184 (Hippocrene 1999).

[255] Consider the case of Willie Ramirez. When admitted to a Florida hospital, Ramirez indicated that he was *intoxicado*, which a nurse translated as "intoxicated," as from drugs or alcohol, rather than the correct translation, "poisoned." The doctors treated Ramirez as

two translations of Henning Mankell's *Sidetracked* by the same translator from the original Swedish to English.[256] In one version, the translator hews closely to the original text, but in a later version, the translator changes the perception of the novel's character by simply altering the narrative point of view.[257] The *Sidetracked* translations demonstrate how a single interpreter can apply different linguistic judgments that materially alter an audience's reaction to the same underlying text.

Second, Professor Tiina Puurtinen buttresses this point with two different Finnish translations of *The Wizard of Oz*.[258] Puurtinen shows how authors may use the mechanism of English–Finnish translation to communicate markedly different styles[259]—even with the same source language *and* the same target language, translations may differ significantly, according to the translator's ultimate aim.

Third, Professors Christina Schäffner and Beate Herting examined a French and a German translation of Timothy Garton Ash's *The Revolution of the Magic Lantern*, as published in the *New York Times Review of Books* in November 1989.[260] The authors found that both translations added, deleted, and changed textual information.[261] The German translator treated the text as "sacrosanct," resulting in several serious translation errors, while the French translator was more apt to look for the "sense behind the words," changing the literal translation.[262]

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if he were suffering from an intentional drug overdose when he was actually suffering from an intracerebral hemorrhage. The delay in treatment left Ramirez quadriplegic and later resulted in a medical malpractice settlement of $71 million. See Nataly Kelly and Jost Zetzsche, *Found in Translation: How Language Shapes Our Lives and Transforms the World* 3–5 (Perigee 2012).

[256] See Lawrence Venuti, *The Translator's Invisibility: A History of Translation* 157–58 (Routledge 2d ed 2008).

[257] See id.

[258] See Tiina Puurtinen, *Dynamic Style as a Parameter of Acceptability in Translated Children's Books*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* 83, 84–87 (cited in note 226) (comparing Kersti Juva's translation, *Ozin velho*, with Marja Helanen-Ahtola's translation, *Oz-maan taikuri*, and noting a "target-culture-specific" norm in children's literature that necessitates manipulation). Though the subject matter is inapposite, Puurtinen's analysis demonstrates the possibility for manipulation in translating conversation.

[259] See id at 86.

[260] See Christina Schäffner and Beate Herting, *"The Revolution of the Magic Lantern": A Cross-cultural Comparison of Translation Strategies*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* 27, 27 (cited in note 226).

[261] See id at 34.

[262] Id.

Finally, recall the American film "It's Complicated," starring Meryl Streep and Alec Baldwin.[263] When the film was circulated in France, rather than choosing a literal translation for the French title, *C'est compliqué*, the producers chose *Pas si simple!*—literally translated to English as "Not so simple!"—in an effort to convey a particular impression about the film.[264] These examples further illustrate how different translators treat the relationship between the source language and the target language differently—there is not *one* option, as the language-conduit theory otherwise suggests.

Applied to a legal proceeding, in which the audience is sometimes a jury, a particular translation may lead a jury to make assumptions and draw inferences about a defendant.[265] Commentators have shown that juries favor evidence presented by the prosecution when it is presented as being "official."[266] Others have shown how an interpreter may manipulate a non-English-speaking defendant's statements to change the jury's perceptions of the defendant and his testimony.[267] This is particularly problematic when considered alongside the fact that, when a defendant presents a credibility challenge to police testimony, "the police will almost always win."[268]

The fact that there is not a one-to-one relationship between languages is even more apparent when considering words that simply do not exist in the target language. Consider, for example, *cualcino* in Italian ("the mark left on a table by a cold glass") or *jayus* in Indonesian ("a joke told so poorly . . . that one cannot help but laugh").[269] This discussion refutes the notion of a one-to-one

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[263] *It's Complicated* (Universal Pictures 2009).

[264] See Bellos, *Is That a Fish in Your Ear?* at 80–81 (cited in note 251) (noting variance in connotations of words that are otherwise exact denotations in English and French).

[265] See, for example, *Amadou v Immigration and Naturalization Service*, 226 F3d 724, 727 (6th Cir 2000) (concluding that a particular translation in an asylum hearing led the immigration judge to make a credibility determination adverse to the plaintiff).

[266] Mary Bucholtz, *Language in Evidence: The Pragmatics of Translation and the Judicial Process*, in Morris, ed, 8 *Translation and the Law* 115, 127 (cited in note 239).

[267] See, for example, Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* 97–118 (Chicago 2002); Marianne Mason, *Courtroom Interpreting* 19–39 (America 2008) (documenting how interpreters alter style, grammar, meaning, and intent in their interpretations of a non-English-speaking defendant's statements).

[268] Lawrence M. Solan and Peter M. Tiersma, *Speaking of Crime: The Language of Criminal Justice* 110 (Chicago 2005).

[269] Saunders, *11 Untranslatable Words from Other Cultures* (cited in note 231). See also Christina Sterbenz, *9 Incredibly Useful Russian Words with No English Equivalent*,

relationship between languages. Foreign-language translation involves inherent subjectivity and judgment, akin to diagnosing rather than reading test results.[270]

2. Context is a key part of communication.

The context of the translation itself comprises a key component of this communication, as both the translated interaction and the translator's own cultural background influence the manner in which statements are translated.[271] "[T]ranslating is a culture-sensitive process"[272] that is determined "on the very fundamental cognitive level."[273] The method of communication between parties also affects meaning,[274] and this is particularly important for legal communication.[275] The fact that context informs a translator's choices provides further support for an approach that subjects translators to cross-examination.

A translator must view him or herself in relation to the speaker's sociocultural and geographic space,[276] such that the translator's work product accounts for local norms.[277] People often omit information in conversation because societal norms

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Business Insider Education (Business Insider Apr 18, 2014), online at http://www.businessinsider.com/untranslatable-russian-words-2014-4 (visited Nov 3, 2014) (providing examples of Russian words that must be explained, at length, in English).

270 See text accompanying notes 207–11. For an example of a culturally untranslatable legal term, see notes 300–01 and accompanying text.

271 See Catford, *A Linguistic Theory of Translation* at 2 (cited in note 232); H.P. Grice, *Logic and Conversation*, in Peter Cole and Jerry L. Morgan, eds, 3 *Syntax and Semantics: Speech Acts* 41, 45–47 (Academic 1975) (describing how a conversation has several key features that are specific to each interaction).

272 Vermeer, *Translation Today: Old and New Problems*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* at 10 (cited in note 226).

273 Kaiser-Cooke, *Translatorial Expertise*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* at 138 (cited in note 226).

274 See Cecilia Wadensjö, *Interpreting as Interaction* 8 (Longman 1998); William M. O'Barr, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* 3 (Academic 1982) (noting how the "noncontent" features of language carry substantial information). See also Herbert H. Clark, *Arenas of Language Use* 116–21 (Chicago 1992) (explaining how a conversation establishes a "common ground" between the parties present, resulting in economy of language).

275 See Negru, *Acceptability versus Accuracy in Courtroom Reporting* at 214 (cited in note 227) (noting the importance of the meaning of nuances in legal communication).

276 See Judith Woodsworth, *Translators and the Emergence of National Literatures*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* 55, 55 (cited in note 226). See also Michael Stubbs, *Discourse Analysis: The Sociolinguistic Analysis of Natural Language* 8 (Chicago 1983) (suggesting that there is no use of language that is not "embedded" in the local culture).

277 See José Lambert, *The Cultural Component Reconsidered*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* 17, 19 (cited in note 226).

render particular phrases superfluous.[278] For example, a speaker in Japan might say, "It is four o'clock," while what the speaker *precisely* means is that "it is four o'clock in Japan at this particular moment."[279] Social norms may truncate expressions, a fact that a translator must consider in the process of translation.[280] Consider, too, how dialects shape the use of language based on geography and social composition.[281] As Professor José Lambert notes, it is important to be aware of these institutional norms, but it is a difficult task for interpreters in heterogeneous societies.[282] This underscores the argument above concerning variation and nuance within language—an interpreter must be equally sensitive to local dialects to effectively communicate meaning from the source language to the target language. Consider, for example, translating demonstratives from Standard English to the northeast Scottish dialect. Whereas Standard English uses singular and plural demonstratives, Scottish does not make this distinction, adding a dimension beyond "this" and "that."[283] Determining how, exactly, "this," "that," or "yon" is translated from Scottish to English involves translator discretion because there are not universal equivalencies, as illustrated in Figure 4.

[278] See Hideyuki Nakashima and Yasunari Harada, *Situated Disambiguation with Properly Specified Representation*, in Kees van Deemter and Stanley Peters, eds, *Semantic Ambiguity and Underspecification* 77, 80–81 (Center for the Study of Language and Information 1996).

[279] Id at 80.

[280] See Ludlow, *Living Words* at 65 (cited in note 226) (claiming that words and phrases are simply "hints and clues" that can be understood only in light of contexts and social settings); Bellos, *Is That a Fish in Your Ear?* at 77 (cited in note 251).

[281] See Catford, *A Linguistic Theory of Translation* at 87–88 (cited in note 232) (noting that the English dialect of Cockney might be best translated to the French dialect of Parigot, rather than Parisian French).

[282] See Lambert, *The Cultural Component Reconsidered*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* at 22 (cited in note 226).

[283] This example is provided by Catford, *A Linguistic Theory of Translation* at 37 (cited in note 232).

FIGURE 4. COMPARING DEMONSTRATIVES IN STANDARD ENGLISH AND NORTHEAST SCOTTISH

<table>
<tr><th colspan="2">Standard English</th><th colspan="2">Northeast Scottish</th></tr>
<tr><td>Singular</td><td>Plural</td><td>Singular</td><td>Plural</td></tr>
<tr><td rowspan="3">This</td><td rowspan="3">These</td><td colspan="2" rowspan="2">This</td></tr>
<tr></tr>
<tr><td colspan="2" rowspan="2">That</td></tr>
<tr><td rowspan="3">That</td><td rowspan="3">Those</td></tr>
<tr><td colspan="2" rowspan="2">Yon</td></tr>
<tr></tr>
</table>

Though an isolated example, translating "this" versus "that" could have significant consequences. Imagine a criminal suspect who is asked whether he was in a particular location at a given time. In his non-English response, there may be some ambiguity over whether he was "in this neighborhood" versus "in that neighborhood." The exact location of the suspect could be dispositive for a criminal investigation, such that it would be critical to interrogate the foreign-language interpreter who translated the suspect's statements in a particular way.

Similarly, Professor Peter Ludlow claims that language is "underdetermined."[284] That is, word meanings are dynamic; they constantly shift between and *within* conversations.[285] Language is not fixed.[286] "[T]ranslators are [ ] in the business of . . . extending and morphing the target language so as to communicate the *ideas* found in the source."[287] For example, consider the statement,

[284] Ludlow, *Living Words* at 2–3 (cited in note 226). See also generally Barbara Abbott, *Reference* (Oxford 2010).

[285] See Peter Ludlow, *The Living Word*, NY Times Opinionator: The Stone (NY Times Apr 22, 2012), online at http://opinionator.blogs.nytimes.com/2012/04/22/the-living-word (visited Nov 3, 2014). See also Kaiser-Cooke, *Translatorial Expertise* at 138 (cited in note 226); David Shwayder, *A Semantics of Utterance*, 2 Midwest Stud Phil 104, 114–15 (1977) (describing different uses of "telling" as an assertion, a promise, a request, an order, a piece of advice, or an imprecation, and contrasting use of "I tell you, shut up!" as an order, to "I told you, that would be unwise," as a piece of advice).

[286] See Ludlow, *Living Words* at 65, 113 (cited in note 226) (furnishing the example of a Serbian translation of *The Color Purple*, in which "Black English Vernacular" was translated to Bosnian, rather than a Serbian dialect).

[287] Id (emphasis added). See also Venuti, *The Translator's Invisibility* at 125 (cited in note 256).

"I saw her duck."[288] In isolation, "duck" is underdetermined. Only in context is it clear whether "duck" refers to a bird or a movement. In a criminal interrogation, imagine that a suspect says, "I sold hamburger helper." Out of context, one might infer that the suspect was referring to the commercial food product, but "hamburger helper" has also been used as a street term to refer to cocaine.[289] That language is underdetermined extends the idea of context-dependent translation. Modulations happen constantly, forcing keener awareness of conversational context, as couched within the broader cultural context.

Exacting use of language is particularly important in the law.[290] There is much room for subjectivity, manipulation, and error in translation, so when parties' legal rights turn on a correct translation, as in the cases cited,[291] the stakes should dictate an inquiry into the correctness and potential ambiguity of the translation—that is, through the opportunity to cross-examine the translator. Translation error is certainly not specific to criminal defendants. One court explained in an immigration proceeding that "errors are bound to occur even in the best of circumstances with the most competent translators."[292]

Translation errors can occur throughout the criminal process. *Miranda* warnings,[293] for example, must be delivered so that a non-English-speaking defendant understands the substantive rights at stake. In one instance, a court found that the

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[288] Georgia M. Green, *Ambiguity Resolution and Discourse Interpretation*, in van Deemter and Peters, eds, *Semantic Ambiguity and Underspecification* 1, 16 (cited in note 278).

[289] Mieczkowski, 65 Amer Speech at 287 (cited in note 216). In the context of a non-English-speaking suspect, it would also be crucial to interrogate *how* an interpreter was able to translate a foreign phrase to "hamburger helper," in addition to interrogating the difficulty of determining whether this phrase refers to cocaine.

[290] See generally Brenda Danet, *Language in the Legal Process*, 14 L & Socy Rev 445 (1980). "Words are obviously of paramount importance in the law." Id at 448. For one, the construction of discrete statutory terms can have tremendous implications for the scope of particular rights. See, for example, *Nationwide Mutual Insurance Co v Darden*, 503 US 318, 321–23 (1992) (wrestling with the appropriate definition of "employee," when the Court's construction of the term would determine the plaintiff's statutory rights to retirement benefits); *Reconstruction Finance Corp v Beaver County*, 328 US 204, 208–10 (1946) (interpreting the term "real property" in order to determine the scope of federal tax exemptions, with substantial implications for local and municipal governments). See also note 228.

[291] See Parts II.B, II.C.

[292] *Giday v Gonzales*, 434 F3d 543, 549 n 2 (7th Cir 2006). See also *He v Ashcroft*, 328 F3d 593, 598 (9th Cir 2003) (holding that deficiencies in translation for immigration-removal proceedings violate an alien's Fifth Amendment due process rights).

[293] See notes 117–20 and accompanying text.

Spanish statement (translated to English), "In case that you do not have money, you have the right to petition an attorney from the court," was inadequate to provide a *Miranda* warning.[294] Relatedly, foreign defendants may be overly willing to answer the police's questions based on experience with overly aggressive and corrupt police in their home country, but when a defendant states that he understands a *Miranda* warning, the court will not inquire into the defendant's subjective, culturally informed beliefs.[295] A court may order a retrial due to an incompetent translation, but as Judge Harry Pregerson astutely noted, "It is extremely difficult to pinpoint direct evidence of translation errors without a bilingual transcript."[296] Regrettably, there is no requirement for bilingual transcripts, and courts have a high standard for determining that an incompetent translation prejudiced a party's outcome—the translation must have potentially affected the outcome of the proceeding.[297] Unfortunately for non-English-speaking defendants, this is an "onerous" standard.[298] Indeed, when the government provides a translation in habeas proceedings, the translation is presumed lawful and is unreviewable, insulating the government-provided translation from dispute.[299]

[294] *United States v Higareda-Santa Cruz*, 826 F Supp 355, 359–60 (D Or 1993) (noting that this *Miranda* translation suggests that a defendant must be completely indigent to have a state-provided attorney and that the defendant must "petition" the court for an attorney, whereas under the Sixth Amendment, a defendant is entitled to an attorney simply by requesting one and a formal petition is not required).

[295] See, for example, *United States v Zapata*, 997 F2d 751, 757 (10th Cir 1993) (finding irrelevant the defendant's claim that he consented to the search because, in his native Mexico, people must acquiesce to police demands to avoid dire consequences); *Le v State*, 947 P2d 535, 543 (Okla Crim App 1997) (explaining that, when an attorney was not present, the defendant believed that officers "would turn him upside down and put fish salt in his nose if he did not talk to them"); *Liu v State*, 628 A2d 1376, 1380 (Del 1993) (stating the defendant's argument that he instinctively surrendered his *Miranda* rights because his culture traditionally demanded unquestioning cooperation with authority figures). See also *Summary of Survey Results: Application Chapter*, in Moore and Fisher, eds, *Immigrants in Courts* at 167–76 (cited in note 116) (summarizing non-English-speaking immigrants' perceptions of the American legal process and noting salient differences from English-speaking Americans' perceptions).

[296] *Perez-Lastor v INS*, 208 F3d 773, 778 (9th Cir 2000).

[297] See id at 780, citing *Hartooni v Immigration & Naturalization Service*, 21 F3d 336, 340 (9th Cir 1994).

[298] *Perez-Lastor*, 208 F3d at 780. See also *United States v Santos*, 397 Fed Appx 583, 588 (11th Cir 2010) (declining to reverse a lower court's ruling on the validity of a foreign-language translation despite the "translator's confusion and [troubling] likely error").

[299] See *Latif v Obama*, 666 F3d 746, 755 (DC Cir 2011).

Concerning the accuracy of legal translation in a broader sense, Professor Uwe Kischel presents a cynical—though perhaps more realistic—view: "[T]he question in legal translation is not which translation is right, but, much more modestly, which one is less wrong."[300] Kischel substantiates his cynicism with the example of the Japanese *jôri*, which may be variously translated as "reason," "nature of things," or "common sense"—there is no single English equivalent.[301]

Translating complex American legal concepts for a non-English-speaking defendant may be particularly problematic. Professor Enrique Varó highlights this concern by comparing various Spanish terms to their English equivalents, which have wholly different legal implications.[302] Specifically, the Spanish *responsable* may be fairly translated to "answerable," "accountable," "liable," *or* "responsible"; each English term carries different connotations and, importantly, different legal consequences.[303] For example, "responsible" carries a stronger moral sense, whereas "liable" implies legal wrongdoing.[304] The American legal system might be particularly full of linguistic complexity; one commentator has noted the prolixity of American judicial opinions and how they "read like statutes."[305] How a translator chooses among these words—for example, from the Spanish *responsable* to the English "answerable" or "liable"—to describe a defendant's statements can be dispositive in a legal proceeding.[306] Recall the defendant in *Charles*.[307] What led the interpreter to say that Charles *knew* that her immigration paperwork was "illegal"?[308]

Thus, the conduit theory becomes increasingly less convincing: given the "morphing" process from source to target language,

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[300] Uwe Kischel, *Legal Cultures—Legal Languages*, in Olsen, Lorz, and Stein, eds, *Translation Issues in Language and Law* 7, 7 (cited in note 237).

[301] Id at 7–8.

[302] See Enrique Alcaraz Varó, *Isomorphism and Anisomorphism in the Translation of Legal Texts*, in Olsen, Lorz, and Stein, eds, *Translation Issues in Language and Law* 182, 186–88 (cited in note 237).

[303] Id.

[304] Id at 187–88 (providing multiple examples of terms with different moral and legal connotations).

[305] Ross Charnock, *Traces of Orality in Common Law Judgments*, in Giannoni and Frade, eds, *Researching Language and the Law* 113, 130 (cited in note 227) (contrasting American legal opinions with English legal opinions, which are often delivered orally).

[306] But see *Latif*, 666 F3d at 755 (affording government-provided translation in habeas proceedings a strong presumption of regularity).

[307] See Part II.C. See also note 11 and accompanying text.

[308] *Charles*, 722 F3d at 1321.

it is important to inquire how and why an interpreter chose to express a defendant's ideas in a particular way. The interpreter's calculus, being context-dependent, changes with each communication. This militates in favor of affording defendants an opportunity to cross-examine their interpreters, which is further justified by the complexity of legal translation. It is thus illogical to equate a foreign-language interpreter's subjective, culture-specific inputs and language choices with a machine's rote results.

* * *

Language relationships are complex—much more so than courts currently treat them. Even in cases in which there is arguably a "correct" translation, a foreign-language interpreter exercises judgment akin to the work of a forensic analyst. In many other contexts, when a person applies an inference or judgment to evidence in the course of a criminal investigation, this inference or judgment is subject to a hearsay objection when the person does not testify. As this Section demonstrates, the principle that subjects any person who applies independent inferences or judgments to cross-examination should equally apply to foreign-language interpreters. This principle is operationalized in Part III.C.

3. The interpreter-as-agent theory conflicts with core principles of agency law.

The *Da Silva* court determined that the hearsay exceptions in FRE 801(d)(2)(C) or (D) include an interpreter-as-agent approach but did not explore the explicit requirements for entering into an agency relationship.[309] Courts apply a "presumption of agency" in this context, despite no evidence of explicit authorization from a defendant.[310] Further, the *Nazemian* court deliberately avoided articulating a standard for proving that an agency relationship exists.[311] Because the government provides the translator in nearly all these circumstances, simply presuming that the government-provided translator (who is often a government *employee*)[312] is the defendant's agent is troubling and

309 See text accompanying notes 131–34.

310 Jack B. Weinstein, Margaret A. Berger, and Joseph M. McLaughlin, 4 *Weinstein's Evidence* § 801(d)(2)(C)[01] at 801-279 (Bender 1996).

311 See *Nazemian*, 948 F2d at 527.

312 See, for example, *Da Silva*, 725 F2d at 829 (involving a US Customs inspectional aide as the foreign-language interpreter); *Alvarez*, 755 F2d at 860 (involving an

conflicts with core principles of agency law. Professor Susan Berk-Seligson agrees, noting that there are problematic incentives when police officers serve as interpreters and that a police officer's role as interpreter should be viewed with "great skepticism."[313] For non-English-speaking defendants, complete comprehension of their criminal-investigation proceedings should be of paramount importance. This does not currently appear to be the case, as police officers have been shown to use conversational strategies to create the illusion of a crime to potential suspects, even when a crime did not occur.[314]

A principal-agent relationship may be entered into by express or implied contract, or by operation of law.[315] In the case of an implied contract, the parties' conduct must manifest a mutual intent that the agent may represent the principal for purposes of contracting on his behalf, but there is not a requirement of consideration.[316] Indeed, to have "actual authority" to legally bind the principal, the agent must "reasonably believe[ ]" that the principal wishes the agent "so to act," according to the principal's manifestations to the agent.[317]

In the foreign-language-interpreter context, courts often run roughshod over the manifestation requirement. In one instance, the defendant's "relie[f]" at the entrance of a translator, coupled with his acknowledgment of understanding his *Miranda* rights, was sufficient for "authorization."[318] More troublingly, a mere conversation with an undercover agent was deemed an agency relationship.[319] Compare these examples to agency principles in commercial law: the principal must provide actual evidence from his words and conduct that an agency relationship exists.[320]

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undercover Bureau of Alcohol, Tobacco, and Firearms special agent as the foreign-language interpreter).

313 Berk-Seligson, *The Bilingual Courtroom* at 225–27 (cited in note 267).

314 See Roger W. Shuy, *Creating Language Crimes: How Law Enforcement Uses (and Misuses) Language* 15–29, 37 (Oxford 2005) (explaining how police officers employ ambiguity, inaccurately restate information, and withhold information, among other strategies, to elicit confessions and inculpatory testimony from parties).

315 See Leonard Lakin and Martin Schiff, *The Law of Agency* 5 (Kendall/Hunt 1984).

316 See id at 5 & n 2. See also Roderick Munday, *Agency: Law and Principles* 48 (Oxford 2010) ("[I]mplied authority is a matter of inference from the circumstances of the case.").

317 Restatement (Third) of Agency § 2.01 (2006).

318 *Da Silva*, 725 F2d at 832.

319 See *Alvarez*, 755 F2d at 860.

320 See *Schaffart v ONEOK, Inc*, 686 F3d 461, 472–73 (8th Cir 2012). See also *Garanti Finansal Kiralama A.S. v Aqua Marine & Trading Inc*, 697 F3d 59, 73 (2d Cir 2012)

In light of typical applications of the principal-agent relationship, courts' invocation of the interpreter-as-agent approach is untenable. For one, agency relationships arise predominately in commercial contexts that involve repeat players and incentives for fair dealing.[321] Additionally, Rule 801(d)(2)(C), the nonhearsay agency exception, includes admissions by attorneys and spouses, which are irreconcilably different from the interpreter-defendant relationship.[322] A party may *choose* his attorney or spouse but, at least in the cases discussed, a defendant has *no* choice of interpreter.[323] Rather, the government almost always provides the interpreter without any consultation with the defendant. Accordingly, proper hearsay analysis suggests that courts should reverse the current presumption of agency, as discussed in the next Section.[324]

C. A New Framework

A witness's testimony of a defendant's translated statements is almost assuredly "testimonial" and thus covered by *Crawford*.[325] First, this Section proposes a clear rule: all foreign-language interpreters involved in a criminal investigation should be subject to *Crawford*-style–Confrontation Clause analysis unless the government proves an agency relationship by a preponderance of the evidence. Interpreters should be considered separate declarants, making their translations hearsay when another person testifies to the translations in court. This is consistent with Confrontation Clause jurisprudence, the inherent subjectivity of language translation, and principles of agency law. This approach varies slightly from the Eleventh Circuit's in that it suggests more-comprehensive protections, rooted in the Confrontation Clause. Second, this Section provides an additional rationale for the proposed rule: the existing *Nazemian* factors do not account for certain critical components of an interaction with

(finding, in the maritime context, that "apparent authority cannot be evidenced by statements of an agent alone").

[321] See Lakin and Shiff, *The Law of Agency* at 1 (cited in note 315).

[322] See Weinstein, Berger, and McLaughlin, 4 *Weinstein's Evidence* § 801(d)(2)(C)[01] at 801-270 to -71 & nn 5–6 (cited in note 310).

[323] See 28 USC § 1827(d)(2) (vesting the power to appoint translators primarily in the court).

[324] For a discussion of the few cases that have found the presumption of agency overcome in "unusual circumstances," see note 174.

[325] See *Charles*, 722 F3d at 1323–24.

a foreign-language interpreter. Third, this Section addresses potential objections to the proposed rule.

1. A right to confront foreign-language interpreters unless the government proves an agency relationship.

In *Crawford*'s wake, courts have become well versed in determining the scope of Confrontation Clause rights.[326] Given the analysis above, courts should conclude that foreign-language translators' statements are hearsay and include translators within the class of witnesses subject to the Confrontation Clause.[327] This is consistent with existing Confrontation Clause jurisprudence.

As established above,[328] the work of foreign-language interpreters is substantially similar to that of other expert witnesses who apply "training and experience to . . . reach[ ] an independent judgment,"[329] diagnose a condition,[330] or interpret laboratory results.[331] The Eleventh Circuit correctly found that there is not a one-to-one relationship between languages.[332] Language translation necessarily involves subjectivity, potentially introducing errors into evidence, which the defendant has a right to investigate. Accordingly, a foreign-language interpreter's out-of-court translations should be considered hearsay, fitting squarely within the Confrontation Clause's scope.

This approach affords a defendant the right to confront *any* foreign-language interpreter involved in his proceedings, not simply the interpreter with the "final say" over a translated transcript, as the Eleventh Circuit provides.[333] Rather, consistent with *Melendez-Diaz*, *Bullcoming*, and the multitude of lower court opinions,[334] a defendant should be allowed to cross-examine *every* interpreter involved with his case. This is because *each* interpreter

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[326] See Keenan, Note, 122 Yale L J at 827–32 (cited in note 110) (arguing that empirical data reveal that the lower courts apply *Crawford* consistently and that their application is generally correct).

[327] Note that a translator's statements to a police officer may still be admitted, for example, under the residual hearsay exception. See FRE 807. In this event, however, because the hearsay is admitted, the Confrontation Clause still affords the defendant a right to cross-examine the translator in regard to his or her statements.

[328] See Part III.A.

[329] *United States v Johnson*, 587 F3d 625, 635 (4th Cir 2009).

[330] See *United States v Moon*, 512 F3d 359, 362 (7th Cir 2008).

[331] See *Bullcoming*, 131 S Ct at 2710.

[332] See *Charles*, 722 F3d at 1324.

[333] See Part II.C.

[334] See Part III.A.

may exercise judgment in translating a defendant's statements. Each of these judgments merits cross-examination—not simply those of the interpreter who had the final say.

Under the proposed approach, in lieu of requiring a foreign-language interpreter to appear, the government may prove that the interpreter actually did serve as the defendant's agent during the course of pretrial interrogation. In that case, the interpreter's translation of the defendant's statements to the police would be appropriately considered nonhearsay under FRE 801(d)(2)(D). Courts currently apply a presumption of agency when considering whether an interpreter is a defendant's agent, even when the interpreter is a government employee.[335] Agency law requires, however, a "reasonabl[e] belie[f]" by the agent that he may bind his principal.[336] Accordingly, in order for an interpreter to be justifiably considered a defendant's agent, the government should be required to prove the interpreter's reasonable belief by a preponderance of the evidence. The interpreter's reasonable belief may also be informed by Code of Ethics standards set by the National Association of Judiciary Interpreters and Translators.[337]

Incorporating this requirement into criminal proceedings would not be unduly burdensome. The agency requirement operates from a baseline that would allow a defendant to provide his own interpreter in the course of an interrogation. This interpreter, present at the defendant's explicit request, is clearly an agent for the defendant, who would be more easily cross-examined at trial. Additionally, if the defendant's interpreter were to commit an error, the defendant, as the interpreter's principal, would have a cause of action against the interpreter for breach of agency duties to "act reasonably and . . . refrain from conduct that is likely to damage the principal[ ]."[338]

The state could also provide an interpreter, but this would require the defendant's waiver: the defendant would be required to indicate that he understands his right to provide his own interpreter and instead prefers to have a government-provided interpreter act as his agent. This waiver could be easily incorporated

[335] See text accompanying notes 135, 142.

[336] Restatement (Third) of Agency § 2.01 (2006).

[337] See generally National Association of Judiciary Interpreters and Translators, *Code of Ethics and Professional Responsibilities*, online at http://www.najit.org/about/NAJITCodeofEthicsFINAL.pdf (visited Nov 3, 2014).

[338] Restatement (Third) of Agency § 8.10 (2006).

into *Miranda* warnings, or the police could provide the defendant with an additional written acknowledgment of the implications of an interpreter's statements—much like a written contract. In fact, the police already use *Miranda* cards, translating *Miranda* warnings into a variety of languages.[339] It seems relatively simple, then, to require clear communication of the implications of a defendant's statements to a translator.[340] Of course, there are instances of defendants not fully understanding their *Miranda* rights as they are currently presented, so one might be skeptical of requiring additional rights to be presented at this stage of a criminal investigation.[341] This solution merely aims to provide a floor for courts to enforce; it does not offer a panacea, which is realistically impossible.

Courts must consider the interpreter-as-agent model with considerably more probing analysis than the status quo—otherwise, there is potential for rampant abuse in criminal investigations. There are no clear legal standards for police interpreters in the course of an investigation, to which Judge Berzon expressed growing concern: "[I]f [the government] continues to provide translators who are untrained, untested, and of, at best, 'marginal' competence, and also continues not to record interrogations involving an interpreter, it will be unnecessarily risking the validity of the resulting convictions."[342] Notably, the federal judiciary has outlined professional qualifications for courtroom interpreters, which could be easily imported to police officers' criminal investigations.[343] By contrast, "relief" at the arrival of an interpreter is plainly insufficient to prove an agency relationship.[344]

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339 See Solan and Tiersma, *Speaking Crime* at 82–83 (cited in note 268); Berk-Seligson, *The Bilingual Courtroom* at 56 (cited in note 267) (providing an example of a mistranslated *Miranda* card).

340 See, for example, *Translated Explanation of Important Legal Concepts*, in Moore and Fisher, eds, *Immigrants in Courts* at 177–201 (cited in note 116) (providing templates of explanations of important rights translated for non-English-speaking defendants into Spanish, Russian, Arabic, Vietnamese, and simplified Chinese).

341 See note 294 and accompanying text.

342 *Romo-Chavez*, 681 F3d at 967 (Berzon concurring).

343 See *Guide to Judiciary: Vol. 5: Court Interpreting* §§ 310–20 (US Courts June 2011), online at http://www.uscourts.gov/uscourts/FederalCourts/Publications/Guide_Vol05.pdf (visited Nov 3, 2014) (requiring certified interpreters to pass the Federal Court Interpreter Certification Examination or the United Nations interpreter tests, among other examinations). Developing standards for interpreters in the course of an investigation is outside the scope of this Comment—this is likely within the ambit of congressional lawmaking—but this source makes clear that the judicial system has already outlined these standards, which could be easily imported to the police.

344 *Da Silva*, 725 F2d at 832.

2. An additional rationale: *Nazemian*'s inadequacy.

Crawford jurisprudence, the nature of foreign-language interpretation, and problems with the existing interpreter-as-agent model compel the cross-examination of foreign-language interpreters. The Ninth Circuit may continue to employ the *Nazemian* factors in *Crawford*'s wake, but, following from the above analysis, these factors are incomplete. The flawed notion of a language conduit may lead to unjust outcomes because the Ninth Circuit's analysis does not require consideration of the context of the interpretation—a holistic inquiry that includes the interpreter's physical presence and the location of the conversation—or the relationship of the source language to the target language. These additional factors are important for courts to consider. Further, the *Nazemian* court essentially ignored the fact that the government-provided interpreter in *Romo-Chavez* had a "quite weak" grasp of the defendant's foreign language.[345] Adding these additional factors to the *Nazemian* framework would, however, render the framework unworkable. Thus, the Ninth Circuit may continue to apply *Nazemian*, given its high threshold for abrogating circuit precedent,[346] but it must recognize that its analysis falls far short of accurately assessing the defendant-interpreter-police interaction for several reasons.

First, as explained above,[347] both the nature of the translated interaction and the translator's own cultural background will inform any given foreign-language translation. Currently, the *Nazemian* factors consider only which party supplied the interpreter and whether the interpreter had any motive to mislead or distort the defendant's statements.[348]

Courts do not presently consider whether an interaction is deemed official or the degree of documentation that the interpreter provides. The more official an interaction, the more likely that an interpreter would be attentive to the details of a defendant's statements. An undocumented interaction is less likely to represent a language-conduit relationship, as there is no mechanism to hold an interpreter accountable for his or her work. In

[345] *Romo-Chavez*, 681 F3d at 962–64 (Berzon concurring) (noting that the translator grew up merely "listening to Spanish," rather than actually speaking the language, and that he had studied Spanish for only four years in secondary school, roughly twenty years prior).

[346] See notes 147–52 and accompanying text.

[347] See notes 276–83 and accompanying text.

[348] See *Nazemian*, 948 F2d at 527.

contrast, for documented interactions there is a transcript of the conversation.[349] Accordingly, a foreign-language interpreter is unlikely to act as a language conduit in an undocumented, unofficial interaction.

Second, if an interpreter and a non-English-speaking defendant do not share a cultural background or heritage, the interpreter is less aptly characterized as a language conduit. Even speaking a language "correctly" does not necessarily entail correct use of a language.[350] An interpreter who is culturally unrelated to a defendant is less likely to understand particular idioms and slang, resulting in misunderstanding, ambiguity, and error. This inquiry should not simply be ethnicity- or nationality-based but should also inquire into an interpreter's degree of familiarity with the defendant's *use* of the foreign language.[351]

Third, the relationship between languages is unique to each language pair.[352] Just as courts currently conduct a case-by-case inquiry to determine whether an interpreter is a language conduit[353] and whether a statement is testimonial,[354] courts must inquire into the relationship between the source language and the target language for *each* translated interaction. In some instances—for example, translating from academic French to English—there is arguably an objectively correct translation. In others—for example, translating from idiomatic Spanish or Kabardian to English—this is less likely.[355] Accordingly, courts should inquire into these language relationships to determine whether the interpreter is appropriately characterized as a language conduit.

Of course, this inquiry is quite complicated and forces courts to conduct a linguistic inquiry well outside their area of expertise.

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349 But note that transcripts are often monolingual and that assessing a monolingual transcript's accuracy is "extremely difficult." *Perez-Lastor*, 208 F3d at 778.

350 See note 236 and accompanying text.

351 See Catford, *A Linguistic Theory of Translation* at 83 (cited in note 232) (claiming that "whole language," as a concept, is useless and that dialects and styles must inform one's analysis of language relationships); Lambert, *The Cultural Component Reconsidered*, in Hornby, Pöchhacker, and Kaindl, eds, 2 *Translation Studies* at 23 (cited in note 226) (suggesting that "culture cannot just coincide with the principle of 'nation'"); Kischel, *Legal Cultures—Legal Languages*, in Olsen, Lorz, and Stein, eds, *Translation Issues in Language and Law* at 9 (cited in note 237) (providing the example of different uses of the German language: Austrians and Germans both speak "German" but have "emotionally charged debates" over the correct words for potato and tomato).

352 See notes 248–64 and accompanying text.

353 See *Nazemian*, 948 F2d at 527.

354 See, for example, *United States v Burden*, 600 F3d 204, 224 (2d Cir 2010).

355 See Catford, *A Linguistic Theory of Translation* at 32–34 (cited in note 232).

Determining the relationship between languages is a complex analysis and requires sophisticated linguistic theory that judges are ill equipped to employ. This relationship is also likely different in each case, as substantial variety exists intralanguage.[356] The relationship between the languages at issue is, however, a critical component of the analysis that cannot be ignored.

For the above reasons, *Nazemian* is incomplete. Not only is its multifactor test "in great tension" with the Supreme Court's Confrontation Clause jurisprudence,[357] but it also mischaracterizes the relationship between a foreign-language interpreter and a non-English-speaking defendant. Therefore, continued application of *Nazemian* may be faithful to circuit precedent, but courts applying this test must recognize its inherent logical fallacy—the language conduit is woefully clogged.

3. The concern over a parade of horribles is unfounded.

The Confrontation Clause's storied history[358] undergirds support for a principle connected with a fundamental sense of fairness—that is, "acting evenhandedly, [ ] treating people with dignity, [ ] giving them autonomy and voice, [and] avoiding authoritarian abuse."[359] Justice Antonin Scalia agrees, calling face-to-face confrontation between an accused and his accuser something rooted "deep in human nature."[360]

Certain justices and commentators decried the results in *Melendez-Diaz* and *Bullcoming*, claiming that expanding the scope of the Confrontation Clause creates enormous burdens in criminal prosecutions.[361] The Court explicitly rejected this notion, however. First, the Confrontation Clause should not be shirked or disregarded in the name of the courts'—or prosecutors'—

[356] Consider, for example, the proliferation of dialects and idioms. See also notes 281–83 and accompanying text (highlighting differences in dialects and the implications for translation).

[357] *Romo-Chavez*, 681 F3d at 962 n 1 (Berzon concurring).

[358] See Part I.A.

[359] David Alan Sklansky, *Confrontation and Fairness*, 45 Tex Tech L Rev 103, 105 (2012).

[360] *Coy v Iowa*, 487 US 1012, 1017 (1988).

[361] See, for example, *Melendez-Diaz*, 557 US at 341–43 (Kennedy dissenting); *Williams*, 132 S Ct at 2251 (Breyer concurring); Ronald J. Coleman and Paul F. Rothstein, *Grabbing the* Bullcoming *by the Horns: How the Supreme Court Could Have Used* Bullcoming v. New Mexico *to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 Neb L Rev 502, 552–54 (2011).

"convenience."[362] Second, many states had passed laws enacting the holdings of *Melendez-Diaz* and *Bullcoming* before the Court's rulings—that is, affording a criminal defendant a statutory right to cross-examine the forensic scientist that processed laboratory evidence for the defendant's trial.[363] In these states there is *no* evidence to suggest that the criminal justice system has "ground to a halt."[364] In fact, empirical data supports the opposite conclusion.[365]

That the criminal justice system has continued to run smoothly is not surprising. Defendants will challenge a foreign-language translation only in the rare case in which the translation is disputed. Consider, for example, the asylum petition in *Perez-Lastor v Immigration and Naturalization Service*.[366] The transcript of the proceeding before the Immigration Judge (IJ) revealed multiple instances in which Perez-Lastor, the immigrant petitioning for asylum, was not responsive to the question asked of him.[367] Perez-Lastor appealed his denied asylum claim, disputing adequate translation before the IJ.[368] On appeal, the Ninth Circuit agreed and reversed the lower court's decision.[369] Perez-Lastor challenged the IJ's denial of his asylum claim on account of a disputed translation—if the translation had been accurate, Perez-Lastor would not likely have appealed. A defendant gains nothing by disputing a correct translation. Accordingly, it is important to provide an opportunity to challenge a translation's accuracy. A defendant's mere objection to a police officer's testimony of the defendant's translated statements would not reveal the underlying basis for a particular translation (as the officer is unable to furnish this explanation), and jurors will likely construe evidence in the officer's favor.[370]

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[362] *Melendez-Diaz*, 557 US at 325. See also *United States v Leon*, 468 US 897, 941 (1984) (Brennan dissenting).

[363] See, for example, *Melendez-Diaz*, 557 US at 326 (furnishing examples of such statutes in Georgia, Texas, and Ohio).

[364] Id at 325–26 & n 11.

[365] See Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 Tex Tech L Rev 51, 78 (2012) (stating that, in a study of Michigan rape trials involving evidentiary DNA results, there was an average of only 1.24 lab witnesses per trial).

[366] 208 F3d 773 (9th Cir 2000).

[367] Id at 778–79. For example, when asked whether his family still lived in a province in Guatemala, the petitioner said, "My dad has passed away, so I don't have any dad." Id at 779.

[368] Id at 780.

[369] Id at 783.

[370] See notes 266–68 and accompanying text.

Commonly, defendants will simply stipulate to the prosecution's evidence—one would expect this to be equally true of foreign-language translations.[371] Accordingly, this Comment's approach will realistically compel translators to testify only when there is a true dispute over the content or method of the translation, in line with the Sixth Amendment's purpose.

CONCLUSION

As should now be clear, courts' current inquiries into the relationship between a foreign-language interpreter and a non-English-speaking defendant's statements lack robustness: courts regularly consider an interpreter a language conduit for a defendant's statements without considering important aspects of this interaction. Given the complex nature of language relationships, this interaction requires a more scrutinizing inquiry. The majority of courts have found that interpreters' statements do not constitute hearsay and therefore concluded that interpreters (as language conduits) are outside the scope of the Confrontation Clause entirely. This analysis overlooks critical components of the interaction, however—components that undermine the language-conduit theory. An interpreter is anything but a conduit: he or she exercises discretion and judgment when translating a defendant's statements and may even alter third parties' perceptions—juries' included—of the defendant by employing a particular interpretive strategy.

This Comment resolves the ambiguity surrounding a non-English-speaking defendant's right to confront a foreign-language interpreter, suggesting that a police officer's testimony about an interpreter's out-of-court translation of the defendant's statements is hearsay. Thus, the interpreter should be subject to confrontation unless the prosecution can prove the interpreter's agency relationship by a preponderance of the evidence. This

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[371] See, for example, *Bullcoming*, 131 S Ct at 2718 ("[D]efendants 'regularly . . . [stipulate] to the admission of [ ] analysis.' '[A]s a result, [forensic] analysts testify in only a very small percentage of cases.'") (citation omitted); *Melendez-Diaz*, 557 US at 328:

> Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.

See also Friedman, 45 Tex Tech L Rev at 80 (cited in note 365) ("Defense counsel often stipulate to the results of DNA tests.").

approach eliminates the ambiguity inherent in courts' current balancing test for determining whether an interpreter is a defendant's language conduit, and it helps to counterbalance the incredible disadvantage at which non-English-speaking defendants are already placed in criminal proceedings.