

BREAKING THE LANGUAGE BARRIER: THE FAILURE OF THE OBJECTIVE THEORY TO PROMOTE FAIRNESS IN LANGUAGE-BARRIER CONTRACTING

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INTRODUCTION

[E]stará estableciendo un contrato con Microsoft Corporation, One Microsoft Way, Redmond, WA 98052, Estados Unidos y la legislación del estado de Washington regula la interpretación de este contrato y se aplica a las demandas por su incumplimiento, independientemente de los principios de las normas de resolución de conflictos. . . . Ambas partes, usted y Microsoft, aceptan de manera irrevocable como jurisdicción exclusiva y foro competente a los tribunales estatales o federales del condado de King, Washington (EE. UU.) para resolver los conflictos derivados de este contrato o relativos al mismo.¹

People who read the above passage might be frustrated that it is not in English. If an individual signed a contract that included this language, he might be even more frustrated to find out that only the state and federal courts of King County, Washington have jurisdiction over claims arising out of or related to the contract.² These frustrations are a reality for millions of U.S. residents who do not speak English but must sign contracts written exclusively in English.³

The objective theory of contracts states that a party's outward manifestations of assent will bind the party to the contract if the other party could reasonably

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1. Acuerdo de servicio de Microsoft. Última actualización: Mayo de 2009, <http://help.live.com/help.aspx?project=tou&mkt=es-us> (last visited Sept. 24, 2009), *translated in* Microsoft Service Agreement Last Updated: May 2009, <http://help.live.com/help.aspx?project=tou&mkt=en-us> (last visited Sept. 24, 2009) (“[Y]ou are contracting with Microsoft Corporation, One Microsoft Way, Redmond, WA 98052, United States, and Washington state law governs the interpretation of this contract and applies to claims for breach of it, regardless of conflict of laws principles. . . . You and we irrevocably consent to the exclusive jurisdiction and venue of the state or federal courts in King County, Washington, USA for all disputes arising out of or relating to this contract.”).

2. Microsoft Service Agreement Last Updated: May 2009, *supra* note 1.

3. See *infra* text accompanying notes 165-76. In this Note, a language-barrier contract means a contract in which one party does not speak the contract's written language.

regard those manifestations as assent.⁴ However, a party cannot reasonably regard outward manifestations as assent if he subjectively knows the party making those manifestations means otherwise.⁵ Thus, courts apply the objective theory to reach decisions regarding the enforceability of contracts based on the circumstances present between the parties at the time of contracting.⁶ Along this spectrum of outcomes, courts treat non-English speakers the same as people who speak English—they have a duty to read the contract.⁷

Courts refuse to recognize that holding non-English speakers to the duty-to-read standard is an unfair and outdated application of the objective theory.⁸ The other party likely knows that the non-English speaker cannot read the contract; thus, the other party should not reasonably regard a non-English speaker's signature or affirmation as assent. Policy concerns about upholding efficiency and reliability in contracting, however, continue to dissuade courts from reevaluating the place of language-barrier contracts on the objective theory's spectrum of outcomes.⁹

This Note argues that alternative doctrines to the duty-to-read standard for language-barrier contracts would balance the policies of efficiency and reliability in contracting with more fairness. Specifically, these alternatives include applying the reasonable-expectations standard to language-barrier contracts, allowing a quasi-fraud defense, and holding non-English speakers to the lesser duty of using reasonable efforts to obtain translations of contracts before signing them. Part I of this Note provides background on the development of the objective theory and the policies that drove its development. Part II applies the objective theory to different contracting circumstances and describes the spectrum of outcomes. Part III discusses the current location of language-barrier contracts on that spectrum and argues that this position is wrong due to an outdated view of assent under the objective theory. Finally, Part IV concludes with a discussion of possible alternatives that would shift the location of

4. RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:19 (West 4th ed. 2009) (1920).

5. Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1127 (2008).

6. 17A AM. JUR. 2D *Contracts* § 31 (2009).

7. See *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) (“[A] blind or illiterate party (or simply one unfamiliar with the contract language) who signs the contract without learning of its contents would be bound.”); *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965) (holding that an Iranian citizen with limited English had a duty “to acquaint himself with the contents of the” contract); *Paulink v. Am. Express Co.*, 163 N.E. 740, 741 (Mass. 1928) (“The plaintiff was bound by [the contract’s] terms, in the absence of deceit on the part of the defendant, even though not understanding their purport and ignorant of the English language.”).

8. See *infra* Part III.B.

9. See *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 221 (3d Cir. 2008) (“The integrity of contracts demands that [the duty to read] be rigidly enforced by the courts.”) (internal quotes omitted); see also *Paper Express*, 972 F.2d at 757 (indicating that the duty-to-read standard is appropriate in “a global economy [where] contracts between parties of different nationalities, and speaking different languages, are commonplace”).

language-barrier contracts on the spectrum and argues that placing a duty on non-English speaking parties to use reasonable efforts to obtain contract translations is the best way to increase fairness in language-barrier contracting.

I. THE OBJECTIVE THEORY OF CONTRACTS

A basic principle of contract law states that “the formation of a contract requires . . . a manifestation of mutual assent to the exchange.”¹⁰ Since the late nineteenth century, courts have applied the objective theory to determine which manifestations amount to assent to form a contract.¹¹ Courts have continued to favor the objective theory over more subjective approaches of determining assent because they wish to uphold the theory’s founding principles of reliability and freedom in contracting.¹²

A. Definition of the Objective Theory

Because the central purpose of the objective theory is to serve as the standard by which courts determine if two or more parties intended to and actually did form a contract,¹³ principles of contract formation naturally serve as the background for the theory.¹⁴ The most common way parties manifest their mutual intent to be bound is through the process of offer and acceptance.¹⁵ In this process, parties make an outward manifestation of assent through either actions or words.¹⁶ The clearest and most conventional way for a party to assent objectively to a contract is by signing it.¹⁷

After parties outwardly manifest their assent to contract, the objective theory governs whether their outward manifestations of assent are actually effective to form a binding contract.¹⁸ Under the objective theory, a party’s outward manifestation of assent is effective if the other party may justifiably regard it as assent.¹⁹ If a reasonable contracting party would deem the other party’s outward manifestation as assent to contract, in light of the surrounding circumstances, the

10. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

11. See Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428-29 (2000).

12. See Barnes, *supra* note 5, at 1120.

13. 17A AM. JUR. 2D *Contracts* § 31 (2004).

14. See ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 4.12 (2008) (defining objective theory).

15. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 475 (2008).

16. LORD, *supra* note 4, § 4:2.

17. *Booker v. Robert Half Int’l, Inc.*, 315 F. Supp. 2d 94, 100 (D.D.C. 2004) (“[A] signature on a contract indicates “mutuality of assent””) (quoting *Emeronye v. CACI Int’l, Inc.*, 141 F. Supp. 2d 82, 86 (D.D.C. 2001)).

18. See LORD, *supra* note 4, § 4:19 (describing what assent must entail under the objective theory in order to form a contract).

19. *Id.*

party receiving that manifestation is justified in regarding it as assent.²⁰ In describing the objective theory, Judge Learned Hand stated:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.²¹

Judge Hand's example directly illustrates the objective theory's central premise—a party's internal, subjective intent does not matter; contract formation depends only on what he outwardly communicates.²²

Although the subjective intent of a person manifesting assent to contract is not relevant in the objective theory, the personal knowledge of the party receiving that manifestation is important.²³ An offeror may regard an offeree's objective manifestations to mean what they reasonably appear to mean unless the offeror actually knows the offeree intends otherwise.²⁴ The personal knowledge of the party receiving another's manifestation of assent is the major factor that determines where on the spectrum of outcomes²⁵ the purported contract falls;²⁶ therefore, the effect of the offeror's personal knowledge is more fully explored in Part II of this Note.

Finally, the objective theory should be characterized as a tool courts use to evaluate the formation of a contract.²⁷ The objective theory is often the initial analysis a court engages in to determine whether a contract is enforceable, but it is hardly ever the only one.²⁸ In situations where the objective theory renders a contract enforceable, the party who objectively manifested assent may still raise defenses such as fraud, duress, mistake, and undue influence in an attempt to

20. *Id.* § 4:2.

21. *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

22. *See Barnes*, *supra* note 5, at 1119-20.

23. *Id.* at 1125.

24. *Id.* at 1127.

25. The spectrum of outcomes is an array of holdings on the enforceability of contracts based on the application of the objective theory to the facts surrounding the formation of the contracts.

26. *Barnes*, *supra* note 5, at 1125 (noting that the modern objective theory takes into account the knowledge of someone in the position of "the actual recipient of the recipient of the manifestation" in determining the formation of a contract).

27. *Id.*

28. *See, e.g., Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537-39 (5th Cir. 2003) (evaluating claims that defendant fraudulently induced plaintiff to sign an arbitration agreement and, alternatively, that the agreement lacked a "meeting of the minds"); *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94, 100-02 (D.D.C. 2004) (analyzing plaintiff's claims that an arbitration agreement lacked a "meeting of the minds" and was unconscionable).

invalidate the contract.²⁹

B. Foundations of the Objective Theory

During the mid-nineteenth century, courts required that parties have a subjective “meeting of the minds” in order to contract.³⁰ The parties’ actual intent determined their assent to an agreement and courts only analyzed outward manifestations as evidence of the parties’ internal intent.³¹ William Wentworth Story, a contracts scholar of the time, highlighted the prominence of a party’s subjective intent in contract formation when he wrote, “[w]henver such intent can be distinctly ascertained, it will prevail, not only in cases where it is not fully and clearly expressed, but also, even where it contradicts the actual terms of the agreement.”³²

In the late nineteenth century, changes inside and outside the courtroom pushed judges to adopt an objective standard for analyzing the formation of a contract.³³ After evidentiary rules changed, allowing parties to testify on their own behalf, courts became sensitive to the fact that, ultimately, “the mind of a human is unknown and unknowable for the rest of the world,” even when a party provides testimony of his intent.³⁴ Moving to an objective standard removed any incentive for parties to lie about their subjective intent under oath because their actual intent no longer determined the formation of the contract.³⁵

The growth of big business and free enterprise in the late nineteenth century increased the desire for more reliability, predictability, and freedom in contracting, and the objective theory increased all three.³⁶ In the following illustration, Professor John Edward Murray, Jr. pointed out the reliance and economic problems caused by the subjective approach in the following illustration:

If *A* makes an offer to which *B* manifests assent, may *A* later say, “I’m sorry, but we have no contract since I changed my mind a moment before

29. LORD, *supra* note 4, § 3:4.

30. *Id.* § 4:1.

31. Barnes, *supra* note 5, at 1123.

32. Perillo, *supra* note 11, at 446 (quoting WILLIAM WENTWORTH STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL § 231, at 149 (1972) (1844)).

33. *See id.* at 428-29.

34. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1266 (1993) (citing MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 200 (1977)).

35. Perillo, *supra* note 11, at 457-63 (outlining the shift from a subjective theory after parties become allowed to testify because of courts’ concerns that parties would be about their subjective intent).

36. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629-31 (1943) (discussing the importance of freedom of contract and self-reliance as foundational principles in the development of contract law during the emergence of free enterprise systems).

you announced your acceptance?" The possible hardship to one who had relied upon what had been expressed, only to discover that he had built his house of expectations upon the shifting sands of subjective intention, was unacceptable. Under that analysis, no system of contract law could ever prove workable since it would be impossible to prove the subjective intention of either party at any time.³⁷

The objective theory fixes this reliability and certainty problem because it defines assent as objective manifestations instead of internal, unknown thoughts and desires.³⁸ If contractual liability is based on external manifestations, *A* may reasonably rely on *B*'s objective manifestation of assent to their contract and can continue to form other contracts that depend on the enforceability of his contract with *B*.³⁹ In this way, the objective theory increases security in business transactions.⁴⁰

The objective theory also plays a role in furthering the principles of freedom of contract and private autonomy that serve as a basis for the Anglo-American common law contract system.⁴¹ The objective theory requires that a party receive the other party's outward manifestation of assent before either party can be bound to the contract.⁴² Without receiving the other party's manifestation of assent, a party could not justifiably or reasonably believe the other party assented to a contract.⁴³ In a system where only objective and received manifestations of assent effectuate a contract, a party can plan his business and personal affairs based on these manifestations without concern that he will be bound to other contracts to which he was unaware another party had assented.⁴⁴

II. APPLICATION OF THE OBJECTIVE THEORY: CREATING THE SPECTRUM OF OUTCOMES

In applying the objective theory, courts reach different decisions on the enforceability of contracts based on the circumstances present between parties at the time of contracting.⁴⁵ Possible circumstances that affect the enforceability of a contract range from the age and mental capacity of a party to whether a party even read the contract before signing it.⁴⁶ When courts analyze these circumstances under the objective theory, the important aspect for contract enforceability is generally not the circumstances existing at the time of

37. JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 30 (4th ed. 2001).

38. Barnes, *supra* note 5, at 1128.

39. *Id.*

40. *Id.* at 1128-29.

41. *Id.* at 1129.

42. LORD, *supra* note 4, § 4:1.

43. Barnes, *supra* note 5, at 1130.

44. *Id.* at 1130-31.

45. See 17A AM. JUR. 2D *Contracts* § 31 (2009).

46. See discussion *infra* Part II.A-F.

contracting but whether the parties were aware of those circumstances.⁴⁷ In the majority of cases, the subjective awareness of the party receiving an objective manifestation of assent factors into the court's analysis of whether a contract is enforceable.⁴⁸ In this way, the objective theory maintains contract enforceability based on external circumstances and the reasonable determinations of a party receiving a manifestation of assent to a contract.⁴⁹

A. Minors

The general rule is that a contract where one party is a minor "is voidable and may be repudiated by the minor during minority or within a reasonable time upon achieving majority absent a ratification."⁵⁰ This rule follows the application of the objective theory to a minor's contract. If a minor outwardly manifests an intent to contract, the other party, who knows the minor is too young to contract according to law, would not reasonably be able to regard the minor's manifestations as assent under the objective theory.⁵¹

Often, however, courts also apply the general rule in situations where the minor has lied about his age to induce the other party to enter the contract.⁵² When a minor credibly misrepresents his age, it would be reasonable for a party who receives the minor's outward manifestation of assent to regard that manifestation as valid assent.⁵³ However, such contracts are generally enforceable against adults, as expected under the objective theory, but are voidable by the minor because policy concerns about protecting minors from their own improvidence trump policies favoring the objective theory.⁵⁴ Thus, in the case of a minor lying about his or her age in order to contract, courts often

47. LORD, *supra* note 4.

48. See discussion *infra* Part II.C-F.

49. See CORBIN, *supra* note 14 (indicating that the objective theory's merit stems from its "incorporating the knowledge and characteristics of the actual parties to the transaction").

50. Sheller *ex rel.* Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997) (quoting Iverson v. Scholl, Inc., 483 N.E.2d 893, 897 (Ill. App. Ct. 1985)) (internal quotations omitted).

51. See Barnes, *supra* note 5, at 1127 ("[P]romisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise.").

52. Nicholas v. People, 973 P.2d 1213, 1219 (Colo. 1999) ("We expressly hold that a minor . . . may disaffirm any contract that he may have entered into during his minority, and this is equally true whether he has or has not misrepresented his age and even though his misrepresentation of age induced the other party to enter into the contract." (quoting Doenges-Long Motors v. Gillen, 328 P.2d 1077, 1080 (Colo. 1958) (emphasis omitted), *superseded by statute*, COLO. REV. STAT. ANN. § 19-2-511 (West 2005))).

53. See Barnes, *supra* note 5, at 1127.

54. See, e.g., Nicolas, 973 P.2d at 1219 (arguing that public policy demands that minors be protected from "improvident and imprudent contractual commitments").

make an exception to the strict application of the objective theory.⁵⁵

B. Mental Incompetence

A mentally incompetent person's contracts are generally voidable.⁵⁶ The Restatement states:

A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.⁵⁷

Following the objective theory's notion that the personal knowledge of the party receiving a manifestation of assent is relevant, if an offeror has reason to know that an offeree is mentally incompetent at the time the offeree objectively manifests assent to a contract, the offeree may avoid the contract.⁵⁸

Similar to the situation where a minor lies about his age in order to contract, if a party is not aware of the other party's mental incapacity at the time of contracting, a strict application of the objective theory would make the contract enforceable.⁵⁹ However, courts often balance the equities of ensuring predictability in the contracting system with protecting people with diminished mental competence from deception.⁶⁰ If the contract is made on fair terms and the offeror did not have knowledge of the mental defect of the offeree, the offeree's power of avoidance terminates to the extent that the contract has been performed or in circumstances where avoidance would be unjust.⁶¹

C. Intoxication

A person who executes a contract while intoxicated may later avoid the contract if the other party had reason to know that the intoxicated person could not understand or carry-out his contractual obligations due to his intoxicated

55. *But cf.* LORD, *supra* note 4, § 9:22 (noting that some state statutes do not allow minors who misrepresent their age to later disaffirm their contracts on the basis of infancy).

56. *Id.* § 10:3 (noting that this is the majority view).

57. RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1981).

58. *E.g.*, *Farnum v. Silvano*, 540 N.E.2d 202, 205 (Mass. App. Ct. 1989) (holding that a vendor may avoid contract where she was not mentally competent at time of signing and the purchaser was aware of her mental disability).

59. The other party could reasonably regard the mentally incompetent party's objective manifestations as assent because the other party did not know that the mentally incompetent party lacked the capacity to contract at the time of contracting. *See Barnes*, *supra* note 5, at 1127.

60. *See Knighten v. Davis*, 358 So. 2d 1022, 1025 (Ala. 1978) (applying "general equitable principle which requires restoration of the consideration received upon cancellation of a deed for the incompetency of the grantor").

61. RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (1981).

state.⁶² Thus, applying the objective theory, a person cannot reasonably regard as assent an objective manifestation received from a party who is clearly intoxicated or known to be a chronic alcoholic or drug abuser.⁶³ On the other hand, if the offeror was not aware of the offeree's intoxication at the time of contracting, the offeree generally does not have the power of avoidance.⁶⁴ This outcome is a strict application of the objective theory because the offeror's reasonable interpretation of the offeree's manifestation of assent at the time of contracting determines the enforceability of the contract.⁶⁵

D. Joke

Joking situations also give rise to a strict application of the objective theory.⁶⁶ Where one party was simply joking when he made an objective manifestation of assent, his contract is generally still enforceable under the objective theory if the other party had no reason to know of the joke.⁶⁷ *Lucy v. Zehmer* demonstrates this point.⁶⁸ Lucy offered Zehmer \$50,000 for his farm, and Zehmer and his wife wrote and signed a document of transfer.⁶⁹ Zehmer later claimed they were joking about the transfer,⁷⁰ but the court found in favor of Lucy.⁷¹ The court concluded that Zehmer's manifestation of assent through his document of transfer was reasonable under the circumstances, and that Lucy had no way of knowing Zehmer was joking.⁷² Alternatively, if a party's manifestation of assent objectively indicates that he is joking so that the other party would reasonably know of the joke, the objective theory renders the contract unenforceable.⁷³

62. *Id.* § 16; *see also* *Williamson v. Matthews*, 379 So. 2d 1245, 1248 (Ala. 1980) (setting aside sale of property when seller met burden of showing she was intoxicated during execution of contract).

63. *E.g.*, *Kendall v. Ewert*, 259 U.S. 139, 148-49 (1922) (voiding a deed signed by a habitual drunkard after the drunkard died and could not avoid it himself).

64. LORD, *supra* note 4, § 10:11.

65. Professor Wayne Barnes explains that the "gist of the objective theory of contracts" is that "promisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise." Barnes, *supra* note 5, at 1127. When the promisee knows the promisor is intoxicated, he "actually knows otherwise," so a strict application of the objective theory means the contract is unenforceable.

66. *Id.* at 1125.

67. *See* *Lucy v. Zehmer*, 84 S.E.2d 516, 520-22 (Va. 1954).

68. *Id.*

69. *Id.* at 517-18.

70. *Id.*

71. *Id.* at 522-23.

72. *Id.* at 521.

73. *See* *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 127-30 (S.D.N.Y. 1999) (holding that no reasonable person would perceive an offer in a commercial to convey a Harrier jet in exchange for Pepsi points as a genuine manifestation of assent to form a contract).

E. Illiterate

An illiterate party is bound to a contract if he objectively manifests assent to it, usually by signing.⁷⁴ Courts have imposed a duty on the illiterate party to ask someone to read and explain the contract to him before signing.⁷⁵ If the illiterate party fails to have someone read the contract to him and he signs it, courts find him negligent.⁷⁶ This rule generally applies whether the other party knows of the illiteracy or not.⁷⁷ Thus, when one party to an agreement is illiterate, courts strictly apply the objective theory and deem the illiterate party's signature as a reasonable manifestation of assent, in the absence of fraud, even if the other party knows of his illiteracy.⁷⁸ As previously noted, however, an illiterate party who signs a contract may still raise any applicable contract defense in an attempt to invalidate the contract.⁷⁹ For example, if the other party is aware of the party's illiteracy and fraudulently induces or takes advantage of it, the illiterate party will not be bound.⁸⁰

F. Duty to Read

Courts impose a "duty to read" on parties to a contract, so the parties are bound even if they do not read a contract before objectively manifesting assent to it.⁸¹ Generally, "[i]t will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained."⁸² Similar to the illiteracy context, courts applying the objective theory strictly regard an offeree's signature as a

74. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 242 (2002).

75. *Miner v. Farm Bureau Mut. Ins. Co.*, 841 P.2d 1093, 1102 (Kan. Ct. App. 1992) ("Even where a contracting party is unable to read, the party is under a duty to have a reliable person read and explain the contract to them before signing it." (citation omitted)).

76. *See, e.g., Sutherland v. Sutherland*, 358 P.2d 776, 785 (Kan. 1961) ("If a person cannot read an instrument, it is as much his duty to procure some reliable person to read and explain it, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." (citation omitted)); *Sponseller v. Kimball*, 224 N.W. 359, 360 (Mich. 1929) ("If [a contracting party] cannot read, he should have a reliable person read it to him. His failure to do so is negligence which estops him from voiding the instrument on the ground that he was ignorant of its contents . . .").

77. White & Mansfield, *supra* note 74, at 243.

78. *Id.*

79. *See* LORD, *supra* note 4, § 3:4.

80. *Pimpinello v. Swift & Co.*, 170 N.E. 530, 531 (N.Y. 1930).

81. *Jabour v. Calleja*, 731 So. 2d 792, 795 (Fla. Dist. Ct. App. 1999) ("A party has a duty to learn and know the contents of an agreement before signing it." (citation omitted)).

82. *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 221 (3d Cir. 2008) (citing *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875)).

reasonable, objective manifestation of assent, even when the offeror knows that the offeree did not read the contract.⁸³ Further, in cases where acceptance is verbal or consists of some action other than signing, courts do not invalidate contracts for lack of mutual assent when a non-English speaking party did not read or understand the contract's terms before manifesting assent.⁸⁴ Again, the traditional contract defenses, especially fraud, are available to a party who did not read a contract before signing it.⁸⁵ In practice, proving a defense is the best way for a party who accepted a contract without reading it to invalidate the contract because courts rigidly enforce the duty to read standard under the notion that it is necessary to protect the "integrity of contracts."⁸⁶

III. LANGUAGE BARRIER CONTRACT'S CURRENT PLACE ON THE SPECTRUM

For nearly a century, courts have held parties to the duty to read standard when they accept or sign contracts but are ignorant of the contract's written language.⁸⁷ For non-English speaking parties facing this standard in litigation, the only practical mechanism to avoid their contracts is to attempt to prove a contract defense, such as unconscionability or fraud.⁸⁸ What courts fail to realize when they apply the duty to read standard to language-barrier contracts is that their analyses are unfair and outdated applications of the objective theory based on the circumstances present at contracting.⁸⁹ This fact, combined with the reality that millions of residents in the United States are regularly parties to language-barrier contracts, highlights the need for a change in courts' analyses of language-barrier contracting.⁹⁰

A. Current Location on the Spectrum: Duty to Read

The Supreme Judicial Court of Massachusetts adopted the duty to read standard early in the 1928 case, *Paulink v. American Express Co.*⁹¹ Paulink, who did not speak or understand English, purchased traveler's checks from an

83. Barnes, *supra* note 5, at 1152-53; see *F.D. McKendall Lumber Co. v. Kalian*, 425 A.2d 515, 518 (R.I. 1981) ("[A] party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents.").

84. See *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 560 (Mont. 1965).

85. Warkentine, *supra* note 15, at 476.

86. LORD, *supra* note 4, § 4:19.

87. See *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992); *Shirazi*, 401 P.2d at 562; *Paulink v. Am. Express Co.*, 163 N.E. 740, 741 (Mass. 1928).

88. See generally Julian S. Lim, Comment, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 604-08 (2003) (analyzing the use of fraud and unconscionability to protect racial-language minorities in language-based contract disputes).

89. See *infra* text accompanying notes 125-43.

90. See *infra* text accompanying notes 165-76.

91. *Paulink v. Am. Express Co.*, 163 N.E. 740, 741 (Mass. 1928).

American Express agent.⁹² The checks, written in English, contained language outlining the conditions for their redemption.⁹³ When the checks turned out to be something other than what Paulink had intended to purchase, he sued to recover the money he paid for the unused traveler's checks.⁹⁴ The court refused to invalidate the transaction.⁹⁵ Applying the duty to read standard, the court held that Paulink "was bound by [the contract's] terms, in the absence of deceit on the part of the defendant, even though not understanding their purport and ignorant of the English language."⁹⁶ Regardless of his ability to understand the language of the contract, Paulink's purchase of the checks was a reasonable manifestation of assent.⁹⁷

Nearly forty years later, the Supreme Court of Montana denied relief to a non-English speaker who accepted a contract he did not understand.⁹⁸ In *Shirazi v. Greyhound Corp.*, Shirazi was an Iranian citizen attending school in the United States who spoke approximately 400 English words.⁹⁹ After purchasing a ticket from Greyhound for a bus trip, Shirazi checked his luggage.¹⁰⁰ Printed in English on Shirazi's luggage receipt was a clause that limited Greyhound's liability for lost luggage to \$25.¹⁰¹ When Greyhound lost Shirazi's luggage, Shirazi sued for the total value of the lost items.¹⁰² The court held that Shirazi had agreed to the liability limitation by accepting the receipt and that the notice on the receipt was reasonable.¹⁰³ Ultimately, the court did not accept Shirazi's argument that the contract should be void because he could not read the English terms.¹⁰⁴ The court strictly applied the duty to read and held that "[i]t was incumbent upon Mr. Shirazi, who knew of his own inability to read the English language, to acquaint himself with the contents of the [receipt]."¹⁰⁵

The application of the duty to read to language-barrier contracts remains the standard in courts today.¹⁰⁶ In *Morales v. Sun Constructors, Inc.*, one of the most recent examples, the U.S. Court of Appeals for the Third Circuit purported to base its reasoning on the objective theory.¹⁰⁷ Morales, who only spoke and understood Spanish, signed an employment agreement, written in English, with

92. *Id.* at 740-41.

93. *Id.* at 740.

94. *Id.*

95. *Id.*

96. *Id.* at 741 (citations omitted).

97. *See id.*

98. *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965).

99. *Id.* at 560.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 562.

104. *Id.*

105. *Id.*

106. *See Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 222 (3d Cir. 2008).

107. *Id.* at 221-23.

Sun Constructors, Inc.¹⁰⁸ Another Sun employee translated the document for Morales, but the employee failed to translate the arbitration clause.¹⁰⁹ After Morales's termination from Sun, he filed a wrongful termination suit, and Sun moved to stay the proceedings pending arbitration.¹¹⁰ The district court held that Morales did not assent to the arbitration clause and denied Sun's motion, but the Third Circuit reversed.¹¹¹ The Third Circuit held that Morales had an "obligation to ensure he understood the [employment contract] before signing."¹¹² In declining to create an exception to the duty to read where a party is ignorant of the language of the contract, the court held that "[i]n the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable."¹¹³ Morales's signature was an objective and reasonable manifestation of assent regardless of whether Sun knew he did not speak English at the time of contracting.¹¹⁴

Because courts strictly apply the duty to read standard in the language-barrier context, parties who face a language barrier depend on contract defenses as a means to invalidate their contracts.¹¹⁵ An important contract formation defense for non-English speaking parties is fraud.¹¹⁶ To prove the other party fraudulently induced the non-English speaking party to sign the contract, these parties must generally show that their "manifestation of assent [was] induced by either a fraudulent or a material misrepresentation by the other party upon which [they were] justified in relying."¹¹⁷ For example, if a non-English speaking party desires to open a money market account, a financial advisor tells him that the English documents he is signing relate to opening a money market account, but the documents are really security agreements, the non-English speaking party may argue fraud as a defense.¹¹⁸

Unconscionability is also a key defense for non-English speaking parties.¹¹⁹ Unconscionability generally includes "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."¹²⁰ Thus, if a non-English speaking party desires to prove unconscionability, he must generally show both procedural and substantive

108. *Id.* at 220.

109. *Id.*

110. *Id.* at 220-21.

111. *Id.* at 220.

112. *Id.* at 223.

113. *Id.* at 222.

114. *Id.* at 223.

115. *See* LORD, *supra* note 4, § 3:4.

116. *See id.* § 4:19.

117. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

118. *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 999 (11th Cir. 1986).

119. *Lim*, *supra* note 88, at 605.

120. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

elements.¹²¹ This defense is most successful for non-English speaking parties in the area of consumer and employment contracts because the unequal bargaining power inherent in those contracts “is merely aggravated by the fact that the weaker party cannot speak English.”¹²²

B. Problems with Current Location on the Spectrum

When adjudicating a contract dispute that involves a language barrier between parties, most courts find mutual assent between the parties to the contract and simply cite the principle that non-English speaking parties have a duty to read the contract as their analysis of the issue.¹²³ Courts see holding non-English speaking parties to the duty to read as a way to protect predictability and reliability in the contracting system because without this standard, “contracts would not be worth the paper on which they are written.”¹²⁴ Courts need to take a closer look at the language barrier issue in contracting, however, because strong doctrinal and policy reasons exist for shifting the location of language-barrier contracts on the objective theory’s spectrum of outcomes.

1. *Doctrinal Reasons for Shift.*—The most basic reason for shifting the location of language-barrier contracts on the spectrum is that when a court simply holds non-English speakers to a duty to read without further analyzing the facts of the case, the court overlooks the deeper analysis that highlights that this application of the objective theory is outdated.¹²⁵ In some cases, a more preferable, modern application of the objective theory might only affect the court’s analysis of the case but does not change its outcome.¹²⁶ However, in the most basic language-barrier cases—where one party signing an agreement does not know the language and does not obtain a translation before signing—a court’s failure to see a signature as anything other than a strict manifestation of assent under the objective theory leads to an unfair outcome in the case.¹²⁷

What leads courts most often to miss the opportunity to redefine the customary objective theory analysis in language-barrier contract cases is that they automatically regard a non-English speaking party’s signature or form of acceptance as a reasonable, objective manifestation of assent.¹²⁸ Realities of contracting in today’s economy, however, provide compelling reasons to rethink this conclusion. Because nearly ninety-nine percent of contracts today are

121. Lim, *supra* note 88, at 605-06.

122. *Id.* at 606.

123. See *Holcomb v. TWR Express, Inc.*, 782 N.Y.S.2d 840, 841-42 (App. Div. 2004); *Poplar Realty, LLC v. Po*, 778 N.Y.S.2d 832, 833-34 (App. Div. 2003).

124. *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875).

125. See *infra* text accompanying notes 128-43.

126. See *infra* text accompanying notes 138-43.

127. See *infra* text accompanying notes 133-37.

128. Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1037 (1996).

standard form contracts,¹²⁹ the majority of contracts involving a non-English speaking party are likely form contracts as well. Professor Michael Meyerson, as well as other scholars, argue that a signature on a standard form contract is not a reasonable manifestation of assent; thus, the contract does not satisfy the objective theory.¹³⁰ Meyerson reasons that because the offeror who presents the form contract for signature often knows that the offeree did not read the contract before signing it, the offeror may not reasonably regard the offeree's signature as true assent to the terms in the contract.¹³¹ Meyerson's argument follows the basic precept of the objective theory that if the offeror receives a manifestation of assent but is subjectively aware of something that affects the offeree's ability to truly assent to the contract, the offeror cannot reasonably regard the offeree's objective manifestation, in any form, as assent.¹³²

In the language barrier context, finding a lack of assent on behalf of a non-English speaking party is easy using an application of Meyerson's view of assent. In *Paulink*, if Paulink was truly "ignorant of the English language,"¹³³ the American Express agent from whom Paulink purchased the traveler's checks would have been aware of this circumstance at the time of contracting.¹³⁴ Even though Paulink purchased the checks and accepted them,¹³⁵ a modern application of the objective theory holds that these objective manifestations of assent are not reasonable to the agent because of his knowledge that Paulink could not understand the agreement.¹³⁶ Without Paulink's assent, the contract is void for lack of mutual assent.¹³⁷ In *Paulink*, a fairer view of assent under the objective theory leads to a different outcome.

If the court in *Shirazi* had followed this modern analysis of assent under the objective theory, the outcome would have been the same, but the analysis would

129. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002).

130. Meyerson, *supra* note 34, at 1265. See generally John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 351-55 (1974) (discussing the foundational cases holding that a signature is not an automatic manifestation of assent on standard form contracts).

131. Meyerson, *supra* note 34, at 1271.

132. See Barnes, *supra* note 5, at 1127 ("[P]romisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise.").

133. *Paulink v. Am. Express Co.*, 163 N.E. 740, 741 (Mass. 1928) (citation omitted).

134. See *id.* (indicating that oral communications between the parties likely occurred at the time of contracting).

135. *Id.* at 740.

136. The American Express agent could not reasonably deem Paulink's objective manifestations of purchasing and accepting the checks as assent because the agent knew of Paulink's inability to understand the English language at the time of contracting. See Barnes, *supra* note 5, at 1127.

137. See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . .").

have been different. Because the facts do not indicate that Shirazi spoke with anyone when he checked his luggage, Greyhound likely was not aware of Shirazi's inability to speak or understand English at the time of contracting.¹³⁸ Applying Meyerson's modern view of assent, however, this circumstance would lead the court to enforce the limited liability provision not because Shirazi had a duty to read the English on the receipt, but because Greyhound could reasonably regard Shirazi's acceptance of the luggage receipt as an objective manifestation of assent under the circumstances.¹³⁹

Similarly, applying this updated objective theory analysis in *Morales* produces the same outcome with a different analysis. Morales's employer Sun knew Morales did not speak English when he signed the contract.¹⁴⁰ Typically in this situation, the modern analysis under the objective theory holds that Sun could not justifiably and reasonably believe Morales's signature indicated he understood and assented to the terms of the contract written in English.¹⁴¹ The intervention of a translator, however, changes the analysis. Sun knew that Morales received a translation of the employment contract.¹⁴² Sun had no way of discovering that the translation was faulty.¹⁴³ Therefore, from Sun's perspective, Morales knew, understood, and reasonably assented to the terms of the employment contract when he signed it. Following this preferable objective theory analysis, and not because Morales failed to fulfill his duty to read the contract, the contract is enforceable.

Courts must also reexamine their treatment of language-barrier contract cases because non-English speaking parties are often unsuccessful in the difficult task of proving traditional contract formation defenses.¹⁴⁴ Fraud is a difficult defense to prove because it generally requires a party to show "evidence of active or affirmative misrepresentation" on the part of the other party at the time of contracting.¹⁴⁵ The existence of a language barrier at contracting does not in itself constitute fraud; it only makes it easier for the other party fraudulently to induce the non-English speaking party to sign because he cannot verify the other party's representations with the contract's words.¹⁴⁶ Beyond these evidentiary hurdles to proving fraud, non-English speaking parties also have trouble proving this defense because some courts deny relief on the ground that it was

138. See generally *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965).

139. The Greyhound employee could reasonably regard Shirazi's objective manifestation of accepting the luggage receipt as assent because the employee did not know that Shirazi could not understand English at the time of contracting. See *Barnes*, *supra* note 5, at 1127.

140. See *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 220 (3d Cir. 2008).

141. See *Barnes*, *supra* note 5, at 1127.

142. See *Morales*, 541 F.3d at 220.

143. See *id.* (indicating that the Sun employee in charge of hiring, who did not speak or understand Spanish, explained the arbitration provisions of the employment contract and that Morales's translator spoke to Morales in Spanish throughout this explanation).

144. See generally *Bender*, *supra* note 128, at 1038-43.

145. *Lim*, *supra* note 88, at 605.

146. *Id.*

unreasonable for the non-English speaking party to rely on an oral statement which clearly contradicted the language in the written contract.¹⁴⁷ The practical effect of these rulings is that the non-English speaking party's inability to read and failure to obtain a translation of the written contract precludes his remedy for the other party's fraudulent statements.¹⁴⁸

In analyzing an unconscionability defense, courts may highlight a language barrier as evidence of procedural unconscionability or unequal bargaining power that leaves the weaker, non-English speaking party with a lack of meaningful choice.¹⁴⁹ However, parties who face a language barrier still must be able to prove substantive unconscionability at the time of contracting in order to prevail in court.¹⁵⁰ Non-English speaking parties often find it difficult to prove substantive unconscionability because they generally desire to avoid their language-barrier contracts due to their lack of knowledge of an included term, not because the term is substantively unconscionable.¹⁵¹ Also, because many non-English speakers neither realize they have a legal challenge to the enforcement of a contract nor have the financial means to litigate, unconscionability is a difficult defense to argue in attempting to overcome the duty to read.¹⁵²

Even in situations where a non-English speaking party may be successful in proving unconscionability, the remedies available make the effort hardly worthwhile.¹⁵³ Generally, courts have not awarded punitive damages, tort remedies, or restitution to victims of unconscionable contracts.¹⁵⁴ For example, if a court finds a merchant's price unconscionable, courts typically limit the price to a fair amount but "will not require the merchant to return any overpayment."¹⁵⁵ This outcome provides little incentive for people who suspect they are victims of unconscionable conduct to seek a remedy in court, and it does not adequately deter merchants from continuing their unconscionable practices.¹⁵⁶

2. *Policy Reasons for Shifting.*—The primary policy reason for shifting the location of the language barrier on the objective theory's spectrum of outcomes is that the basic principles behind the language barrier's current location are outdated. Courts developed the duty to read standard during the age of classical contract law when principles of individualism, liberty, and privacy prevailed.¹⁵⁷ The development of neoclassical contract law, which gave rise to more equitable

147. Bender, *supra* note 128, at 1038-39.

148. *Id.* at 1039.

149. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

150. Warkentine, *supra* note 15, at 471-72.

151. See *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 220 (3d Cir. 2008); *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965); *Paulink v. Am. Express Co.*, 163 N.E. 740, 741 (Mass. 1928).

152. Warkentine, *supra* note 15, at 472.

153. Bender, *supra* note 128, at 1042.

154. *Id.*

155. *Id.*

156. *Id.*

157. See Kessler, *supra* note 36, at 630.

doctrines such as reliance and unconscionability, reintroduced values of trust, fairness, and cooperation as contract principles.¹⁵⁸ Under classical contract law, consideration and mutual assent were the sole defining characteristics of a contract.¹⁵⁹ Neoclassical contract law adds to the enforceability analysis social factors that influence whether the parties could have given clear and informed assent to the contract.¹⁶⁰ For example, courts adopted the doctrine of unconscionability to hold that in situations where mutual assent and consideration exist, the contract still may not be enforceable due to unequal bargaining power between the parties at the time of contracting or substantively unwarranted contract terms.¹⁶¹

Following the neoclassical trends in contract scholarship and adjudication, fairness needs to play a greater role in courts' decisions regarding what constitutes assent when a party to a contract does not speak or understand the contract's written language. Often the non-English speaking party is in a position of lesser bargaining power relative to the party presenting the English-language contract for signing, and the language barrier only exacerbates this feeling of inferiority.¹⁶² If courts are willing to look at a party's "education or lack of it" as a social factor that could determine if he had the capability to understand the terms of a contract and thus truly consent to it, they also should take into consideration a party's ability to speak the language in which the contract is written.¹⁶³ Further, the duty to read and other unsympathetic doctrines give non-English speakers little faith in the fairness of the U.S. judicial system to the point that non-English speakers who recognize that they may have a legal claim regarding a contract do not pursue litigation.¹⁶⁴

158. Lim, *supra* note 88, at 592 (citation omitted).

159. *Id.*

160. *Id.* (citation omitted).

161. Bender, *supra* note 128, at 1040.

162. See Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965).

163. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965). Here, the court held that the duty to read should be abandoned for victims of unconscionable contracts. *Id.* The court stated:

Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id.

164. Lim, *supra* note 88, at 602.

The potentially large number of contracts in America in which one party does not speak the language of the contract intensifies the need to shift the language barrier's location on the objective theory's spectrum of outcomes. The most recent census data estimates the legal permanent resident population in the United States at 12.1 million,¹⁶⁵ the nonimmigrant population at 3.8 million,¹⁶⁶ and the number of unauthorized immigrants at 11.8 million.¹⁶⁷ Typically, individuals in these categories live in communities with other immigrants and nonimmigrants of similar ethnicity or nationality.¹⁶⁸ Living and working in these culturally and linguistically homogeneous communities reduces the pressure on individuals to learn English.¹⁶⁹ Usually, three generations pass before family members primarily use English to communicate at home.¹⁷⁰ Census data supports this notion: 17.6% of the U.S. population over eighteen years of age that speaks a language other than English speaks English "not well"¹⁷¹ and 8.4% of the same population speaks English "not at all."¹⁷² Further, a higher percentage of the population than the census data reflects likely does not have basic English proficiency because household language serves as a barrier to the effective administration of census surveys.¹⁷³

Finally, because contracting is at the core of business, the sheer number of immigrant-owned firms in the United States is also strong evidence for reevaluating the law's treatment of language-barrier contracts. Asians own

165. NANCY RYTINA, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2006 1 (2008) (Legal permanent resident "includes persons granted lawful permanent residence, e.g. 'green card' recipients, but not those who [have] become U.S. citizens.").

166. ELIZABETH M. GRIECO, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE NONIMMIGRANT POPULATION IN THE UNITED STATES: 2004 1 (2006) ("A nonimmigrant is a foreign national seeking to enter the United States temporarily for a specific purpose.").

167. MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, at 1 (2008) ("The unauthorized resident population is the remainder or 'residual' after estimates of the legally resident foreign-born population—legal permanent resident (LPRs), asylees, refugees, and nonimmigrants—are subtracted from estimates of the total foreign-born population.").

168. Annick Germain, *Immigrants and Cities: Does Neighborhood Matter?* 2 (May 23, 2000) (unpublished presentation before the Transatlantic Learning Committee), available at http://im.metropolis.net/research-policy/research_content/doc/IMMIGRANTS.pdf.

169. *See id.* at 3.

170. Bender, *supra* note 128, at 1032.

171. U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-37, ABILITY TO SPEAK ENGLISH BY LANGUAGE SPOKEN AT HOME: 2000.

172. *Id.*

173. PAUL SIEGEL ET AL., U.S. CENSUS BUREAU, LANGUAGE USE AND LINGUISTIC ISOLATION: HISTORICAL DATA AND METHODOLOGICAL ISSUES 1 (2001).

1,103,587 of the 22,974,655 business firms accounted for in the United States.¹⁷⁴ Hispanics or Latinos own even more at 1,573,464 firms.¹⁷⁵ These business owners sign standard English form contracts with vendors and suppliers on a regular basis, but they have little recourse in the courts when they discover that the form's language and their understanding or expectations concerning issues such as quality, packaging, and shipping do not coincide.¹⁷⁶

IV. NEW LOCATION ON THE SPECTRUM FOR LANGUAGE-BARRIER CONTRACTS

The ultimate goal of shifting language-barrier contracts' location on the objective theory's spectrum of outcomes is to add more fairness to courts' analyses of whether a non-English speaking party should be bound to the English-only contracts he signs. Increased fairness comes in many different forms and can arise at different times in the contracting process.¹⁷⁷ Following trends in contract adjudication that work to balance fairness with the time-honored principles of reliability, predictability, and freedom of contracting,¹⁷⁸ this Note suggests three approaches to increasing fairness in language-barrier contracting that have a basis in the objective theory—the doctrine of reasonable expectations, a quasi-fraud defense, and the non-English speaking party's duty to use reasonable efforts to obtain a translation.¹⁷⁹ Although all three solutions have advantages and disadvantages, this Note argues that placing a duty on the non-English speaking party to use reasonable efforts to obtain a translation is the best solution because it most fully balances a fair outcome for non-English speaking parties with predictability and reliability in language-barrier contracting.

Before analyzing any viable solutions for where language-barrier contracts should fall on the spectrum, courts must note one more location, besides the duty to read, where these contracts should *not* fall. An application of the objective theory following Meyerson's modern definition of assent without regard for the unintended consequences of court outcomes on contracting in today's economy will not serve the interests of either party to language-barrier contracts.¹⁸⁰ For example, the modern objective theory analysis in *Paulink* resulted in the contract being void for lack of mutual assent.¹⁸¹ This outcome injures the English

174. U.S. CENSUS BUREAU, 2002 ECONOMIC CENSUS SURVEY OF BUSINESS OWNERS, 33 COMPANY SUMMARY: 2002 (2006).

175. *Id.* at 13.

176. Lim, *supra* note 88, at 588.

177. See discussion *infra* Part IV. (discussing the how the three solutions introduced in this Note increase fairness in language-barrier contracting).

178. See, e.g., Lim, *supra* note 88, at 605, for a discussion of unconscionability as "a fairly modern doctrinal development in contract law, typifying contract law's shift away from a classical theory of contracts based on freedom of contract and autonomy rationales."

179. See discussion *infra* Part IV.

180. See *infra* text accompanying notes 181-83.

181. See *supra* text accompanying notes 138-42.

speaking party in the short term because he cannot demand performance or win damages for non-performance of a void contract.¹⁸² Simply adopting Meyerson's view of assent in a new objective theory analysis also injures non-English speakers' ability to contract in the future because the other parties would not view the contracts as certain or reliable.¹⁸³ The following three alternatives avoid these adverse consequences by increasing fairness in ways that also protect parties' ability and willingness to contract.

A. Doctrine of Reasonable Expectations

The doctrine of reasonable expectations holds that "[a]lthough [promisees] typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation."¹⁸⁴ Thus, a term is not part of a standard form contract unless it is one that the "uninitiated reader ought reasonably to have understood to be a part of that offer."¹⁸⁵ Courts primarily apply the doctrine in insurance cases to uphold applicants' and beneficiaries' objectively reasonable expectations about the terms of their policies, even though the policies do not actually contain those terms.¹⁸⁶ After the rise of standard form contracting, academic scholarship began advocating for the application of the doctrine in general contract disputes.¹⁸⁷

Applying the doctrine of reasonable expectations to determine assent in language-barrier contracts benefits non-English speaking parties because it increases the standard for what the other parties to the contract may regard as objective, reasonable manifestations of assent.¹⁸⁸ Under the doctrine, a party presenting a non-English speaker with a standard form contract to sign is only able to regard the non-English speaker's signature as assent to contract terms of which he knows the non-English speaker is aware.¹⁸⁹ To help ensure the non-English speaker is aware of the terms, the other party will have an incentive to provide some form of translation of the agreement.¹⁹⁰ Therefore, applying the

182. See LORD, *supra* note 4, § 1:20 ("A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor is . . . a void contract.").

183. See generally Kessler, *supra* note 36, at 630 (explaining that in a freedom of contract system, "[e]ither party is supposed to look out for his own interests and his own protection.").

184. Lim, *supra* note 88, at 613 (second alteration in original) (quoting *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 396 (Ariz. 1984)).

185. *Id.* at 614 (citations omitted).

186. Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 251 (2007).

187. See Warkentine, *supra* note 15, at 497 (listing the doctrine of reasonable expectations as one of the academic theories for determining the enforceability of standard form contracts).

188. For an explanation of how the doctrine of reasonable expectations raises this standard see Lim, *supra* note 88, at 614-15.

189. *Id.* at 615.

190. *Id.* at 616.

doctrine of reasonable expectations to language-barrier contracts increases fairness because non-English speaking parties will at least have the opportunity to read and understand the contracts they sign through a translation, and other parties will be less likely to include language to which they know a non-English speaking party, if he was truly aware of the term, would not agree.¹⁹¹

The same benefit the doctrine of reasonable expectations provides—creating an incentive for English speaking parties to provide translations of their agreements—is also its greatest flaw. If a party cannot enforce his contract with a non-English speaker unless he knows that the non-English speaker is aware of all the terms, he may choose not to contract with non-English speaking parties at all.¹⁹² It is costly for a business to translate every standard form it uses,¹⁹³ especially if that business does not regularly contract with non-English speakers or contracts with a wide variety of language groups. Although large corporations may be able to afford translation services, many smaller, local companies cannot.¹⁹⁴ This circumstance reduces the number of businesses that are willing and able to provide goods and services to non-English speakers, which in turn raises the prices non-English speakers pay for those goods and services.¹⁹⁵ Although non-English speakers may find the contracting process fairer, they may not appreciate the effect of the doctrine of reasonable expectations on the cost of and access to goods and services in the marketplace.

The doctrine of reasonable expectations also loses persuasiveness as an alternative to the duty to read standard for language-barrier contracts because of the continued reluctance of legal bodies to promote its application outside the realm of insurance contracts.¹⁹⁶ Professor Robert Keeton first explained the doctrine and its application to the interpretation of insurance contracts in 1970.¹⁹⁷ After a short burst of experimentation with the doctrine, courts began limiting its application to or even outright abolishing its use in interpreting insurance contracts, citing fears of judicial meddling in contractual relations.¹⁹⁸ Now, as

191. See *id.* at 615 (explaining how the doctrine of reasonable expectations can serve as a “powerful safeguard of the business interests of racial-language business owners”).

192. See generally Kessler, *supra* note 36, at 630 (explaining that in a freedom of contract system, “[e]ither party is supposed to look out for his own interests and his own protection”).

193. See Associated Press, *Interpreters Easing Patient Stress*, L.A. TIMES, Jan. 15, 2009, at B2 (reporting that an insurance carrier spent \$500,000 to provide translation services for policyholders).

194. See *id.*

195. See ARLEEN J. HOAG & JOHN H. HOAG, INTRODUCTORY ECONOMICS 67-68 (4th ed. 2006) for a discussion of consequences in the market when supply changes. The cost of production is a determinant in supply. When the cost of production increases because suppliers must translate all their contracts, supply decreases. A decrease in supply means that a seller charges a higher price to produce the same amount of goods or services as before.

196. Warkentine, *supra* note 15, at 498.

197. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

198. Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable*

courts are less inclined to apply the doctrine in the insurance context, very few courts advocate for the doctrine's expansion as an interpretation tool for other types of contracts.¹⁹⁹ Further, the American Law Institute (ALI) rejected a draft of subsection 211(3) which would have incorporated the doctrine of reasonable expectations into the Restatement.²⁰⁰ Commentary suggests that ALI members changed the language in order to make the Restatement's position clearer and more appealing to courts.²⁰¹ Consequently, a court would not likely consider expanding the application of the retreating doctrine of reasonable expectations to the interpretation of assent in language-barrier contracts.

B. *Quasi-fraud*

Another option for increasing fairness in language-barrier contracting is to create a defense non-English speaking parties can raise and prove more easily than fraud or unconscionability. One example of such a defense, quasi-fraud, allows a non-English speaking party to avoid a contract if he can show that the other party was aware of the language barrier and took advantage of it in any way during the contracting process.²⁰² This defense is easier to prove than fraud because the non-English speaking party only needs to show that the other party took advantage of the language barrier in any way, not that he specifically made verbal misrepresentations on which the non-English speaking party relied.²⁰³ Quasi-fraud is also easier to prove than unconscionability because the non-English speaker does not have to prove both a procedural and substantive element in order to be successful.²⁰⁴ If the other party *either* took advantage of the language barrier to deny the non-English speaker a meaningful choice in the bargaining process *or* used the language barrier to bury substantively unconscionable terms in an English-only contract, the non-English speaking party would have a valid quasi-fraud defense.²⁰⁵

Contract law governing the validity of contracts between two parties in a fiduciary or confidential relationship serves as the basis for the creation of this new quasi-fraud defense.²⁰⁶ A confidential or fiduciary relationship exists between parties "whenever one is in the position of advisor or counselor, and the other reasonably reposes confidence or trusts that person to act in good faith for

Expectations Approach and the Misleading Mythology of Judicial Role, 5 CONN. INS. L.J. 181, 182-83 (1998).

199. Warkentine, *supra* note 15, at 498.

200. Barnes, *supra* note 186, at 251-52.

201. *Id.* at 252.

202. *See Ellis v. Mullen*, 238 S.E.2d 187, 189 (N.C. Ct. App. 1977) (applying a standard similar to quasi-fraud).

203. *See supra* text accompanying note 117.

204. *See supra* text accompanying notes 119-20.

205. *But cf.* Warkentine, *supra* note 15, at 471-72 (noting that a party seeking to prove unconscionability must show evidence of procedural and substantive unconscionability).

206. *See infra* text accompanying notes 207-12.

the latter's interest."²⁰⁷ Generally, the non-advising party in "a confidential or fiduciary relationship" may invalidate a contract with the other party if he shows that the contract is not "fair, open, or honest."²⁰⁸ One factor courts consider when determining if a contract is fair, open, and honest is whether the advising party "made a full and frank disclosure of all relevant information within his or her possession" before entering into the contract.²⁰⁹ The policy reason behind this required disclosure is that the dominant party in the relationship automatically has superior information regarding the contract and courts want to ensure that he does not use this information to take unfair advantage of the weaker party during contracting.²¹⁰ The quasi-fraud defense does not create a fiduciary or confidential relationship between non-English speakers and every party with whom they contract in English.²¹¹ The defense merely recognizes that many of the same circumstances exist in language-barrier contracting—i.e. a dominant party exists who has superior knowledge about the contract which is not readily available to the other party—and seeks to protect non-English speaking parties in a similar manner to ensure they are not exploited.²¹²

The case of *Ellis v. Mullen* provides an example of how a court can apply the policies and principles of fiduciary and confidential relationship contracts to what is generally a duty to read analysis, thereby creating a defense for the weaker contracting party that resembles quasi-fraud.²¹³ In *Ellis*, Ellis sued Mullen seeking to recover \$50,000 for personal injuries incurred in a car wreck between the parties.²¹⁴ Mullen's insurance company issued checks to Ellis totaling \$900, which also stated that endorsement by Ellis satisfied all claims between the parties and released Mullen from liability.²¹⁵ Ellis signed the checks, but later sued to invalidate the checks claiming he was illiterate, did not have the checks read to him, and did not intend to release Mullen from liability.²¹⁶ The

207. LORD, *supra* note 4, § 71:53.

208. 17A C.J.S. *Contracts* § 139 (2008).

209. *Id.*

210. *See id.*

211. See BLACK'S LAW DICTIONARY 1315 (8th ed. 2004), for an explanation of the four situations which give rise to fiduciary relationships:

(1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties

.....

Id. None of these situations precisely describes the circumstances between the parties to a language-barrier contract.

212. *See* 17A C.J.S. *Contracts* § 139 (2008).

213. *See Ellis v. Mullen*, 238 S.E.2d 187, 189 (N.C. Ct. App. 1977).

214. *Id.* at 188.

215. *Id.*

216. *Id.*

court held that

[t]he illiterate signer does not have to show fraud to attack the validity of the agreement. . . . Illiterate persons ignorant of the contents of contracts signed by them may be relieved of their obligations thereunder on proof of anything in the nature of overreaching or unfair advantage taken of their illiteracy.²¹⁷

In allowing Ellis's claim to pass summary judgment, the court held that Mullen failed to establish that no issue of material fact existed whether he had taken unfair advantage of Ellis's illiteracy.²¹⁸ Because Mullen was aware of Ellis's illiteracy and used this information to his benefit in the contract between them without providing a full and frank disclosure of the contract terms, Ellis could raise a valid defense against the enforcement of the contract based on the theory that Mullen took advantage of his illiteracy.²¹⁹

The defense of quasi-fraud adds fairness to language-barrier contracts in many of the same ways as the doctrine of reasonable expectations. If a non-English speaking party has a valid defense against contract enforcement because the other party did not fully disclose detrimental contract terms at the time of contracting, the other party will likely begin offering translations of its contracts in order to avoid facing this defense.²²⁰ Creating this incentive to translate, however, may have the same unintended consequences as the doctrine of reasonable expectations,²²¹ which would negatively affect a non-English speaker's ability to contract at all.

Further, the quasi-fraud defense does not directly address the current problem of language-barrier contracts because it does not change a court's analysis of assent. Courts will still hold non-English speakers to a duty to read, and a signature on a contract will still be a reasonable, objective manifestation of assent.²²² The quasi-fraud defense only makes it easier for non-English speaking parties to later overcome the duty to read by showing that the other parties exploited their inability to read or understand English during the contracting process.²²³ Without evidence of exploitation, courts will still enforce contracts the non-English speaking party accepted but did not read.²²⁴

Regardless of quasi-fraud's shortcomings, it does have one major advantage over the doctrine of reasonable expectations: because it is a defense, only non-English speaking parties will be able to use quasi-fraud in attempts to avoid a contract.²²⁵ The other party will not be able to use quasi-fraud as a claim.²²⁶

217. *Id.* at 189.

218. *Id.*

219. *See id.*

220. *See supra* text accompanying note 190.

221. *See supra* text accompanying notes 192-95.

222. *See supra* text accompanying notes 81-87.

223. *See Ellis v. Mullen*, 238 S.E.2d 187, 189 (N.C. Ct. App. 1977).

224. *See Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965).

225. *See BLACK'S LAW DICTIONARY*, *supra* note 211, at 451 (noting that a defendant raises a

Because the doctrine of reasonable expectations redefines assent to a contract, either party may raise it in an attempt to avoid the contract for lack of mutual assent.²²⁷ Therefore, the quasi-fraud defense makes the enforcement of language-barrier contracts more predictable for non-English speaking parties because only they have the power to avoid the contract in litigation for the reasons underlying the defense.²²⁸

C. Duty to Use Reasonable Efforts to Obtain a Translation

The final option proposed in this Note for increasing fairness in language-barrier contracting is to reduce the duty to read obligation on non-English speaking parties to a duty to use reasonable efforts to obtain a translation. Under this lesser duty, instead of considering non-English speaking parties negligent if they do not have the contract translated, courts would only find these parties negligent if they fail to use reasonable efforts to obtain a translation.²²⁹ If a non-English speaking party signs a contract without attempting to obtain a translation, the contract is enforceable just like the contract of a person who can read English but does not read the terms before signing.²³⁰ However, if a non-English speaking party signs a contract after attempting to obtain a translation and that translation turns out to be faulty, he can avoid the contract because he is not aware of the contract's terms through no fault of his own.²³¹

*Pimpinello v. Swift & Co.*²³² provides a good example for how the duty to use reasonable efforts to obtain a translation would play out in litigation. In this case, Pimpinello sued Swift & Co. to collect damages for personal injuries suffered in an accident involving one of their trucks.²³³ Pimpinello was not able to read or write English.²³⁴ His attorney explained that the defendant had agreed to pay \$750 on the claim up front and a larger amount to be determined later at trial.²³⁵ Pimpinello signed a document believing it to be a receipt for the \$750 payment, but the paper actually was a general release of all his claims against

defense).

226. *See id.*

227. *See Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 222 (3d Cir. 2008) (rejecting a *claim* that parties did not form a valid contract due to a lack of mutual assent); *Operating Eng'rs Pension Trust v. Cecil Backhoe Serv., Inc.* 795 F.2d 1501, 1504-05 (9th Cir. 1986) (rejecting a *defense* that parties did not form a valid contract due to a lack of mutual assent).

228. *See BLACK'S LAW DICTIONARY*, *supra* note 211, at 451.

229. *See Pimpinello v. Swift & Co.*, 170 N.E. 530, 531 (N.Y. 1930).

230. *See Upton v. Tribilcock*, 91 U.S. 45, 50 (1875); *see also F.D. McKendall Lumber Co. v. Kalian*, 425 A.2d 515, 518 (R.I. 1981).

231. *See Pimpinello*, 170 N.E. at 530-31.

232. *Id.* at 530.

233. *Id.*

234. *Id.*

235. *Id.*

Swift & Co.²³⁶ In finding Pimpinello had a cause of action to void the release, the court held that “[i]f the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger, unless the signer be negligent, the writing is void.”²³⁷ The court held that Pimpinello was not negligent in his duty to read the contract because he had his attorney do so.²³⁸ Because his attorney misread the document to him, Pimpinello had a claim to void the contract.²³⁹

Applying the *Pimpinello* holding to language-barrier contract cases provides for a fairer outcome of the case from the perspective of the non-English speaking party. In *Morales*, if the court would have held Morales to the duty to use reasonable efforts to obtain a translation instead of the duty to read, the arbitration clause in Morales’s employment contract would have been unenforceable.²⁴⁰ Morales obtained a translation of the agreement before signing it, but, through no fault of Morales’s, the translator neglected to translate the arbitration clause.²⁴¹ Therefore, Morales used reasonable efforts to obtain a translation, was not negligent in signing the agreement based on the representations of that translator, and should not be held to terms of which he was not aware due to the negligence of the translator.²⁴²

The duty to use reasonable efforts to obtain a translation also provides benefits to non-English speaking parties beyond fairer outcomes in language-barrier contract cases. The standard keeps the duty to read and understand the contract before signing on the non-English speaking parties; thus, the other parties to the contract do not risk an adverse ruling in court because they failed to translate the terms of the contract for the benefit of the non-English speaking party.²⁴³ Keeping the burden to translate documents on non-English speaking parties prevents non-English speakers from bearing the negative consequences in the marketplace associated with shifting the burden to the other parties.²⁴⁴

Regardless of the increased fairness in language-barrier contracting associated with the duty of the non-English speaking party to use reasonable efforts to obtain a translation, the creation of the duty does have downsides. First, in a court’s analysis of assent to a language-barrier contract, the duty would force the court to recognize an exception to the objective theory. Typically,

236. *Id.*

237. *Id.* at 531.

238. *Id.* at 531-32.

239. *Id.*

240. *See infra* text accompanying notes 241-42.

241. *Morales v. Sun Constructors, Inc.* 541 F.3d 218, 224 (3d Cir. 2008) (Fuentes, J., dissenting).

242. This finding is an application of the duty of the non-English speaking party to use reasonable efforts to obtain a translation. *See supra* text accompanying notes 229-31.

243. *See supra* text accompanying notes 192-95.

244. *But see* Lim, *supra* note 88, at 616-18 (arguing that placing the duty to translate form contracts on the drafting party better serves contract goals of efficiency and fairness).

under the objective theory, a court would find it reasonable for an offeror to deem a non-English speaking party's signature to a contract as a manifestation of assent if the offeror was aware that the non-English speaking party obtained a translation before signing.²⁴⁵ If the translation turned out to be faulty and the offeror was not aware of this circumstance at the time of contracting, the non-English speaking party's signature would still be a reasonable manifestation of assent.²⁴⁶ Under the duty to use reasonable efforts to obtain a translation, however, if the translator failed to provide a correct translation of the agreement, the court would not hold the non-English speaking party to the terms of which he was not aware at signing.²⁴⁷ Unlike the objective theory's analysis, the offeror's knowledge of the translator's mistake would not factor into the court's analysis of assent.²⁴⁸ With the *Morales* court's unwillingness to create what it regarded as an exception to the objective theory for *Morales*'s contract,²⁴⁹ other courts adjudicating language-barrier contract cases might similarly decline to adopt a theory or doctrine which forces them to deviate from the traditional objective theory analysis.

Second, if the point of shifting the location of language-barrier contracts on the objective theory's spectrum of outcomes is to increase fairness in language-barrier contracting, the duty to use reasonable efforts to obtain a translation only increases fairness for non-English speaking parties at the expense of fairness to the other parties. Under the duty, the non-English speaking party is the only party with guaranteed access to the translator or translation.²⁵⁰ Thus, the offeror does not have a way to check the accuracy of the translation prior to the completion of the contract, and he may not be able to enforce certain terms of the contract if the translation turns out to be incorrect.²⁵¹ Not only does the duty reduce fairness in the contracting process from the perspective of the drafter, but this level of insecurity about the enforceability of their agreements with non-English speaking parties also might push parties to avoid contracting with non-English speakers at all.²⁵²

Finally, the duty to use reasonable efforts to obtain a translation lacks definitiveness in some aspects that could affect a court's willingness to adopt it. The duty does not define how long a non-English speaker has to obtain a

245. See *Wilkisius v. Sheehan*, 155 N.E. 5, 6 (Mass. 1927) (holding Lithuanians who could not read or understand English to their contract written in English even though their interpreter provided a faulty translation of the agreement).

246. See *Barnes*, *supra* note 5, at 1127.

247. See *supra* text accompanying notes 229-31.

248. Compare *supra* text accompanying note 23, with *supra* text accompanying note 231.

249. *Morales v. Sun Constructors, Inc.* 541 F.3d 218, 222 (3d Cir. 2008) ("Morales, in essence, requests that this Court create an exception to the objective theory of contract formation where a party is ignorant of the language in which a contract is written. We decline to do so.").

250. See *supra* text accompanying note 231.

251. See *supra* text accompanying note 231.

252. See generally *Kessler*, *supra* note 36, at 630 (explaining that in a freedom of contract system, "[e]ither party is supposed to look out for his own interests and his own protection").

translation.²⁵³ Generally, the time frame for acceptance of an offer varies depending on the needs and desires of the parties.²⁵⁴ Some contracts require nearly instantaneous acceptance.²⁵⁵ Reasonably speaking, Shirazi could not have sought out a Persian translation of the luggage receipt before he accepted it due to factors such as the language's relative obscurity in the United States and the short time before he needed to catch his bus.²⁵⁶ Also, non-English speakers, such as Morales, seeking to sign an employment contract may not have the bargaining power to request time to obtain a translation.²⁵⁷ Many employment fields have a large supply of skilled laborers and immediate openings such that if one person cannot sign the contract and start work immediately, he may be passed over and the next person in line who does not require extra time to obtain a translation will get the job.²⁵⁸ Therefore, the duty to use reasonable efforts to obtain a translation could force the non-English speaker to choose between either signing the contract without obtaining a translation, thus giving up the protection of the duty, or not getting the job. Further, the duty does not define what constitutes reasonable efforts to obtain a translation.²⁵⁹ Many non-English speakers rely on family or friends who may not be completely fluent in English to serve as their translators.²⁶⁰ If the duty requires official, certified translations, the cost to obtain these documents may place the protections of the duty financially out of reach of some non-English speakers.²⁶¹ They will be forced to sign contracts without translations, and the duty will cease to serve its protective function for non-English speaking parties.

253. See *supra* text accompanying notes 229-31.

254. LORD, *supra* note 4, § 5:5 (explaining that the offeror is at liberty to determine the time frame for acceptance).

255. See *id.* § 5:7 (“A reasonable time for the acceptance of an offer made on a commercial exchange is within a few seconds A reasonable time for the acceptance of most offers made in face to face conversation or over the telephone will generally not extend beyond the time of the conversation . . .”).

256. See *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 560 (Mont. 1965). But see *id.* at 562 (holding that, even though it would be difficult, Shirazi had the duty to “acquaint himself with the contents of the ticket”).

257. See *Morales v. Sun Constructors, Inc.* 541 F.3d 218, 220 (3d Cir. 2008) (noting Morales needed to sign the employment contract with Sun quickly because the company needed to start work immediately).

258. See *id.*

259. See *supra* text accompanying notes 229-31.

260. See *Morales*, 541 F.3d at 220 (noting Morales depended on an acquaintance who “generally understands about eighty-five percent of what is said and written in English” for interpretation of his employment contract); see also *Trans-State Inv., Inc. v. Deive*, 262 A.2d 119, 121 (D.C. 1970) (indicating party depended on an “interpreter-friend” to explain the contract to him in his native language before signing); *People v. Kassim*, 799 N.Y.S.2d 163 (Sup. Ct. 2004) (unpublished table decision) (indicating that the party takes friends along to interpret business documents).

261. See *Associated Press*, *supra* note 193.

*D. The Best Solution: Duty to Use Reasonable Efforts
to Obtain a Translation*

Although the duty to use reasonable efforts to obtain a translation appears to have the most disadvantages of the three proposals for increased fairness in language-barrier contracting, the overall benefit of the duty—equitably placing non-English speakers in the same position as English speakers in contracting—greatly outweighs these disadvantages. For nearly a century, courts have simply assumed that English and non-English speaking parties are similarly situated at the time of contracting and thus should both be held to the duty to read.²⁶² Reality shows that this assumption is not correct. English speaking parties can choose to fulfill or ignore the duty to read at the time of signing a form contract written in English, but non-English speaking parties have no choice but to sign without reading. With the duty to use reasonable efforts to obtain a translation, the non-English speaking party gains the option to fulfill the duty or not.²⁶³ Given time to obtain a translation of the contract before signing, the non-English speaking party has the same opportunity as an English speaking party to learn and understand the terms of the contract.²⁶⁴ If he does not capitalize on this opportunity by obtaining a translation before signing, he loses the right to argue later that he should not be held to terms he was not aware were in the contract.²⁶⁵ His situation is the same as the English speaker who does not take the time to read the contract before signing and who cannot later seek to avoid the contract based on the fact that he was ignorant of its terms.²⁶⁶ Thus, the duty of the non-English speaking party to use reasonable efforts to obtain a translation finally converts the fiction into a reality that English speaking parties and non-English speaking parties have the same opportunities to understand their agreements at the time of contracting.

Further, the disadvantages of the duty to use reasonable expectations to obtain a translation are not cause for concern. Even though the creation of the duty would force courts to recognize an exception to the objective theory, the spectrum of outcomes shows that courts are willing to make exceptions to the objective theory when necessary to protect a party from exploitation in the

262. See *supra* text accompanying note 87.

263. See Lim, *supra* note 88, at 616 (arguing that providing translations at the time of contracting also later places non-English speakers on the same footing as English speakers when they desire to check the contract terms for breach after unsatisfactory performance by the other party).

264. See *Shirazi v. Greyhound Corp.*, 401 P.2d 559, 562 (Mont. 1965) (indicating that a translation would have allowed the non-English speaking party to understand the limited liability waiver).

265. See *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875); *F.D. McKendall Lumber Co. v. Kalian*, 425 A.2d 515, 518 (R.I. 1981).

266. See *Upton*, 91 U.S. at 50; *McKendall Lumber*, 425 A.2d at 518.

contracting process.²⁶⁷ Underlying courts' reasons for not strictly applying the objective theory in situations where a minor or mentally incompetent person contracts is that minors or mentally incompetent people are not fully able to understand the terms of the bargains they are accepting.²⁶⁸ Similarly, non-English speaking parties are not able to understand the terms of their bargains when those bargains are written in English. Courts should place the protection of non-English speaking parties in contracting above forcing as many factual situations as possible into a strict objective theory analysis.

Second, although the duty to use reasonable efforts to obtain a translation may make contracting with non-English speaking parties less predictable for the English speakers in the transaction, reducing predictability to some extent is necessary in order to increase fairness in language-barrier contracting as a whole. Currently, the bargaining power in language-barrier contracting is entirely on the side of the English speaker who creates and presents the English language contract.²⁶⁹ Not only is the drafter completely able to control the form of the contract at the time of contracting, he knows his allegedly unfair contract is generally safe in court because the court will hold the non-English speaking party to the duty to read standard.²⁷⁰ The duty to use reasonable efforts to obtain a translation does not completely shift the bargaining power to the non-English speaking party. Instead, if the non-English speaking party fulfills the duty, it opens up the contracting process to actual bargaining between the parties because both parties have an opportunity to know, understand, and shape the terms of the agreement.²⁷¹ Although the question of whether bargaining is really possible when a party is presented with a standard form contract is outside the scope of this Note,²⁷² even increasing the possibility of bargaining in language-barrier contracting is an important step to increased fairness for non-English speaking parties.

Finally, the duty's indefiniteness about the time period to obtain a translation and the definition of "reasonable efforts" should not dissuade courts from adopting it. Language-barrier contracting arises in various factual situations—e.g., employment contracts and checked luggage receipts—which raises the argument that courts should simply define the duty on a case-by-case basis. For example, having a friend translate the small print on a checked luggage receipt may be reasonable, whereas having the same friend translate a lengthy and complex real estate investment contract may not be reasonable. Determining reasonableness based on the circumstances of the case is not a new idea in the

267. See discussion *supra* Part II.A-B.

268. See discussion *supra* Part II.A-B.

269. See Kessler, *supra* note 36, at 632.

270. See *supra* text accompanying note 87.

271. See *supra* text accompanying notes 230-31.

272. For a discussion of bargaining in standard form contracting, see generally Kessler, *supra* note 36; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

Anglo-American legal system.²⁷³ The heart of the objective theory is determining what constitutes a reasonable manifestation of assent based on the circumstances present at the time of contracting.²⁷⁴ Because courts are able to apply the duty with the same level of certainty as other established legal doctrines, courts should not deny non-English speaking parties the increased fairness in contracting resulting from the duty.

CONCLUSION

The objective theory of contracts is an important standard courts use to judge assent to a contract.²⁷⁵ However, its application in the context of language-barrier contracts is outdated in light of the increased encounters non-English speaking parties have with English-only standard form contracts.²⁷⁶ Over the last century, courts have applied doctrines and theories, such as unconscionability and the doctrine of reasonable expectations, that take into account the fairness of the bargain and the unequal knowledge of the parties in determining whether a contract is enforceable.²⁷⁷ The time has come for courts to recognize that a bargain is not fair if one party does not understand the language of the contract.²⁷⁸ New rules must replace the duty to read standard in adjudicating the enforceability of language-barrier contracts on the objective theory's spectrum of outcomes.

The doctrine of reasonable expectations, quasi-fraud, and the duty of the non-English speaking party to use reasonable efforts to obtain a translation are three possible ways for courts to balance efficiency and reliability in contracting with increased fairness for the protection of non-English speaking parties. All three possibilities have advantages and disadvantages, but the duty of the non-English speaking party to use reasonable efforts to obtain a translation most clearly places non-English speaking parties on equal footing with English speaking parties in contracting.²⁷⁹ Most importantly though, all three solutions press the need for change in adjudicating language-barrier contracts and open the discussion for further analysis of ways to make contracting fairer for non-English speaking parties.

273. See discussion *supra* Part I.A; see also RUSSELL L. WEAVER ET AL., TORTS: CASES, PROBLEMS, AND EXERCISES 103 (2d ed. 2005) (explaining that for the duty of care element of negligence, "most courts evaluate people based on their duty to act as a reasonably prudent person under the same or similar circumstances").

274. See discussion *supra* Part II.A-F.

275. See discussion *supra* Part I.A.

276. See *supra* text accompanying notes 165-76.

277. See *supra* text accompanying notes 119-22, 184-91.

278. See *supra* text accompanying note 269.

279. See discussion *supra* Part IV.