

January 1994

## Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial

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### Recommended Citation

Deirdre M. Smith, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 Me. L. Rev. 87 (1994).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol46/iss1/7>

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*Editor's Note:*

*The Editorial Board and Staff of Volume 46 are very pleased to announce that the following article by Deirdre M. Smith was chosen as the winning entry in the 1994 SCRIBES Notes & Comments Writing Competition. The Competition recognizes an outstanding article written by a law student associated with a student edited law review that exhibits the highest standards of clear, succinct, and forceful legal writing.*

## CONFRONTING SILENCE: THE CONSTITUTION, DEAF CRIMINAL DEFENDANTS, AND THE RIGHT TO INTERPRETATION DURING TRIAL

### INTRODUCTION

Every person in the courtroom stands. Your attorney taps your arm and gestures for you to do the same. As you rise you see the judge enter the room. As she sits the courtroom sits as quickly and uniformly as it stood, with you a moment behind. The judge looks down at the papers in front of her and moves her mouth. Suddenly, the prosecutor steps forward and faces the jury. You catch glimpses of the meaningless gestures of his hands. This continues for ten minutes as you watch the expressions on the faces of the jurors. They glance at you but quickly avert their eyes. On a few occasions, the prosecutor turns toward you and extends his hand in your direction; you recognize your name on his lips and sit up in your chair. Your attorney passes you a note but your grade-school education renders it nearly indecipherable.

These could be the opening moments of a deaf person's trial. For most deaf<sup>1</sup> people, interactions with the hearing community in the absence of interpretation or technological assistance consist of communications that are, at most, only partly comprehensible. Criminal proceedings, with the defendant's liberty interest directly at stake, are occasions in which the need for deaf people to have a full under-

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1. In this Comment, the term "deaf" will be used as sociologist Jerome Schein has defined it: "Deaf people cannot hear and understand speech through the ear alone, with or without amplification." JEROME D. SCHEIN, *AT HOME AMONG STRANGERS* 5 (1989). See also BLACK'S LAW DICTIONARY 399 (6th ed. 1990) (defining "deaf person" as "[a]ny person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone."). Both of these definitions exclude "hard of hearing" people who possess sufficient residual hearing to understand spoken language with amplification. See also *infra* note 16 and accompanying text on the distinction between "deaf" and "Deaf."

standing of what is said and done around them is most urgent.<sup>2</sup> Ironically, the legal "right to interpretation" has not been clearly defined in either statutory or case law. Although the federal and state constitutions do not provide a separate or lesser set of rights for deaf defendants, their situation remains unique. The complete reliance on spoken and written English in the criminal justice process systematically excludes full participation of almost all deaf people. This factor, compounded by the general ignorance about deafness among hearing people, places deaf defendants at a serious disadvantage.

The federal government and most state legislatures recognize the injustice that results from a defendant's inability to understand the proceedings that may result in punishment. These bodies have passed legislation allowing or requiring interpretation for defendants who cannot hear or understand English.<sup>3</sup> This Comment argues, however, that the right to interpretation at criminal proceedings is already embodied in protections afforded all defendants through the Sixth and Fourteenth Amendments of the United States Constitution.<sup>4</sup> The rights to effective assistance of counsel, to confront wit-

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2. The criminal justice system is not the only adjudication system that can result in the deprivation of liberty but it accounts for the vast majority of incarcerations. In the civil context, proceedings such as those for civil contempt and immigration status also can result in deprivation of liberty.

Discussion of the right to interpretation in the civil context, however, is beyond the scope of this Comment. For discussion of interpretation in civil trials, see Gregg F. Relyea, Note, *Procedural Due Process: A Deaf Defendant's Right to Be Heard Should Encompass a Right to "Hear" Civil Trials Through Interpretation*, 29 CATH. U.L. REV. 867 (1980); SY DuBOW ET AL., *LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE* (4th ed. 1992). According to Elaine Gardner, Associate Legal Director of the National Center for Law and Deafness, the Center's present focus is on securing courtroom interpretation for civil litigants through enforcement of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. III 1991) (hereinafter ADA). Telephone interview with Elaine Gardner, Associate Legal Director of the National Center of Law and Deafness (February, 1993). See, e.g., *Baker v. Louisiana*, 1992 U.S. Dist. LEXIS 21599 (W.D. La. 1992) (dismissing an action brought under ADA and § 504 of the Rehabilitation Act of 1974 (29 U.S.C.A. § 794 (West Supp. 1993)) because civil litigant failed to request an interpreter for a family law proceeding). See *infra* at notes 304-313 and accompanying text for discussion on the ADA.

3. See *infra* text accompanying notes 213-313.

4. Although the focus of this Comment is interpretation during criminal trials, the constitutional protections during arrest require interpretation as well. The most compelling problem is how to administer the warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966). "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," and these warnings must be full and effective. *Id.* at 444. The requirement of full and effective warnings cannot be met unless there is adequate communication between officers and suspects.

The problem of properly administering the warning is compounded by the fact that even if the services of an interpreter are obtained immediately after arrest, the *Mi-*

nesses against the defense, to be present at trial and assist in the defense, and to understand the nature and cause of the charges, impose a duty on the government to provide a defendant the means to

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*randa* warnings are not easily translated into American Sign Language (ASL), especially for those deaf people who have low ASL and English skills or who rely on a visual gestural system of communication. The written advice read to hearing suspects requires a sixth-to-eighth grade reading level, DuBow ET AL., *supra* note 2, at 176, but, due to the disastrous quality of education of deaf children, the average deaf high school graduate's reading level is closer to fourth grade, far below that of a hearing graduate. OLIVER SACKS, *SEEING VOICES* 28-29 (1989). Also, many of the terms and concepts, such as "right" and even "lawyer," do not always translate easily into ASL. DuBow ET AL., *supra* note 2, at 176. Therefore, interpreters often must spend a great deal of time explaining the terms of the warning before a suspect adequately understands the full meaning and implications of that warning.

The challenges presented in the arrest of deaf suspects can be demonstrated by an Oregon case, *State v. Mason*, 633 P.2d 820 (Or. App. 1981), where police attempted to question a "low-verbal [ASL]" suspect initially with fingerspelling (using manual signs to spell words in English) and then by using a psychologist at the station as an interpreter. After thirty minutes the psychologist concluded that the defendant did not understand his rights. *Id.* at 822. Although the suspect did sign *Miranda* and polygraph waiver forms in the presence of another interpreter, the trial and appellate courts concluded that he did not waive his rights. *Id.* at 826-27. The court stated that, "to give *Miranda* warnings to this defendant so as to make an intelligent waiver possible would require an interpreter familiar with and competent in his primary language. This he did not have." *Id.* at 827 n.8.

Some states have passed statutes specifically requiring the appointment of an interpreter upon the arrest of a deaf suspect. Oklahoma has passed such a law and it was enforced against municipal police through a class action case brought against the City of Oklahoma City. *Kiddy v. City of Oklahoma City*, 576 P.2d 298 (Okla. 1978). The statute provides that, "[w]hen a deaf-mute is arrested he shall be entitled to the assistance of an interpreter." *Id.* at 300 (citing 22 OKLA. STAT. ANN. tit. 22, § 278 (repealed in 1982 and replaced by 63 OKLA. STAT. ANN. § 2707 (1984 & Supp. 1993) which is essentially the same in this respect)). The Supreme Court of Oklahoma interpreted this language to mean that an interpreter would be provided "within a reasonable time after arrest, presumably to enable the deaf-mute arrested to understand the charges against him, and appreciate his constitutional rights. . . ." *Kiddy v. City of Oklahoma City*, 576 P.2d at 301. The city jailed the lead plaintiff for two days without providing an interpreter, reading his *Miranda* warnings, or informing him of the charges. *Id.* In Pasadena, a deaf man was awarded \$100,000 in damages against the police force because they refused to appoint an interpreter for him and insisted on using written notes to communicate with him while he was held overnight. Amy Louise Kazmain, *Deaf Man Gets \$100,000 in Suit Against Police*, L.A. TIMES, May 10, 1992, at J1.

Maine's statute, ME. REV. STAT. ANN. tit. 5, § 48 (West 1989 & Supp. 1992-1993), does not specifically require interpreters to be furnished upon arrest. Nevertheless, that is the general practice, at least in southern Maine. Upon arrest, police contact an interpreter referral agency such as Pine Tree Society Deaf Services, which sends two interpreters, one of whom is often Deaf, to administer *Miranda* warnings. As an additional precaution, the warnings and the waiver are often videotaped. Interviews with Douglas Newton, C.S.C., Program Director, Pine Tree Society Deaf Services, in Portland, Me. (Nov. 1992) and Polly Lawson, I.C., T.C., C.I., Certified Interpreter, in Portland, Me. (Nov. 1992).

understand the proceedings.<sup>5</sup> Although many courts have referred to the right to interpretation as having a basis in the Constitution, they nonetheless fail to treat it as such.<sup>6</sup> By expecting defendants to secure trial rights for themselves and by granting the trial court judges broad discretion in ensuring these rights, appellate courts have allowed deaf defendants' rights to fall below the constitutionally guaranteed minimum.

The increasing amount of legislation addressing the need for interpretation has led many modern courts to focus on the statutory, rather than the constitutional, requirements of the right to interpretation.<sup>7</sup> This approach usually results in less protection for deaf defendants. These courts analyze the need for interpretation as a "special right" for deaf people rather than viewing the statutes as legislated procedures to ensure and protect, but not supplant, the constitutional protection. The distinction between statutory and constitutional rights is significant. For example, habeas corpus relief for state court prisoners,<sup>8</sup> requirements for waiver of a constitutional right,<sup>9</sup> and the standard of review in appellate courts<sup>10</sup> all depend on the characterization of the right as constitutional or statutory. The need of deaf defendants for interpretation provides an unfortunate example of how the failure to recognize the constitutional basis of the right to interpretation has resulted in disparate treatment of defendants in the courts. A recent Maine Supreme Judicial Court case, *State v. Green*,<sup>11</sup> reveals many of the problems deaf defendants face in trial and appellate courts.

Part I of this Comment provides an overview of some social, legal, and cultural factors unique to the deaf population. These problems and issues include the linguistic impact of deafness, the composition

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5. See *infra* notes 147 and 152 for text of constitutional provisions.

6. See, e.g., *Turner v. State*, 429 So. 2d 645 (Ala. Crim. App. 1982); *People v. Fleagle*, 472 N.E.2d 155 (Ill. App. Ct. 1984); *State v. Green*, 564 A.2d 62 (Me. 1989).

7. See, e.g., *State v. Hammons*, 771 P.2d 1 (Colo. Ct. App. 1989); *State v. Green*, 564 A.2d 62 (Me. 1989).

8. Section 2254(a) of title 28 of the United States Code provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.*

28 U.S.C.A. § 2254(a) (1977) (emphasis added).

9. The Supreme Court has held that courts must make every reasonable presumption against finding a waiver of a constitutional right by a defendant, and any such waiver must be done knowingly and competently. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

10. In order for a federal constitutional error to be found harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

11. 564 A.2d 62 (Me. 1989). See *infra* text accompanying notes 263-86.

of the deaf population, the use and structure of American Sign Language (ASL), the quality of education of deaf children, and the special difficulties facing those who have lost their hearing later in life. This Comment maintains that, when courts do not recognize these circumstances and related problems, the constitutional rights of deaf criminal defendants are often compromised unintentionally. Part II provides an overview of court decisions discussing the right to interpretation. Part III outlines the sources of the constitutional right to interpretation and demonstrates the application of general constitutional principles to deaf defendants. Part IV discusses the current statutes addressing interpretation in the courtroom and the shortcomings of those provisions. Part V sets forth the consequences of the failure to recognize that the federal and state constitutions guarantee a right to interpretation. Finally this Comment concludes that courts should facilitate, not block, enforcement of this right and recommends specific approaches that can eliminate unfair treatment of deaf defendants in both trial and appellate courts.

#### I. THE DEAF POPULATION IN AMERICA: ITS LANGUAGE AND IDENTITY

The legal system, for the most part, operates through hearing people whose primary language is English. The vast majority of these people (judges, attorneys, witnesses, jurors, clerks, and court personnel) have little or no contact with deaf people on a regular basis. Protection of deaf people's rights is often compromised because of a failure on the part of hearing people to understand and appreciate their circumstances and problems. To understand the challenges faced by deaf people in criminal settings, one must also examine and consider the problems the deaf population faces as a whole. Specifically, being deaf in America has implications that go beyond an inability to hear. It is to be part of a unique group considered by some to be "disabled" and by others to be a linguistic minority.<sup>12</sup> A deaf educational administrator once commented: "Deafness is much broader than just hearing loss; it is a complex sociopolitical reality that permeates one's life."<sup>13</sup> Analysis of the judicial decisions mentioned throughout this Comment will demonstrate that often it is ignorance of this complex reality on the part of hearing people in the judicial system, including defense counsel,<sup>14</sup> that results in a compromise of deaf people's rights.

Foremost, the deaf population is not a monolith. The *only* common trait among its members is an inability to hear well enough to

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12. HARLAN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY* (1992) examines the implications of each of these two views. See also Edward Dolnick, *Deafness as Culture*, *THE ATLANTIC*, Sept. 1993, at 37.

13. SCHEIN, *supra* note 1, at 5.

14. See, e.g., *People v. Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984) (defendant's lawyer unaware of client's severe hearing loss). See also *infra* note 200.

understand spoken language, and even this similarity can vary in degree. The problematic treatment of deaf people by legislatures and courts stems from a basic failure to recognize the tremendous diversity within the deaf population. This diversity is reflected in the challenge of determining the size of the American deaf population. The only study of the size of the deaf population was done in 1974. It estimated that there were 13,362,842 Americans with some degree of deafness but characterized only two million people, one percent of the United States population, as "profoundly deaf." Moreover, the number of "prelingually" deaf adults (those who were born deaf or lost most of their hearing prior to age three) was only 201,626.<sup>15</sup>

An important distinction is whether one is "Deaf" or "deaf." The former term is used to describe members of the "Deaf community," a sub-group of the deaf population, while the latter indicates the physiological condition of being unable to hear.<sup>16</sup> The Deaf community is the only group in America that has created an extensive culture based upon a physical characteristic.<sup>17</sup> Those within this community share several important bonds that set them apart from the rest of the deaf population. The Deaf community has created not only a unique language, ASL, but also a history, art, folklore, theater, and humor, separate and distinct from a culture based on English.<sup>18</sup> Hearing people's ignorance and misunderstanding of these bonds form their erroneous assumptions about Deaf people. For example, many hearing people are surprised to learn the extent of Deaf culture. There are a great number of social, political, and recreational organizations on national, local, and even international levels. The high degree of organization and complexity in this community is unique among groups identified as "disabled."<sup>19</sup>

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15. SCHEIN, *supra* note 1, at 9. The Maine Department of Rehabilitation estimates that there are approximately 70,000 "deaf or hard of hearing" Maine residents, 2,000 of whom are profoundly deaf. DEP'T OF HUMAN SERVICES, BUREAU OF REHABILITATION (DIVISION OF DEAFNESS), INTERPRETING SERVICES IN MAINE: A REPORT BY THE STUDY COMMITTEE ON INTERPRETING SERVICES (1989).

As will be shown in this Comment, the distinction between those born deaf and those who lose their hearing later in life is critical in several ways, particularly since many hearing people assume that the vast majority of deaf people have been deaf since birth. If deaf adults have a strong ability to use spoken language, as is the case with those who lost their hearing later in life, the assumption is often made by hearing people that they do not experience significant hearing impairment.

16. This distinction was first made by James Woodward, a linguist at Gallaudet University, according to CAROL PADDEN & TOM HUMPHRIES, *DEAF IN AMERICA: VOICES FROM A CULTURE* 2 (1988); see also SCHEIN, *supra* note 1, at 6.

17. See SCHEIN, *supra* note 1, at 10-11.

18. JACK GANNON, *DEAF HERITAGE: A NARRATIVE HISTORY OF DEAF AMERICA* (1981) provides an extensive catalog of two centuries of Deaf culture, including Deaf publications, Deaf athletes, and the National Theatre of the Deaf.

19. Dolnick, *supra* note 12, at 43.

Without question, the most important bond among members of the Deaf community is their language, ASL. From this language, Deaf culture has blossomed. ASL is a visual language used by over a half million Americans and Canadians.<sup>20</sup> ASL is not inferior or "slang" English expressed manually.<sup>21</sup> The use of ASL is the single most important factor in determining whether someone is a member of the Deaf community.<sup>22</sup> An anthropologist observed that the Deaf community is a cultural group, not simply a group of people with a common sensory deprivation, because the common adaptation to that deprivation is the creation of a language.<sup>23</sup> This culture and community has emerged from deaf people's desire to communicate and share experiences with others.<sup>24</sup>

Language is also at the center of the most critical legal and political concerns of the Deaf community, including those concerns presented in this Comment. For example, the "War of Methods,"<sup>25</sup> the controversy over whether deaf children should be taught in English, ASL, or some combination of both, has been the focus of debate among deaf people, hearing professionals, and parents of deaf children for over a century. On one side are members of the Deaf community and their hearing supporters who think deaf children should be taught in ASL because it is the native language of the Deaf community and the method through which language is most easily taught and comprehended.<sup>26</sup> On the other side are "oralists," deaf and hearing people who reject the use of ASL either in schools or daily life and see it as "ghettoizing" deaf people and preventing assimilation.<sup>27</sup> This debate has spilled over into the legal system in the context of interpreting the Individuals with Disabilities Education Act (IDEA).<sup>28</sup> Another alternative method has arisen in the twentieth century and joined the controversy: manually coded English sys-

20. CHARLOTTE BAKER & CAROL PADDEN, *ASL: A LOOK AT ITS HISTORY, STRUCTURE, AND COMMUNITY* at 3 (1978).

21. ASL was not recognized as a "legitimate" language distinct from English in academic circles until the 1960s. Jerome Schein attributes this recognition and acceptance as the reason the Deaf community is recognized as a "linguistic community" and not a "disabled community." SCHEIN, *supra* note 1, at 39.

22. BAKER & PADDEN, *supra* note 20, at 5; SCHEIN, *supra* note 1, at 11.

23. SCHEIN, *supra* note 1, at 6.

24. JOHN VICKREY VAN CLEVE & BARRY A. CROUCH, *A PLACE OF THEIR OWN: CREATING THE DEAF COMMUNITY IN AMERICA* 106 (1989).

25. GANNON, *supra* note 18, at 359.

26. SCHEIN, *supra* note 1, at 136-41; LANE, *supra* note 12, at 129-43.

27. For a detailed history of the ongoing controversy in United States, see HARLAN LANE, *WHEN THE MIND HEARS: A HISTORY OF THE DEAF* (1984).

28. 20 U.S.C. §§ 1400-1485 (1988 & Supp. III 1991) (originally enacted as Education for All Handicapped Children Act (EAHC)). See DuBOW ET AL., *supra* note 2, at 67; Board of Educ. v. Rowley, 458 U.S. 176 (1982) (finding that the EAHC Act does not require a school to provide a deaf student with a sign language interpreter in a mainstreaming setting).



tems.<sup>29</sup> One result of this debate is that not all members of the deaf population who were born deaf or lost their hearing in childhood use ASL.

These controversies about the education of deaf children have become heated partly because the personal connections created within the Deaf community during school years have lasting significance. A study of the formation of the American Deaf community noted the importance of the residential schools in Deaf history: "It was in the residential schools that deaf Americans first met each other, developed a standard visual language, and discovered the common interests that presaged the formation of their community."<sup>30</sup> In his study of the dynamics of the American Deaf community, one sociologist observed that deaf adults who were sent to state residential schools for their education often identify these institutions, rather than their current residence, as "where they are from."<sup>31</sup> Although, at the turn of the century, most deaf children attended residential schools, the trend after the enactment of IDEA and the backlash against ASL<sup>32</sup> has been towards "mainstreaming" deaf children in public schools. Today the majority of deaf children go to school with few, if any, deaf children.<sup>33</sup> Members of the Deaf community resist efforts to close the old residential schools out of concern that mainstreaming will fracture the Deaf community if these educational bonds are lost.<sup>34</sup> This feeling, of course, is not a bond shared by deaf adults who lost their hearing after they became adults.<sup>35</sup> These cultural, linguistic, and educational connections, therefore, not only set members of the Deaf community apart from hearing culture but also result indirectly in the isolation of deaf people who do not share these experiences, yet cannot move within the hearing community with ease.

This Comment addresses the constitutional rights of both cultur-

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29. See *infra* note 45.

30. VAN CLEVE & CROUCH, *supra* note 24, at 171.

31. SCHEIN, *supra* note 1, at 64.

32. VAN CLEVE & CROUCH, *supra* note 24, at 106 (by the 1920s, 80 percent of deaf students were educated without sign language or fingerspelling). See also LANE, *supra* note 12, at 134, who reports that the current trend in deaf schools is the use of "total communication" which employs a few ASL signs but does not use them with ASL grammar or usage.

33. SCHEIN, *supra* note 1, at 143.

34. LANE, *supra* note 12, at 139; SCHEIN, *supra* note 1, at 143. A former president of the National Association of the Deaf and a "distinguished educator," Mervin D. Garretson, has said that, "mainstreamed deaf children may find themselves cast adrift without much of a self-identity because they are compelled to settle for half a life in a hearing community that is only partially accessible to them." *Id.* This "partial accessibility" also results in a lifetime of incomplete comprehension of spoken language, including that used at criminal trials. See also Dolnick, *supra* note 12, at 43-44.

35. SCHEIN, *supra* note 1, at 65.

ally and non-culturally deaf people and will use the term "deaf" to encompass both. Some articles and cases have focused entirely on "Deaf" people and the right to ASL interpreters.<sup>36</sup> This Comment, however, will also examine problems faced by those deaf adults who are isolated from the Deaf community, as well as from hearing people, since they are often most prejudiced by a lack of interpretation of some kind.<sup>37</sup> ASL interpretation is of no assistance to deaf people who are not fluent in the language, but the dynamics and nature of criminal proceedings limit the use of alternative forms of communication such as writing and speechreading.<sup>38</sup> Additionally, when the term "interpretation" appears in this Comment, it is not limited to the use of ASL interpreters. This term also encompasses any other form of communication necessary to give a deaf person maximum possible comprehension. Such alternative methods include oral interpretation,<sup>39</sup> assistive listening devices,<sup>40</sup> and modern technological systems such as the Computer Assisted Transcript (CAT), which allows a deaf court participant to follow on a video monitor a verbatim written version of all testimony and remarks in court.<sup>41</sup>

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36. See, e.g., DuBow ET AL., *supra* note 2, at 172-89.

37. For example, according to Douglas Newton, Program Director of Pine Tree Society Deaf Services, *supra* note 4, only a few police districts and court clerks in southern Maine will immediately contact his agency for ASL interpretation when a deaf or hard of hearing person in the court system is identified. For those deaf and hard of hearing people in the outlying areas of Maine who attended public school and never learned ASL, the problem is far worse, and Newton was unsure what happens when such a person must appear in court. The appellate decisions reviewed for this Comment suggest deaf persons without knowledge of ASL appear to have a disproportionately high representation among deaf defendants claiming to have had inadequate interpretation at trial. See, e.g., Ferrell v. Estelle, 568 F.2d 1128 (5th Cir. 1978); People *ex rel.* Myers v. Briggs, 263 N.E.2d 109 (Ill. 1970); State v. Green, 564 A.2d 62 (Me. 1989); Shook v. State, 552 So. 2d 841 (Miss. 1989); Peeler v. State, 750 S.W.2d 687 (Mo. Ct. App. 1988); People v. Branson, 475 N.E.2d 905 (Ill. App. Ct. 1984); State v. Gonzalez, 453 A.2d 297 (N.J. Super. Ct. Law Div. 1982); Adams v. State, 749 S.W.2d 635 (Tex. Ct. App. 1988).

38. See *infra* notes 49-55 and accompanying text.

39. See *infra* note 57 and accompanying text.

40. DuBow ET AL., *supra* note 2, at 10.

41. See Michele-Lee Berko, Comment, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 Dick. L. Rev. 101, 121 (1992). One of the first uses of this system, also known as "real-time captioning," in Maine was in federal district court in Bangor for a visiting judge who had lost his hearing. According to Harry Hagopian, the official court reporter who operated the system, the judge was "ecstatic" and commented, "Now I won't have to retire!" A similar system was used for a deaf juror in Augusta but has not yet been used for a criminal defendant. Telephone interview with Harry Hagopian, Co-Owner and President of Caption Technology, Inc., Bangor, Maine (Mar. 11, 1993).

A deaf defendant in Houston, Texas was acquitted on retrial when a CAT was used. In his previous trial he had been convicted without the use of an interpreter or any other form of interpretation. The decision of the Court of Appeals of Texas, Adams v. State, 749 S.W.2d 635 (Tex. Ct. App. 1988) is discussed *infra* at text accompanying notes 141-45 and 259-62. The defense attorney attributed the acquittal to the

Another important distinguishing factor within the deaf population affecting the ease of communication is the age at which an individual lost her hearing. This factor has substantial impact on an individual's linguistic ability and interpretation needs. Sociologists have identified "sub-categories" reflecting this distinction within the deaf population. "Prelingually deaf" persons are those who lost their hearing before age three<sup>42</sup> and thus acquired little to no English skills prior to that time. "Prevocationally deaf" adults lost their hearing prior to completing their education.<sup>43</sup> Seventy-five percent of deaf Americans fall in neither sub-category, never learn to use ASL and never participate in Deaf society;<sup>44</sup> their lack of ASL skills may lead to serious compromises of their rights. Interpretation statutes often assume that the deaf person communicates through ASL and that providing her with an ASL interpreter satisfies her communication needs. Clearly, for these deaf adults, another means of facilitating communication is necessary.

Although many deaf Americans do not use ASL, aspects of the language and ASL interpretation demonstrate the shortcomings of many modern statutes and the ignorance underlying some judicial opinions. ASL is a language entirely distinct from English in syntax, grammar, humor, idioms, and vocabulary.<sup>45</sup> It has a radically different structure from English in that it conveys concepts visually

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active participation of his client regarding the cross-examination of the victim. Marc Charmatz, attorney for the National Association of the Deaf Legal Defense Fund said of the acquittal, "This is one of the best illustrations of the need for assistance . . . to go from guilty to not guilty when they use the proper equipment." Gary Taylor, *Computer Help Acquits Deaf Defendant; Preserving 6th Amendment Right*, NAT'L L.J., Jan. 29, 1990, at 21.

A limit to the use of the this type of interpretation is demonstrated in a more recent Texas case. In *Brazell v. State*, 828 S.W.2d 580 (Tex. Ct. App. 1992), another Texas Appeals Court upheld the conviction of a deaf defendant who was allowed to follow a simultaneous transcription during trial but argued on appeal that he had a limited ability to read and had been too embarrassed at trial to admit this. *Id.* at 582.

After this Comment was prepared, the Comment by Michele-Lee Berko, *supra*, also addressing the constitutional rights of deaf criminal defendants, was published. Berko's Comment, however, has a different focus and provides a detailed examination of the practical application of various methods of communication in criminal trials. She concludes that sign language is the method through which a deaf criminal defendant's rights can be best preserved. Berko, *supra*, at 130.

42. SCHEIN, *supra* note 1, at 5, 9.

43. *Id.*

44. Brooke A. Masters, *Sign Language: Can It Be Used Fairly in Court? Testimony in Idiom of the Deaf Poses Problems for Interpreters*, WASH. POST, Oct. 13, 1992, at B1. This includes Americans who have lost the ability to understand spoken language because of age. Older persons do, of course, comprise part of the criminal defendant population.

45. The second half of the twentieth century has seen a dramatic rise in the use of "manually coded English systems" such as "Signing Exact English." These are different from ASL in that they use a word for word translation of English through manual signs. GANNON, *supra* note 18, at 369-72.

through manual signs, gestures, and facial expressions.<sup>46</sup> Furthermore, there is significant variation among users of ASL. Some deaf people do not learn ASL until they become adults, either because they did not lose their hearing as children, were educated in oralist schools, or were mainstreamed in public schools. Although they use ASL, these deaf people may never acquire ASL skills equal to those of "native signers" who grew up using ASL during their social and educational development.<sup>47</sup> ASL can also vary by region and race.<sup>48</sup>

In addition to ignorance of the nature of ASL, hearing people have other misconceptions about communicating with deaf people that arise repeatedly in criminal cases and often lead to inadequate protection of the deaf person's rights. For example, some hearing people may assume that all or most deaf people, regardless of whether they use ASL or know English, can "read lips."<sup>49</sup> In fact, the opposite is true. One study found that the best lipreaders (or speechreaders) could fully comprehend only twenty-six percent of what was said to them.<sup>50</sup> Speechreading can supplement other forms of communication but its usefulness depends largely on the proximity of the speaker, the speaker's style, and the addition of other visual cues to assist the deaf person.<sup>51</sup> Also, speaking loudly, as many hearing people do in the presence of deaf people, tends to distort lip movements making it more difficult for the deaf person to understand.<sup>52</sup>

46. SCHEIN, *supra* note 1, at 35; see also PADDEN & HUMPHRIES, *supra* note 16, at 1.

47. See *supra* note 34 and accompanying text. Mainstreaming is more of a threat to the preservation of ASL than are oral residential programs largely because, throughout the twentieth century, ASL flourished in residential schools as an underground language passed on by older children and was used out of the presence of the hearing educators. Deaf children educated without other deaf people as classmates or teachers do not have the same opportunity to learn and use the language.

An example in a legal setting can demonstrate the degree of difference among some users of ASL. The defendant in *State v. Mason*, 633 P.2d 820 (Or. Ct. App. 1981) (see *supra* note 4) received "some oral or lip reading training in school, but no training in sign language until the age of 14." *Id.* at 826 n.3. An expert witness at the hearing seeking an order to suppress statements he made to police described that Mason's ASL level was that of "baby talk." *Id.* It does not appear that he understood written or spoken English.

48. SCHEIN, *supra* note 1, at 29-30.

49. Of course, "lipreading" also presupposes a person's knowledge of the language being spoken.

50. DUBOW ET AL., *supra* note 2, at 6 (citing McCAY VERNON & EUGENE D. MINDEL, *THEY GROW IN SILENCE: THE DEAF CHILD AND HIS FAMILY* 96 (1971)). A study in Great Britain demonstrated that, even after ten years of "oral" education, most deaf students were not better at lipreading than "a man in the street . . ." LANE, *supra* note 12, at 129.

51. See DUBOW ET AL., *supra* note 2, at 7. See also Berko, *supra* note 41, at 109-10 for a discussion of additional factors limiting the use of speechreading as an effective form of communication.

52. *People v. Rivera*, 480 N.Y.S.2d 426, 429 (Sup. Ct. 1984).

Courtroom trials provide an excellent example of the limitations of speechreading. The speaker is usually quite far from the deaf defendant and, in the case of an attorney, may be turned away from the defendant when examining witnesses or addressing the jury. When objections are made, two, sometimes three, persons may speak at once. The courtroom setting and decorum eliminate many visual cues used by deaf people who speechread. The use of legal terms and other words unfamiliar to lay persons can further limit understanding. For example, the professional jargon of police officers, medical examiners, and psychiatrists contain many words and phrases that would be incomprehensible to one who is speechreading. Further, people who testify are often instructed by attorneys to remain "composed" and to speak with as little emotion and gesturing as possible. Many responses to cross-examination consist of only "yes" or "no" and, unless the deaf person was able to understand the question, the answer will be meaningless to him or her.

Many deaf people who have some residual hearing rely on speechreading and amplification (hearing aids) for comprehension of spoken language. Hearing aids have their own drawbacks and limitations, however. Their effectiveness depends largely on the type and degree of hearing loss and the nature of the surroundings during their use. Background noise or the acoustics of a particular room, for example, can render them totally useless in some cases.<sup>53</sup> Additionally, some hearing people mistakenly assume that deaf persons have near-perfect hearing when they wear a hearing aid.

It is also important to recognize the inadequacy of writing as a substitute for ASL or other interpretation. People, hearing or deaf, tend to condense what they would say in other modes when they are writing notes, which could be extremely prejudicial in legal settings. Moreover, English is a second language to most deaf people who lost their hearing during childhood. Given the poor quality of educational opportunities for most deaf children in this country, deaf adults, on average, have reading levels far below that of hearing adults,<sup>54</sup> thus greatly limiting comprehension of this form of com-

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Also, courts' opinions often appear to rest on the belief that it is acceptable for deaf people to have less than full comprehension even when the means to better comprehension are readily available. *See, e.g.*, *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Court's denial of a deaf child's right to an interpreter in public school under the Education for All Handicapped Children Act was based on the claim that she was already receiving "adequate education," although the uncontroverted evidence showed that the child understood less than half of what was said in the classroom without an interpreter. *Id.* at 215 (White, J., dissenting). The question may be asked whether the defendant's participation in his own trial is less important than that of the other participants. For example, would a judge allow the proceedings to be only partly comprehensible to him or her?

53. *See* DuBow *ET AL.*, *supra* note 2, at 7.

54. SACKS, *supra* note 4, at 28-29.

munication. Studies estimate that the average American deaf sixteen-year-old reads at the same level as the average hearing eight-year-old, and that eighty-five percent of profoundly deaf people cannot read a newspaper when they complete their education.<sup>55</sup> Computer Assisted Transcript systems, however, can be a useful interpretation tool for non-ASL fluent defendants with a minimum level of literacy.

The role of interpreters and interpretation takes on enormous importance due to the complex and unusual communication needs of deaf people. Several types of interpreters facilitate communication between deaf and hearing people.<sup>56</sup> The most common type is an interpreter who uses ASL, translating from ASL to English and vice versa. There are also "oral interpreters" for deaf people, who rely on speechreading to understand spoken words. Oral interpreters sit in front of the deaf person and silently mouth the speaker's words, substituting words that are easier to speechread.<sup>57</sup> Also, intermediary interpreters (usually Deaf persons themselves) translate ASL from a person who is signing or interpreting into a simpler form of ASL for deaf people with lower ASL skills or who use a visual-gestural system.<sup>58</sup>

Many professional interpreters are certified by the Registry of Interpreters for the Deaf (RID), a national professional organization.<sup>59</sup> To be certified one must have a high level of ASL proficiency (including an ability to interpret from ASL to English) as well as an understanding of ethical and cultural issues involved in interpreting for deaf and hearing people.<sup>60</sup> In the absence of certification, it is difficult for hearing people, including trial court judges, to assess the skills of an interpreter.<sup>61</sup> RID also provides specialized certification for legal interpreting requiring additional training in substantive and procedural legal issues.<sup>62</sup> An additional factor in interpreting,

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55. LANE, *supra* note 12, at 130-31.

56. See DuBow ET AL., *supra* note 2, at 2-3. This discussion centers on the types of professional interpreters. Of course, most deaf people who need interpretation to communicate with hearing people rely on non-professional interpreters such as family, friends, and, occasionally, strangers who happen to be available. *Id.* at 4.

57. *Id.* at 2. See also Berko, *supra* note 41, at 111-12.

58. DuBow ET AL., *supra* note 2, at 2. See also discussion of *People v. Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984), *infra* at text accompanying notes 130-40.

59. DuBow ET AL., *supra* note 2, at 2-3. According to Hagopian, *supra* note 41, the National Association of Court Reporters is developing a training and certification program for real time captioning.

60. DuBow ET AL., *supra* note 2, at 2-4; Interviews with Douglas Newton and Polly Lawson, *supra* note 4.

61. Schein mentions that a court's inability to judge the competence of an interpreter results in many problems for deaf people in the court system, SCHEIN, *supra* note 1, at 185. Deaf people themselves are the best authorities on the quality of individual interpreters. DuBow ET AL., *supra* note 2, at 3.

62. DuBow ET AL., *supra* note 2, at 3; Interviews with Douglas Newton, *supra* note

with added significance in legal settings, is the RID Code of Ethics, which must be followed by all RID certified interpreters. Included as part of this code is thoroughness, accuracy,<sup>63</sup> and confidentiality.<sup>64</sup> Non-certified interpreters (especially those who are acquainted with one of the parties) could severely compromise the accuracy of the testimony.<sup>65</sup> Despite the importance of having certified interpreters available for legal and other settings, the number of certified interpreters is very low.<sup>66</sup> Currently, there are only fourteen certified interpreters in Maine, not all of whom have the skills required to interpret in legal settings.<sup>67</sup>

Special considerations apply when interpreting in criminal defense contexts. Defense attorneys require the use of an interpreter in pretrial preparations particularly if they are going to use an interpreter during trial.<sup>68</sup> Interpreting between two distinct languages that often do not share identical concepts or words is itself a formidable undertaking,<sup>69</sup> and courtroom interpreting presents its own set

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63. *DuBow ET AL.*, *supra* note 2, at 4. See also *United States v. Torres*, 793 F.2d 436, 439 (1st Cir. 1986) in which the trial court judge chastised a Spanish-language interpreter for translating a pro se defendant's statements as well as his questions during his cross-examination of a witness. If this were a RID interpreter and deaf defendant, the judge would be asking her to violate the RID ethical rules, which require complete interpretation of every word.

64. *DuBow ET AL.*, *supra* note 2, at 4. In addition, Maine has enacted a statute to protect interpreters from being required to disclose communications unless such disclosure is deemed absolutely necessary by the presiding judge. ME. REV. STAT. ANN. tit. 5, § 48(4) (West Supp. 1992-1993).

65. The expert witness who testified in *People v. Rivera* discussed the tendency of some interpreters to "parent," filling in some of the answers or changing words as they believe will benefit the defendant. 480 N.Y.S.2d 426, 429 (Sup. Ct. 1984). During testimony, of course, changing a word or two can have a significant impact. Additionally, use of a non-certified interpreter who knows a party can also raise the question of interpreter bias. See *State v. Doucette*, 398 A.2d 36 (Me. 1978); *Urquhardt v. Lockhart*, 726 F.2d 1316 (8th Cir. 1984) (both cases affirming conviction when defendants alleged interpreter bias on the part of ASL interpreter for prosecution witness).

66. *Schein*, *supra* note 1, at 197-98.

67. Interview with Douglas Newton, *supra* note 4. There is only one certified interpreter for approximately every 167 deaf Maine residents. What is even more compelling is the importance placed on certification by those who rely on interpreters. A poll of deaf persons and employers, educators, and interpreters for the deaf in Maine indicated that over 80 percent expressed the "importance of certification of interpreters." Only 10 percent indicated that they had no preference for the certification status of an interpreter with whom they were working, and only 7 percent were satisfied with the services of non-certified interpreters in the state. DEPARTMENT OF HUMAN SERVICES, BUREAU OF REHABILITATION (DIVISION OF DEAFNESS), INTERPRETING SERVICES IN MAINE: A REPORT BY THE STUDY COMMITTEE ON INTERPRETING SERVICES (1989).

68. Deaf defendants who obtain interpreting services through Pine Tree Society Deaf Services in Portland, Maine are usually able to have use of the same interpreter for both pretrial preparations and the trial itself. Interview with Douglas Newton, *supra* note 4.

69. For example, there is no exact equivalent for the concepts of "legal rights" or

of challenges. During trial, all proceedings must be interpreted including attorneys' arguments, statements to and from the bench, and the examination of all witnesses. Interference with the interpretation results when a person speaks at the same time as another, or blocks the interpreter with use of exhibits or body positions.<sup>70</sup> More difficult to guard against are the cultural differences between hearing and deaf people. For example, ASL incorporates many nonverbal behaviors that have different connotations to hearing people. American society often regards "exaggerated" gesturing or facial expressions as "vulgar," whereas the opposite is true in deaf culture.<sup>71</sup> These differences can affect the jurors' evaluation of a deaf person's credibility or criminal responsibility.

Another problem can be the cultural norm among many deaf people of nodding. Such nodding does not necessarily indicate agreement or approval but rather that someone is paying attention.<sup>72</sup> When a deaf person is nodding but the word "No" is interpreted, the jury's faith in the credibility of both the witness and interpreter

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"appeal" in ASL. Larry J. Goldberg, *The Law: From Shield to Sword for Deaf People*, 9 HUMAN RIGHTS 22, 25 (1980). The fact that there are concepts which do not translate exactly from ASL to English is not an indication of any inferiority of ASL but is a common occurrence in the case of two languages with different origins. These differences are compounded by the fact that ASL is an entirely visual language using specific facial expressions as well as individual signs to convey meaning, tone, and emphasis. Differences between the two languages temper many verbal techniques used by attorneys during examination to control and focus questioning, such as phrasing questions in double negatives. Brooke A. Masters, *Sign Language: Can It Be Used Fairly in Court? Testimony in Idiom of the Deaf Poses Problems for Interpreters*, WASH. POST, Oct. 13, 1992, at B1.

70. Goldberg, *supra* note 69, at 25.

71. SCHEIN, *supra* note 1, at 35. For example, the sign for "you" or "her" in ASL consists of "pointing" to the person to whom one is referring; in American culture pointing to someone is considered impolite. Douglas Newton and other interpreters will usually suggest a pretrial meeting among the parties, counsel, and judge to discuss these differences and how they can be minimized during a civil or criminal trial. Newton urges judges to explain these differences to jury members so that they do not use hearing standards of behavior when observing a deaf person's testimony and evaluating its credibility. Newton nonetheless believes that even with these cautionary explanations, hearing juries appear to react negatively to the use of ASL in a trial. Interview with Douglas Newton, *supra* note 4.

The cultural differences between hearing and deaf people raise the question of whether a deaf defendant must always be adjudged guilty or not by all-hearing juries. The law is in a state of flux over this issue. Usually the cases are brought by hearing defendants who are challenging the selection of a deaf juror. *See, e.g., United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987) (upholding conviction where one juror was deaf).

72. In *People v. Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984), discussed *infra* at notes 130-40 and accompanying text, an expert witness also noted that, "in stress situations, hearing-impaired persons may attempt to diffuse perceived hostility by assuming an acquiescent emotional posture. This often takes the form of nodding affirmatively in response to a question that the person does not understand." *Id.* at 429.



may decrease.<sup>73</sup> Also, a deaf person who is a party may observe a witness' testimony and nod throughout, while wholeheartedly disagreeing with it.

Courts too easily assume they have met a deaf person's interpretation needs. A closer examination of the facts involved in the decisions discussed herein, however, reveals the erroneous reliance upon speechreading, note-writing, and amplification. The failure of trial court judges and defense attorneys to address the factors outlined above has allowed the rights of defendants to be compromised in trial settings. This problem, however, as discussed in the following sections, is further compounded by vague statutory requirements and enormous discretion accorded by appellate courts to trial court actions in appointing interpreters.

## II. OVERVIEW OF COURT DECISIONS ON THE CONSTITUTIONAL RIGHT TO INTERPRETATION

A few state and federal courts have recognized interpretation as a constitutional right of deaf defendants based upon the United States and state constitutions. A larger number of courts purport to connect the right to interpretation with the basic trial rights of defendants but fail to enforce this right with the same vigilance as other constitutional protections, such as the right to counsel. The following section examines many of these cases.

### A. Federal Courts

Many constitutional principles trace their source to an opinion or line of cases from the United States Supreme Court.<sup>74</sup> Unfortunately, the Court has never directly addressed the impact of the Sixth and Fourteenth Amendments on the rights of deaf criminal defendants to have proceedings interpreted, leaving the development of the case law entirely to lower federal courts and the individual states. However, there are two early cases in which the Court addressed related issues. In a 1906 case, *Felts v. Murphy*,<sup>75</sup> the Court upheld a circuit court denial of a deaf state prisoner's habeas corpus petition. In *Felts*, the trial court denied the defendant's request that the proceedings be repeated into his ear trumpet.<sup>76</sup> Although there was no question that the defendant did not hear a word of the entire trial (with the exception of the one sentence which was repeated into his trumpet), the Court found no due pro-

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73. Interview with Douglas Newton, *supra* note 4.

74. Several examples of the origins of the trial rights of criminal defendants are provided in Part III *infra*.

75. 201 U.S. 123 (1906).

76. An ear trumpet is a trumpet-shaped device held to the ear to amplify sound. It is now obsolete, having been replaced by hearing aids and other amplification devices.

cess violation and upheld the conviction.<sup>77</sup> Also, in *Perovich v. United States*,<sup>78</sup> decided the following year, the Court granted broad discretion to a trial court judge in the matter of whether to appoint an interpreter to translate the non-English-speaking defendant's testimony, allowing him to testify in his native and stronger language.<sup>79</sup>

This deference to trial court judges on matters of language interpretation during trial continues in federal courts today.<sup>80</sup> However, given the extensive case law development on the Sixth and Fourteenth Amendments since *Felts* and *Perovich*, it is doubtful that the Court would decide such egregious cases the same way today. Given the development in the second half of this century of the jurisprudence of the constitutional rights of criminal defendants, conclusions such as those in *Felts* and *Perovich* are inconsistent with the fundamental principles that have emerged.<sup>81</sup> The Supreme Court has had numerous occasions in recent years to comment on the issue of interpretation at trial, particularly in the area of federal courts and the Federal Court Interpreters Act, but has denied certiorari on every occasion.<sup>82</sup> The result is that the only cases from the Court on the issue of interpretation are nearly a century old and inconsistent with modern jurisprudence on defendants' federal constitutional rights.

In contrast, several lower federal courts have addressed the issue of the right to interpretation in the context of defendants who are deaf or whose primary language is not English. The leading case on interpretation under the United States Constitution, *United States ex rel. Negron v. New York*,<sup>83</sup> involved a Spanish-speaking defendant.<sup>84</sup> Regelio Nieves Negron petitioned a federal district court for

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77. *Felts v. Murphy*, 201 U.S. at 130-31.

78. 205 U.S. 86 (1907).

79. *Id.* at 91.

80. See discussion *infra* at text accompanying notes 215-47.

81. See *infra*, Part III of this Comment for an outline of Supreme Court cases regarding the importance of the defendant's presence at trial and competence.

82. See, e.g., *United States v. Perez*, 918 F.2d 488, (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2055 (1991); *United States v. Gomez*, 908 F.2d 809 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 699 (1991); *United States v. Joshi*, 896 F.2d 1303 (11th Cir. 1990), *cert. denied sub nom. Panchal v. United States*, 111 S.Ct. 523 (1990); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), *cert. denied sub nom. Estevez v. United States*, 492 U.S. 908 (1989); *United States v. Torres*, 793 F.2d 436 (1st Cir. 1990), *cert. denied*, 479 U.S. 889 (1986); *Carrion v. United States*, 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974).

83. 434 F.2d 386 (2d Cir. 1970) (Retired United States Supreme Court Justice Clark sat on the unanimous panel).

84. Many cases in the development of the law on the right to interpretation did not involve deaf defendants. The similarities between the treatment of deaf and other non-English speaking persons outweigh the potential differences for the purposes of the analysis here. Deaf people, like other linguistic minorities, do not use English, for the most part, as a "native" or "first" language. Both groups are hampered by a lack

habeas corpus relief after a state court conviction of second degree murder.<sup>85</sup> He spoke no English and was unable to communicate with his attorney until twenty minutes prior to trial when an interpreter was made available. During trial, the interpreter translated the Spanish testimony of the defendant and witnesses for the benefit of the English-speaking persons present. She did not, however, translate the remainder of the proceedings into Spanish for Negron and provided only a few "summaries" of the testimony during recesses. The district court granted the writ of habeas corpus and the state appealed.<sup>86</sup>

The United States Court of Appeals for the Second Circuit affirmed and held that Negron's trial "lacked the basic and fundamental fairness required by the Due Process Clause."<sup>87</sup> It found the source of Negron's constitutional protection in the Due Process Clause's incorporation of the Sixth Amendment guarantees of confrontation of prosecution witnesses, presence at trial, and competency to stand trial. Without translation, the court reasoned, "[t]he adjudication loses its character as a reasoned interaction. . . ."<sup>88</sup> The court rejected the state's argument that Negron had waived his right to an interpreter. Applying the United States Supreme Court's definition of waiver in *Johnson v. Zerbst*,<sup>89</sup> the court concluded that the defendant could not be deemed to have intentionally relinquished a known right or privilege, especially when there was no indication that he knew he had such a right and the right was "ill-defined."<sup>90</sup> Moreover, since the law on the right to interpretation

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of accessible communication to persons in the court system but in both cases, for the most part, communication can be facilitated by interpretation.

It is likely, however, that there are other factors that separate the treatment of deaf people from that of other linguistic minorities, largely due to many misconceptions held by hearing people about deaf people. For example, it may be difficult to imagine that an individual who was born in and grew up in the United States among English-speaking people knows little to no English. Likewise, it may be hard to recognize that someone who speaks English has little ability to understand it in return, as is the case for some deaf adults who lost their hearing later in life. While other non-English speaking people encounter racism and xenophobia from the majority culture, deaf people may encounter condescension and intimidation.

85. United States *ex rel.* Negron v. New York, 434 F.2d at 387-88.

86. *Id.* at 388.

87. *Id.* at 389.

88. *Id.* (quoting Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1969)).

89. 304 U.S. 458, 464-65 (1938) (holding that waiver of a constitutional right must be done knowingly and competently and courts should make every reasonable presumption against finding such a waiver).

90. United States *ex rel.* Negron v. New York, 434 F.2d at 390. Waiver is a critical issue in many of these cases and it is where many courts fail to apply correct constitutional analysis. See *infra* text accompanying notes 324-28. Waiver of a known right is a salient point for deaf persons in two respects. First, for example, many deaf people and their supporters in Maine are unaware of the right to interpretation in Me.

was unsettled, his attorney could not have anticipated its effect on appeal.<sup>91</sup> Rather than granting broad discretion to the trial court's inaction, the court held that the judge had a duty to make it "unmistakably clear to [the defendant] that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial."<sup>92</sup> Unfortunately few circuit courts have made such unequivocal statements, even since the passage of the Federal Court Interpreters Act, which was intended to codify *Negron*.<sup>93</sup>

Federal courts have addressed the right to interpretation in deaf defendants' appeals as well. An early Eighth Circuit case, *Mothershead v. King*,<sup>94</sup> granted a deaf defendant his petition for a writ of habeas corpus relief when he was denied his constitutional right to due process under the Fifth Amendment and assistance of counsel under the Sixth Amendment by a state court conviction without the assistance of either an interpreter or an attorney.<sup>95</sup> The court held: "The conviction of a person whose infirmities are such that he cannot understand or comprehend the proceedings . . . is

REV. STAT. ANN. tit. 5, § 48 (West 1989 & Supp. 1992-1993). Maine's Bureau of Rehabilitation, Division of Deafness, conducted polls during a series of public hearings held throughout the state on interpreter services. A total of 94 people participated in the polls from hearings in Bangor, Auburn and Portland; 60 percent were hearing impaired, 19 percent were interpreters, and the remainder were educators, employers, and service providers. Only 23 percent of this group, arguably the most knowledgeable in the state on the status of deaf persons, were familiar with the Maine law on interpreting services for the Deaf/Hearing Impaired. In Bangor none were familiar. DEPARTMENT OF HUMAN SERVICES, BUREAU OF REHABILITATION (DIVISION OF DEAFNESS), INTERPRETING SERVICES IN MAINE: A REPORT BY THE STUDY COMMITTEE ON INTERPRETING SERVICES (1989). This is not to condemn this group for not knowing the law, but only to point out that, like most of us, members of the Deaf community cannot instantly recite their rights. The court interpreter statute is not one that a defense attorney is likely to encounter during practice, given the small number of arrests of deaf persons.

The second implication of a waiver requirement for deaf people is the fact that, due to the very small number of interpreters, most of whom are concentrated in southern Maine, most deaf people are used to "getting by" without full interpretation. In general, requests for interpretation usually go unmet, even where federal law requires interpretation. SCHEIN, *supra* note 1, at 192-93. It is the Author's personal observation (of Deaf people in Philadelphia) that eventually many deaf people simply stop asking.

91. United States *ex rel.* *Negron v. New York*, 434 F.2d at 390.

92. *Id.* at 391.

93. The House of Representatives Judiciary Committee Report indicates that An original impetus for legislation . . . was the 1970 decision of the U.S. Court of Appeals for the Second Circuit in *U.S. ex rel. Negron v. New York* . . . which held that the sixth amendment to the Constitution requires that non-English speaking defendants be informed of their right to simultaneous interpretation of the proceedings at government expense.

H.R. REP. No. 1687, 95th Cong., 2d Sess. 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4652, 4653.

94. 112 F.2d 1004 (8th Cir. 1940).

95. *Id.* at 1005.

violative of certain immutable principles of justice."<sup>96</sup>

The most extensive discussion by a federal court of the constitutional aspects of the right to interpretation for deaf defendants, however, was in the 1978 Fifth Circuit case, *Ferrell v. Estelle*.<sup>97</sup> *Ferrell* is important not only because it outlines the constitutional basis of the right to interpretation, but because it involved an additional challenge for the trial court: the deaf defendant could not communicate using ASL. Ferrell, like Negron, was a state prisoner seeking habeas corpus relief in the federal courts. The state trial court denied his motion for simultaneous transcription by a stenographer and instead allowed for frequent recesses to confer with defense counsel.<sup>98</sup> His attorney, however, made such requests on only two occasions. The federal district court and the Fifth Circuit agreed that the rights to confront prosecution witnesses and assist in one's own defense were compromised in this case. The language barrier was not easily remedied since an ASL interpreter was not useful. Nonetheless, the court of appeals did not excuse the trial judge from failing to protect these rights. It concluded that "[e]nsuring that the defendant has that minimum understanding [to be able to assist in his own defense] is primarily the task of the trial judge,"<sup>99</sup> and based this conclusion upon "the constitutional principles" outlined in *Negron*.<sup>100</sup> The court found that the "Constitution does not require that every defendant comprehend the English language with the precision of a Rhodes Scholar . . .,"<sup>101</sup> and also allowed for a "basic balancing" of the defendant's Sixth Amendment rights against "the public's interest in the administration of criminal law."<sup>102</sup> The court suggested that this "balancing" required the trial court to find a method of interpretation that was both helpful to the defendant and not disruptive to hearing participants.<sup>103</sup> It rejected simultaneous transcription as potentially impairing the defendant's ability to present his case. Nonetheless, the court held that, if no other option could be found, this "least attractive device" must be used, regardless of inconvenience or expense.<sup>104</sup>

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96. *Id.* at 1006 (paraphrasing *Powell v. Alabama*, 287 U.S. 45, 71 (1934), which referred to the Fourteenth Amendment's Due Process Clause).

97. 568 F.2d 1128 (5th Cir. 1978), *opinion withdrawn after defendant died*, 573 F.2d 867 (5th Cir. 1978).

98. *Id.* at 1129-30. The defendant had recently lost his hearing after he was injured in a police "shoot-out," and he communicated through reading and speaking. *Id.*

99. *Id.* at 1132.

100. *Id.* at 1131.

101. *Id.*

102. *Id.* at 1131-32.

103. *Id.* at 1132.

104. *Id.* at 1132-33. It should be noted that the technology involved in simultaneous transcription, now also known as CAT or "real time captioning," see *supra* note 41, has improved greatly only in the last four years or so. Today's systems allow for

Few federal courts impose the same degree of responsibility on trial court judges to determine a mode of communication for a deaf defendant as did the *Ferrell* court. The current federal case law on interpretation is influenced largely by a First Circuit case, *United States v. Carrion*,<sup>105</sup> decided five years before *Ferrell* but not mentioned in the *Ferrell* opinion. The *Carrion* court upheld the conviction of a "foreign born national with a limited ability to speak and comprehend English."<sup>106</sup> The opinion acknowledged that language barriers can result in impairment of confrontation rights and the ability to take the stand in one's own defense. According to the court, "[t]he right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."<sup>107</sup> However, after this declaration the court retreated and granted enormous discretion to trial court judges to decide when an interpreter is necessary based upon such considerations as complexity of issues and testimony, "the language ability of the defendant's counsel," and "considerations of judicial economy."<sup>108</sup> Ultimately

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near-instantaneous transmission of the information to deaf people and are entirely unobtrusive to the conduct of the trial. Interview with Harry Hagopian, *id.*

105. 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974).

106. *Id.* at 14.

107. *Id.*

108. *Id.* There may be some argument that the actual language and hearing abilities of a defendant are "findings of fact" that should be reversed only if they are clearly erroneous, but in the area of constitutional protection, these fact/law distinctions are far from clear. For example, in *Drope v. Missouri*, 420 U.S. 162 (1975), Chief Justice Burger quoted Justice Frankfurter's discussion in *Watts v. Indiana*, 338 U.S. 49, 51 (1949):

But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this court's adjudication. . . . Especially in cases arising under the Due Process Clause it is important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review for which this Court sits.

*Drope v. Missouri*, 420 U.S. at 175 n.10. Also, in none of the dozens of cases of deaf and other non-English-speaking minorities reviewed for this Comment was an expert witness produced at trial or in pre-trial proceedings on either side to demonstrate the actual language and/or hearing ability of a defendant. Instead, courts typically rely on usually incorrect sources such as their own impressions and those of other court personnel. Two cases where expert testimony was introduced during post-trial proceedings provide compelling demonstrations of the prejudice to defendant that can result from courts' failure to ascertain defendants' hearing impairments. In *People v. Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984), Rivera's own attorney in the original trial believed that "[Rivera] appeared to understand the proceeding" but an audiologist who tested the defendant testified that the results showed a "severe to profound sensori-neural hearing impairment [in both ears], which . . . renders him incapable of

the court upheld the conviction of a defendant, whose English skills were admittedly "limited."<sup>109</sup>

Unfortunately, the approach of modern federal courts has more resembled *Carrion* than *Ferrell* and *Negron*. Some federal courts have adopted a mutation of the "basic balancing" principle mentioned in *Ferrell* but have used it to deny new trials or habeas corpus petitions. A Fifth Circuit panel, which differed from that deciding *Ferrell* two years earlier, upheld the conviction of a Spanish-speaking defendant using a markedly different analysis from that in *Ferrell*.<sup>110</sup> The case, *United States v. Martinez*, employed a "test" that combined those used in *Carrion* and *Ferrell*. The court upheld the conviction of a defendant whose defense counsel offered to serve as an interpreter after being informed by the court that "since [the defendant] had employed counsel the court was not required to provide an interpreter for him."<sup>111</sup> The court reasoned that the use of interpreters "involves a balancing of the defendant's constitutional rights to confrontation and due process against the public's interest in the economical administration of criminal law. . . . That balancing is committed to the sound discretion of a trial judge, reversible only on a showing of abuse."<sup>112</sup> *Ferrell*, however, made no specific reference to fiscal considerations. The *Ferrell* court did discuss the expense and inconvenience of simultaneous transcription but held that if no other option is available to provide interpretation, it *must* be used.<sup>113</sup> Interestingly, *Martinez* has been cited in other circuits as an authoritative discussion of the constitutional aspects of interpretation rights.<sup>114</sup>

understanding normal speech." *Id.* at 428. In *Peeler v. State*, 750 S.W.2d 687 (Mo. Ct. App. 1988), the judge who presided over the original trial testified at the defendant's motion for a new trial that he "felt there was no need to appoint an interpreter. The judge observed [the defendant] throughout trial, particularly his testimony while on the stand, and felt that he understood the proceedings." *Id.* at 689. An audiologist, however, testified that Peeler also had "severe to profound" hearing loss in both ears. He could not understand spoken English except under ideal conditions and using visual cues; neither were present at trial. *Id.* See also *Brewer v. Williams*, 430 U.S. 387, 397 n.4 (1977) ("Whether [defendant] waived his constitutional rights was not, of course, a question of fact, but an issue of federal law.").

109. *United States v. Carrion*, 488 F.2d at 14-15.

110. *United States v. Martinez*, 616 F.2d 185 (5th Cir. 1980).

111. *Id.* at 187 (citation omitted). The trial took place after the passage of the Federal Court Interpreters Act, 28 U.S.C.A. § 1827 (West Supp. 1993), but just prior to its effective date; the statute requires federal courts to provide interpreter services to all who require them, regardless of income. See also *infra* note 340 and accompanying text for the implications of the constitutional right and who is required to pay.

112. *Id.* at 188.

113. *Ferrell v. Estelle*, 568 F.2d 1128, 1133 (5th Cir. 1978).

114. See, e.g., *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989); *United States v. Bennett*, 848 F.2d 1134, 1141 (11th Cir. 1988). See also *Luna v. Black*, 772 F.2d 448, 451 (8th Cir. 1985) (following *Carrion* in granting trial court wide discretion, and finding that no right to interpretation exists if no need is deter-

Most federal courts, following *Carrion* and *Martinez*, therefore, have regarded the right to interpretation as having a "quasi-constitutional" level of significance. While courts recognize a connection between the need for translation and other constitutional rights, they are unwilling to take the necessary steps at trial or on review to enforce these rights in a meaningful way. Using such an analysis, appellate courts confronted with issues of interpretation explicitly allow a balancing of constitutional rights against notions of "economical administration of justice" and grant broad discretion to trial court judges over matters about which they have limited information and resources. It can be argued, however, that the strength of constitutional protections is precisely their mandatory application, regardless of inconvenience or expense. This uncompromising nature has been the foundation of criminal justice for over two hundred years, without amendment. Furthermore, courts often fail in these cases to recognize exactly which underlying principles are being "balanced," such as the right to communication with counsel, confrontation of defense witnesses, and presence at trial. It is unimaginable, for instance, that a criminal defendant's right to a jury trial could be denied because it was less expensive to have a bench trial.

### B. State Courts

The state court decisions on the scope of a deaf criminal defendant's right to interpretation at trial have varied widely throughout this century. As Part IV will address, an increasing number of state court decisions are based upon statutory requirements for interpretation. Frequently, an analysis of the constitutional requirements is marginal or absent. Although some states have applied a constitutional, as well as statutory, analysis, they have done so without unanimity on what the rights and responsibilities of the defendant and trial court involve.<sup>115</sup>

*Terry v. State*,<sup>116</sup> a 1925 Alabama case, was among the earliest cases that addressed this issue, and remains one of the most unequivocal statements on the constitutional aspects of interpretation. In *Terry*, the court based the right to interpretation on the Alabama state constitution's guarantees of a right to demand the nature and cause of the accusation and to confront prosecution witnesses.<sup>117</sup>

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mined and no request is made).

115. The Maine Supreme Judicial Court, sitting as the Law Court, has never directly addressed the issue of the constitutional dimension of the right to interpretation. As will be discussed *infra* notes 263-86 and accompanying text, the court had an opportunity to do so in *State v. Green*, 564 A.2d 62 (Me. 1989), but did not settle the question.

116. 105 So. 386 (Ala. 1925).

117. *Id.* at 387.



Over the defense counsel's objections, the trial court repeatedly refused to appoint an interpreter in a deaf man's trial. The Alabama Supreme Court reversed the conviction and wrote:

In the absence of an interpreter it would be a physical impossibility for the accused, a deaf-mute, to know or to understand the nature and cause of the accusation against him, and . . . he could only stand by helplessly . . . and all this in the teeth of the mandatory constitutional rights which apply to an unfortunate afflicted deaf-mute, just as it does to every person accused of a violation of the criminal law.<sup>118</sup>

A 1982 Alabama case, however, indicated a retreat from *Terry*. In *Turner v. State*,<sup>119</sup> the appeal involved a deaf defendant who was arraigned without an interpreter. When the trial court addressed the defendant orally during the arraignment, the defendant responded by nodding. This was considered by the trial and appellate courts to be an adequate waiver although there was no showing that the defendant actually understood the judge's explanation.<sup>120</sup> The appellate court noted that, although appointment of interpreters is "certainly the recommended procedure," there was no constitutional violation based upon the "factual findings"<sup>121</sup> that the defendant nodded and "[could] communicate, at least to some degree, by writing."<sup>122</sup> As discussed in Part II,<sup>123</sup> nodding is not necessarily an affirmative response among deaf people, and writing may be an inadequate form of communication.

In *People ex rel. Myers v. Briggs*,<sup>124</sup> the Supreme Court of Illinois required trial court judges to provide deaf defendants "reasonable facilities" to protect their constitutional rights.<sup>125</sup> In *People v. Fleagle*,<sup>126</sup> however, an Illinois intermediate appellate court held that the "reasonable facilities" requirement of *Myers* could be met by allowing defense counsel to repeat all testimony to the defendant, speaking loudly and slowly so that the defendant could "read his lips."<sup>127</sup> Both *Turner* and *Fleagle* provide examples of the special problems faced by non-ASL fluent deaf people played out in the forum of the criminal justice system. *Ferrell* also involved a non-ASL

118. *Id.* at 387-88.

119. 429 So. 2d 645 (Ala. Crim. App. 1982).

120. *Id.* at 647.

121. *Id.*

122. *Id.* at 646.

123. See *supra* notes 72-73 and accompanying text.

124. 263 N.E.2d 109 (Ill. 1970). See discussion of this case *infra* notes 178-80 and accompanying text.

125. *People ex rel. Myers v. Briggs*, 263 N.E.2d at 113.

126. 472 N.E.2d 155 (Ill. App. Ct. 1984).

127. *Id.* at 160. See discussion of "lipreading" *supra* at text accompanying notes 49-52.

fluent defendant,<sup>128</sup> yet the court demonstrated an unwavering application of constitutional principles that was absent from both of these state court cases. The result in cases like *Turner* and *Fleagle* is that convictions were upheld when the "communication" with the accused occurred entirely through note-writing or attempts at speechreading when more comprehensive means should have been used. Such cases occur because many state appellate courts do impose a constitutional obligation on the trial court to make not the best effort, but only a bare attempt, in facilitating the defendants' understanding of the proceedings.<sup>129</sup>

In contrast, two recent cases prove that courts can take a more responsible, comprehensive, and constitutionally sound approach. In *People v. Rivera*<sup>130</sup> and *Adams v. State*,<sup>131</sup> the courts not only recognized the constitutional right to interpretation, aside from any statutory guarantees, but also closely scrutinized the actions of the trial court. In *Rivera*, the defense counsel was clearly knowledgeable about deaf issues and sought to educate the trial court.<sup>132</sup> The court, in turn, examined the deaf defendant's individual needs rather than making assumptions from the bench about the adequacy of interpretation. The procedural posture was as unusual as was the court's attention to these issues; the defendant pleaded guilty to grand larceny in the third degree, but moved to contest sentencing as a "second felony offender" because his two prior convictions were obtained in trials in which his due process rights were denied by inadequate interpretation. The Supreme Court of New York, Criminal Term, held a fact-finding hearing and ultimately granted the motion. The judge noted that the defendant had relatively low skills in ASL and that a deaf interpreter<sup>133</sup> had assisted in trial preparation and was present at the evidentiary hearing on the motion. The defendant was able to speak Spanish (only a Spanish language interpreter was provided at the first hearing), but was unable to under-

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128. *Ferrell v. Estelle*, 568 F.2d 1128, 1129 (5th Cir. 1978). In the state court decision in *Ferrell*, *Ferrell v. Texas*, 479 S.W.2d 916 (Tex. Crim. App. 1972), the Texas Court of Criminal Appeals demonstrated the prejudice to non-ASL fluent defendants. The court upheld the trial court's refusal to order simultaneous transcription because of the inconvenience and expense and concluded the opinion with the statement: "This case is distinguishable from those involving deaf-mutes . . . where virtually instant transcription may be provided through hand signals or an interpreter." *Id.* at 917 (footnote omitted).

129. This can arise in cases of deaf people with all kinds of interpretation needs. See, e.g., *People v. Branson*, 475 N.E.2d 905, 911 (Ill. App. Ct. 1984) (noting that "the trial judge noted for the record that the defendant had been bright and alert throughout the trial"); *State v. Hansen*, 464 P.2d 960, 961 (Ariz. 1970) (noting that the trial judge found that the defendant was "fairly adept at reading lips").

130. 480 N.Y.S.2d 426 (Sup. Ct. 1984).

131. 749 S.W.2d 635 (Tex. Ct. App. 1988).

132. *People v. Rivera*, 480 N.Y.S.2d at 427 n.2.

133. See *supra* text accompanying note 58.

stand spoken language.<sup>134</sup> At his prior trials, he nodded in response to explanations and never requested an interpreter. Although his previous defense attorney, testifying for the state, claimed that he had not noticed any serious communication problem, the defendant was unable to recite correctly the acts for which he had been previously convicted.<sup>135</sup> The new defense attorney also presented expert testimony on the "psycho-linguistic implications of problems related to the art of interpretation" to explain why many deaf people nod their heads (particularly in stressful situations), the limits of "lip-reading" in courtroom situations, and the importance of using an impartial certified interpreter.<sup>136</sup>

The *Rivera* court defined the issue as whether the failure to provide the defendant with an interpreter amounted to a deprivation of due process, and "[c]rucial to an analysis of this issue is an understanding of what an uninterpreted trial means to a deaf person."<sup>137</sup> It regarded a New York statute requiring interpretation as embodying a constitutional right and agreed that "a hearing-impaired person cannot receive a fair trial absent a qualified sign-language interpreter."<sup>138</sup> The court concluded that the inadequate interpretation deprived the defendant of the right to participate in his own defense, confront witnesses against him, and receive effective assistance of counsel. The court further noted that, based upon the principles outlined in *Zerbst*,<sup>139</sup> the defendant's failure to request an ASL interpreter did not amount to a waiver of these Sixth and Fourteenth Amendment rights.<sup>140</sup>

*Adams v. State*<sup>141</sup> involved another non-ASL fluent defendant. At trial, the defense counsel never requested any form of interpretation. Instead, counsel wrote down the direct examination questions (the defendant was able to respond in spoken language) and informed the defendant of the proceedings through written notes on only two occasions.<sup>142</sup> The Texas Court of Appeals applied the language of an earlier case of a Spanish-speaking defendant<sup>143</sup> and held that "[i]n the absence of the opportunity to be aware of the proceedings and the testimony of witnesses against her, appellant was denied the constitutional right of confrontation and, that right not

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134. *People v. Rivera*, 480 N.Y.S.2d at 428.

135. *Id.*

136. *Id.* at 429.

137. *Id.* at 432.

138. *Id.* at 433.

139. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding that waiver of a constitutional right must be done knowingly and competently, and courts should make every reasonable presumption against finding such a waiver).

140. *People v. Rivera*, 480 N.Y.S.2d at 434.

141. 749 S.W.2d 635 (Tex. Ct. App. 1988).

142. *Id.* at 636.

143. *Baltierra v. State*, 586 S.W.2d 553 (Tex. Crim. App. 1979).

being knowingly and intelligently waived, her trial and conviction are null and void."<sup>144</sup> More significant was the court's reiteration that it is the duty of the trial court, not the defendant or defense counsel, to make sure the defendant adequately understands the proceedings: "Ensuring that the defendant has that [constitutionally required] minimum understanding is primarily the task of the trial judge. . . . Counsel is not obliged to implement the right of confrontation. That duty is imposed upon the court by the confrontation clause in the Sixth Amendment."<sup>145</sup>

The dimensions of the right to interpretation in state courts remain unsettled. As in federal case law, the decisions demonstrate a non-uniform application of trial court discretion and responsibility. The problems originate in both the trial and appellate courts. In *Turner* and *Fleagle*, appellate courts deferred to the trial courts' actions although they were based upon erroneous assumptions about the interpretation needs of the defendants. In cases like these, trial judges fail in their roles as protectors of deaf defendant's rights, and reviewing courts give trial judges a wide degree of discretion. The courts in *Adams* and *Rivera*, by contrast, conducted thorough analyses of the defendants' communication needs and the impact on their constitutional rights. In the latter cases, the courts found it was the responsibility of the trial court, not the defendant or defense counsel, to prevent a compromise of constitutional rights. The result of these differing approaches to interpretation is a great disparity of treatment of deaf people in state criminal adjudication systems, which flies in the face of the essential guarantees of the Constitution.

### III. CONSTITUTIONAL SOURCES OF THE RIGHT TO INTERPRETATION

A search for a constitutional basis for a right to interpretation requires analysis beyond the texts of the Sixth and Fourteenth Amendments. A set of principles recognized as the fundamental constitutional protections for all defendants has emerged from the jurisprudence of the Sixth and Fourteenth Amendments. Applying these principles to the cases of deaf criminal defendants demonstrates that adequate interpretation is a constitutional requirement.<sup>146</sup>

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144. *Adams v. State*, 749 S.W.2d at 637 (citation omitted).

145. *Id.* at 638 (citations omitted).

146. This analysis is unnecessary in the context of international human rights law where the right to interpretation during criminal proceedings is expressly recognized as a fundamental human right. See, e.g., International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, art. 14(3)(f), 999 U.N.T.S. 171 (ratified by the United States in 1992) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . [t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court."); European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 6(3)(e), 213

In federal courts, the Sixth Amendment of the United States Constitution<sup>147</sup> provides the primary source of criminal defendants' rights at trial: it explicitly protects a defendant's rights to be informed of the nature and cause of the accusation, to confront prosecution witnesses, and to be provided the assistance of counsel.<sup>148</sup> Courts have also recognized trial rights that are embodied in the principles of the Constitution but not expressly provided in the text, including the right to be present and competent, and to assist in one's own defense.<sup>149</sup> Through the doctrine of "selective incorporation" of the Fourteenth Amendment's Due Process Clause,<sup>150</sup> the Supreme Court has applied to state court proceedings all of these Sixth Amendment protections because they are "implicit in the concept of ordered liberty."<sup>151</sup> Criminal defendants in state courts are protected by provisions of state constitutions as well.<sup>152</sup>

U.N.T.S. 222 (text essentially identical to International Covenant); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 8(2)(a), 9 I.L.M. 673 (text essentially identical to International Covenant).

147. The language of the Sixth Amendment is as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

148. The rights under the Sixth Amendment attach at the commencement of criminal proceedings. See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

149. See *infra* notes 171-84 and accompanying text (right to be competent at trial) and notes 185-96 and accompanying text (right to be present and assist in defense).

150. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

151. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The Court has made applicable to the states the following Sixth Amendment rights, among others: to be informed of nature and cause of accusation, *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); to be confronted with prosecution witnesses, *Pointer v. Texas*, 380 U.S. 400, 403 (1965); to have assistance of counsel, *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); to be competent at trial, *Pate v. Robinson*, 383 U.S. 375, 385 (1966); and to be present at trial, *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 117-18 (1934). The Court has incorporated other provisions of the Sixth Amendment as well, but they are beyond the scope of this Comment. See JOSEPH G. COOK, *THE RIGHTS OF THE ACCUSED*, § 1:5 (2d ed. 1985).

152. See Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 151 (1988); Ken Gormley, ed., *State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 OR. L. REV. 689 (1988). Both articles argue that state constitutional rights of defendants are being given an increasing amount of weight in light of the decreasing protection under the Federal Constitution.

Maine's Constitution provides the following rights for criminal defendants at trial:

In all criminal prosecutions, the accused shall have a right to be heard by

This part of the Comment will analyze the constitutional sources for interpretation in terms of each of the rights afforded to criminal defendants in general. The meaning and underlying rationale of the right to interpretation will be outlined. Then, employing that rationale, this Comment will demonstrate how preserving that right in the trial of a deaf criminal defendant requires adequate interpretation throughout the trial proceedings.

#### A. *The Right to Confront Prosecution Witnesses*

The "right to confrontation" of witnesses is an express provision in the United States Constitution, applicable in all courts, state as well as federal.<sup>153</sup> There are two aspects to this right. The first concerns the prohibition of hearsay testimony by the prosecution.<sup>154</sup> The second aspect, which is more applicable to the issue of interpretation, arises when there has been some interference with the defendant's cross-examination of prosecution witnesses. The underlying principle recognizes that "[c]onfrontation means more than being allowed to confront the witness physically."<sup>155</sup> The ability of a defendant to conduct a cross-examination and expose the direct testimony's weaknesses is considered a critical fact-finding tool in criminal trials.<sup>156</sup>

It seems reasonable that the right to confront witnesses would include the actual ability to understand the witnesses' testimony and to assist the attorney in cross-examination.<sup>157</sup> As observed in one

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the accused and counsel to the accused, or either, at the election of the accused;

To demand the nature and cause of the accusation, and have a copy thereof;

To be confronted by the witnesses against the accused;

To have compulsory process for obtaining witnesses in favor of the accused;

To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity. The accused shall not be compelled to furnish or give evidence against himself or herself, nor be deprived of life, liberty, property, or privileges, but by judgment of that person's peers or the law of the land.

ME. CONST. art. 1, § 6 (West Supp. 1992-1993).

153. *Pointer v. Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

154. *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (requiring prosecutors seeking to introduce hearsay evidence to demonstrate both the unavailability of the declarant and an "indicia of reliability").

155. *Davis v. Alaska*, 415 U.S. 308, 315 (1973).

156. *See California v. Green*, 399 U.S. 149, 156 (1970):

[T]he particular vice which gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.

157. *See United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973), *cert. denied* 416

treatise on defendants' constitutional rights, "[t]he right to confront one's accuser would be an empty protection if the accused, because of physical impairment or a lack of comprehension of the language spoken, was unable to understand the testimony or proceedings."<sup>158</sup> Many courts that have found a right to interpretation have based this conclusion, at least in part, on the established right to confrontation.<sup>159</sup>

In a Texas decision, *Field v. State*,<sup>160</sup> the court found that a failure to request an interpreter amounted to a waiver of a deaf defendant's right to confrontation.<sup>161</sup> This finding acknowledged the intimate connection between confrontation and interpretation but was not consistent with the Supreme Court's requirement that a waiver of a constitutional right be knowing and intelligent.<sup>162</sup> The right to confrontation requires trial courts to ensure that defendants understand prosecution testimony well enough to be able to comment on the veracity of the statements and assist defense attorneys in cross-examination. In the case of deaf defendants, the trial court's responsibility requires it to provide adequate interpretation, regardless of whether a specific motion or request is made.

#### B. *The Right to Understand the Nature and Cause of the Accusation*

The Sixth Amendment guarantees all defendants the right to understand the nature and cause of the accusation.<sup>163</sup> The issue of enforcement of this right often arises in cases where there has not been a full trial and a defendant has entered a plea of guilty. Courts often analyze the issues at trial in terms of competency, as is discussed in the following section. The right to understand the nature and cause of the accusation clearly requires a minimum level of communication and understanding between hearing participants within the criminal justice system and the accused to avoid a "Kafkaesque" proceeding. For deaf defendants, interpretation is a necessary pre-

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U.S. 907 (1974). ("Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered.")

158. See Cook, *supra* note 151, § 18:8.

159. See, e.g., *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); *Terry v. State*, 105 So. 386, 387 (Ala. 1925); *People v. Rivera*, 480 N.Y.S.2d 426, 434 (Sup. Ct. 1984).

160. 232 S.W.2d 717 (Tex. Crim. App. 1950).

161. *Id.* at 718. A parallel issue that has arisen in criminal appeals involves the use of interpreters for a deaf prosecution witness. Defendants have challenged the use of interpreters in several different contexts including one occasion in Maine where the interpreter knew the witness previously. *State v. Doucette*, 398 A.2d 36 (Me. 1978).

162. See *supra* note 89.

163. See *supra* note 147.

requisite to such understanding.

Some state and federal courts have found that a trial court erred when it accepted the pleas of a deaf defendant who did not have adequate interpretation. The Eighth Circuit, in *Mothershead v. King*,<sup>164</sup> granted a defendant's habeas corpus petition after he had entered his plea without an interpreter. The court found that the Sixth Amendment acted as a bar to a valid conviction and sentence when a defendant did not understand the proceedings.<sup>165</sup> An Alabama state court, in *Goodman v. State*,<sup>166</sup> reached a similar result.

Other courts have reached less enlightened decisions. In *State v. Hansen*,<sup>167</sup> the Arizona Supreme Court accepted the plea of a defendant after determining that he was "fairly adept at reading lips."<sup>168</sup> The Alabama Supreme Court, in *Turner v. State*,<sup>169</sup> held that the trial record supported judicial findings that the defendant understood the nature and cause of his accusations since "the circuit judge who arraigned the defendant looked the defendant in the face as he spoke to him and wrote notes to him. The defendant 'nodded' when asked if he understood."<sup>170</sup> Clearly, a trial court's ignorance of interpretation needs can severely prejudice a defendant's rights. Had either judge been cognizant of the limits of "lipreading," he or she would have had little basis upon which to accept the defendant's plea.

### C. *The Right to Be Competent at Trial*

A right derived from the express right to understand the nature and cause of the accusation is the right to be competent at trial. While this Comment does not suggest that deaf people are mentally "incompetent" as a result of a hearing loss, the principle underlying this important right has been and should be applied in the cases of all deaf defendants as well as to the mentally ill.<sup>171</sup> The United States Supreme Court has held that anyone who lacks the capacity to understand, to consult with counsel, and to assist in the preparation of his or her own defense, cannot be subjected to a criminal

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164. 112 F.2d 1004 (8th Cir. 1940).

165. *Id.* at 1006.

166. 226 So. 2d 94 (Ala. Ct. App. 1969).

167. 464 P.2d 960 (Ariz. 1970).

168. *Id.* at 961.

169. 429 So. 2d 645 (Ala. Crim. App. 1983). See *supra* text accompanying notes 119-22.

170. *Turner v. State*, 429 So. 2d at 646. As discussed in Part I, the nodding might not have been an indication of comprehension on the part of the defendant. See *supra* notes 72-73 and accompanying text.

171. The New York Supreme Court justice in *Rivera*, see *supra* text accompanying notes 130-40, commented wryly, "[a] more accurate view is that the judicial system [is] incompetent to constitutionally try the handicapped defendant." *People v. Rivera*, 480 N.Y.S.2d 426, 433 n.11 (Sup. Ct. 1984).



trial.<sup>172</sup> This right was first articulated in *Dusky v. United States*<sup>173</sup> and was applied to state court proceedings through the Due Process Clause of the Fourteenth Amendment in *Pate v. Robinson*.<sup>174</sup>

At common law, deaf people were automatically assumed to be incompetent to stand trial.<sup>175</sup> Today, since recognized methods of interpretation are available the assumption is anachronistic. The issue of competency can arise, however, when a defendant, due to a language difference, is forced to sit through the proceedings without the ability to understand or participate. Although the source of the lack of comprehension is different from defendants who are mentally ill, the result is comparable. The *Negron* court found that the language difference between the defendant and the proceedings in that case was analogous to a "mental disease or defect," warranting the constitutional protection afforded by the Sixth and Fourteenth Amendments.<sup>176</sup> The New Hampshire Supreme Court went a step further and articulated the fundamental distinction between cases involving mental conditions and deafness: "[R]emedial measures could have been taken to enable [the defendant] to assist in his own defense. . . ." <sup>177</sup> Therefore, a trial court has the responsibility of ensuring that every defendant, deaf or hearing, does in fact have sufficient ability to understand the proceedings and to consult with his or her attorney.

Non-ASL fluent deaf people can present an additional challenge to the criminal justice system when no "remedial measures" can be determined and used. Some deaf people cannot communicate by ASL or other manual language and have not acquired sufficient knowledge of English to enable them to read a computer-assisted transcript system or speechread to any degree. A famous Illinois case involving a man in such a situation has been litigated for more

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172. *Drope v. Missouri*, 420 U.S. 162 (1975).

173. 362 U.S. 402 (1960).

174. 383 U.S. 375, 377-78 (1966). The Maine Supreme Judicial Court explained that "competence to stand trial denotes that the accused is capable of understanding the nature of the charges and object of the proceedings against him, of comprehending his own condition in reference thereto, and, in cooperation with his counsel, of conducting his defense in a rational and reasonable manner." *State v. Hewett*, 538 A.2d 268, 269 (Me. 1988) (citations omitted). Again, this is not to suggest that deaf people are "irrational," but the Law Court's test clearly indicates that the defendant must be in a position to contribute to his own case rather than placing all control in the hands of his attorney.

175. Bruce Harry, M.D. & Park Elliot Dietz, M.D., M.P.H., Ph.D., *Offenders in a Silent World: Hearing Impairment and Deafness in Relation to Criminality, Incompetence, and Insanity*, 13 BULL. OF AM. ACAD. OF PSYCHIATRY AND THE L. 85, 86 (1985).

176. *United States ex rel. Negron v. New York*, 434 F.2d 386, 391 (2d Cir. 1970). *Ferrell*, in contrast, rejected this approach because the defendant did not have a "mental defect." *Ferrell v. Estelle*, 568 F.2d 1128, 1137 (5th Cir. 1978).

177. *State v. Staples*, 437 A.2d 266, 268 (N.H. 1981).

than twenty years.<sup>178</sup> Donald Lang, a deaf man who had no ASL skills, was arrested and charged with murder in 1965. The Illinois Supreme Court, in a landmark case, found that he could not be indefinitely confined if he had no mental impairment that could be "cured."<sup>179</sup> The court held that the trial court must give Lang a "reasonable opportunity to exercise his constitutional rights"<sup>180</sup> by

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178. *People ex rel. Myers v. Briggs*, 263 N.E.2d 109 (Ill. 1970) (habeas corpus petition brought on behalf of Lang by Lowell Myers, Esquire). The *Myers* case was also the subject of a 1979 television movie, "Dummy."

179. *People ex rel. Myers v. Briggs*, 263 N.E.2d at 112-13. Although the case was reinstated on remand, Lang was released when the state was unable to proceed after the death of the principal witness. *People v. Lang*, 325 N.E.2d 305, 307 (Ill. App. 1975). Donald Lang was arrested again in 1971 for another murder, and the same dilemma faced the Illinois courts. An interpreter was useless where the defendant had no skills in either ASL or English. Although no competency hearing was held, Lang was diagnosed with "mental retardation with emotional instability," and his attorney chose to pursue a trial rather than risk lifetime confinement. *Id.* at 307-08. An Illinois appellate court reversed the conviction upon a finding that "there were no trial procedures which could effectively compensate for the handicaps of a deaf mute with whom there could be no communication" and, therefore, the defendant "could not be constitutionally tried or convicted." *Id.* at 308-09. Eventually, Lang was found to meet the requirements for involuntary commitment. *People v. Lang*, 587 N.E.2d 490, 491 (Ill. App. 1992). Lang's fate, however, appears to be caught in a cycle of appellate court decisions (of which there have been at least six), as well as hearings to determine his eligibility for a discharge and fitness to stand trial. *Id.* at 490 (affirming denial of discharge); 498 N.E.2d 1105 (Ill. 1986) (reversing prior discharge hearing denial and requiring new hearing); 468 N.E.2d 1303 (Ill. App. 1984) (finding that defendant was entitled to "fitness" hearing but not discharge hearing); 391 N.E.2d 350 (Ill. 1979) (remanding to determine fitness to stand trial); 378 N.E.2d 1106 (Ill. App. 1978) (affirming denial of writ of habeas corpus); 325 N.E.2d 305 (Ill. App. 1975) (reversing of jury conviction and remanding for fitness hearing).

After twenty-three years of confinement, Lang has yet to be tried constitutionally. The evidence produced against him is the basis of that confinement although the courts have never heard his version of the events of the night of the murder. In 1987, although granting the state its fourteenth involuntary commitment order against Lang, the Cook County Circuit Court judge noted the irony that had been created as a result of Lang's confinement and urged the staff at the Illinois Department of Mental Health to reduce the punitive measures taken against Lang:

It could be the "unintended" rigidity of staff toward him and his lack of understanding the reason for the rules that may be part of the problem. . . . Lang has been involuntarily hospitalized and in jails for more than 17 years, during which he has been denied basic human desires and yearnings everyone has. Perhaps his anger, frustrations and acting-out comes from his lack of understanding why he is kept in against his will. It is shocking to the conscience that after 17 years of commitment and training, very little indeed has been done to understand him, his motivations and perhaps his sense of despair and frustration, and to communicate with him in any depth.

Charles Mount, *State Ripped for Care of Deaf Suspect*, CHI. TRIB., Dec. 30, 1987, at 3.

180. *People ex rel. Myers v. Briggs*, 263 N.E.2d at 113. The *Myers* decision mentions the efforts of the state to teach Lang ASL so that he could stand trial. These efforts were clearly against his wishes. *Id.* at 112. The court in *Ferrell* made a similar

allowing communication of the testimony. The court failed, however, to acknowledge the impossibility of this task. The result in the Illinois case also influenced the United States Supreme Court case *Jackson v. Indiana*,<sup>181</sup> which prohibited indefinite commitment of persons who would never be competent to stand trial.

The scenario of a deaf defendant with little or no ability to communicate with the hearing world is not unique. In 1992 a Portsmouth, Virginia court concluded it had no alternative but to rule that Curtis Turner, a twenty-one-year-old man accused of murder, was "permanently incompetent" solely because he did not know sign language and there was no other mode of communicating with him at trial. An expert testified that Turner had the ability of a six-year-old "to match pictures on a page with a word or statement."<sup>182</sup> He had spent three years in a state hospital when the judge finally released him.<sup>183</sup> A Florida appeals court reversed the second degree murder conviction of a seventeen-year-old deaf man with limited skills in ASL and English after it was shown that the expert witnesses at trial were divided in their assessment of his competency to stand trial and the transcript revealed that the defendant was incapable of explaining his version of the events to the court.<sup>184</sup> Al-

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suggestion in its instructions to the trial court on retrying the case: "If Ferrell still has not learned sign language, the court should determine whether it would be feasible to require him to be trained in its use. If so, Ferrell could be retried . . . after allowing a reasonable time for him to learn sign language." *Ferrell v. Estelle*, 568 F.2d at 1133. Although no court has ever discussed it, there may be some due process concerns with *forcing* a defendant to learn a language for the sole purpose (from the state's perspective) of trying him for a crime.

The United States Supreme Court avoided addressing a related issue recently in *Riggins v. Nevada*, 112 S.Ct. 1810, 1815 (1992) ("The question of whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us."). The Court, however, strongly suggested that a state may have this power "by establishing that it could not obtain an adjudication of . . . guilt or innocence by using less intrusive means." *Id.*

The issue remains open, and it would be interesting to see how far a court would allow a pre-trial detainee to be controlled in an incarceration or medical context (as Lang's was) for the sake of the "public's interest in the administration of criminal law." *Ferrell v. Estelle*, 568 F.2d at 1132. This is a tempting step for a state to take in light of *Jackson v. Indiana*, 406 U.S. 715, 731 (1972) (finding that indefinite confinement of criminal defendant solely on account of his incompetence to stand trial violates the Due Process Clause of the Fourteenth Amendment). *See also* *Shook v. State*, 552 So. 2d 841, 844-45 (Miss. 1989) (holding that a trial court judge did not err when he refused to delay the trial of a deaf criminal defendant until he could be taught ASL).

181. 406 U.S. 715, 735-36 (1972).

182. *Case of Deaf Man Baffles Court System*, UNITED PRESS INT'L, June 3, 1992.

183. *Id.*

184. *Holmes v. State*, 494 So. 2d 230 (Fla. Dist. Ct. App. 1986). A recent Louisiana case, *State v. Barber*, 617 So. 2d 974 (La. Ct. App. 1993) is similar in that the reversal of the conviction came as a result of the appellate court's review of the defendant's unresponsive answers in the transcript. In light of these opinions, one wonders

though these cases create the greatest challenges for courts and defense attorneys, the defendant cannot be punished as a result by allowing his rights to fall below the constitutionally protected minimum. Society, therefore, may have to pay the ultimate price (i.e. releasing murderers) for restricting the educational and linguistic development of deaf children.

#### D. *The Right to Be Present at Trial and Assist in Defense*

The defendant's right to be present during trial is closely related to the rights to be competent and to confront prosecution witnesses. Each recognizes and protects the important role of the defendant during trial even if she never takes the stand.<sup>185</sup> The United States Supreme Court found the right to be present at trial to derive from both the Confrontation and Due Process Clauses<sup>186</sup> and to be among the fundamental rights incorporated in the Fourteenth Amendment's Due Process Clause.<sup>187</sup> In *Snyder v. Massachusetts*,<sup>188</sup> the Court held that a defendant must be afforded a "reasonably substantial opportunity" to defend against charges by assisting in her own defense. In a recent case, *Riggins v. Nevada*,<sup>189</sup> the Court found that the forced administration of psychotropic medication may well have impaired the interaction between the defendant and his attorney, as well as the defendant's comprehension, at his hearing.

Again, this Comment is not suggesting that deaf people are not

whether the lack of comprehension would have gone unaddressed by the appellate courts in either case had the defendants exercised their right to not testify. These cases suggest that it is only when *hearing* people cannot comprehend the proceedings that the actual degree of language difference is given due regard.

185. See *State v. Hewett*, 538 A.2d 268 (Me. 1988); see also *Cook*, *supra* note 151, § 18:7 ("The right [to confrontation] is essentially a trial right, and its most self-evident manifestation is in the right of the accused to be present at his trial.")

186. *United States v. Gagnon*, 470 U.S. 522 (1985). Originally the Supreme Court interpreted this rule so strictly that it held that the right to be present could not be waived because of its fundamental importance. *Lewis v. United States*, 146 U.S. 370, 374 (1892). This rule was limited and finally abrogated in *Diaz v. United States*, 223 U.S. 442 (1912) (limiting the *Lewis* holding to cases in which the defendant was actually in custody) and *Taylor v. United States*, 414 U.S. 17 (1973) (holding that defendant's failure to return after lunch recess was effective waiver of right to be present). See also *FED. R. CRIM. P.* 43. *Maine Rule of Criminal Procedure* 43 provides:

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury, and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

In prosecutions for any offenses the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial.

187. *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). Maine defendants enjoy this right as well under the Maine Constitution. *State v. Staples*, 354 A.2d 771 (Me. 1976).

188. 291 U.S. 97 (1934).

189. 112 S.Ct. 1810, 1816 (1992).

“present” when they do not have a mode of communication with hearing people. The principle underlying this right is violated, however, if the trial is a meaningless array of moving lips or turned backs for the defendant. In order to satisfy constitutional requirements, a defendant must be “present” in the sense of being able to follow the proceedings and assist her attorney in the preparation of closing arguments and cross-examination. In *Drope v. Missouri*,<sup>190</sup> the Court recognized that the meaning of “presence” goes beyond mere physical appearance at trial. It described the right to be competent at trial “as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.”<sup>191</sup> Although the Court has held that a defendant can lose his right to be present at trial by seriously disrupting the proceedings,<sup>192</sup> at least one Supreme Court Justice believed that when a court orders the removal of a defendant it must also “make reasonable efforts” to allow communication with his attorney.<sup>193</sup>

The courts in *Negron*, *Rivera*, and *Ferrell* found that the right to be present and assist in one’s defense required that a deaf defendant be provided with adequate interpretation.<sup>194</sup> The Court of Appeals for the Second Circuit in *Negron* wrote, “[c]onsiderations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial . . . .”<sup>195</sup> An Illinois appellate court found no such compromise of a defendant’s right when the trial court refused to order amplification of the proceedings, and defendant had been “bright and alert” during trial.<sup>196</sup> An application of the rationale outlined in *Snyder*, *Riggins*, and *Drope* suggests that such an approach is wrong absent a finding that a defendant could participate meaningfully during his trial. The defendant’s appearance cannot be considered adequate evidence that he was truly “present” under the Supreme Court’s definition.

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190. 420 U.S. 162 (1975).

191. *Id.* at 171 (quoting Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. Rev. 832, 834 (1960)). The Court also noted in *Illinois v. Allen* that a drawback to dealing with disruptive defendants by binding and gagging them is that “one of the defendant’s primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced . . . .” *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

192. *Id.* at 343.

193. *Id.* at 351 (Brennan, J., concurring).

194. *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); *People v. Rivera*, 480 N.Y.S.2d 426, 434 (Sup. Ct. 1984); *Ferrell v. Estelle*, 568 F.2d 1128, 1132 (5th Cir. 1978).

195. *United States ex rel. Negron v. New York*, 434 F.2d at 389 (citations omitted).

196. *People v. Branson*, 475 N.E.2d 905, 911 (Ill. App. Ct. 1984).

*E. The Right to Effective Assistance of Counsel*

The right to be present at trial is also linked to the right to effective assistance of counsel since a productive attorney-client relationship during trial is an essential prerequisite for an attorney to represent his or her client competently and effectively. The Sixth Amendment right to effective assistance of counsel has been applied to the states<sup>197</sup> and is present in the Maine Constitution as well.<sup>198</sup> The Supreme Court held in *United States v. Cronin*<sup>199</sup> that a defendant could challenge a conviction not only when his attorney had made a specific error or errors at trial but also if external circumstances impaired the effectiveness of the representation.<sup>200</sup> Interference in attorney-client communication is an example of such an impairment. In *Geders v. United States*,<sup>201</sup> the Court reversed a conviction after a trial judge prevented communication between an attorney and his client during an overnight recess.<sup>202</sup> This decision recognized the importance of communication between a defendant

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197. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

198. ME. CONST. art. I, § 6. See also *State v. Currier*, 409 A.2d 241, 243 (Me. 1979) (stating that the right to effective assistance of counsel in Maine courts is guaranteed under both the Maine and United States Constitutions).

199. 466 U.S. 648 (1984).

200. *Id.* at 662. Although the primary focus of this section is governmental interference with effectiveness of counsel by not providing adequate communication, a few courts have reversed convictions of deaf defendants based upon specific errors made by defense attorneys.

In *State v. Staples*, 437 A.2d 266 (N.H. 1981), both of the defense attorneys were aware of the defendant's severe hearing impairment prior to trial but took no action to ensure that there was adequate interpretation at trial by alerting the court. They attempted to remedy the situation by whispering the testimony into the defendant's ear. Not surprisingly, the defendant could barely hear any of the testimony. The New Hampshire Supreme Court relied upon the ABA Standards for the Defense Function, § 4-3.6 at 4.45 2d ed. 1980, which encourages defense attorneys to inform defendants of their rights and "take all necessary action to vindicate such rights." *State v. Staples*, 437 A.2d at 268.

In *Peeler v. State*, 750 S.W.2d 687 (Mo. Ct. App. 1988), the defendant filed a motion for rehearing after he was tried without an interpreter. At the motion hearing it was shown that, despite the defendant's severe to profound hearing loss (proven later by expert testimony), his attorney had taken no steps to obtain an interpreter. A co-defendant began to take notes for Peeler during the trial but gave up after he could no longer keep up with testimony (the co-defendant, who happened to be defendant Peeler's son, alleged that he had been denied his right to be present at trial since he was distracted by the note-taking; the appellate court found he had voluntarily waived his right by taking on "interpretation duties"). *Id.* at 689-91.

These cases are inconsistent with the notion that it is the trial court's duty to protect a defendant's constitutional rights. On the other hand, given the ambiguity in this area of the law, it might not detract from the legal duty of the court to expect some initiative from defense attorneys.

201. 425 U.S. 80 (1976).

202. *Id.* at 91. But see *Perry v. Leeke*, 488 U.S. 272, 284 (1989) (finding that communication with attorney during brief recess immediately prior to cross-examination of defendant was not constitutionally required).

and his attorney throughout the trial. Without interpretation, such communication is impossible for most deaf defendants.

An issue in several appeals has been the failure to provide an interpreter at the defense table during trial in addition to the interpretation of the proceedings themselves. The case law discussed in the previous section concerning the right to assist in one's own defense<sup>203</sup> underscores the importance of facile communication between attorney and client throughout the proceedings. Unless an attorney is ASL fluent or is able to communicate easily with her client in some other way, a lack of interpretation during the trial will essentially cut off the defendant from his attorney.

In addition, courts have found that the right to effective assistance of counsel attaches during preparations for trial. This principle was articulated in the landmark case *Powell v. Alabama*,<sup>204</sup> which held that, although an attorney is appointed, one can nonetheless be deprived of "the aid of counsel in any real sense" if no assistance is provided "during perhaps the most crucial period of the proceedings . . . from the time of arraignment until the beginning of . . . trial."<sup>205</sup> Justice Sutherland provided an example of how, when taken to the extreme, deprivation of counsel of this sort "would be little short of judicial murder" if a "deaf and dumb, illiterate and feeble-minded" defendant is sentenced to death.<sup>206</sup> In several cases, including a case arising in Maine, *Maine v. Moulton*,<sup>207</sup> the Supreme Court has reversed convictions when states have diluted this protection during pretrial periods. In *Moulton*, the Court not only required states to refrain from interfering with the assistance of counsel but also found an obligation to "respect and preserve" the defendant's choice to seek that aid.<sup>208</sup> Given the Court's recognition of the period prior to trial as a time when a defendant and his attorney must be allowed to work together, law enforcement agencies and courts have an obligation not only to refrain from interference but also to ensure meaningful communication throughout the entire process.

Despite the importance of this right, most federal and state interpreter laws have overlooked the right to effective assistance of counsel, as will be discussed below in Part IV.<sup>209</sup> Severe prejudice to the

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203. See *supra* notes 185-96 and accompanying text.

204. 287 U.S. 45 (1932).

205. *Id.* at 57.

206. *Id.* at 72-73.

207. 474 U.S. 159 (1985).

208. *Id.* at 171; see also *Massiah v. United States*, 377 U.S. 201, 205 (1964) (applying principles articulated in *Powell v. Alabama* to federal criminal defendants).

209. See, e.g., *People v. Hammons*, 771 P.2d 1, 2 (Colo. Ct. App. 1988) (finding that deaf defendant was not deprived of claimed "right to communicate with counsel" since the state interpreting statute did not specifically require the trial court to appoint more than one interpreter for the trial). See also *infra* notes 215-47 and ac-

effectiveness of a defense can result if there is a lack of clear and thorough communication between an attorney and her client prior to and during court proceedings.<sup>210</sup> A defendant's understanding of the adjudication procedure will be impaired, and his attorney will have incomplete knowledge of circumstances of the alleged crime. Also, if a defendant plans to take the stand in his own defense and testify through an interpreter, it is important to prepare the testimony with the use of an interpreter.<sup>211</sup>

Several specific constitutional sources support a right to interpretation without stretching the existing jurisprudence. The case law in both federal and state courts establishes a minimum standard of constitutional protection for all criminal defendants. Application of these principles to deaf defendants also requires recognition of the unique features of deafness and interpretation. In order to ensure that deaf defendants receive the same constitutional protection as hearing defendants, adequate interpretation during pretrial preparations and trial must be provided. When the limitations of speech-reading, the poor quality of the education of most deaf children, the dangers of using non-certified interpreters, and the significant number of non-ASL fluent deaf adults are overlooked, the rights of deaf people will too frequently fall below this minimum protection.

#### IV. STATUTORY SOURCES OF THE RIGHT TO INTERPRETATION

If all constitutional principles were recognized and applied, statutes guaranteeing a right to interpretation would not be needed since the right is already guaranteed by the Constitution of the United States, as outlined in the previous section. However, there is no reason why a statute cannot provide the same protection as a

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companying text on the Federal Court Interpreters Act.

210. In *State v. Hansen*, 464 P.2d 960 (Az. 1970), for example, the Supreme Court of Arizona upheld the conviction of a deaf defendant sentenced to seven to ten years for grand theft who alleged on appeal that not only could he not understand the testimony presented at his preliminary hearing but also he thought his attorney said that he would receive only probation if he pleaded guilty. The court's decision included a transcript of the entry of the pleas with several indications that defendant was confused as to what was occurring. The court upheld the conviction since the defense attorney explained the consequences of the plea "in some detail" and the defendant was "fairly adept at reading lips." *Id.* at 961, 964.

*See also* *Cervantes v. Cox*, 350 F.2d 855 (10th Cir. 1965) ("There is no constitutional right, as such, requiring the assistance of a court-appointed interpreter to supplement the right to counsel" but a language barrier between a defendant and his attorney can be a consideration as to whether he was adequately represented.); *United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676 (E.D. Pa. 1973) (upholding the conviction of a Spanish-speaking defendant who could not communicate with his attorney while Spanish-speaking witnesses were on the stand since the interpreter was being used to translate their testimony into English because the trial court allowed interruptions for conference with counsel).

211. Interview with Douglas Newton, *supra* note 4.



constitutional provision, particularly where there is no unanimity in the courts about the nature and extent of that protection. In some cases the law may attempt to expand upon a constitutional right or simply outline a procedure for enforcement.<sup>212</sup>

The latter half of this century has seen an explosion of legislation, on both the state and federal levels, directly or indirectly addressing the need for interpretation in criminal proceedings. Unfortunately, these laws have not gone far enough to protect the minimum constitutional rights outlined in the previous section. The result is that, despite these laws, some deaf defendants' rights are still compromised during proceedings. The problems arise from three sources. First, the laws themselves do not specifically address the needs of all deaf people, including those without knowledge of ASL, those who use visual gestural systems, persons with mental illness, or those who have other unique communication needs. For such individuals, the appointment of oral and/or Deaf interpreters or the use of equipment for interpretation is required to ensure comprehension of the proceedings.<sup>213</sup> Second, the laws do not go far enough to ensure that all of the constitutional requirements are met, such as a presumption against waiver and the right to communicate with counsel. Finally, the courts reviewing these laws on appeal apply only the specific requirements of the law, and if these are met, the courts do not examine whether the Sixth and Fourteenth Amendments are satisfied as well. Although many courts purport to perform a constitution-based analysis of a deaf defendant's rights, they do so in name only. Both Maine's statute and a case arising under it, *State v. Green*,<sup>214</sup> exemplify these problems and the implications for deaf defendants at trial.

#### A. *The Federal Court Interpreters Act*

The United States Congress passed the Court Interpreters Act<sup>215</sup> in 1978 in response to the *Negron* case<sup>216</sup> and lobbying efforts by, among others, leaders in the Deaf community. The Court Interpreters Act applies to all non-English-speaking and deaf parties in cases brought by the federal government, and covers all criminal proceed-

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212. The Law Court has specifically found that the Maine Declaration of Rights (of which Article I, § 6 is a part) is self-executing but "the Legislature is not thereby precluded from enacting legislation to facilitate the exercise of these constitutional privileges and the enforcement of these protective rights." *State v. Bachelder*, 403 A.2d 754, 758-59 (Me. 1979).

213. Interview with Douglas Newton, *supra* note 4.

214. 564 A.2d 62 (Me. 1989). See discussion *infra* at notes 263-86 and accompanying text.

215. 28 U.S.C.A. §§ 1827-1828 (West Supp. 1993).

216. 434 F.2d 386 (5th Cir. 1970); H.R. REP. No. 1687, *supra* note 93, at 3, reprinted in 1978 U.S.C.C.A.N. at 4653.

ings.<sup>217</sup> The law places responsibility for identifying the need for interpretation on *both* the defense counsel and the trial courts. This duty arises whenever a party has a hearing impairment that "inhibits comprehension," although the statute does not specify what level of impairment triggers this responsibility.<sup>218</sup> The law also requires the defendant to waive her right to an interpreter on the record;<sup>219</sup> gives preference for the use of certified interpreters;<sup>220</sup> requires simultaneous, not summary, translation;<sup>221</sup> and requires the court to cover the cost of interpretation.<sup>222</sup> The law does not, however, apply in civil cases that are not initiated by the government, and it is questionable whether it could be invoked in evidentiary hearings brought in federal habeas corpus actions.<sup>223</sup>

Although the language of the Court Interpreters Act may appear to approximate the requirements of the Sixth Amendment, federal courts have not interpreted the statute's provisions strictly nor have they examined thoroughly whether constitutional as well as statutory rights may have been compromised in a particular case. It should be noted that all of the case law on the statute has developed through the appeals of hearing, non-English-speaking defendants. With the exception of a bankruptcy case,<sup>224</sup> federal courts have never addressed directly an issue under the statute in the context of a deaf individual.<sup>225</sup> The statute's provisions are the same for both

217. 28 U.S.C.A. § 1827(d)(1). See also FED. R. CRIM. P. 28, which allows for the appointment of interpreters but does not express it in terms of a defendant's right.

218. 28 U.S.C.A. § 1827(d)(1).

219. *Id.* § 1827(f)(1).

220. *Id.* § 1827(d)(1).

221. *Id.* § 1827(k).

222. *See id.* § 1827(g). The legislative history indicates that an interpreter should be provided and paid for by the court, regardless of a defendant's ability to pay. H.R. REP. NO. 1687, *supra* note 93, at 7, *reprinted in* 1978 U.S.C.C.A.N. at 4658.

223. The law includes within its definition of judicial proceedings initiated by the United States, "proceedings upon a petition for a writ of habeas corpus initiated in the name of the United States by a relator." 28 U.S.C.A. § 1827(j).

Also, a bankruptcy judge ruled that the deaf debtors in a bankruptcy case did not have a right to an interpreter under 28 U.S.C.A. § 1827. He also found no constitutional violation under either the Due Process Clause or Equal Protection Clause for such denial since the United States Supreme Court has held that there is no constitutional right to have one's debts discharged in bankruptcy. *In re Morrison*, 22 B.R. 969 (Bankr. N.D. Ohio 1982). The statute itself does not specifically indicate whether bankruptcy proceedings were intended to be covered but does provide in 28 U.S.C.A. § 1827(i) that the term "presiding judicial officer" used in the statute "refers to any judge of a United States district court, including a bankruptcy judge . . . ."

224. *In re Morrison*, 22 B.R. 969 (Bankr. N.D. Ohio 1982).

225. The absence of these cases does raise the question of why there are, and have been, so few deaf defendants' appeals in the federal courts. Perhaps federal courts have done a better job than most state courts in securing the rights of deaf defendants while providing less protection to other non-English-speaking people. More likely, however, deaf people are simply not tried in federal courts as often as in state courts due to the nature of the crimes committed. For example, it may be that deaf

deaf and hearing defendants and, presumably, the outcome would be similar if a deaf defendant raised the same issues addressed in the non-English-speaking defendant cases.

Few courts have actually reversed a conviction of a defendant who claimed inadequate or flawed interpretation during trial. One such reversal occurred in *United States v. Tapia*.<sup>226</sup> The court followed the language of the statute closely and found that a trial court judge has an affirmative duty to inquire about the need for an interpreter. The Fifth Circuit panel also held that a waiver is effective only if made by the defendant and only after the nature and effect of the waiver is explained to the defendant by the court. The court found that deprivation of the rights provided under the statute can prevent a defendant from receiving adequate assistance of counsel and from confronting prosecution witnesses.<sup>227</sup>

Most circuits, however, have given a far more restrictive interpretation of the statute by giving broad discretion to trial court judges and adopting the "balancing test" from *United States v. Martinez*.<sup>228</sup> One example of this approach was an Eleventh Circuit case, *United States v. Bennett*.<sup>229</sup> The court held that the statute did not require that a Spanish language interpreter be appointed for each defendant when three were tried together, even though the placement of the single interpreter next to the witness box made it impossible for two of the three defendants to confer with their attorneys during testimony.<sup>230</sup> Two other circuits upheld convictions in similar circumstances.<sup>231</sup> In each of these cases, there was a clear interference by the government with communication between attorney and client during trial, despite the United States Supreme Court's prohibition of such interference, as articulated in *United States v. Cronin*<sup>232</sup> and *Geders v. United States*.<sup>233</sup> Such interfer-

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people are less likely to be involved in drug conspiracies, racketeering, organized crime, or white collar crime. A pre-§ 1827 federal court case discussed above, *Ferrell v. Estelle*, involved a habeas corpus appeal from state court convictions. *Ferrell v. Estelle*, 568 F.2d 1128 (5th Cir. 1978). The deaf defendant in *Mothershead* was a federal prisoner, but the decision does not indicate the crime for which he was convicted. *Mothershead v. King*, 112 F.2d 1004 (8th Cir. 1940).

226. 631 F.2d 1207 (5th Cir. 1980). *Tapia* was decided soon after *United States v. Martinez*, 616 F.2d 185 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981), *see supra* notes 110-112 and accompanying text, but by a completely different panel with no reference to the decision in *Martinez*.

227. *United States v. Tapia*, 631 F.2d at 1209-10.

228. *See supra* notes 110-112 and accompanying text.

229. 848 F.2d 1134, 1141 (11th Cir. 1988).

230. *Id.* at 1140. The attorney for the third defendant was fluent in Spanish.

231. *See United States v. Yee Soon Shin*, 953 F.2d 559 (9th Cir. 1992); *United States v. Sanchez*, 928 F.2d 1450 (6th Cir. 1991).

232. 466 U.S. 648, 662 (1984) (finding that the right to effective assistance of counsel can be compromised by circumstances surrounding the representation of the defendant). *See discussion supra* at notes 199-200 and accompanying text.

ence contravenes the defendant's rights to assist in his own defense and have effective assistance of counsel and diminishes the effectiveness of his presence at trial. This analysis of the importance of attorney-client communication, however, is absent from the cases interpreting the federal statute.

*United States v. Moya-Gomez*<sup>234</sup> is one of several cases conferring broad discretion upon trial courts' determinations of the need for and adequacy of the interpretation. The Seventh Circuit upheld a conviction in this case in which the defendant complained repeatedly that he could not understand the interpreter and specifically could not understand some "legal terms" she was using. The trial court judge stated on the record, "The interpreter is doing a marvelous job in my opinion . . ." <sup>235</sup> While the court's actions violated section 1827(e)(1) of the Court Interpreters Act, which requires dismissal of any interpreter who is unable to communicate effectively with a party,<sup>236</sup> and the defendant claimed on appeal not to have understood the proceedings adequately, the court of appeals employed an "abuse of discretion" standard of review and deferred to the trial court's determination that the interpretation was adequate.<sup>237</sup>

Retired United States Supreme Court Justice Lewis Powell wrote the opinion for a panel of the Eleventh Circuit in *Valladares v. United States*,<sup>238</sup> allowing a criminal defendant's conviction to stand after a non-certified interpreter had provided only summary translation rather than the simultaneous interpretation required by section 1827(k).<sup>239</sup> Although Justice Powell did not deny that the statute's

233. 425 U.S. 80 (1976) (finding that interference with attorney-client communications during trial resulted in deprivation of effective assistance of counsel). See discussion *supra* at notes 201-02 and accompanying text.

234. 860 F.2d 706, 740 (7th Cir. 1988), *cert. denied sub nom. Estevez v. United States*, 492 U.S. 908 (1989).

235. *Id.*

236. "If any interpreter is unable to communicate effectively with . . . a party (including a defendant in a criminal case) . . . the presiding judicial officer shall dismiss such interpreter and obtain the services of another interpreter . . ." 28 U.S.C.A. § 1827(e)(1) (West Supp. 1993). The circuit court made no reference whatsoever to this requirement.

237. *United States v. Moya-Gomez*, 860 F.2d at 740.

238. 871 F.2d 1564 (11th Cir. 1989).

239. The federal statute provides in pertinent part:

The interpretation provided by certified or otherwise qualified interpreters pursuant to this section shall be in the simultaneous mode for any party . . . and in the consecutive mode for witnesses, except that the presiding judicial officer, *sua sponte* or on the motion of a party, may authorize a simultaneous, or consecutive interpretation when such officer determines after a hearing on the record that such interpretation will aid in the efficient administration of justice.

28 U.S.C.A. § 1827(k). There is no allowance in the statute for the use of summary translation at any time. The "interpreter" used at Valladares' trial was actually a

requirements had not been followed,<sup>240</sup> he reasoned that the conviction should be upheld since allowing summary translation was within the "sound discretion of the trial judge."<sup>241</sup>

In *United States v. Perez*,<sup>242</sup> the Court of Appeals for the Fifth Circuit eased the responsibilities imposed on trial courts by *United States v. Tapia*.<sup>243</sup> The *Perez* court found that the Court Interpreters Act requires express waiver by a non-English-speaking defendant only after the trial court makes a threshold determination of need.<sup>244</sup> The court of appeals deferred to the trial court's actions and upheld the conviction although the defendant claimed to have "some difficulty" with English.<sup>245</sup> This case suggests a serious deficiency in the statute. Since no minimum threshold of language im-

Spanish-speaking attorney present only on the first day of proceedings. *Valladares v. United States*, 871 F.2d at 1565. See also *United States v. Torres*, 793 F.2d 436 (1st Cir. 1986), cert. denied, 479 U.S. 889 (1986) (concluding that only harmless error resulted from summary translation).

240. *Valladares v. United States*, 871 F.2d at 1565-66. There was apparently little, if any, dispute that the statute requires consecutive (simultaneous in the case of ASL) translation and that only a summary translation was provided. Justice Powell, however, found that the case law of § 1827 established that "[t]he ultimate question is whether any inadequacy in the interpretation 'made the trial fundamentally unfair.'" *Id.* at 1566. This approach resembles one requiring a finding of actual prejudice to the defendant. Such an analysis is not required in cases involving ineffective assistance of counsel due to external factors affecting the representation of the defendant. *United States v. Cronin*, 466 U.S. 648, 662 (1984). Furthermore, this willingness to dispose of the statute's specific requirements appears to undermine the findings and intent of Congress that were the basis of the provisions. A House of Representatives Report found that "[S]ummary translations allow the interpreter to condense and distill the speech of the speaker." H.R. REP. NO. 1687, *supra* note 93, at 8 reprinted in 1978 U.S.C.C.A.N. at 4659.

241. *Valladares v. United States*, 871 F.2d at 1566. Retired Justice Powell considered the failure to object to the translation to be "a factor weighing against a finding of abuse of discretion by the trial court." *Id.* However, this is a dubious approach for practical reasons. The defense attorney may not have known a summary translation occurred, and the defendant may not have known that simultaneous translation was his right. A trial court could not have detected this either during proceedings but could have taken steps prior to trial to discuss the statutory requirements with the interpreter, defense attorney, and defendant.

The court also employed a test derived from a Ninth Circuit case, *United States v. Lim*, 794 F.2d 469, 470 (9th Cir.), cert. denied *sub nom.* *Dong Joon Ahn v. United States*, 479 U.S. 937 (1986) to determine whether the "purposes of the Act were adequately met." *Valladares*' conviction was upheld largely because defense counsel failed to object to the inadequate interpreting, although the errors committed could be detected by the trial court.

242. 918 F.2d 488 (5th Cir. 1990), cert. denied, 111 S.Ct. 2055 (1991).

243. 631 F.2d 1207, 1209 (5th Cir. 1980) (finding that trial court judge has an affirmative duty to inquire into the need for an interpreter). See *supra* text accompanying notes 226-27.

244. *United States v. Perez*, 918 F.2d at 491.

245. *Id.* For a discussion concerning the problem of providing trial courts with the discretion to determine the need for interpretation, see *infra* text accompanying note 320.

pairment is required to invoke these rights, courts have imposed a burden on defendants to demonstrate a severe need, in contrast to imposing the duty on trial courts to assure that a defendant's constitutional rights are protected.<sup>246</sup>

The cases that allow some blurring of the requirements of the Court Interpreters Act fail to consider the impact on defendants' constitutional rights. For example, the United States Supreme Court held that a physical barrier placed between a defendant and a child witness during testimony is unconstitutional;<sup>247</sup> but arguably the right to confrontation is compromised even more by erroneous or summary translation although the appeals courts fail to recognize this. The court decisions interpreting the Court Interpreters Act indicate that deaf people would fare as poorly, if not worse, in federal appellate courts given the deference of the appellate courts to trial court actions, their willingness to dispose of essential statutory requirements, and their failure to recognize the constitutional implications of inadequate interpretation.

## *B. Statutes That Apply to State Court Proceedings*

### *1. State Statutes Addressing a Right to Interpretation*

A combination of state and federal law provides the statutory means of securing the right to interpretation in state courts. Most states have enacted legislation addressing interpretation in court that either applies to all non-English-speaking defendants or specifically to deaf people. A brief survey of the statutes reveals that there is considerable variety among them. Most cannot be considered comprehensive enough to ensure that all constitutional requirements have been met.<sup>248</sup> For example, many statutes provide only for the appointment of an interpreter, but do not require the use of other forms of interpretation, such as CAT systems, for non-ASL fluent deaf defendants.<sup>249</sup> Statutes vary in designating who has primary responsibility for raising the issue of interpretation.<sup>250</sup> Few statutes

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246. See *supra* note 108 (on fact/law distinction in constitutional law).

247. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

248. Sy DuBow, the Legal Director of the National Center for Law and Deafness, considers most state laws inadequate and has devised his own "Model Interpreting Statute" which can be found in DuBow *ET AL.*, *supra* note 2, at 245.

249. See, e.g., ARIZ. REV. STAT. ANN. § 12-242(A) (1992); CAL. EVID. CODE § 754 (West Supp. 1993); COLO. REV. STAT. § 13-90-204 (1987); CONN. GEN. STAT. ANN. § 46a-33 (West Supp. 1993); ME. REV. STAT. ANN. tit. 5, § 48 (West 1989 & Supp. 1992-1993); MASS. GEN. LAWS ANN. ch. 221, § 92A (West Supp. 1992); N.H. REV. STAT. ANN. § 521-A (Supp. 1992). See also VT. STAT. ANN. tit. 1, § 332 (Supp. 1992) (party or witness in court proceedings has right to assistive listening devices).

250. In many statutes the responsibilities of the parties, counsel, and court are unclear. See, e.g., ARIZ. REV. STAT. ANN. § 12-242(A) (1992); COLO. REV. STAT. § 13-90-204 (1987); CAL. EVID. CODE § 754 (West Supp. 1993); VT. STAT. ANN. tit. 1, § 331 (Supp. 1992). See also, ALA. CODE § 12-21-131(f) (Supp. 1993) (stating that it is the

have waiver requirements equivalent to or approximating those outlined by the Supreme Court in *Johnson v. Zerbst*.<sup>251</sup> Statutes also vary as to specific provisions for the appointment of non-ASL interpreters,<sup>252</sup> and nearly all express a preference, but not necessarily a requirement, for certified, or at least qualified, interpreters.<sup>253</sup> Few require appointment of an interpreter to interpret attorney-client communications during preparations for trial and during the trial itself.<sup>254</sup>

State interpreter laws, regardless of how comprehensive, exhibit the same shortcomings as their federal counterpart, the Court Interpreters Act, when they are actually implemented on both the trial and appellate levels. Courts often follow the statute literally even if the result compromises a defendant's rights. *People v. Hammons*,<sup>255</sup> a case decided in the Colorado Court of Appeals, is an example of this problem. The defendant argued on appeal that he was unable to communicate with his attorney during trial due to the court's refusal

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responsibility of the deaf person to notify appointing authority and request interpreter prior to appearance in a proceeding); N.H. REV. STAT. ANN. § 521-A (Supp. 1992) (requiring that an interpreter be appointed by the court upon request of deaf principal party in interest); CONN. GEN. STAT. ANN. § 46a-33(b)(1) (West Supp. 1993) (stating that deaf person or the court can request an interpreter).

251. See *supra* notes 89-90 and accompanying text. Several states simply do not mention what constitutes a waiver of the right to an interpreter under the statute. See, e.g., ALA. CODE § 12-21-131 (Supp. 1993); CAL. EVID. CODE § 754 (West Supp. 1993); ME. REV. STAT. ANN. tit. 5, § 48 (West 1989); N.H. REV. STAT. ANN. § 521-A (Supp. 1992); CONN. GEN. STAT. ANN. § 46a-33 (West Supp. 1993). Compare, e.g., ARIZ. REV. STAT. ANN. § 12-242(G) (1992) ("A deaf person entitled to the services of an interpreter under this section may knowingly and intelligently waive these services."); COLO. REV. STAT. § 13-90-208 (1987) (requiring that waiver be in writing and is subject to the approval of counsel and "appointing authority," and stating that failure to request an interpreter cannot be deemed to be a waiver of the right to have one provided); MASS. GEN. LAWS ANN. ch. 221, § 92A (West Supp. 1993) (requiring "special finding" by the court that defendant waived right to interpreter "knowingly, voluntarily, and intelligently").

252. See, e.g., CAL. EVID. CODE § 754 (West Supp. 1993) (oral, deaf-blind, and intermediary interpreters mentioned); ARIZ. REV. STAT. ANN. § 12-242(F) (1992) (intermediary interpreters). Most other statutes simply use the general term "interpreter."

253. See, e.g., ALA. CODE § 12-21-131(b) (Supp. 1993); ARIZ. REV. STAT. ANN. § 12-242(H)(2) (1992); CAL. EVID. CODE § 754(f) (West Supp. 1993); COLO. REV. STAT. § 13-90-202(4) (1987); ME. REV. STAT. ANN. tit. 5, § 48(2)(B) (West 1989); CONN. GEN. STAT. ANN. § 46a-33(a) (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 221, § 92A(3) (West Supp. 1993); N.H. REV. STAT. ANN. § 521-A:2 (Supp. 1993); VT. STAT. ANN. tit. 1, § 331(a)(3) (Supp. 1992).

Also, some states specifically require trial courts before and during trial to ensure that the interpretation is adequate. See, e.g., MASS. GEN. LAWS ANN. ch. 221, § 92A(1) (West Supp. 1992); COLO. REV. STAT. § 13-90-207 (1987); N.H. REV. STAT. ANN. § 521-A:4 (Supp. 1992); ME. REV. STAT. ANN. tit. 5, § 48(2)(D) (West 1989).

254. See MASS. GEN. LAWS ANN. ch. 221, § 92A (West Supp. 1993) (applying only to instances when counsel has been appointed by the court to represent an indigent defendant).

255. 771 P.2d 1 (Colo. Ct. App. 1988).

to appoint a second ASL interpreter to sit at the defense table. The court dismissed this assertion as being "without merit" since the statute made no specific requirement of a second interpreter.<sup>256</sup> There was no discussion of the defendant's constitutional rights to effective assistance of counsel or to assist in his defense. A similar case was *Turner v. State*<sup>257</sup> in which the Court of Criminal Appeals of Alabama determined that a failure to request an interpreter was a waiver of the right to have one even though it was not done knowingly or intelligently. This decision was based on Alabama law, which places the duty to make the request upon the defendant and his attorney.<sup>258</sup>

In sharp contrast to these approaches is a decision by the Court of Appeals of Texas, *Adams v. State*.<sup>259</sup> The defendant did not know ASL, and simultaneous transcription was not specifically required by the Texas statute. The court, however, looked beyond the text of the statute. It also gave weight to an opinion by the Texas Attorney General that clarified the duty of the trial court judge to protect the constitutional rights of deaf criminal defendants, including a duty to explore other methods of interpretation such as simultaneous transcription.<sup>260</sup> Even more important, the court recognized that the statute was intended to facilitate a right that was already provided to deaf defendants in Texas, under the United States and Texas Constitutions, even if the statute did not specifically require simultaneous transcription and no specific request was made. The court concluded: "[I]t is clear that *Baltierra, Ferrell, and the Attorney General of Texas have recognized an obligation outside the statute, based on state and federal constitutional law, to fashion a remedy suitable to overcome a particular defendant's disability.*"<sup>261</sup> *Adams* presents a compelling demonstration of the need for interpretation

256. *Id.* at 2.

257. 429 So. 2d 645 (Ala. Crim. App. 1982).

258. *Id.* at 647.

259. 749 S.W.2d 635 (Tex. Ct. App. 1988). See discussion of the case *supra* at text accompanying notes 131, 141-45.

260. The opinion states:

[When notified that a defendant is deaf], a court does not have any discretion as to whether an interpreter will be appointed, but does have discretion as to whether it will appoint a person to interpret by use of sign language or by use of an alternative method of communication that is more appropriate to a specific deaf person . . . [T]he trial judge has the task of insuring the minimum understanding necessary to the protection of . . . constitutional rights [to confront witnesses and to assist in his own defense]. . . .

*Id.* at 638 (emphasis in original).

261. *Id.* at 639 (emphasis added). See also *People v. Rivera*, 480 N.Y.S.2d 426, 432-33 (Sup. Ct. 1984), (regarding the central issue as whether due process was provided and concluding that the applicable state statute was intended to protect constitutional rights).



because after the reversal of his conviction, the defendant was retried using a CAT system and acquitted. The defense attorney credited the acquittal to his client's assistance with the cross-examination of the alleged victim.<sup>262</sup>

## 2. *Maine's Interpreter Statute and Its Application in State v. Green*

The Maine Supreme Judicial Court, in contrast to the Texas court in *Adams*, failed to recognize an "obligation outside the statute" when it applied the Maine interpreter law in a 1989 case, *State v. Green*.<sup>263</sup> The decision demonstrates how a court's failure to use a constitutional analysis allowed a conviction to stand when the defendant's rights fell below the minimum required. Maine's statute<sup>264</sup> falls somewhere in-between the extremes of the most and least comprehensive state laws. It applies in civil and administrative as well as criminal proceedings, and provides that, "[w]henever any personal or property interest of a deaf or hearing impaired person is the subject of a proceeding before any agency or court, the presiding officer of the proceeding shall, in consultation with the deaf or hearing impaired person, appoint a qualified interpreter."<sup>265</sup> The Maine statute gives preference to the use of certified interpreters<sup>266</sup> and, at a minimum, requires use of a "qualified interpreter," which is defined as:

a person with the knowledge and understanding of the code of ethics of the National Registry of Interpreters for the Deaf who is able to recognize the comprehension level of a deaf or hearing impaired person and is able to communicate effectively in a mode of communication used by the deaf or hearing impaired person and to interpret accurately the statements of the deaf or hearing impaired person.<sup>267</sup>

In practice, the statute works relatively well, according to the Program Director of an agency providing interpreter services in legal and quasi-legal settings. He has found generally that some courts, but not many police districts, in Maine are sensitive to the importance of adequate interpretation.<sup>268</sup> If the agency is contacted for interpreting assistance, and if *Miranda* rights need to be read, at

262. Gary Taylor, *Computer Helps Acquit Deaf Defendant; Preserving 6th Amendment Right*, NAT'L L.J., Jan. 29, 1990, at 21. See also *supra* note 41.

263. 564 A.2d 62 (Me. 1989).

264. ME. REV. STAT. ANN. tit. 5, § 48 (West 1989 & Supp. 1992-93).

265. *Id.* § 48(2).

266. "In appointing a qualified interpreter, the presiding officer shall give first consideration to persons who are certified by the National Registry of Interpreters for the Deaf." *Id.* § 48(2)(B).

267. *Id.* § 48(1)(G).

268. Interview with Douglas Newton, *supra* note 4.

least two certified interpreters, one of whom is often a Deaf interpreter, are sent<sup>269</sup> to provide interpretation throughout police questioning, trial preparations, and any court proceedings. The largest barrier to effective implementation of the statute, however, is the failure by court and police personnel to recognize the need for interpretation.

The problem is particularly acute when a deaf person in the court system does not use ASL or her hearing impairment is not readily apparent to those involved. Such persons can "slip through the cracks" when the need for interpretation is not addressed from the outset. Such was the case in *State v. Green*,<sup>270</sup> the Law Court's only opinion addressing an appeal of a deaf criminal defendant where the defendant sought reversal on the basis of inadequate interpretation. The defendant, Dean Green, was deaf and did not know ASL. He was charged with rape and convicted after a two-day jury trial.<sup>271</sup> His attorney brought a friend of Green's to serve as a "quasi-interpreter" and to testify as the only witness for the defense.<sup>272</sup> The record does not reveal how interpretation was provided, if this individual was certified, or if he was at all qualified to provide the interpretation. The trial court made no inquiries of this kind, and the court and the defendant never addressed each other directly. The record does reveal, however, that the court did not consider the friend to be providing a "real formal interpretation. . . . We will try to tell [the defendant] what's going on from the witness stand."<sup>273</sup>

Green was convicted and obtained new counsel to seek a motion for a new trial.<sup>274</sup> The new attorney moved for the appointment of a qualified interpreter. He also requested a copy of the transcript so that Green could assist in the preparation of the motion; Green claimed he was unable to follow much of the testimony.<sup>275</sup> The motion for a transcript was denied. A certified oral interpreter was provided for the hearing on the motion for a new trial which was denied

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269. There are several reasons for sending more than one interpreter on legal interpreting assignments including assisting each other with certain terms and relieving an interpreter who becomes fatigued. Douglas Newton, *supra* note 4, estimates that interpreters need to rest every half hour; it is particularly mentally and physically exhausting work in courtroom settings. It has proven beneficial that during trial one interpreter is positioned in front of the deaf person and the other is at the counsel table to monitor the accuracy of the interpretation as well as to interpret all attorney-client communications.

270. 564 A.2d 62 (Me. 1989).

271. Brief for Appellant at 3, *State v. Green*, 564 A.2d 62 (Me. 1989) (YOR-88-407).

272. *State v. Green*, 564 A.2d at 63.

273. Remarks by Maine Superior Court Justice Broderick, Brief for Appellant at 3.

274. *Id.* at 1.

275. *Id.* at 4.

as well.<sup>276</sup> Prior to sentencing, the trial court judge stated on the record that formal interpretation had been offered (although this does not appear anywhere in the record) and “[f]rom where I sat Mr. Green seemed to follow all of the testimony very attentively. . . . As far as I’m concerned Mr. Green was able to follow what was happening during trial.”<sup>277</sup> Green was sentenced to twenty years, the maximum allowable sentence.

The Law Court affirmed the conviction.<sup>278</sup> Since no objection to the inadequate interpretation was made during trial, the court restricted its review to a determination of “whether the asserted error, if error at all, was ‘so highly prejudicial and so taints the proceeding as to virtually deprive the aggrieved party of a fair trial.’”<sup>279</sup> The

276. According to Douglas Newton, *supra* note 4, there are no certified oral interpreters in Maine; the interpreter he provided for Green traveled from Massachusetts to interpret the proceedings.

277. Brief for Appellee at 4-5, *State v. Green*, 564 A.2d 62 (Me. 1989) (YOR-88-407). The State’s brief provides several transcript references where the court addressed the issue of the defendant’s deafness. Presumably, if the court made a reference on the record where a specific offer of a certified interpreter was made and refused, the state would have brought this to the Law Court’s attention. The brief for the defendant claims that there was no consultation with the defendant on the record. Brief for Appellant at 14.

It should also be noted, as it was in Defendant’s brief, that the trial court could have required proof of the defendant’s deafness under the statute if it had any doubt as to the severity of the impairment. *Id.* at 15; see ME. REV. STAT. ANN. tit. 5, § 48(2)(C) (West 1989).

278. *State v. Green*, 564 A.2d at 64.

279. *Id.* at 63 (quoting *State v. True*, 438 A.2d 460, 468 (Me. 1981)). The Law Court also stated that this would be the applicable standard regardless of whether a constitutional or statutory right was involved and attributed this rule to *State v. Christianson*, 404 A.2d 999, 1005 (Me. 1979) (holding that when defendant failed to assert violation of right to confrontation at trial, “our review of the issue is confined to the determination whether the error thus asserted, if error at all, was so serious in its effect upon defendant’s trial that the trial was rendered unfair.”). *But see* DAVID P. CLUCHEY AND MICHAEL D. SEITZINGER, *MAINE CRIMINAL PRACTICE*, § 52.2 (rev. ed. 1991) (“As a practical matter, the Law Court is likely to exercise its discretion to examine serious constitutional error under Rule 52(b) [“obvious error” rule] even when it has not been noted below.”).

It is worth noting that in all but a few of the cases in both the state and federal courts that have found a compromise of defendant’s rights, there had been no objection at trial to the inadequacy of interpretation. *See, e.g.*, *Adams v. State*, 749 S.W.2d 635 (Tex. Ct. App. 1988); *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1979). *See also supra* note 200, which discusses two cases in which failure to object to inadequate interpretation amounted to deprivation of ineffective assistance of counsel.

*See also Brown v. Mississippi*, 297 U.S. 278 (1936), where a defense attorney failed to move for the exclusion of confessions obtained by torture once the fact of coercions had been proved, and the Court held “[t]hat complaint [of admission of the confessions by the trial court] is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. . . . We are not concerned with a mere question of state practice . . . .” *Id.* at 286-87 (citations omitted). *See discus-*

only error found by the court was the trial court's failure to administer an oath to the quasi-interpreter, and that did not rise to the level of "obvious error."<sup>280</sup> The court did not address the more significant violations of the statute such as failure to review the qualifications of a person who could not even be considered an "interpreter," not to mention a "qualified interpreter," under the definition in the statute.<sup>281</sup> Also, no consultation with the defendant, as is required by the statute,<sup>282</sup> appears on the record.

Most important, however, the Law Court failed to make a determination of whether Green's constitutional rights were protected. Stating that the same standard of review will be used, regardless of whether the protected rights were statutory or constitutional, should not end the analysis of the constitutional aspects of Green's appeal. Even if the violation of the statute was minor, as the Law Court viewed it to be, the court was nonetheless obligated to ensure that the defendant's constitutional rights were at the minimum level required by the United States and Maine Constitutions as outlined in the cases discussed in Part III of this Comment. Although both parties briefed the constitutional aspect of this case extensively,<sup>283</sup> the Law Court conducted no analysis in this area.<sup>284</sup> The fact that the

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sion *infra* of standard of review at notes 318-23 and accompanying text.

280. *State v. Green*, 564 A.2d at 64. The Law Court based this finding, in part, on what it saw as a failure of the defendant to allege any difficulty understanding testimony. *Id.* In his brief, however, the defendant refers to the transcript of the motion for trial transcript where the defense counsel made the request, in part, because "Appellant had been unable to understand the testimony of the victim at trial, even with the assistance of a quasi-interpreter . . ." Brief for Appellant at 4-5. This claim was acknowledged on the record by the Superior Court Justice. *Id.* at 5.

281. See *supra* note 267 and accompanying text.

282. ME. REV. STAT. ANN. tit. 5, § 48(2) (West 1989).

283. The State of Maine argued that "[although] it has long been recognized in American jurisprudence, that an accused . . . is entitled to interpretive services when he cannot otherwise understand or comprehend the criminal proceedings against him. . . . [T]his right does not rise to one of absolute constitutional dimensions." Brief for Appellee at 10. The State claimed that the defendant was able to understand the proceedings and that the trial court "complied with the requirements and spirit of [ME. REV. STAT. ANN. tit. 5, § 48] when he, in consultation with Mr. Green through his attorney, appointed an interpreter who in Defendant's opinion was best qualified to understand and assist the Defendant." Brief for Appellee at 13. Although it is true that Green's attorney told the court that he thought the friend "knows the Defendant very well, is an excellent lip reader and can communicate with Defendant probably better than any other individual *immediately available*," Brief for Appellee at 3 (text of defendant's Motion to Continue to provide for availability of the quasi-interpreter) (emphasis added), this statement cannot be considered a knowing and intelligent waiver by the defendant himself of the right to a certified, or at least *qualified*, oral interpreter.

284. A further irony in this case is that the Law Court referred to the cases of *Terry v. State* and *United States ex rel. Negron v. New York* in an earlier case, *State v. Doucette*, 398 A.2d 36 (Me. 1978), as standing for "the unquestioned principle that a defendant must be afforded the means to understand the proceedings against him."

inadequate interpretation was not raised by the defendant prior to his conviction should not be considered conclusive evidence of the adequacy of the interpretation.<sup>285</sup> Only a knowing and intelligent waiver could be a basis for finding no compromise of Green's rights. A constitutional analysis probably would have resulted in a reversal and a remand for a new trial as it did in *Adams*<sup>286</sup> since it is impossible to determine from the record whether the defendant understood the proceedings or was able to communicate with his attorney sufficiently. In the absence of such findings or a waiver, the court should not conclude that Green was afforded all of his constitutional rights at trial.

### 3. *Federal Statutes Prohibiting Discrimination in Public Services*

Other sources of statutory protection of the right to interpretation in state courts can be found in federal laws, such as section 504 of the Rehabilitation Act of 1973<sup>287</sup> and the Americans with Disabilities Act of 1990 (ADA),<sup>288</sup> both of which prohibit discrimination in public services against disabled persons. Before discussing the application of these laws to the right to interpretation in state courts, it is important to note the ambivalence felt by many members of the Deaf community toward seeking protection under laws designed to protect the disabled.<sup>289</sup> Many people, hearing and deaf, who work in the Deaf community dispute any notion that deaf people are "disabled." This is part of an effort to recognize the Deaf community as a linguistic and cultural minority rather than a group of people connected by a "medical dysfunction."<sup>290</sup>

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*Id.* at 40. The context of that discussion, however, was the appeal of a hearing defendant who alleged that he had been deprived of a fair trial due to the alleged bias of the ASL interpreter who translated the victim's testimony. *Id.*

285. The trial court made references to the fact that the defendant had conversations with police without an interpreter. Brief for Appellee at 4, sentencing transcript, pp. 67-68. As discussed *supra* notes 49-52 and accompanying text, the ability to follow the essence of one-on-one conversations is no indication that one can understand the testimony of a person thirty feet away, in circumstances that make speechreading more difficult. Moreover, the fact that the police officers could understand the defendant indicates that he lost his hearing later in life, but not the degree of his hearing impairment.

286. See *supra* text accompanying notes 259-62.

287. 29 U.S.C.A. § 794 (West Supp. 1993).

288. 42 U.S.C. § 12131 (Supp. III 1991).

289. PADDEN & HUMPHRIES, *supra* note 16, at 44. The authors describe the awkwardness experienced in a conversation where a deaf man told his friends that he uses a "handicapped" transit pass to use the city buses.

290. See LANE, *supra* note 12, for a detailed discussion of the attempts of the "audist establishment" to medicalize deafness. This Comment does not reject that position by discussing legislation providing access to federal programs. These laws are a necessary part of the survey of existing statutory protections addressing interpretation that can and have been used. See also, Dolnick, *supra* note 12, at 37.

The Rehabilitation Act is regarded as the first major civil rights bill for the disabled and prohibits discrimination on the basis of disability in all federally funded programs.<sup>291</sup> The Supreme Court has interpreted this statute to guarantee "meaningful access" to these programs for qualified disabled people.<sup>292</sup> The regulations require accessibility in terms of communication as well as mobility.<sup>293</sup> The case law for deaf people under the Rehabilitation Act has been largely disappointing. Many of the cases have involved employment discrimination or access to federally funded educational programs, and courts have concluded that deafness can be an acceptable reason to bar someone from a job or program.<sup>294</sup> There has been success, however, in several cases where courts have read the regulations as specifically requiring appointment and funding of interpreters for deaf graduate students.<sup>295</sup> The significance of those cases is that the regulations were interpreted as not only prohibiting discrimination that actually bars participation, but as imposing an affirmative duty on the part of the recipient of federal funds to provide interpretation to ensure full participation.

The Rehabilitation Act provides the right to an interpreter in state courts, but the specific provision is neither well defined nor widely recognized. The actual text of the law is very broad and provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."<sup>296</sup> The specific requirements of the law are provided in Justice Department regulations;<sup>297</sup> however,

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291. 28 C.F.R. § 42.503(a) (1992). Elaine Gardner of the National Center for Law and Deafness, *supra* note 2, stated that the law has never been considered applicable to federal courts, however.

292. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

293. 28 C.F.R. § 41.511(e) (1991) (promulgated pursuant to Executive Order 12250, requiring the U.S. Department of Justice to coordinate the implementation of § 41.1).

294. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (upholding refusal of college to admit deaf woman to clinical nursing program on the basis of her deafness and finding that intent of the Rehabilitation Act was to ban discrimination against otherwise qualified handicapped people, not to require hiring of people despite their disability).

295. *See, e.g., Jones v. Illinois Dep't Rehabilitation Servs.* 689 F.2d 724, 729-30 (7th Cir. 1982) (holding that a state department of rehabilitation services had primary burden of providing interpreter services to deaf college student); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) (concluding that the trial court properly granted injunctive relief to a deaf graduate student seeking interpretation services from a university), *vacated and remanded on other grounds*, 451 U.S. 390 (1981).

296. 29 U.S.C.A. § 794 (West Supp. 1993).

297. The Justice Department regulations require that:

Recipients shall insure that communications with their applicants, employ-

there is no language indicating that courts are bound by those requirements or that interpretation must always be provided. Rather, the sole reference to interpretation in courts appears in a comment accompanying the final regulation:

Court systems receiving Federal financial assistance shall provide for the availability of qualified interpreters for civil and criminal court proceedings involving persons with hearing or speaking impairments . . . . Where a recipient has an obligation to provide qualified interpreters under this subpart the recipient has the corresponding responsibility to pay for the services of the interpreter.<sup>298</sup>

The language of the comment clearly requires interpretation but one has to know exactly where to look to find it. Moreover, the regulations and comment are silent on the requirements of waiver, simultaneous translation, time of appointment, and who has the responsibility to ensure that communications are adequate. Provisions such as these are necessary to assure protection of the deaf defendants' constitutional rights.

Despite the clear language of the comment, the Rehabilitation Act has never been the basis of a criminal appeal. The statute has been raised in two courtroom interpretation cases in federal district court, neither of which resolved the issue of the statute's applicability or involved deaf criminal defendants. *Dobard v. Oakland/Piedmont Municipal Court*<sup>299</sup> was an action by a deaf man who requested a computer assisted transcript system (CAT) in his traffic court case. Although the court appeared willing to read the language of the Rehabilitation Act to require courtroom interpretation,<sup>300</sup> the court

ees and beneficiaries are effectively conveyed to those having impaired vision and hearing. . . . A recipient that employs fifteen or more persons shall provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program receiving Federal financial assistance. Such auxiliary aids may include . . . qualified interpreters.

28 C.F.R. § 42.503(e)-(f) (1992).

298. 45 Fed. Reg. 37,630 (1980). The comments also indicate a preference for certified interpreters and require services of an interpreter to be provided "for all phases of the preparation and presentation of the defendant's case" where the defendant had qualified for a court-appointed attorney. *Id.*

299. 1992 U.S. Dist. LEXIS 10756 (N.D. Cal. June 22, 1992).

300. The court noted:

If section 504 protects anything, it should insure that all individuals, regardless of their disability, have access to the Federal and State courthouses. Plaintiff is completely without the ability to hear. He can neither read lips nor understand sign language. . . . Absent communicating through the use of a pad and pen, plaintiff has no means of communicating with the court or counsel except by means of a CAT system or an equivalent device.

*Id.* at 9-10.

found that the traffic court did not receive any federal funding and dismissed the case for other reasons. The other case, *Avraham v. Zaffarano*,<sup>301</sup> involved a deaf plaintiff in a state court civil action. The claim for interpretation under the Rehabilitation Act survived a motion to dismiss and the funding requirement was never discussed in the ruling. The only criminal context in which the Rehabilitation Act has been used by a deaf person was a Ninth Circuit case, *Bonner v. Lewis*,<sup>302</sup> in which a prisoner won the right to an interpreter for, among other things, prison disciplinary proceedings.<sup>303</sup> Surely, however, one does not have to wait to be convicted to receive protection under the Rehabilitation Act.

A more promising potential source of statutory protection in state courts is the Americans with Disabilities Act of 1990.<sup>304</sup> Title II of the ADA<sup>305</sup> extends the requirements of the Rehabilitation Act to all state and local services, not only those receiving federal funding, but exempts the federal government.<sup>306</sup> As with the Rehabilitation Act, the language of the ADA fails to describe trial courts' obligations to provide interpretation under this law. The applicable section of the regulations implementing Title II does not provide any express requirement for use of interpreters in state courts for parties, witnesses, or jurors.<sup>307</sup> Discussion of access to communication in courtrooms is completely absent from the extensive legislative history.<sup>308</sup> A comment accompanying the regulations contains, once again, the only reference to interpretation in courts by instructing courts not

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301. 1991 U.S. Dist. LEXIS 10373 (E.D. Pa. July 22, 1991).

302. 857 F.2d 559 (9th Cir. 1988).

303. *Id.* at 567. This was the sole source of the right; the court rejected the applicability of state interpreter laws, the Due Process Clause, and the Eighth Amendment.

304. 42 U.S.C. §§ 12131-12134 (Supp. III 1991).

305. "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (Supp. III 1991).

306. 56 Fed. Reg. 35,694 (1991). See also Anne B. Thomas, *Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act*, 22 N.M. L. Rev. 243 (1992) (asserting that the ADA will be a highly significant law only if compliance by state and local governments is enforced strictly).

307. The implementing regulations provide:

A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. . . . In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

28 C.F.R. § 35.160(b) (1992).

308. H.R. REP. NO. 485(III), 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 445.



to include interpreter fees as part of "court costs."<sup>309</sup> This is the only suggestion that the statute provides a right to interpretation in court.

One difficulty in applying the Rehabilitation Act or the ADA is that deafness is an "invisible disability" (if one at all).<sup>310</sup> For example, few agencies are surprised by a requirement to provide a ramp into a welfare office but they may balk at having to locate, provide, and pay for an interpreter for an application interview.<sup>311</sup> It may not occur to courts to look to the ADA or the Rehabilitation Act for an obligation to appoint a qualified interpreter, especially since, in the thirteen years since the publication of the Justice Department's regulations for section 504, this requirement has never been raised in any criminal appeals in state court.

Despite the Department of Justice comment on the requirement of interpretation, there are at least two primary barriers to applying the ADA and the Rehabilitation Act in an appeal in state court or a federal habeas corpus petition. First, it is unclear what remedy under either statute would be available to criminal defendants who faced trial with inadequate interpretation. The ADA regulations do not contemplate use in a criminal trial context since they provide only for administrative complaint procedures or civil actions against the government for damages to remedy the alleged discrimination.<sup>312</sup>

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309. "The Department [of Justice] has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. . . . Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited [under the ADA]." 56 Fed. Reg. 35,705-706 (1991). See also *Baker v. Louisiana*, 1992 U.S. Dist. LEXIS 21599, 5 (W.D. La. Sept. 4, 1992).

310. Goldberg, *supra* note 69, at 23.

311. This observation is based upon my personal experience as a paralegal in a legal services office. A deaf client of mine received a notice requiring him to attend a "recertification interview" in the federal food stamp program. The notice indicated that if he did not appear for this appointment his food stamps would be terminated. The welfare office, a recipient of federal funds, did not have a TDD (telecommunication device for the deaf). The notice made no mention of a right to an interpreter or the fact that my client was deaf, although this was known to the caseworker. When I called to ask the worker to provide an interpreter for the interview the response was "Can't he bring someone? Why don't you come?" Eventually the "interview" was conducted in my office over the phone; I asked the worker's questions and told her my client's responses. I surveyed informally four other deaf food stamp recipients, all of whom told me that their caseworkers expected them to bring a family member or friend to appointments, or that they communicated through note-writing. This pattern was also noted in the "public comment" to the ADA regulations. 28 C.F.R. pt. 35, app. A, § 35.104, at 436 (1992).

312. 28 C.F.R. §§ 35.170, 35.175, 35.178 (1992). Also, unlike the Rehabilitation Act, the ADA allows state and local governments to be sued directly without Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. . . . [R]emedies (including remedies both at law and in equity) are available." 28 C.F.R. § 35.178. Al-

Second, since the "agency" involved is a state court system, an action in federal court to obtain an injunction during the proceedings would involve the *Younger v. Harris* abstention doctrine.<sup>313</sup> The Supreme Court held in the 1971 case that, absent extraordinary circumstances, issues of federalism prevent interference by federal courts in ongoing state criminal proceedings. The ADA, therefore, has serious drawbacks and limitations in this context. Moreover, any development in the right to interpretation under the ADA would be a mixed blessing for many members of the Deaf community who strive to avoid a label of "disabled."

Therefore, although many state and federal laws were passed with the intention of requiring interpretation at trial, they have failed to provide the protections required by the Sixth and Fourteenth Amendments. The lack of uniformity among state laws results in unequal treatment of defendants. Courts and counsel have ignored federal laws as a source of rights and duties. Moreover, many courts have actually retreated from discussing the constitutional dimension of the right to interpretation and have instead analyzed the appeal on the basis of the statutory requirements only. As seen in *State v. Green*, the tendency of courts to approach the right to interpretation as existing wholly within the statute without examining the overall result, can have substantial consequences for the defendant.

#### V. THE EFFECT OF THE FAILURE TO RECOGNIZE THE CONSTITUTIONAL RIGHT TO INTERPRETATION

It may appear initially that the interpretation needs of deaf defendants can be met with more comprehensive legislation. An examination of the case law, however, demonstrates why it is crucial for courts to review the appeals of deaf criminal defendants using the Sixth and Fourteenth Amendments, as well as statutory law, as the bases for their analyses. The primary reason is the essential difference between a statute and a constitution. On a practical level, because the communication needs of deaf criminal defendants vary greatly, no statute could be comprehensive enough to protect the rights of all. The Constitution, on the other hand, establishes the

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though the Rehabilitation Act did not contain a similar provision, it is unclear what impact this would have in the area of criminal proceedings. Government immunity was not raised in either *Dobard* or *Avraham*, discussed *supra* at notes 299-302 and accompanying text.

313. *Younger v. Harris*, 401 U.S. 37, 54 (1971). Two federal cases actually address this issue in similar contexts. *Avraham v. Zaffarano*, 1991 U.S. Dist. LEXIS 10373 (E.D. Pa. July 22, 1991) discussed *supra* at note 301 and accompanying text, found that *Younger* abstention did not prevent a deaf civil plaintiff from seeking relief under the Rehabilitation Act in federal court. The First Circuit, however in *Jackson v. Garcia*, 665 F.2d 395, 396 (1st Cir. 1981), found that *Younger* precluded an attack under 42 U.S.C. § 1983 to compel the courts of Puerto Rico to conduct all proceedings in English.

basic *minimum* quantum of rights of every defendant, hearing or deaf; it is a starting point, not the full extent. Thomas Paine wrote that a constitution is "to liberty, what a grammar is to language."<sup>314</sup> The statutes should be seen as a source of procedure to implement these rights, and not as a source of the rights themselves.

As laws are passed to provide more protection, the courts tend to concern themselves primarily with statutory requirements, such as administering an oath to an interpreter,<sup>315</sup> rather than ensuring that a defendant's communications with his attorney prior to and during trial are unimpaired. In fact, some of the most important discussions of the right to interpretation were in early cases such as *Terry*<sup>316</sup> and *Mothershead*,<sup>317</sup> decided in the absence of any statutes. Few courts since have made such unequivocal statements that the basis of this right lies in both the federal and state constitutions.

One of the most compelling reasons to recognize a constitutional right is the impact of the standard of review used by appellate courts.<sup>318</sup> Most courts, especially in cases interpreting the Court Interpreters Act, give exceptionally broad discretion to trial courts' determinations of the need for and adequacy of interpretation.<sup>319</sup> The discretion given to trial courts is particularly problematic in deaf defendants' appeals. A trial court's assessment of the interpretation needs can reflect erroneous assumptions made by hearing people about "lipreading" and ASL interpretation, unfamiliarity with the particular difficulties of interpreting in courtroom situations, and underestimation of the need for educated, trained, and certified interpreters. Findings of "fact" reviewed by appellate courts include comments such as that the defendant looked "alert" or nodded<sup>320</sup> during trial as indications of comprehension, although no actual evidence of the defendant's ability to hear is discussed.<sup>321</sup> Evidence of

314. THOMAS PAINE, *RIGHTS OF MAN*, as quoted in CHARLES HOWARD McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 2 (1947).

315. See, e.g., *State v. Green*, 564 A.2d 62 (Me. 1989), discussed *supra* notes 263-86 and accompanying text.

316. 105 So. 386 (Ala. 1925).

317. 112 F.2d 1004 (8th Cir. 1940).

318. See also *supra* note 279.

319. See, e.g., *United States v. Perez*, 918 F.2d 488 (5th Cir. 1990) *cert. denied*, 111 S.Ct. 2055 (1991), *supra* text accompanying notes 242-45; *Valladares v. United States*, 871 F.2d 1564 (11th Cir. 1989), *supra* text accompanying notes 238-41; *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), *cert. denied sub nom.*, *Estevez v. United States*, 492 U.S. 908 (1989), *supra* text accompanying notes 234-36.

320. See discussion of nodding, *supra* note 72 and accompanying text.

321. See, e.g., *People v. Branson*, 475 N.E.2d 905 (Ill. App. Ct. 1984). Many deaf people are particularly alert in response to oral conversation even if they understand little; in the absence of aural information deaf people must gain information from visual cues, but it is not complete comprehension.

It is not suggested that trial courts' findings are always incorrect. In many of the cases discussed in this Comment, it is possible that the trial court's conclusions were

comprehension could include, for example, audiological tests or other medical records which trial courts are permitted to require by many statutes.<sup>322</sup> Also, a defendant could be asked specific questions about the testimony or the right she is waiving, not simply if she understood in general. A defendant herself may not know if she understood fully until that comprehension is actually tested.

Federal and state courts use a heightened standard of review when the issue is whether constitutional errors occurred during a trial. Federal Rule of Criminal Procedure 52 distinguishes what trial court errors can be reversed. "Harmless error" is "[a]ny error, defect, irregularity or variance which does not affect substantial rights" and can be disregarded by the appellate court.<sup>323</sup> "Plain error," by contrast, is one that does affect the "substantial rights" of the defendant and can be reviewed even if it was not preserved for appeal during trial.<sup>324</sup> Although the United States Supreme Court, in *Chapman v. California*,<sup>325</sup> acknowledged that "harmless constitutional error" can exist, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt."<sup>326</sup> Deprivations of certain rights, including the right to counsel at trial, can never be "harmless error."<sup>327</sup> Even if a violation of the defendant's right was not the subject of an objection at trial, as is the case for many deaf defendants, appellate courts may nonetheless grant relief if it is

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correct. The problem, however, is that appellate courts are willing to defer to these findings even in the absence of a reasonable basis for doing so. The examples *supra* at note 108 demonstrate that trial courts can and have made erroneous assessments of a defendant's hearing and comprehension.

322. See, e.g., ME. REV. STAT. ANN. tit. 5, § 48(2)(C) (West 1989). The burden to settle the question of the need for interpretation should rest on the prosecutors for practical and policy reasons. First, a deaf person should not be required to obtain tests for a physical characteristic that has existed for many years, or even a lifetime. Most deaf persons have no reason to routinely submit to these tests. Second, there is simply no reason why someone would exaggerate her or his deafness; interpretation at trial is something that is of benefit only if one has some limitation in comprehension. Denials of, rather than requests for, interpretation should be viewed with suspicion by the trial court.

323. FED. R. CRIM. P. 52(a).

324. FED. R. CRIM. P. 52(b). ME. R. CRIM. P. 52(b) is substantially similar except that it refers to "obvious error" rather than "plain error."

325. 386 U.S. 18 (1967).

326. *Id.* at 24. The Maine Law Court recently reiterated that it differentiates between constitutional violations and other errors: "Where constitutional violations are claimed to be harmless, a heightened standard applies, namely, that the error must be harmless beyond a reasonable doubt. This standard is more strict than that used for errors which are not of constitutional magnitude." *State v. Haasapelis*, 620 A.2d 288, 291 n.4 (Me. 1993) (citation omitted).

327. See *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) ("Circumstances . . . may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate . . .").

found to be "plain error." The Supreme Court has said of Rule 52(b): "It grants the courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default . . . ."<sup>328</sup> Moreover, courts have recognized that trial courts have an affirmative duty to protect the constitutional rights of defendants even if defendants and their attorneys take no steps to do so themselves.<sup>329</sup> These rules demonstrate that the treatment on appeal of violations of constitutional rights is significantly different from the treatment of other rights.

The standard of review also guides the actions of the trial court and the degree of respect it provides a particular right. If judges are aware that the right to interpretation must be guarded with the same vigilance as the rights to confrontation and counsel, they may hesitate before concluding that a deaf person has adequate comprehension of the proceedings.

Recognition of a constitutional right to interpretation would also require courts to apply the rule of *Johnson v. Zerbst*.<sup>330</sup> The presumption against waiver of a constitutional right has been a cornerstone of criminal constitutional protection for more than fifty years. If a right must be waived knowingly and intelligently, failure to request an interpreter, for example, cannot be deemed to be a waiver of the right to interpretation. *Negron* specifically found this to be true, applying the rule in *Zerbst*.<sup>331</sup> Most appeals of deaf criminal defendants arise out of trials in which the defense counsel never requested an interpreter, and the trial court assumed the defendant could understand the proceedings, regardless of the degree of comprehension that actually existed.<sup>332</sup> This factor is especially important since most deaf people and defense attorneys do not know of the right to interpretation under statutory law.<sup>333</sup> Furthermore, cases have demonstrated that a deaf person's attorney may not have a full understanding of the degree of her client's hearing impairment.<sup>334</sup>

Another important consideration is that state court defendants would have a constitutional basis upon which to file a federal habeas corpus petition.<sup>335</sup> *Negron*, *Ferrell*, and *Mothershead* were cases that granted habeas corpus petitions based upon a constitutional

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328. *United States v. Frady*, 456 U.S. 152, 163 (1982).

329. *See, e.g., Ferrell v. Estelle*, 568 F.2d 1128, 1132 (5th Cir. 1978) (stating that ensuring that the defendant has sufficient understanding of the proceedings against him to be able to assist in his own defense is primarily the task of the trial judge).

330. 304 U.S. 458 (1938). *See supra* notes 89-90.

331. *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir. 1970).

332. *See, e.g., Turner v. State*, 429 So. 2d 645, 647 (Ala. Crim. App. 1982); *State v. Green*, 564 A.2d 62, 64 (Me. 1989). *See also supra* note 279.

333. *See supra* note 90.

334. *See supra* notes 108 and 200.

335. *See supra* note 8.

right to interpretation.<sup>336</sup> *Felts v. Murphy*<sup>337</sup> and an early Tenth Circuit case involving a deaf defendant, *Stevens v. Page*,<sup>338</sup> were cases in which courts denied the habeas corpus petitions of defendants who could not understand the proceedings on the basis that there was no deprivation of a constitutional right, despite the inadequate interpretation. However, since the right to bring a habeas corpus petition has been restricted greatly over the past several terms of the Supreme Court, this distinction between constitutional and statutory rights may become less important in the context of habeas corpus.<sup>339</sup>

Recognition of a constitutional right to an interpreter could also have a bearing on who pays for interpreter fees. Many statutes do not specify a state's obligation to pay fees, and it rarely arises in appellate decisions. One federal court in a habeas corpus case held that a state trial court had violated a Spanish-speaking defendant's Sixth and Fourteenth Amendment rights by failing to inquire into his actual need and ability to pay for interpretation.<sup>340</sup> This raises the question of whether an interpreter should be seen as an individual whose assistance is required by the Constitution in the same way that an attorney is needed, or if the interpreter is equivalent to "equipment" for a courtroom. If the former approach is used, a need-based determination would precede the appointment of an interpreter. The latter approach, however, would require a state to provide interpretation regardless of the defendant's financial situation. The second would appear to be a fairer approach since a criminal defendant is not required to pay for courtroom equipment such as microphones or light bulbs to provide sensory assistance for non-deaf parties. Moreover, the need-based approach would become

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336. *Ferrell v. Estelle*, 568 F.2d 1128 (5th Cir. 1978); *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *Mothershead v. King*, 112 F.2d 1004 (8th Cir. 1940).

337. 201 U.S. 123 (1906).

338. 420 F.2d 933 (10th Cir. 1969).

339. Recently, in fact, the Court reversed a Ninth Circuit case where the circuit court was willing to allow an evidentiary hearing on whether a Spanish-speaking defendant understood the nature of the charge when it was alleged that the interpreter inadequately explained the mens rea element before a nolo contendere plea was entered. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992).

340. *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504 (M.D. Fla. 1989). The facts of the case limit the holding since the defendant could pay for an attorney or an interpreter but not both. *See id.* at 506. *But see United States v. Desist*, 384 F.2d 889, 902 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969) (suggesting that non-indigent defendants do not have a right to a court-appointed interpreter).

The ADA and § 504 suggest that it would be incorrect to attach the right to a free interpreter to the right to a free attorney; would a person in a wheelchair, for example, be required to pay in part or in full for the ramp into the courthouse? Even the comments accompanying the promulgation of the § 504 regulations, however, suggest that only indigent criminal defendants can receive the assistance of an interpreter for pre-trial preparations. 45 Fed. Reg. 37,630 (1980).

more problematic if a CAT or other mechanical system was required.

Finally, the recognition of this right as derived from the principles of the Sixth and Fourteenth Amendments, independent of statutory rights, could avoid the discomfort within the Deaf community that accompanies any reliance on "special legislation" such as the Rehabilitation Act or the ADA addressing disabled people as a category.<sup>341</sup> It would be understood that a statute involving interpretation does not create special rights for deaf people, but ensures the implementation of general rights already present, but not readily apparent to hearing people.

## VI. CONCLUSIONS AND RECOMMENDATIONS

In *Rivera* and *Adams*, the courts' analyses were consistent with, and protective of, the defendants' full constitutional rights, including their right to interpretation. Their reasoning and sensitivity to issues facing deaf people suggest a model approach to be followed by other courts for the following reasons. First is these courts' understanding of the complexity of deafness and the limitations of making audiological diagnoses either from the bench or from reading appellate briefs. Second is an acknowledgment that the relevant statutes do not determine the extent of the constitutional protection, but rather operate as legislative guidance on its implementation. Third is a recognition that it is the trial court judge, not the defense counsel or defendant, who serves as the primary protector of the defendant's constitutional rights. Fourth is the recognition that a failure to raise the issue of inadequate interpretation at trial is not evidence that a defendant understood the proceedings fully.

The cases examined in this Comment indicate that new standards need to be articulated and used by trial and appellate courts where proceedings involve deaf or hearing-impaired defendants. At the trial level, courts cannot rely exclusively on defense counsels' assessments of the interpretation needs of defendants since attorneys may be unaware of the individual needs of their clients or the availability of interpretation resources. If defense counsel indicates that no interpretation is needed, the trial court judge has a duty to inquire into how the defendant will be able to understand testimony and communicate with his or her attorney. This inquiry should consist of direct interaction with the defendant to ensure that his or her right to interpretation (including, if necessary, the right to a CAT system) has been fully explained and that it is being waived knowingly, voluntarily, and intelligently. The trial court should also tell defendants that if at any time during trial they are unable to follow the proceedings, they can invoke the right to interpretation. If interpre-

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341. Interview with Polly Lawson, *supra* note 4.

tation of any kind has been requested by the defendant, and the trial court decides that it is not required, the court should provide objective audiological evidence as the basis of that decision. If interpreters are used, the trial court should ensure that they are certified and adequately trained.

Appellate courts must carefully review the appeals of deaf defendants. If there was no interpretation at trial, they should look to the circumstances of the proceedings. If objective evidence of moderate to severe hearing loss was offered, then the court must find a violation of constitutional rights. If the defendant could not understand the testimony, a reviewing court should find a deprivation of the right to confrontation. If the defendant was not able to communicate adequately with the defense attorney, then the court should find a violation of the rights to effective assistance of counsel and to assist in one's own defense. The use of noncertified or unqualified interpreters should be prima facie evidence of inadequate interpretation. If the defendant did not request interpretation, the appellate court should examine the record for a knowing and intelligent waiver that would meet the requirements of *Zerbst*. Findings of fact involving a defendant's interpretation needs should not be given deference absent objective evidence. An unwillingness to yield to a trial judge's determination of the extent of the defendant's hearing loss and interpretation needs would encourage more careful decision-making by trial judges and avoid the necessity of retrial. In short, trial and appellate courts must act in concert to ensure that all deaf defendants are provided their full constitutional rights.

What makes the issue of the right to interpretation compelling is that, in most cases, a solution to the communication barrier is readily available. What courts need to consider is the rationale behind the constitutional guarantees embodied in the Sixth and Fourteenth Amendments. It is inconsistent to recognize a right to confront prosecution witnesses yet not recognize a right to understand their testimony; to provide assistance of counsel without providing the means to communicate with that counsel before or during trial; and to uphold a defendant's right to be present and assist in one's defense but deny the ability to do so in any meaningful sense. Would we allow such chiseling of the rights of a hearing defendant? Would we, for example, ask him to leave the room during part of the prosecution's key witnesses' testimony? Would we allow him to sit at counsel table but never write a note to or speak to his attorney? Would we keep him from meeting with his attorney until after the trial began? Would we allow a defendant to hear only every fourth word of the prosecution witnesses' testimony? Would we allow the defendant to learn about what happened during her trial only from newspaper accounts and second-hand summaries of the testimony?

While these scenarios would clearly be offensive to most of us, they are in fact what occurs when a deaf person is tried in the ab-



sence of adequate interpretation. No special law would be sought to eliminate such possibilities for hearing persons; such actions are all examples of fundamental betrayals of our notions of justice, as embodied in the Constitution. The same consideration must be extended to deaf persons as well. To deny deaf defendants the full array of constitutional rights guaranteed to all criminal defendants is, quite simply, to punish them for being deaf and to compromise the effectiveness of the judicial process sought by the Constitution.

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