# Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant

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*The authors of this Comment contend that the communications problems of non-English-speaking indigent defendants can best be solved by the appointment of court-compensated interpreters. Although they evaluate recent legislative proposals directed at these problems, the authors stress the arguments derived from considerations of equal protection and due process which support a possible constitutional right to interpreters.*

Since language is the principal medium of communication in all legal proceedings, the ability to understand the language used in them is critical to the fairness of those proceedings.[1] Language problems have not often been recognized as a threat to the fair administration of justice.[2] But to a sizeable minority of the people of the United States[3] the inability to speak and understand English well has become

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1. For example, a question misunderstood by a defendant-witness "may bring forth an answer that might turn the scales from innocence to guilt or from guilt to innocence. Then too, the answer given might be made in words not entirely familiar or understood by the defendant." State v. Vasquez, 101 Utah 444, 450, 121 P.2d 903, 905 (1942).

2. Increasingly, however, commentators as well as courts are recognizing the problems faced by the non-English-speaking defendant. The authors found two articles particularly useful: Morris, *The Sixth Amendment's Right of Confrontation and the Non-English Speaking Accused*, 41 FLA. B.J. 475 (1967); Comment, *The Right to an Interpreter*, 25 RUTGERS L. REV. 145 (1970-71). For discussions of recent cases on the right to an interpreter, see Note, *Criminal Law: Right to Interpreter is Waived Where Defendant or Counsel Fail to Act Overtly to Inform Court of Defendant's Inability to Understand English*, 37 BROOKLYN L. REV. 201 (1970-71); Note, *Constitutional Law: Translators: Mandatory for Due Process*, 2 CONN. L. REV. 163 (1969); Note, *Criminal Law: Confrontation—Right to Translator*, 46 ST. JOHNS L. REV. 469 (1972); Annot., 36 A.L.R.3d 276 (1971).

3. Census statistics indicate that as many as 22.1 million persons in the United States have poor English language skills. This figure represents the total of foreign-born persons claiming a non-English first language (7.9 million persons) and native-born of foreign or mixed parentage (14.2 million persons). Comment, *"Citado A Comparecer": Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?*, 61 CALIF. L. REV. 1395, 1399 & n.41 (1973), *citing Mother Tongue of the*

a source of frustration and injustice.[4]

One way of alleviating some of the frustration and injustice felt by those who do not speak and understand English is the use of interpreters in criminal trials. Interpreters may play three different roles in criminal proceedings: (1) They make the questioning of a non-English-speaking witness possible; (2) they facilitate the non-English-speaking defendant's understanding of the colloquy between the attorneys, the witness, and the judge; and (3) they enable the non-English-speaking defendant and his English-speaking attorney to communicate. In this Comment an interpreter performing the first service will be called a "witness interpreter," one performing the second service, a "proceedings interpreter," and one performing the third service, a "defense intepreter."

Most courts have been reluctant to provide interpreters for defendants. Some have held that failure to request an interpreter constitutes waiver of the right.[5] Others have denied interpreters after a perfunctory examination of the defendant's English showed only a minimal ability to understand the proceedings.[6] Longtime citizens are often

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*Population by Nativity, Parentage, and Race: 1970*, in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, UNITED STATES SUMMARY, DETAILED CHARACTERISTICS, PC-(1)-D1 599, table 193 (1973).

Inability to speak English is especially common in low-income, ethnic neighborhoods. One report, for example, indicates that the inability to communicate in English is most common in poor Mexican-American neighborhoods. L. GREBLER, J. MOORE & R. GUZMAN, THE MEXICAN AMERICAN PEOPLE 84, Table 18-1 (1970).

4. For an excellent description of the language-related problems faced by non-English-speaking Mexican Americans see U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970). The Commission found that:

> Interpreters are not readily available in many Southwestern courtrooms; (a) when interpreters were made available, they are often untrained and unqualified; (b) in the higher courts, where qualified interpreters were more readily available, there has been criticism of the standards of their selection and training and skills.

*Id.* at 89. The report described the indifference of judges to problems faced by non-English-speaking Mexican American defendants:

> Many lawyers stated that the language problem puts some Mexican Americans to significant disadvantage in criminal cases. Courts often assume that a defendant who can "get along" in English can understand the charges against him and the proceedings in court. A number of people stated that many judges in the Southwest do not realize the extent of language limitation among Mexican Americans and are unaware of the extent to which it interferes with their ability to defend themselves.

*Id.* at 69.

5. *See* cases cited at note 110 *infra*.

6. *See* People v. Annett, 251 Cal. App. 2d 858, 59 Cal. Rptr. 888 (2d Dist. 1967), *cert. denied*, 390 U.S. 1029 (1968) (monosyllabic "yes" responses to 11 questions demonstrated a sufficient ability to speak and understand English); *In re* Muraviov, 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (2d Dist. 1961) (per curiam) ("yes" and "no" to four questions sufficient); People v. Ayala, 89 Ill. App. 2d 393, 233 N.E.2d 80 (1st Dist. 1967) (interpreter denied on basis of defendant's testimony at trial). *See also*

presumed to understand English despite some indication to the contrary.[7] Furthermore, appellate courts have almost invariably rejected claims of language incompetency either by deferring to the trial court or by finding sufficient understanding of English after examining the trial transcript.[8]

When interpreters have been appointed, their functions have been defined narrowly. Although many courts have statutory authority to appoint an interpreter for witnesses, including the defendant if he testifies,[9] the statutes consider neither proceedings nor defense interpreters. A few courts have granted the non-English-speaking indigent defendant a court-appointed and court-compensated proceedings interpreter,[10] but a possible right to a defense interpreter to translate the

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Perovich v. United States, 205 U.S. 86 (1907); Saurez v. United States, 309 F.2d 709 (5th Cir. 1962); People v. Lopez, 21 Cal. App. 188, 131 P. 104 (2d Dist. 1913).

7. *E.g.*, Suarez v. United States, 309 F.2d 709 (5th Cir. 1962) (30 years); Gonzalez v. People, 109 F.2d 215 (3d Cir. 1940) (eight years); State v. Karumai, 101 Utah 592, 126 P.2d 1047 (1942) (20 years).

8. *Compare* United States v. Barrios, 457 F.2d 680 (9th Cir. 1972); United States v. Sosa, 379 F.2d 525 (7th Cir.), *cert. denied*, 389 U.S. 845 (1967); Cervantes v. Cox, 350 F.2d 855 (10th Cir. 1965); Gonzalez v. People, 109 F.2d 215 (3d Cir. 1940), *with In re* Muraviov, 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (2d Dist. 1961) (per curiam).

9. Twenty-four states make some provision for the appointment of interpreters: Alabama, Arizona, California, Hawaii, Indiana, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, New Mexico (constitutional provision), North Dakota, Oregon, South Dakota, Texas, Utah, Vermont, Wyoming, and Wisconsin. Most state statutes empower the courts to appoint an interpreter whenever the judge believes one necessary; but they typically provide only for the appointment of an interpreter to aid a witness's testimony. Michigan, Wisconsin, New Jersey, and New Mexico, however, permit the appointment of an interpreter any time the defendant does not comprehend the proceeding. For example, Michigan's statute provides:

> If any person is accused of any crime or misdemeanor and is about to be examined or tried before any justice of the peace, magistrate or judge of a court of record and it appears to the . . . judge that such a person *is incapable of adequately understanding the charge or presenting his defense thereto because of lack of ability to understand or speak the English language* . . . the . . . judge *shall* appoint a qualified person to act as an interpreter.

MICH. COMP. LAWS ANN. § 775.192 (emphasis added).

> Article 2, section 14 of the New Mexico Constitution provides:
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> In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him *in language that he understands*. . . .

N.M. CONST. art. 2, § 14 (emphasis added). *But cf.* People v. Lopez, 21 Cal. App. 188, 190, 131 P. 104, 105 (1913) (court required to appoint an interpreter in those cases only where the witness does not understand or speak the English language), *citing* CAL. EVID. CODE § 752(a) (1965).

10. *See* State v. Natividad, — Ariz. —, 526 P.2d 730 (1974). In *Natividad* the non-English-speaking indigent defendant was not informed of his right to an interpreter during interrogation (although the interrogation was conducted in Spanish, his native language). No interpreters were provided at the preliminary hearing, and none was

discussions between the defendant and his attorney prior to and during trial has been ignored.[11]

Focusing on the functions of proceedings interpreters and defense interpreters, we will argne that the requirements of equal protection and due process mandate a constitutional right to interpreters performing these tasks for non-English-speaking defendants. In addition, we will consider the adequacy of recent statutory responses to the problem of the non-English-speaking defendant. Finally, we will discuss the often unrecognized importance of the defense interpreter and the possible alternative of the bilingual attorney.

## I

## EQUAL PROTECTION AND LINGUISTIC MINORITIES[12]

A state violates the equal protection clause when it creates invidious classifications.[13] Governmental action inevitably results in unequal burdens or benefits,[14] so an equal protection claim must demonstrate that the effects of a particular classification fall with unjustifiable harshness on similarly situated groups.[15] The standard for determining the

available during either pre-trial proceedings or attorney-client conferences. The court likened the defendant's position to that of a person forced to observe the proceedings from a soundproof booth in the back of the courtroom, and remanded the case to the trial court for a determination of the defendant's ability to speak English.

11. *E.g.*, United States v. Desist, 384 F.2d 889, 902 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1968) (no absolute right to interpreter); Cervantes v. Cox, 350 F.2d 855 (10th Cir. 1965) (same); Viliborghi v. State, 45 Ariz. 275, 283, 43 P.2d 210, 214 (1935) (same).

12. The frustrations suffered by non-English-speaking defendants are part of a larger problem of discrimination against linguistic minorities in the United States. Equal protection arguments have been used, with mixed success, as a basis for striking down discrimination based on language. *Compare* Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970) (the California Supreme Court struck down as a violation of equal protection a state constitutional provision conditioning the right to vote upon ability to speak English); Lau v. Nichols, 414 U.S. 563 (1974) (Title VI of the Civil Rights Act of 1964 requires school districts to provide English language training programs for non-English-speaking school children); Serna v. Portales Municipal School Dist., 499 F.2d 1147 (10th Cir. 1974) (same), *with* Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (welfare recipients who spoke only Spanish argued unsuccessfully that welfare termination notices must be printed in Spanish); *and* Guerrero v. Carlson, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied*, 414 U.S. 1137 (1974) (persons who spoke only Spanish not denied due process of law where state did not provide Spanish-speaking interviewers, notices in Spanish and other communications in Spanish regarding claims for unemployment insurance).

13. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 353-65 [hereinafter cited as Tussman & tenBroek].

14. *See generally* Tussman & tenBroek, *supra* note 13, at 343; *Developments in in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969) [hereinafter cited as *Equal Protection*].

15. Tussman & tenBroek, *supra* note 13, at 344.

legitimacy of a given classification varies; it becomes stricter when the classifying principle is membership in certain groups which have been historically discriminated against[16] or when the classification is framed so that it infringes upon rights which have been recognized to be fundamental.[17] The remainder of this section examines the applicability of the equal protection analysis to language-based discrimination resulting from rules requiring court proceedings to be conducted in English, and then considers whether a state's failure to supply an interpreter to a non-English-speaking indigent defendant violates any of the recognized tests of equal protection.

### *A. Discriminatory State Action*

When a non-English-speaking indigent defendant is denied an interpreter it would seem undeniable that discriminatory state action exists.[18] The state requires that English be used in its courts, thus placing a burden on those unable to speak English, and then institutes a criminal prosecution, which further subjects non-English-speaking persons to the burden of the rule. Nevertheless, states continue to argue that *de facto* discrimination is too tenuous a thread by which to link the state to the harm. For example, in *Lau v. Nichols*[19] a school district contended that discrimination against Chinese-speaking students in classes taught in English "is not the result of laws enacted by the state presently or historically, but the result of deficiencies created by the applicants themselves in failing to learn the English language."[20] What the school district failed to realize, however, is that state action is not abrogated merely because the characteristic according to which the classification is drawn, language disability, is remediable by the victim of the discrimination.[21] Indeed, state action can be present when unequals like English-speaking and non-English-speaking indigent defendants, are treated the same. As Justice Frankfurter said in *Dennis*

16. See note 27 *infra.*

17. See note 28 *infra.*

18. Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970). *See generally* Abernathy, *Expansion of the State Action Concept under the Fourteenth Amendment*, 43 CORNELL L. REV. 375 (1958); Black, *The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Note, *The Constitutional Right of Bilingual Children to an Equal Equal Opportunity*, 47 S. CAL. L. REV. 943, 972-73 (1974).

19. 483 F.2d 791 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

20. 483 F.2d at 799.

21. *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969) (out of state residency); Griffin v. Illinois, 351 U.S. 12 (1956) (poverty of criminal defendant); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (alienage). While language disability may be remediable, once a defendant is arrested he has little time to learn English without sacrificing his right to a speedy trial.

*v. United States*, "[T]here is no greater inequality than the equal treatment of unequals."[22]

### *B. Applicable Standards of Review*

Assuming the existence of state action and discriminatory classification, the court must decide what standard to apply in reviewing the permissibility of the classification. There are three recognized standards of review: (1) the reasonableness test; (2) the strict scrutiny test; and (3) the intensified means scrutiny test.[23]

#### 1. *Reasonableness*

The Warren Court adhered rather closely to a two-tiered model of equal protection,[24] one level of which was the reasonableness test. In applying the reasonableness or "rational relationship" test, the Court upheld a classification if any conceivable state interest could support such a rule,[25] which made it possible for the Court to speculate as to what rational interests could support the classification.

If the courts choose to apply the reasonableness test to the question of interpreters for non-English-speaking defendants, the state can always advance sufficient interests to justify denial of an interpreter. For example, requiring that interpreters be furnished might result in suspension of the proceedings until a defendant's language disability is determined and interpreters are secured. When the defendant only understands a rare language, and the trial is held in an area where multilingual experts may be few, the delay could be lengthy and costly. In addition, the use of English in court proceedings may encourage the learning of English, which would arguably facilitate commerce and result in a more aware and knowledgeable citizenry.

#### 2. *Strict Scrutiny*

The other level of the equal protection model used by the Warren Court was strict scrutiny.[26] Under this test, when lines are drawn which impose a burden upon a group distinguished by a suspect classifi-

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22. Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting).

23. For a description of the reasonableness test and the strict scrutiny test see *Equal Protection, supra* note 14, at 1077-1132. For a discussion of the new "intensified means scrutiny" test see Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

24. Gunther, *supra* note 23, at 8.

25. *Equal Protection, supra* note 14, at 1083.

26. Gunther, *supra* note 23, at 8.

cation,[27] or which touch upon fundamental interests,[28] the state must justify the classifications by showing that they are necessary in order to further compelling interests.[29] The interests advanced by the states have seldom been found to warrant the harm done.[30]

Denial of an interpreter to a non-English-speaking defendant arguably involves both an infringement of fundamental rights and a use of a suspect classification, thus requiring the application of the strict scrutiny test. The alleged discrimination infringes on non-English-speaking indigent defendant's sixth amendment right to counsel,[31] while the communication barrier between the defendant and his counsel severely restricts the defendant's right to confrontation.[32] Both the right to

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27. Certain classifications which have historically been the targets of discrimination are suspect. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national origin); *see Equal Protection, supra* note 14, at 1088.

28. The number of interests deemed fundamental has remained modest. Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Loving v. Virginia, 388 U.S. 1 (1967) (right to make personal decision relating to procreation); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (rights of criminal defendants); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation). Plausible candidates for the status have been rejected. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1972) (education not fundamental interest); Lindsey v. Normet, 405 U.S. 56 (1972) (housing not fundamental interest). *See also* Gunther, *supra* note 23, at 13. According to Professor Gunther the Court is unlikely to expand the number of fundamental interests in the future. *Id.* at 24. Indeed, attempts to expand the number of fundamental interests might backfire. *Id.* at 10.

29. *E.g.*, Sugarman & Widess, *Equal Protection for Non-English-Speaking School Children: Lau v. Nichols*, 62 CALIF. L. REV. 157, 163 (1974) (citations omitted):

> Since 1954, at least, the United States Supreme Court has taken the position that when the state rule is explicitly based upon race, as when it treats Blacks and whites differently by assigning them to separate schools, or when a candidate's race is made to appear on the ballot, or when a special hurdle—voter rather than just legislative approval—is placed in front of open-occupancy ordinances, then the rule is to be strictly scrutinized by the judiciary. The Court seems to have concluded that since our experience indicates that rules dealing with race often serve invidious racial purposes, and different treatment of Blacks usually means inferior treatment, the state must justify its action with a showing that it is necessary to the furtherance of a compelling state interest.

*See also* Dunn v. Blumstein, 405 U.S. 330 (1972); Loving v. Virginia, 388 U.S. 1 (1967).

30. *Id.*, at 163. *But see* Lee v. Washington, 390 U.S. 333 (1968) (per curiam); Korematsu v. United States, 323 U.S. 214 (1944).

31. The sixth amendment provides:

> 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 defence.

U.S. CONST. amend. VI. *See* Powell v. Alabama, 287 U.S. 45 (1932); notes 97-103 *infra* and accompanying text.

32. See notes 83-84 *infra* and accompanying text.

confrontation[33] and the right to counsel[34] have been identified as fundamental rights under the due process clause, and rights fundamental to due process are also fundamental to an equal protection analysis.[35]

The rules requiring that court proceedings be in English, and withholding a right to a defense interpreter, also discriminate by creating a suspect classification.[36] Language, like physiological characteristics, is closely related to national origin.[37] Since English is the national language of the United States, probably all those who do not speak English were either foreign-born or were born in the United States to foreign-born parents.[38]

The Supreme Court's decision in *Lau v. Nichols*[39] may validate the link between language discrimination and national origin discrimination. While the decision is based on section 601 of the Civil Rights Act of 1964 and guidelines promulgated thereunder, the Court upheld a finding that national origin or race discrimination existed when Chinese-speaking children were forced to attend classes taught only in English.[40] Since the purpose of section 601 is to implement the fourteenth amendment's prohibition against discrimination because of race or national origin,[41] language discrimination which constitutes national origin discrimination under section 601 should also constitute national origin discrimination under the equal protection clause.[42]

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33. Kirby v. United States, 174 U.S. 47, 56 (1898) (United States Constitution deems the right of confrontation essential for the protection of life and liberty).

34. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

35. *Equal Protection, supra* note 14, at 1130.

36. Michelman, *The Supreme Court, 1968 Term, Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20 (1969).

37. Non-English-speaking indigent defendants are also discriminated against on the basis of wealth, since the rules requiring court proceedings to be conducted in English only hurt those non-English-speaking defendants who cannot afford to hire an interpreter. Despite strong dicta in Griffin v. Illinois, 351 U.S. 12, 19 (1956), wealth has not been held to be a suspect classification. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 15-29 (1973); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Nevertheless the Court has been zealous in striking down wealth-related barriers to such fundamental rights as voting or criminal appeals. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Douglas v. California, 372 U.S. 353 (1963) (criminal appeals); Griffin v. Illinois, 351 U.S. 12 (1956) (same). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel).

38. Petitioner's Brief for Certiorari at 13, Lau v. Nichols, 414 U.S. 563 (1974).

39. 414 U.S. 563 (1974).

40. *Id.* at 567-68.

41. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

42. The Court in *Lau* may have simply deferred to the determination of Congress, or to an executive agency acting pursuant to congressional authorization, that regulation of language discrimination is necessary to enforce the fourteenth amendment. If so, the Court may not find the relationship between language and national origin to be so compelling as to equate the two in areas in which Congress has not determined that regula-

When a challenged practice or statute is founded on a suspect classification and impinges upon a fundamental interest, the United States Supreme Court usually applies the strict scrutiny standard.[43] The Court's avoidance of equal protection analysis in *Lau v. Nichols*,[44] however, creates uncertainty as to how language discrimination cases will be analyzed.[45] The equal protection argument for the non-English-speaking indigent defendant, however, is stronger than that of the petitioners in *Lau* who were denied equal access to education. The effective assistance of counsel,[46] unlike education,[47] is a fundamental interest for equal protection purposes.

Moreover, it is not necessarily true that discrimination resulting from inaction or "thoughtlessness" causes less damage than action resulting from invidious intent. As Professor Black stated:

> Inaction, rather obviously, is the classic and the most efficient way of "denying equal protection;" the denial of justice, "in international law, includes the failure to act." When a racial minority is struggling to escape drowning in the isolation and squalor of slum ghetto residence, everywhere across the country, I do not see why the refusal to throw a life-preserver does not amount to a denial of protection.[48]

Few state interests are compelling enough to meet the strict scrutiny

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tion of language discrimination is necessary. In addition, section 601, as construed by HEW, may represent an exercise of Congress' power over interstate commerce.

Furthermore, teaching English to linguistically deprived children increases the ability of such children to become fully functioning participants in the economy. Thus, *Lau* may also be construed as upholding a congressional allocation of federal disbursements unrelated to equal protection.

43. *See Equal Protection, supra* note 14, at 1088.

44. 414 U.S. 563 (1974).

45. Sugarman and Widess suggest that the avoidance of equal protection analysis in *Lau* and similar cases may be due to concern that a "plausible non-invidious explanation" exists. Sugarman & Widess, *supra* note 29. However, not only is there some evidence that language statutes were passed to exclude foreigners in Castro v. State, 2 Cal. 3d 223, 230-31, 466 P.2d 244, 248-49, 85 Cal. Rptr. 20, 24-25 nn.11-14 (1970), but courts have held that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968); Norwalk CORE v. Norwalk Redevel. Agency, 395 F.2d 920, 931 (2d Cir. 1968). Another factor which may have influenced the Court in *Lau* was the large number of linguistically disadvantaged students in the school system. *See* 414 U.S. at 572 (Burger, C.J., concurring). The court of appeals in Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974), indicated that it would not order remedial action if only a few students were linquistically deprived. *Id.* at 1154. Thus, the Court may require courts to provide remedial aid only when non-English-speaking persons comprise a large percentage of the population of the judicial district.

46. See note 34 *supra* and text accompanying note 99 *infra*.

47. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1973).

48. Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 73 (1967).

standard;[49] certainly none exist to justify language discrimination against indigent defendants. Neither the state's interest in maintaining a single national language,[50] nor its interest in the economy and efficiency of court proceedings[51] is sufficiently compelling to justify discrimination against those who have not conformed to the dominant language.[52]

3. *Intensified Means Scrutiny*

Even if the Supreme Court determines that the strict scrutiny test is inapplicable to the denial of an interpreter to non-English-speaking indigent defendants, it may find that the denial violates constitutional standards of equal protection.[53] Under the intensified means scrutiny envisioned by Professor Gunther as an emerging standard for equal protection review,[54] the Court would avoid substantive judgments on the validity of legislative ends and focus on whether the means selected to achieve the objectives were reasonable.[55]

Although the state might claim that its interest in promoting the learning and use of English would be advanced by denying the existence of any right of non-English-speaking indigent defendants to an interpreter, it can hardly be argued that possible conviction and imprisonment is an appropriate sanction for failure to learn English. Furthermore, rules requiring court proceedings to be conducted in English probably do little to encourage the learning of English. Affluent non-English-speaking persons can simply hire their own interpreters, while few non-English-speaking indigents are likely to learn English on the remote chance that they will be required to go to court to protect their liberty. Denying interpreters as a means of compelling persons to learn English is as sensible as arguing that throwing a child into the deep end of a pool is a means of teaching him to swim.

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49. Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); *see Equal Protection, supra* note 14, at 1090.

50. Castro v. State, 2 Cal. 3d 223, 242, 466 P.2d 244, 258, 85 Cal. Rptr. 20, 34 (1970) (state interest in maintaining a single language substantial). *See* Meyer v. Nebraska, 262 U.S. 390, 412 (1923) (Holmes, J., dissenting) (common tongue desirable).

51. See notes 56-72 *infra* and accompanying text.

52. See text accompanying notes 70-72 *infra*.

53. Some members of the Supreme Court are dissatifisfied with the two-tiered model. *See* Gunther, *supra* note 23, at 17-18. As an improvement, Professor Gunther has suggested the "intensified means scrutiny" test. This approach, however, is not intended to completely abolish the strict scrutiny test.

> The intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry.

Gunther, *supra* note 23, at 24.

54. *Id.*

55. *Id.* at 44.

The state could also argue that requiring an interpreter for non-English-speaking indigent defendants would create serious economic and administrative problems since the court would have to hold a hearing to determine the defendant's indigency and need for an interpreter whenever there was a claim of linguistic deficiency and poverty.[56] If the claim were upheld, further proceedings would have to be postponed until interpreters were located and appointed, and interpreters might prove to be costly.[57] But the burden to the state should not be insurmountable. Hearings on indigency and language deficiency, for example, could be held and quickly disposed of before trial, thereby eliminating any need to interrupt the trial. Moreover, interpreters might facilitate the conduct of judicial business. Without an interpreter, defendant's counsel might be forced to request recesses frequently in order to work out communications problems with the defendant.

Indeed the Supreme Court has not found administrative and financial burdens to be determinative. It has held on equal protection grounds that indigent defendants are entitled to appointed counsel on their first appeal of a conviction,[58] to waiver of filing fees on appeal,[59] to free trial transcripts when necessary for access to appellate review[60] or when necessary to present an effective argument on appeal,[61] to free transcripts of *coram nobis*[62] or *habeas corpus*[63] hearings in order to appeal therefrom or to prepare for a de novo hearing,[64] and to a free transcript of a preliminary hearing to prepare for trial.[65] In addition, the Court has established a right to appointed counsel at the trial court level on due process grounds.[66] In each instance, the Court has seemed unimpressed by the interests asserted by the state. For example, it has frustrated attempts by the states to limit the right to a free transcript to non-frivolous appeals.[67] Perhaps the clearest display

56. See note 117 *infra* and accompanying text.

57. When the defendant understands only a rare language, translators might be especially expensive and difficult to locate. Such cases should occur infrequently, however, so the overall burden to the state would be slight.

58. Douglas v. California, 372 U.S. 353 (1963).

59. Smith v. Bennett, 365 U.S. 708 (1961) (appeal from habeas corpus hearing); Burns v. Ohio, 360 U.S. 252 (1959) (appeal from trial).

60. Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956).

61. Mayer v. Chicago, 404 U.S. 189 (1971); *see* Gardner v. California, 393 U.S. 367 (1969) (appeal from habeas corpus); Long v. District Court, 385 U.S. 192 (1966) (same).

62. Lane v. Brown, 372 U.S. 477 (1963).

63. Long v. District Court, 385 U.S. 192 (1966).

64. Gardner v. California, 393 U.S. 367 (1969).

65. Roberts v. LaVallee, 389 U.S. 40 (1967).

66. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

67. Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477

of the Court's view of the balance occurred in *Mayer v. Chicago*.[68] In *Mayer* the city argued that its fiscal and other interests outweighed the defendant's interest in a free trial transcript for his appeal when the only punishment facing the defendant was a fine. The Court rejected the argument:

> *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. *The State's fiscal interest is, therefore, irrelevant.*[69]

The Court's rejection of state administrative and fiscal interests in wealth discrimination cases indicates that such interests are unlikely to support the denial of interpreters under the intensified means scrutiny test. It is almost certain that state administrative and fiscal interests do not satisfy the strict scrutiny test.[70] The case for the non-English-speaking indigent defendants is stronger than the case for the defendants in the *Griffin* line of cases which struck down wealth barriers to appellate review. In the *Griffin* line of cases, the rights of indigent defendants to pursue a meaningful appeal were won despite the lack of a constitutional right to appeal.[71] For the non-English-speaking defendant, however, the right to a defense interpreter is essential to the constitutional right to effective counsel. Moreover, the case for the non-English-speaking defendant is strengthened because discrimination against such persons is substantially equivalent to national origin discrimination, a suspect classification.[72]

## II

## DUE PROCESS

A due process approach to the problem of a possible constitutional

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(1963); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958).

68. 404 U.S. 189 (1971).

69. *Id.* at 196-97 (emphasis added).

70. *See* Carrington v. Rash, 380 U.S. 89, 96 (1964). In Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970), the state argued that providing Spanish language ballots would involve prohibitive costs. The court, however, stated:

> Avoidance or recoupment of administrative costs, while a valid state concern, cannot justify imposition of an otherwise improper classification, especially when, as here, it touches on "matters close to the core of our constitutional system."

*Id.* at 242, 466 P.2d at 257, 85 Cal. Rptr. at 33.

71. Griffin v. Illinois, 351 U.S. 12, 18 (1956).

72. See notes 36-46 *supra* and accompanying text.

right to an interpreter affords a significant advantage over an equal protection approach. Except when appointment of counsel is involved,[73] trial courts are generally given wide discretion in determining whether in the particular circumstances of the case the complaining party was sufficiently deprived of a right to warrant relief. By contrast, the equal protection analysis focuses on the unequal imposition of burdens on different classes, based upon evaluations of rational basis, compelling interests, or reasonableness of the classification.

### *A. A Right to Confrontation*[74]

#### *1. Current Status of the Right*

A defendant's right to confront witnesses testifying against him is guaranteed by the sixth amendment and is a fundamental element of due process.[75] The right to confrontation includes the right to cross-examination.[76] Adequate cross-examination requires that the defendant be able to understand the testimony of the witnesses and to communicate with counsel,[77] because unless the defendant can identify testimony which should be challenged, his right to cross-examination is substantially impaired.

The right to confrontation has been frequently raised by defendants claiming a right to a proceedings interpreter.[78] Early cases held that the non-English-speaking defendant's right to confrontation was not abridged even though the defendant understood neither the witnesses nor his own attorney. For example, in *Luera v. State*,[79] *Zunago*

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73. *E.g.*, United States *ex rel.* Negron v. New York, 310 F. Supp. 1304 (E.D.N.Y.), *aff'd*, 434 F.2d 386 (2d Cir. 1970). *See* Escobar v. State, 30 Ariz. 159, 245 P. 356 (1926); Garcia v. State, 151 Tex. Crim. 593, 210 S.W.2d 574 (1948); Zunago v. State, 63 Tex. Crim. 58, 138 S.W. 713 (1911); State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942); Morris, *supra* note 2.

74. The non-English-speaking defendant's right of confrontation has been discussed in Morris, *supra* note 2; Note, *The Right to an Interpreter*, 25 RUTGERS L. REV. 145 (1970).

75. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

76. Pointer v. Texas, 380 U.S. 400 (1965). *See* Kirby v. United States, 174 U.S. 47 (1898). Wignore said:

> [T]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940) (emphasis in original). *See also* Morris, *supra* note 2.

77. *Cf.* cases cited in note 91 *infra.*

78. *See* cases cited in note 110 *infra.*

79. 124 Tex. Crim. 507, 63 S.W.2d 699 (1933).

*v. State*,[80] and *Escobar v. State*,[81] defendants who understood only Spanish argued that their right to confrontation was denied because they did not comprehend the testimony of the prosecution's English-speaking witnesses. The court in each case held that the right was satisfied if the defendant's *counsel* understood English, even though he did not speak Spanish and could not effectively act as the defendant's agent in the cross-examination.[82]

In *United States ex rel. Negron v. New York*,[83] however, a Court finally recognized the possible impact of the absence of an interpreter on a defendant's right to confrontation. Judge Bartels forcefully stated that it was the trial court's duty to inform the non-English-speaking defendant of the availability of an interpreter. Without a proceedings interpreter the defendant's right of confrontation was abridged:

> In order to afford Negron his right to confrontation, it was necessary under the circumstances that he be provided with a simultaneous translation of what was being said for the purpose of communicating with his attorney to enable the latter to effectively cross-examine those English-speaking witnesses to test their credibility, their memory and their accuracy of observation in the light of Negron's version of the facts.[84]

Denial of the right to confrontation has also been found in other situations where the defendants did not have the ability to communicate effectively with their attorneys. In *Terry v. State*,[85] for example, the trial court refused an indigent deaf-mute's request for an interpreter from the court. The Alabama Supreme Court reversed, holding that the right requires not only that the defendant be able to face witnesses against him, but also that he be provided with the means to understand their testimony.[86]

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80. 63 Tex. Crim. 58, 138 S.W. 713 (1911).

81. 30 Ariz. 159, 245 P. 356 (1926).

82. Escobar v. State, 30 Ariz. 159, 169, 245 P. 356, 359 (1926); Luera v. State, 124 Tex. Crim. 507, 511-12, 63 S.W.2d 699, 701 (1933); Zunago v. State, 63 Tex. Crim. 58, 69-70, 138 S.W. 713, 719-720 (1911).

83. 310 F. Supp. 1304 (E.D.N.Y.), *aff'd*, 434 F.2d 386 (2d Cir. 1970).

84. 310 F. Supp. at 1307. The court of appeals thought that denial of an interpreter was "even more consequential" than the denial of the right to confrontation, on the basis of "[c]onsiderations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice . . . ." 434 F.2d at 389.

85. 21 Ala. App. 100, 105 So. 386 (1925).

86. The court lucidly described the right to confrontation and emphasized that it involves more than physical confrontation.

> The accused must not only be *confronted* by the witnesses against him, but he must be accorded all necessary means to know and understand the testimony given by said witnesses, and must be placed in condition where he can make his plea, rebut such testimony, and give his own version of the transaction upon which the accusation is based. This the fundamental law accords, and for this the law must provide. These humane provisions must not, and cannot, be de-

### 2. *Analogy to Rules Relating to the Mentally Incompetent*

A similar inability to communicate effectively with one's attorney exists when the defendant is mentally incompetent. The Supreme Court has held that when there is an indication that a defendant is mentally incompetent, the trial court must stop the proceedings and hold a hearing to determine whether the defendant is mentally competent.[87] If the defendant is found to be mentally incompetent, his trial is postponed until he regains the ability to understand the proceedings.[88] The test of competency is whether the defendant can communicate with his counsel in the preparation of his defense,[89] and cases have stressed the capacity of the defendant to participate effectively in the defense.[90] The rationale behind the refusal to try a mentally incompetent person is not that the defendant is without knowledge of the facts of the alleged crime; rather, it is that he is unable to communicate such knowledge to counsel in order to participate effectively in his own defense.[91] The defendant's physical presence is not enough; legal presence re-

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> pendent upon the ability, financial or otherwise, of the accused, as here appears. The constitutional right . . . would be meaningless and a vain and useless provision unless the testimony of the witnesses against him could be understood by the accused. Mere confrontation of the witnesses would be useless, bordering upon the farcical, if the accused could not hear or understand their testimony.

21 Ala. App. at 101-02, 105 So. at 387. *See also* United States *ex rel.* Smith v. Baldi, 192 F.2d 540, 559 (3d Cir. 1951) (dissenting opinion), *aff'd*, 344 U.S. 561 (1953).

87. Pate v. Robinson, 383 U.S. 375 (1966). California has a similar requirement. People v. Pennington, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967).

88. Pate v. Robinson, 383 U.S. 375 (1966); People v. Beivelman, 70 Cal. 2d 60, 447 P.2d 913, 73 Cal. Rptr. 521 (1968); People v. Laudermilk, 67 Cal. 2d 272, 431 P.2d 228, 61 Cal. Rptr. 644 (1967); People v. Pennington, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967).

89. In Dusky v. United States, 362 U.S. 402 (1960) (per curiam) the court stated the test as follows:

> [I]t is not enough for the district judge to find "the defendant [is] oriented to time and place and has some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has rational as well as factual understanding of the proceedings against him."

*Id.* at 402.

90. *E.g.*, Dusky v. United States, 362 U.S. 402 (1960) (per curiam); United States v. Horowitz, 360 F. Supp. 772 (E.D. Pa. 1973); United States v. Sermon, 228 F. Supp. 972, 978 (W.D. Mo. 1964).

91. Dusky v. United States, 362 U.S. 402 (1960); Pouncey v. United States, 349 F.2d 699, 701 (D.C. Cir. 1965) ("intellectual and emotional capacity of the accused to perform the functions which are essential to the fairness and accuracy of a criminal proceeding"); United States v. Horowitz, 360 F. Supp. 772, 777 (E.D. Pa. 1973) ("whether or not the mental abilities which are necessary to the construction and presentation of his defense are impaired"); United States v. Sermon, 228 F. Supp. 972, 978 (W.D. Mo. 1964) ("unless he can advise his counsel concerning the facts of the case as known to him and unless, if necessary, he can testify in his own behalf . . . concerning those facts").

quires that the defendant comprehend the proceedings and be able to communicate.[92]

The situation of the non-English-speaking defendant is comparable to that of the mentally incompetent defendant. For example, the non-English-speaking defendant who has only a limited ability to participate in the cross-examination of witnesses[93] may, like the mentally incompetent defendant,[94] be incapable of participating effectively in his own case. Although both non-English-speaking and mentally incompetent defendants are unable to communicate with counsel, the judicial response to the two disabilities has been quite different.[95] In contrast to the requirement that the trial court hold a hearing whenever there is an indication that the defendant is mentally incompetent, the failure of non-English-speaking indigent defendants affirmatively to request an interpreter often has been held to be a waiver of any right to one, despite the defendant's ignorance of the availability of an interpreter.[96]

### B. *Effective Assistance of Counsel*

In *Gideon v. Wainwright*[97] and *Argersinger v. Hamlin*,[98] the Supreme Court extended the right to appointed counsel to all proceedings in which a defendant faces incarceration. The Court recognized the importance of effective counsel in *Powell v. Alabama*,[99] in which it held that the failure to give defendants the time and opportunity to secure counsel was an abridgment of their sixth amendment right to counsel.[100] *Powell* inspired a flood of post-conviction claims for relief based on allegations of inadequate representation by counsel.[101] Fearful that these claims would swamp the judiciary,[102] courts construed

92. *See* cases cited note 91 *supra*.

93. United States *ex rel.* Negron v. New York, 310 F. Supp. 1304 (E.D.N.Y.), *aff'd*, 434 F.2d 386 (2d Cir. 1970).

94. Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

95. *Compare* Cervantes v. Cox, 350 F.2d 855 (10th Cir. 1965); People v. Mammilato, 168 Cal. 207, 142 P. 58 (1914); People v. Young, 108 Cal. 8, 41 P. 281 (1895) (defendant with limited knowledge of English found to have waived right to consel); State v. Karumai, 101 Utah 592, 126 P.2d 1047 (1942), *with* cases cited note 91 *supra*.

96. *See* cases cited note 110 *infra* and accompanying text.

97. 372 U.S. 335 (1963).

98. 407 U.S. 25 (1972).

99. 287 U.S. 45 (1932).

100. *Id.* at 71.

101. *E.g.*, Carter v. Illinois, 329 U.S. 173 (1946); Foster v. Illinois, 332 U.S. 134 (1946); Canizio v. New York, 327 U.S. 87 (1945).

102. The courts were also concerned with the possibility that frequent reversals for inadequate representation would discourage lawyers from representing indigent defendants. Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 355 U.S. 850 (1958). *But see* People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

*Powell* narrowly to require only the "effective appointment" of counsel free from conflicts of interest and with sufficient time to prepare.[103]

In several cases non-English-speaking defendants were denied an interpreter because defense counsel failed to request one.[104] Three rationales may be advanced to support these cases. First, defense counsel's omission might be characterized as trial strategy or tactics.[105] Second, the defense counsel's failure to request an interpreter might be considered a waiver of the right.[106] Third, even if failure to request an interpreter is held to be error, it may be deemed harmless error unless it resulted in the preclusion of a crucial defense.[107] We contend that all three theories have been misused.

Although courts may deny relief to a non-English-speaking defendant whose attorney failed to request an interpreter on the grounds that the failure to request an interpreter was a trial tactic or strategy,[108] the doctrine that an appellate court will not make post-trial judgments with regard to defense counsel's tactical decisions should not be applied to a defense counsel's failure to assert his client's right to an interpreter because the absence of an interpreter can only hamper the defense. There is no legitimate way in which requesting an interpreter would be detrimental to the defendant's case.[109]

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In *Mitchell* the court stated that an attorney should be under no public duty to represent a defendant if he could later attack the attorney's competence. Such a rationale would seem to abrogate the duty of the attorney to represent anybody, contrary to the Canons of Ethics of the American Bar Association. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 8C ¶¶ EC 2-26 to -29 (1974).

103. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 293-94 (1964); Waltz, discussing Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 355 U.S. 850 (1958), argued:

> The [procedural requirement] expounded in *Mitchell* and allied cases ignores both the logical import and plain words of *Powell*. True, Mr. Justice Sutherland referred to the trial judge's manifest failure, "to make an effective appointment of counsel" but he made it clear in *Powell* that the evil condemned was the potential consequence: "the denial of effective and substantial aid."

Waltz, *supra*, at 293.

104. *See* cases cited note 110 *infra*.

105. *See* cases cited note 108 *infra*.

106. *See* cases cited note 110 *infra*.

107. *See* Note, *Effective Assistance of Counsel For the Indigent Defendant*, 78 HARV. L. REV. 1434, 1435 (1965); cases cited notes 108, 118-23, *infra*.

108. United States *ex rel.* Robinson v. Pate, 312 F.2d 161 (7th Cir. 1963); Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir. 1958). *See* Duarte v. Field, 297 F. Supp. 41 (C.D. Cal. 1969); Scearce v. Field, 292 F. Supp. 807 (C.D. Cal. 1968); People v. Miller, 7 Cal. 3d 562, 498 P.2d 1089, 102 Cal. Rptr. 841 (1972) (failure to assert defense of dimmished capacity characterized as a tactical choice); People v. Durham, 70 Cal. 2d 171, 192, 449 P.2d 198, 212, 74 Cal. Rptr. 262, 276, *cert. denied*, 395 U.S. 968 (1969); People v. Goodridge, 70 Cal. 2d 824, 452 P.2d 637, 76 Cal. Rptr. 421 (1969); *cf.* People v. Coogler, 71 Cal. 2d 153, 454 P.2d 686, 77 Cal. Rptr. 790 (1969), *cert. denied*, 406 U.S. 971 (1972).

109. In People v. Ramos, 26 N.Y.2d 272, 258 N.E.2d 197, 309 N.Y.S.2d 906

Even when a constitutional right to an interpreter is recognized, appellate courts have often held that the right may be waived by failure to request an interpreter.[110] The cases seem to turn more upon the trial court's belief that the defendant was not seriously handicapped by his language difficulties than upon any careful analysis of whether the mere failure to raise the issue of language disability should constitute waiver of the right.[111] The New York Court of Appeals in *People v. Ramos*,[112] held that where there was no "obvious manifestation" of the defendant's inability to speak English and the defense failed to assert that the defendant could not understand English, the court had no duty to appoint an interpreter.[113] However, *Ramos* suggests that the court might have the duty to appoint an interpreter *sua sponte* when it is clear that the defendant does not fully comprehend English.[114]

We contend that evidence of language difficulties sufficient to raise a reasonable doubt as to the defendant's ability to understand English and communicate with counsel should mandate a hearing to determine whether interpreters should be appointed.[115] For example, the fact that the defendant testified through an interpreter should be enough evidence of language disability to require a hearing, even though it would not meet the "obvious manifestation" standard of

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(1970), the court held that where defendant's counsel fails to request an interpreter it cannot later be claimed defendant was denied due process by the absence of an interpreter.

> Otherwise, it would be possible for a defendant to remain silent throughout the trial, and take a chance of a favorable verdict—failing in which, he could secure a new trial upon the ground that he did not understand the language in which the testimony was given.

*Id.* 275, 258 N.E.2d at 198, 309 N.Y.S.2d at 908 (1970).

110. Suarez v. United States, 309 F.2d 709, 712 (5th Cir. 1962); Gonzales v. Virgin Islands, 109 F.2d 215, 217 (3d Cir. 1940); People v. Estany, 210 Cal. App. 2d 609, 611, 26 Cal. Rptr. 757, 759 (2d Dist. 1962); People v. Von Mullendorf, 110 Cal. App. 2d 286, 289, 242 P.2d 403, 405 (2d Dist. 1952); People v. Ramos, 26 N.Y.2d 274, 258 N.E.2d 197, 309 N.Y.S.2d 906 (1970); People v. Hernandez, 8 N.Y.2d 345, 348, 170 N.E.2d 673, 675, 207 N.Y.S.2d 668, 671 (1960), *cert. denied*, 366 U.S. 976 (1961); Salas v. State, 385 S.W.2d 859 (Tex. Crim. App. 1965).

111. *See* cases cited note 110 *supra.*

112. 26 N.Y.2d 272, 258 N.E.2d 197, 309 N.Y.S.2d 906 (1970).

113. *See id.* at 275, 258 N.E.2d at 198, 309 N.Y.S.2d at 908.

114. *Id.* The language in *Ramos* suggests that if the court has the duty to act *sua sponte* and appoint an interpreter whenever it is obvious that the defendant does not understand English, the defendant's failure to raise the issue of an interpreter would not constitute waiver of the right. The burden on the court is the same as that imposed on the federal courts in mental incompeteney cases. *See* 18 U.S.C. § 4244 (1970).

115. *Cf.* cases cited notes 87-91 *supra* and accompanying text. Although there is no direct support for requiring an evidentary hearing to determine language ability, the First Circuit Court of Appeals asserted that whenever a trial court is aware that there may be a significaut language difficulty the court should conduct a formal examination of the need for an interpreter. United States v. Carrion, 488 F.2d 12, 15 (1st Cir. 1973) (per curiam).

*Ramos*.[116] If the trial court does not hold a hearing when the evidence before it is sufficient to compel one, the appellate court should remand for a hearing. The trial court decision should be reversed if it is determined on remand that the defendant did not speak English well enough to understand his trial and assist in his defense. A hearing to determine the defendant's ability to speak and understand English need not be elaborate. Normally the court should be able to decide whether interpreters are necessary by questioning and observing the defendant.[117] Especially when fraud is suspected, however, other testimony may be necessary to establish the extent of defendant's ability to understand and communicate in English. Although the question of a particular defendant's need for an interpreter falls largely within the trial judge's discretion, the court should not consider the scarcity or cost of competent translators.

In *People v. Ibarra*,[118] the California Supreme Court used a harmless error standard in holding that the defendant was denied the right to effective counsel where counsel's failure to prepare foreclosed the presentation of a crucial defense.[119] The harmless error principle requires that the defendant show as a matter of "demonstrable reality" that the errors alleged prejudiced the outcome of the trial.[120] The error must be discernible from the record[121] and be of such magnitude as to render the trial a "farce or sham."[122] Even constitutional errors do not automatically call for reversal.[123]

When the error alleged is a specific omission on the part of counsel the harmless error doctrine may be appropriate since an appellate court can assess the impact of a single error with reasonable ease. In

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116. 26 N.Y.2d at 275, 258 N.E.2d at 198, 309 N.Y.S.2d at 908.

117. Procedures for determining English proficiency are discussed in Note, *The Right to an Interpreter*, 25 RUTGERS L. REV. 145 (1970).

118. 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

119. *Id.* at 464, 386 P.2d at 490, 34 Cal. Rptr. at 866. *See also* Scalf v. Bennett, 408 F.2d 325 (8th Cir. 1969) ("only when the trial was a farce, or a mockery or justice, or was shocking to the conscience of the reversing court, or the purported representation was only perfunctory, in bad faith, a sham pretence or without adequate opportunity for conference and preparation"); Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947) ("extreme case"); Scearce v. Field, 292 F. Supp. 807 (C.D. Cal. 1968) (defendant failed to show that counsel was incompetent as a matter of "demonstrable reality"); People v. Floyd, 1 Cal. 3d 694, 464 P.2d 64, 83 Cal. Rptr. 608 (1970), *cert. denied*, 406 U.S. 972 (1972); People v. Durham, 70 Cal. 2d 171, 449 P.2d 198, 74 Cal. Rptr. 262, *cert. denied*, 395 U.S. 968 (1969); People v. Massie, 66 Cal. 2d 899, 428 P.2d 869, 59 Cal. Rptr. 733 (1967); People v. Reeves, 64 Cal. 2d 766, 774, 415 P.2d 35, 39, 51 Cal. Rptr. 691, 695 (1966).

120. People v. Reeves, 64 Cal. 2d 766, 774, 415 P.2d 35, 39, 51 Cal. Rptr. 691, 695 (1966).

121. *Id.*

122. Scalf v. Bennett, 408 F.2d 325 (8th Cir. 1969).

123. Chapman v. California, 386 U.S. 18, 23-24 (1967).

the case of the non-English-speaking defendant, however, the language defect pervades the entire proceeding. Not only is it difficult for the defendant, his attorney, and the appeals court to isolate discrete errors due to miscommunication, but there is a high probability that undetectable errors and misunderstanding will profoundly affect the outcome. Because the potential for harm is great and the identification of specific instances of prejudicial harm may be impossible, courts should use a per se rather than a harmless error standard. When a needed interpreter has been absent at the trial court level, the appellate court should presume that prejudicial error has resulted and should order that the non-English-speaking defendant be granted a new trial with a defense interpreter. Unfortunately, appeals by a non-English-speaking defendant on the ground that his language barrier constituted a denial of assistance of counsel are rarely successful.[124] Thus, we are confronted with the absurdity of a system which grants an attorney to the indigent defendant but refuses to provide an interpreter so he can effectively communicate with counsel.

## III

## LEGISLATIVE SOLUTIONS

Voters and their legislators have proved somewhat more sensitive to defendant's language problems than courts.[125] California voters recently granted defendants who need interpreters a state constitutional right to an interpreter throughout court proceedings.[126] Though few states give defendants a statutory *right* to an interpreter,[127] legislation pending in the United States Senate proposes that in federal judicial districts where five percent or fifty thousand of the residents, whichever is less, do not "speak or understand the English language with reasonable facility," the court must provide interpreters to indigent defendants and make interpreters available to non-indigent defendants at fixed rates.[128] In addition, when interpreters are used the proceedings

124. *See* cases cited note 110 *supra.*

125. In addition to S. 1794 in the U.S. Senate and the approval of Proposition 7 by the people of California which provide interpreters for non-English speaking defendants, the California legislature has passed a bill to protect Spanish-speaking consumers. This provision would require certain business contracts and agreements to be translated into Spanish upon the request of the purchaser. Law of September 26, 1974, ch. 1446, Section 1, to go into effect July 1, 1976, as CAL. CIVIL CODE § 1632.

126. "A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." CAL. CONST. art. 1, § 14. The words "throughout the proceedings" imply that non-English speaking indigent defendants have the right to a defense interpreter.

127. See note 9 *supra.*

128. S. 1724, 93d Cong., 1st Sess. (1973).

must be recorded verbatim so the transcript or recording will reflect the original language.[129]

This long overdue interest in the problems of non-English-speaking indigent defendants, however, is not sufficiently responsive. For example, the federal legislation provides relief only where there are large concentrations of non-English-speaking persons, which means that the right to an interpreter depends on how many non-English-speaking neighbors a person has,[130] or in the judicial district in which a defendant is brought to trial. Furthermore, the proposed federal legislation fails to specify how to determine what percentage of the residents of a judicial district do not speak English with "reasonable facility." The "reasonable facility" standard itself gives little guidance as to what level of English competence is determinative. This vague and subjective standard is likely to render the results of any survey suspect.

Another problem with the proposed federal legislation is that it fails to provide relief for non-English-speaking defendants in state courts. The federal legislation also does not indicate whether a defendant has a right to an interpreter at all stages of the proceedings. Since most criminal cases are plea-bargained and never reach trial, the failure to appoint an interpreter at the onset of prosecution is a significant omission.[131]

## IV

## THE DEFENSE INTERPRETER

Whether the courts or the legislature ultimately provide relief to the defendant disabled by inability to the speak English, the importance of a separate defense interpreter cannot be overstressed. While courts may wish to limit costs by appointing a single interpreter to translate both the court proceedings and the discussions between defendant and counsel, the use of a single translator for both purposes may prove inadequate. First, it is nearly impossible for one interpreter to translate the testimony of a witness while simultaneously translating and listening to the discussions between defendant and counsel. It is in these cir-

129. S. 1724, 93d Cong., 1st Sess. § 1827 (1973).

130. The federal rule is particularly problematic when applied to a district such as San Francisco, where more than five percent of the population speaks myriad languages.

131. Over 85 percent of convictions in the federal district courts are the result of guilty pleas or pleas of *nolo contendere*, many of which are the result of plea bargaining. McCarthy v. United States, 394 U.S. 459, 463 & n.7 (1969). *See* Santobello v. New York, 404 U.S. 257 (1971); Brady v. United States, 397 U.S. 742 (1970); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971); Comment, *Judicial Supervision over California Plea Bargaining: Regulating the Trade*, 59 CALIF. L. REV. 962 (1971).

cumstances that a defense interpreter is most needed to ensure adequate representation by the defendant's counsel. Second, it is difficult for an interpreter who has worked closely with the defendant and his counsel in the preparation of the defense from the pretrial stage to translate the court proceedings impartially.[132] Finally, a separate defense interpreter would serve to ensure the accuracy of the proceedings and witness interpreters.[133]

An alternative to the defense interpreter is the bilingual attorney, who speaks the defendant's language as well as English.[134] Appointment of bilingual counsel does not abrogate the need for a proceedings interpreter, however, since without the proceedings interpreter, the bilingual attorney is in the undesirable position of translating the proceedings to the defendant while at the same time attempting to formulate and discuss strategy and tactics. Even if a bilingual attorney were available, it is unclear whether a defendant would have a right to his services. The California Supreme Court in *Drumgo v. Superior Court*,[135] held that an indigent defendant does not have a constitutional right to appointment of the attorney of his choice so long as the court's choice is not an abuse of discretion. But where a competent, bilingual

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132. Since the interpreter is privy to attorney-client communications, his knowledge is protected by the attorney-client privilege. Annot., 139 A.L.R. 1252 (1942); Annot., 53 A.L.R. 370 (1927).

133. *See generally* Lujan v. United States, 209 F.2d 190 (10th Cir. 1953). In *Lujan* the defendant objected to the use of a witness interpreter who was related to the witness. The trial court's overruling of the objection was sustained on appeal because the defendant had his own interpreter who could assess the accuracy the witness interpreter. *See* United States v. Guerra, 334 F.2d 138 (2d Cir. 1964); People v. Mendes, 35 Cal. 2d 537, 219 P.2d 1 (1950).

134. The Civil Rights Commission has discovered, however, that public defender offices in communities which have a large number of non-English-speaking people are ill-equipped to deal with language problems:

> The public defender for Los Angeles County stated that he was authorized 235 lawyers, but could only think of one Spanish-surnamed lawyer and a dozen Spanish-speaking lawyers who were employed by his office. . . . An attorney in Phoenix was critical of the public defender's office in his community because it did not have any Mexican American attorneys on its staff, nor any attorneys who could speak or understand Spanish. . . . A similar situation was said to exist in the public defender's office in Denver. At the time the director was interviewed by a Commission staff member, nine lawyers, three investigators, and four clerical workers were on his staff. None of the attorneys was Mexican American and none spoke Spanish.

U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 69 (1970). Lacking Spanish-speaking attorneys, these public defender offices were forced to rely on bilingual clerks or secretaries. The quality of such translation was frequently low. *Id.* at 69. In Los Angeles, "When a defendant represented by [the public defender's office] is in custody the non-Spanish-speaking attorneys use a trustee [another prisoner] at the jail to interpret during interviews and trial preparation." *Id.*

135. 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973), *noted in* 62 CALIF. L. REV. 512, 519 (1974).

attorney is available for appointment, the court's refusal to appoint him to represent a non-English-speaking indigent may constitute abuse of discretion, particularly if interpreters are not subsequently appointed to aid counsel.

## CONCLUSION

Courts have displayed an unwarranted insensitivity to the plight of non-English-speaking defendants. The criminal process is particularly terrifying to the defendant who, because of an inability to speak English, is unable to communicate with the court or his counsel and unable to understand the testimony presented against him. Moreover, without the aid of an interpreter, the probability of error prejudicial to the defendant is great and the likelihood of the detection of such error low.

The attack on this problem must be two-fold. The courts should establish that non-English-speaking defendants have a constitutional right to an interpreter. The fundamental guarantees of due process, in the form of the rights to confrontation and counsel are sufficient grounds on which to base such a right. In the absence of judicial action, the legislatures must enact provisions guaranteeing interpreters for non-English-speaking defendants. They must provide a procedure which will compel the trial court to institute an evidentiary hearing whenever a reasonable doubt arises as to a defendant's ability to comprehend and communicate in English.

The quality of justice a defendant receives should not depend on his ability or inability to speak English especially when his linguistic facility may be beyond his control. Other countries have increasingly recognized the necessity of interpreters in a time of expanding international trade and travel to ensure the fairness of their judicial processes.[136] This country must do the same.

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136. *See, e.g.*, CODE ART. 175 (Japan); CODE ART. 48, 1952 Y.B. 46 (Czech.); CODE ART. 180 (Korea); CODE ART. 5 (Yugo.); ACT ART. 6, 1954 Y.B. 135 (Hung.), all cited in Foote, Problems of the Protection of Human Rights in Criminal Law and Procedure, 84-87 & nn.432-35 (Feb. 17, 1958) (unpublished paper presented to the United Nations Seminar on the Protection of Human Rights in Criminal Law and Procedure, Manila, Philippines, 1958).

> To say that the deaf man or the foreigner who does not understand the language of the proceedings has not the inherent right to have them made intelligible to him is to say that the privilege of being present during his trial and the privilege of hearing and cross-examining the witnesses against him was a mere form and that the common law was satisfied to have the letter of its requirement complied with while its spirit and substance went unfulfilled.

The King v. Silvester, 1912 1 K.B. 337, 339 (Can.). *See also* M. MOSKOWITZ, HUMAN RIGHTS AND WORLD ORDER (1958).