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A CALL FOR LEGISLATIVE ACTION: THE CASE FOR A NEW JERSEY COURT INTERPRETERS ACT

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I. FEDERAL LEGISLATION

On October 28, 1978, the Court Interpreters Act [1] was signed into law by President Carter. This legislation represents a landmark in terms of recognition of the right to an interpreter in the federal district courts of the United States. The purpose of the Act, as stated in the report of the Senate Committee on the Judiciary, is

> to insure that all participants in our Federal courts can meaningfully take part by assuring that if the participant does not speak or understand English, or has a hearing or speech impairment, he will have access to qualified interpreters, if needed. It also allows a limited use of Spanish in the District Court of Puerto Rico when it is found by the court to be in the interest of justice.[2]

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[1] Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978) (to be codified at 28 U.S.C. §§ 1827, 1828, 602). In the Senate, the bill originated in the Judiciary Comm., S. Rep. No. 569, 95th Cong. 1st Sess. 1 (1977), and was passed as S. 1315, on November 14, 1977. The bill was amended on October 13, 1978, to coincide with the House version. The House bill, H.R. 14030, originating in the Judiciary Comm., H.R. Rep. No. 1687, 95th Cong., 2d Sess. 1 (1978), was passed on October 10, 1978. *See id.* at 2-9 for a brief legislative history.

[2] S. Rep. No. 569, 95th Cong., 1st Sess. 1 (1977). The thrust of this article deals with foreign language issues in court interpreting. It should be noted here that the Federal Act also includes a

A. Scope of the Act: Civil and Criminal Actions

In carrying out its stated purpose, the Court Interpreters Act amends Chapter 119 (Evidence; Witnesses) of Title 28 of the United States Code[3] by adding sections 1827 and 1828. Appointment of interpreters by the presiding judicial officer is mandated in the following circumstances:

> [I]n any criminal or civil action initiated by the United States in a United States district court (including a petition for a writ of habeas corpus initiated in the name of the United States by a relator), if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such action-
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> (1) speaks only or primarily a language other than the English language; or
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> (2) suffers from a hearing impairment (whether or not suffering also from a speech impairment)
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> so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.[4]

This provision encompasses the right to an interpreter in both civil and criminal actions. It demonstrates a recognition of the need for court interpreters to make the proceedings comprehensible for both witnesses and party defendants.

The right to an interpreter in the civil context represents a significant step forward in terms of access to the courts for linguistic minorities. This comes at a crucial time since within the next decade a linguistic minority—Hispanics—may very well be the largest minority in the United States.[5] Without an interpreter, the judicial process becomes meaningless

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recognition of the special problems of those with speech and hearing impairments, as well as the unique language problem posed by the need to utilize Spanish in the District Court of Puerto Rico.

[3] 28 U.S.C. §§ 1821-1826 (1977).

[4] Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040 (1978) (to be codified at 28 U.S.C. § 1827 (d)).

[5] *It's Your Turn in the Sun*, Time, Oct. 16, 1978, at 48. This article provides as follows:

> Because the rate of natural increase (birth over deaths) among Hispanics is 1.8 percent, .6 percent higher than that for blacks, and because Hispanic immigration (legal and illegal) is running at the staggering rate of an estimated one million people per year, Hispanics may outnumber American blacks within the next decade.

for the non-English-speaking defendant or litigant. One who can neither understand the proceedings nor effectively communicate with counsel, judge, or jury is reduced to mere physical presence in the courtroom.[6]

Until recently, attention was focused upon the use of interpreters in criminal proceedings, due to the need to protect a defendant's constitutional rights. The issue of a criminal defendant's constitutional right to an interpreter was litigated in several fundamental areas: the sixth amendment right to confrontation, particularly in the context of meaningful cross-examination of witnesses; the sixth amendment right to effective assistance of legal counsel, so that otherwise competent counsel is not rendered "linguistically incompetent"; the fifth and fourteenth amendments due process guarantees, in order to approximate the same fundamental fairness which is guaranteed to English-speaking defendants.[7]

Recent court decisions demonstrate a growing awareness that the adversarial process does not begin with the trial itself and therefore the right to an interpreter should be mandatory at such critical stages as grand jury proceedings, arrest and interrogation, preliminary hearing, arraignment, bail hearings, and other pre-trial proceedings.[8] Similarly, the need for an interpreter continues after trial at sentencing, correctional institutions, and parole board hearings. The vast majority of criminal cases are resolved by plea prior to trial and thus an interpreter should be utilized during plea bargaining.[9] Since a defendant is relinquishing his right to trial and thus to confrontation, it is imperative that this waiver be intelligent, informed,

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See also Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7, 11-12 (1964), citing statistics that there are an estimated "20 million people in the United States whose mother tongue is not English."

[6] This situation has been analogized to that of a mental incompetent, in terms of the absence of due process. *See* Note, *Non-English-Speaking Persons in the Criminal Justice System: Current State of the Law*, 61 CORNELL L. REV. 289, 306 (1976); Comment, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 CAL. L. REV. 801, 815 (1975).

[7] *See generally* Annot., *Right of Accused to Have Evidence or Court Proceedings Interpreted*, 36 A.L.R. 3d 276, 285-90 (1971). *See also* Note, 25 RUTGERS L. REV. 145, 148-56 (1970). Note especially the commentary on U.S. *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970), holding that the failure to provide an interpreter for a non-English-speaking indigent defendant rendered the trial constitutionally infirm, based upon denial of the right to confrontation, fundamental fairness, and the right to effective communication with counsel. As a second circuit decision, *Negron* cannot bind all federal circuits, much less state courts, but the decision appears to have wide-ranging influence.

[8] *See* Annot., *supra* note 7, at 303-08, for a discussion as to the right to an interpreter for proceedings other than trials.

[9] Comment, *supra* note 6, at 821 n.131 states: "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."

and voluntary. It is obvious that these ends cannot be attained for the non-English-speaking defendant without the use of an interpreter.

The Court Interpreters Act of 1978 recognizes that the rights of non-English-speaking defendants in civil actions initiated by the United States must be protected through the use of interpreters, just as in criminal court proceedings. It is unfortunate that the right to an interpreter is so limited in the civil context. We are faced with the anomalous situation where a non-English-speaking plaintiff suing the United States on a legitimate claim would not be entitled to a court interpreter under this Act while a defendant in a civil suit would be. In addition, substantial rights are not limited to litigation where the United States is a party. In civil actions between private parties, access to the courts may be effectively foreclosed to any non-English-speaking litigant who cannot afford to pay for the services of an interpreter, since the Act is silent in this area.

A recent study in New Jersey indicates that interpreters' services are needed in many more civil than criminal cases:

> Although the New Jersey statute validly rationalizes that adequate defense is most crucial in criminal cases, civil matters also can involve serious situations involving injustice. Thus, bilingual interpreters need to be provided in civil cases and the law should be so amended.[10]

Linguistic minorites have recently found constitutional support in the equal protection clause, where discriminatory state action has occurred. *Lau v. Nichols*,[11] a landmark case in the area of education, held that the failure to provide adequate instructional opportunities for non-English-speaking students of Chinese ancestry denied them a meaningful opportunity for an education in the public school system and thus violated section 601 of the 1964 Civil Rights Act[12] and the interpretive guidelines promulgated pur-

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[10] Hippchen, *Development of a Plan for Bilingual Interpreters in the Criminal Courts of New Jersey*, 2 JUST. SYS. J. 258, 269 (1977). Although the author's study is limited to New Jersey, his conclusions would appear to be equally valid in terms of the federal court system.

[11] 414 U.S. 563 (1974).

[12] Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964) (current version at 42 U.S.C. § 2000d (1977)). This section states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." It should be noted that Judge Hill's dissent in the appellate decision, which was reversed by the United States Supreme Court, rests upon a broad reading of the equal protection clause, characterizing equal educational opportunity as "one of the most vital and fundamental of all of the rights enjoyed by Americans." Lau v. Nichols, 483 F.2d 791, 803 (9th Cir. 1973) (Hill, J., dissenting), *rev'd*, 414 U.S. 563 (1974). In

suant thereto. The basis for the application of the Civil Rights Act in this context is the provision banning discrimination in any program or activity receiving federal financial assistance under implementing regulations of the Department of Health, Education and Welfare.

Litigants have subsequently sought the expansion of *Lau* to other areas of discrimination against linguistic minorities, relying alternatively upon the due process and equal protection clauses of the United States Constitution, and also section 2000d of the Civil Rights Act of 1964. In *Pabon v. Levine,*[13] a Puerto Rican claimant who was fluent in Spanish but spoke almost no English, charged the New York State Department of Labor with discriminatory action in the right to unemployment benefits.[14] There was a failure to provide an adequate number of interpreters, and forms and notices were printed only in English, thus barring the plaintiff from preserving his rights by requesting a hearing.[15] Judge Weinfeld, in denying defendant's motion for summary judgment, found it unnecessary to reach the constitutional issues.[16] As has been the tendency of courts dealing with this area, he based his opinion upon the statutory basis of section 2000d of the Civil Rights Act of 1964.[17] Since the New York State Department of Labor receives federal funds in administering the state's unemployment insurance program, and since regulations promulgated by the Department of Labor to effectuate section 2000d of the Civil Rights Act of 1964 are virtually identical to those promulgated by the Department of Health, Education and Welfare under which *Lau v. Nichols* was decided, Judge Weinfeld analogized the

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rejecting the limitation of the equal protection clause to those inequalities caused by an intentional direct or indirect state action, Judge Hill analogizes to the special services provided by the state to indigent criminal defendants. Here the state's duty does not arise from a need to redress past wrongs, but rather "because the state must put justice within the reach of every man if the State chooses to provide a system of criminal justice at all." 483 F.2d at 804. This highlights the parallel between access to the courts and other areas of unequal treatment of linguistic minorities such as equal educational opportunity in *Lau*. The Supreme Court's opinion, as delivered by Mr. Justice Douglas, did not reach the equal protection clause argument, but relied solely on 42 U.S.C. § 2000d (1977) in reversing the court of appeals.

[13] 70 F.R.D. 674 (S.D.N.Y. 1976).

[14] *Id.* at 675.

[15] *Id.*

[16] *Id.* at 676. The court denied, however, the plaintiff's motion for class action certification, based upon facts presented regarding numbers of members in the class. *Id.* at 677-78. The rationale was that the "substantial numbers," which the court adopted as a criterion from Justice Blackmun's concurrence in *Lau*, was a disputed fact in *Pabon*. *Id.* at 677. It is significant to note, however, that the subsequent Settlement and Stipulation of Dismissal addresses the issue in general terms, such as "Spanish claimants," thus, implicitly giving support to Pabon's claim of a class similarly situated. *See* note 19 *infra* and accompanying text.

[17] 70 F.R.D. at 677.

situations and held that Pabon had stated a claim of discrimination upon which relief could be granted.[18] Before the case could be tried on the merits, the New York State Department of Labor agreed to assure Spanish-surnamed and/or Spanish-speaking claimants equal access to the benefits and services provided under the unemployment insurance program by providing forms in Spanish as well as the assistance of Spanish-speaking staff to translate decisions and assist claimants.[19]

The application of section 2000d of the Civil Rights Act of 1964 to the area of court interpreters is analogous.[20] The regulations promulgated by the United States Department of Justice in implementing Title VI of the Civil Rights Act of 1964 are virtually identical to those of the Department of Health, Education and Welfare, which the United States Supreme Court applied in *Lau*. They are, likewise, virtually identical to those of the New York State Department of Labor which Judge Weinfeld applied in *Pabon*. The stated purpose of the regulations of the Department of Justice is:

> that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination

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[18] *Id.* at 676-77.

[19] Case settled on October 21, 1976, by a court-approved Settlement and Stipulation of Dismissal. Pabon v. Levine, No. 75-1067 (S.D.N.Y. 1976). The definition of Spanish-speaking claimants as "claimants who are Spanish dominant with English language deficiencies," as noted in the settlement, recognizes the penumbral area of those whose linguistic handicap is not total, but whose exclusion is as effectively complete without the assistance of written translations and interpreters.

The applicability of *Pabon* to the unemployment compensation hearing itself—*i.e.*, the extension of the mandatory use of complete interpreting of proceedings in the context of administrative hearings, was at issue in the case of Pugh v. Ross, No. 76-3607 (S.D.N.Y. 1977). Defendant, the Department of Labor, followed a policy of restricting interpreting, (erroneously called translating since the latter refers to written documents), to direct questions and summaries of testimony and documents, but not the evidence itself. *Id.*, Stipulation of Facts, ¶ 7, July 1, 1977. This policy severely restricts the equal access to unemployment insurance benefits which was the express goal of the settlement in *Pabon*. The question was made moot in *Pugh* since defendant gave plaintiff another hearing. Thus, the issue of complete interpreting of proceedings at administrative hearings under the regulations promulgated pursuant to 42 U.S.C. § 2000d (1977) remains an open question at the time of this writing.

[20] Before *Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976) and *supra* notes 13 & 14, Note, *Bilingual Notice—The Rights of Non-English-Speaking Welfare Clients*, 42 FORDHAM L. REV. 626, 639 (1974), expressed doubt as to the application of 42 U.S.C. § 2000d (1977) to areas other than education in the absence of specific guidelines. Though noting a possible applicability in the welfare area, the author found that 42 U.S.C. § 2000d (1977) "does not, either specifically or through inferences, speak to the question of bilingual notice." Note, 42 FORDHAM L. REV. 626, 639. *Pabon* has subsequently confirmed the applicability of 42 U.S.C. § 2000d (1977) in other areas, in particular, that of bilingual notice, thus disproving the Note writer's hypothesis.

under any program or activity receiving Federal financial assistance from the Department of Justice.[21]

Clearly, federal funds are involved in the administration of justice in the federal court system, as well as through grants to the state systems, and so the rationale of *Lau* mandates no discriminatory treatment of linguistic minorities in the courts. Access to the courts is surely as fundamental a right as equal educational opportunity. Thus, the parameters of the new federal legislation, while constituting a substantial step forward, are patently inadequate if the *Lau* rationale is applied. The regulation of the Department of Justice, promulgated to carry out section 2000d of the Civil Rights Act of 1964, would seem to dictate this result.

B. Scope of the Act: Party and Witness Interpreters

The Court Interpreters Act of 1978 provides for the appointment of interpreters in the case of party defendants as well as witnesses who are non-English-speaking.[22] This represents progress in terms of a recognition of the civil or criminal defendant's need and right to comprehend the proceedings and to communicate with his attorney. Until this Act, courts tended to provide for an interpreter when the defendant was a witness—just as in the case of any other non-English-speaking witness—but did not make provision for his understanding of the remainder of the proceeding.

Makeshift solutions have proven to be grossly inadequate, as well as violative of the rights of the non-English-speaking defendant or litigant. Two of the most frequently utilized "compromises" are the use of a single interpreter and the use of a bilingual attorney.[23] The utilization of a single

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[21] 28 C.F.R. § 42.101 (1978).

[22] Court Interpreters Act, Pub. L. No. 95-539, § 2(a). 92 Stat. 2040 (to be codified at 28 U.S.C. § 1827(d)).

[23] *See* Annot., *supra* note 7, at 289-90, for a series of cases which hold that the accused's right of confrontation is met when defense counsel understands the testimony, on the assumption that counsel can understand the witnesses, either directly or through an interpreter, and *somehow* communicates the evidence to his client. There have been cases holding that constitutional requirements can be met when counsel speaks the language of his client. In United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962), the defendant claimed that the failure to appoint an interpreter amounted to a denial of fair hearing, since his attorney was forced to act as defense interpreter, and so could not perform his normal functions. The court called this a "bald assertion" and denied the claim, stating that "there were no questions of fact at issue in this proceeding requiring Paroutian to testify or understand the proceedings." *Id.* at 490. The issue of denial of right of confrontation by the failure to appoint a defense interpreter where counsel spoke the language of the accused is addressed in People v. Pelegri, 39 Ill. 2d 568, 237 N.E.2d 451, 458 (1968). The court stated: "In a case where defense counsel spoke Spanish so fluently that he often corrected the expert interpreter, we do not believe it is even arguable that the defendant who sat at his

interpreter for both witness and party is clearly inadequate, since the interpreter cannot accurately interpret a witness' testimony at the same time as dialogue between attorney and client. Nor can a bilingual attorney provide a substitute for the services of an interpreter. On the contrary, it is counterproductive to the effective assistance of counsel.[24] If the attorney is occupied with the exacting and rigorous tasks of interpreting all of the court proceedings for the client, he or she cannot fully concentrate upon the legal aspects of the case. In addition, because of the potential for bias and conflict of interest, it would be improper for the attorney to act as interpreter for his own client when the client is testifying as a witness. The attorney as interpreter must qualify as an expert witness and thus becomes a witness in the case. The Canons of Professional Ethics may prohibit the attorney from assuming this dual role.[25] Thus, another interpreter would be required when the party is testifying as a witness.

Although the attorney may be prevented from acting as interpreter for his or her own client, other potentially biased parties have been permitted by the courts to act as interpreters. Since objectivity and disinterest are essential qualities of the competent interpreter, any bias or prior relationship existing between the non-English-speaking witness, defendant, litigant, or other interested party violates the requisite impartiality. Friends or relatives, on the one hand, and law enforcement officers, *or even adverse parties,* have on occasion been permitted by the courts to serve as interpreters.[26] When the

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attorney's side was denied the right to confront the witnesses against him." *Id.* The court is asking counsel to perform two roles, and refuses to recognize that this short-changes the defendant. In addition, the court equates defense counsel's request for a single—rather than a multiplicity—of *witness* interpreters with the need for a *defense* interpreter: "[T]he defendant may not now complain because he was not provided with an interpreter (in addition to his attorney) to give him a running account of the testimony of witnesses many of whom were questioned and responded in Spanish." *Id.* The court thus asks the defendant to forego the understanding of those witnesses whose testimony was given in English, relying instead upon the dual role, unfairly imposed upon the attorney.

[24] *Contra*, Comment, *supra* note 6, at 822. This article poses the use of a single interpreter as a viable possibility, although it notes that the bilingual attorney does not abrogate the need for a proceedings interpreter. The authors also note that it is unclear at this time whether or not a defendant even has a right to the services of a bilingual attorney, if one were available, barring a showing of abuse of discretion. *Id.* at 822-23.

[25] In New Jersey, for example, *see* Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association (as amended by the Supreme Court of New Jersey) D.R. 5-102 (1979).

[26] STATE HEARINGS HANDBOOK FOR INTERPRETERS WITH GLOSSARY OF SELECT WELFARE TERMS, State of California, Health and Welfare Agency, Department of Benefit Payments 16 (1977), lists three essential qualities which state hearing interpreters must possess:

> First, they must be fluent and proficient in the language which they are interpreting as well as in English. Second, they must understand state hearing procedures and be familiar with basic welfare programs and specific terminologies likely to be encountered during the hear-

interpretation of one word can make the crucial difference in the ultimate outcome of a case, any potential for even the subtle or unconscious shading of meanings by a partisan translator must be avoided.[27]

Prior to the Court Interpreters Act of 1978, legal authority for the appointment of interpreters in the federal courts was limited to the following sources: Federal Rule of Civil Procedure 43(f), Federal Rule of Criminal Procedure 28(b), and Federal Rule of Evidence 604.[28] The latter Rule, in requiring that the interpreter qualify as an expert witness, recognizes the necessary expertise of the interpreter. It does not, however, provide any criteria to guide the presiding judicial officer in determining if the interpreter does in fact qualify as an expert witness. In addition, Rule 604 would seem to be limited to the witness interpreter, *i.e.*, to those situations where interpreter testimony becomes a part of the record; thus, it is unclear whether the party interpreter need qualify as an expert. Rules 43(f) and 28(b) allow for the appointment of interpreters based upon the power of the court to call its own witnesses and expert witnesses, the exercise of this power resting in the discretion of the court.

The appointment of an interpreter logically rests within the sound discretion of the trial court.[29] In the Court Interpreters Act of 1978, provi-

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ing. These two qualities can be approximately determined by the process of interpreter certification. The third quality—impartiality—is more difficult to evaluate.

The interpreter, like the hearing officer, must be completely unbiased so that all parties can be assured that the hearing and the laws and regulations are being equitably administered. Impartiality can be difficult for some interpreters because often, claimant's future ability to provide for his or her family is at stake in the hearing.

[27] The interpreter is further cautioned to avoid any conscious or subconscious slanting of the proceedings whether to assist the county or in a manner favorable to the claimant. If the interpreter cannot keep relationships with all parties to a hearing on a warm, yet professional, basis in order to maintain objectivity, "then he or she should withdraw from further particpation in the hearing." *Id.*

[28] FED. R. CIV. P. 43(f) states:

The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties, as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

FED. R. CRIM. P. 28(b) states:

The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the Government, as the court may direct.

FED. R. EVID. 604 states:

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

[29] In Perovich v. United States, 205 U.S. 86, 91 (1907), the Supreme Court of the United States clearly established that the decision to appoint an interpreter "is a matter largely resting in the discretion of the trial court." Only an abuse of discretion would constitute reversible error.

sion is made for an interpreter if a party or witness "speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony."[30]

Frequently the court is faced with the dilemma of the party or witness who appears to speak and understand "some English." The presiding judicial officer must balance subtle questions of degree of comprehension and communicative ability.[31] The decision as to the need for an interpreter is a question of fact for the court and can very seldom be reviewed on appeal.[32]

One aspect of the discretionary appointment of an interpreter by the presiding judicial officer is that a party or witness may waive the right to an interpreter. The constitutional right of confrontation may be waived.[33] Such a waiver must, however, be knowing and intelligent.[34] Passivity of a party or witness as regards the failure to request an interpreter may be the result of the language barrier which occasions the need for an interpreter in the

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State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942), has been heralded by many as an enlightened approach to the appointment of an interpreter for parties as well as witnesses whose ability to communicate in English is doubtful. However, the same court, several months later in State v. Masato Karami, 101 Utah 592, 594, 126 P.2d 1047, 1050 (1942), rejected the application of *Vasquez* to the case before it:

> In State v. Vasquez, supra [121 P.2d 908], Justice Wolfe said: "If it is shown that defendant cannot understand the language in which the testimony is given and knows no friend who would interpret between him and the witness or between him and his counsel in the court room, such facility might well be provided at the expense of the State."
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> In the instant case the suggestion of Justice Wolfe that the defendant might have a friend to interpret for him was evidently carried out to the satisfaction of all parties. There was no obligation—under the facts in this case—on the Court to do more.

More recently, in United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973), the court recognized that "the right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an uncomprehensible ritual which may terminate in punishment." The court aptly described the parameters of judicial discretion: "But precisely because the trial court is entrusted with discretion, it should make unmistakably clear to a defendant who may have a language difficulty that he has a right to a court-appointed interpreter if the court determines that one is needed, and, whenever put on notice that there may be some significant language difficulty, the court should make such a determination of need." *Id.* at 15.

[30] Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040 (1978) (to be codified at 28 U.S.C. § 1827(d)).

[31] *See generally* Annot., *supra* note 7, at 293-303 for a detailed discussion of many of the issues involving the trial court's discretion in the appointment of interpreters.

[32] 75 Am. Jur. 2d *Trial* § 57 (1974).

[33] Salas v. State, 385 S.W.2d 859, 861 (Tex. Ct. App. 1965).

[34] Note, *supra* note 6, at 297; on the issue of waiver, *see generally*, Morris, *The Sixth Amendment's Right of Confrontation and the Non-English-Speaking Accused*, 41 FLORIDA B.J. 475 (1967).

first place. As the Court aptly points out in *United States ex. rel. Negron v. State of New York*:

> Nor are we inclined to require that an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them. Simply to recall the classic definition of a waiver—"an intentional relinquishment or abandonment of a known right," Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)—is a sufficient answer to the government's suggestion that Negron waived any fundamental right by his passive acquiesence in the grinding of the judicial machinery and his failure to affirmatively assert the right. For all that appears, Negron, who was clearly unaccustomed to asserting "personal rights" against the authority of the judicial arm of the state, may well not have had the slightest notion that he had any "rights" or any "privilege" to assert them.[35]

C. Scope of the Act: Interpreter Qualifications and Certification

In questioning the use of the bilingual attorney, the friend or relative, or the law enforcement officer as acceptable individuals who might act as interpreters, emphasis has been placed upon the potential for bias, in light of the overriding concern for interpreter objectivity. More important, yet less

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[35] 434 F.2d at 390. The court distinguished Gonzalez v. People, 109 F.2d 215 (3d Cir. 1940), where the defendants were simply not found unable to speak or understand English. 434 F.2d at 391 n.9. It should be noted, however, that in *Gonzalez*, 109 F.2d at 217 (footnote omitted), the court assumes, arguendo, a possible constitutional right to an interpreter, although not applicable to the instant case:

> They point to Sec. 34 of the Organic Act of the Virgin Islands, 48 U.S.C. § 1406g, 48 U.S.C.A. § 1406g, which provides that "in all criminal prosecutions the accused shall enjoy the * * * to be confronted with the witnesses against him, * * *" and they say that this right necessarily includes the right to have the testimony of such witnesses interpreted if given in a language with which the accused is not familiar.
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> It may well be that an accused who is unfamiliar with the language would be entitled under a constitutional provision like the one just quoted to have the testimony of the People's witnesses interpreted to him in order that he may fully exercise his right of cross-examination. This we need not decide, however, since in the case before us it does not appear from the record that the defendants were unable to speak or understand English, the language of the People's witnesses.

understood, are the special linguistic skills and training which are fundamental in the art of interpreting. The friend, relative, or other "bilingual" volunteer interpreter may be able to speak both English and the foreign language involved, but is in all probability not trained in the very exacting skills of rendering a precise equivalent in one language or the other.[36] The mere ability to speak two languages cannot in and of itself create the bridge between those languages which is necessary for accurate interpreting.[37] In the case of the bilingual attorney, the problems multiply if he must also serve as interpreter for his clients. It would be a serious misconception to somehow equate legal expertise with linguistic expertise.

Another fundamental and unique aspect of the art of interpreting is the rapidity of required responses. Yet it must be remembered that the apparent spontaneity of the interpreter is the product of study and practice. The unskilled "bilingual" person will often—and incorrectly—reach for cognates, *i.e.*, words which are apparent synonyms but which, in actuality, frequently differ in shades of meaning or in a particular context.[38] Such seemingly minor errors may, in the judicial context, mean the difference between life and death, or between justified recovery and no compensation. While the translator may, in dealing with written language, ponder the meaning of

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[36] It is indeed rare to find a *truly* bilingual individual. Dominance in one of the two languages involved is generally the pattern. It is usually recommended that the translator in the written context always translate *into* his native language, since idiomatic constructions and other usage problems are more accurately handled in one's native-dominant-language. This is, of course, much more difficult to accomplish in court interpreting, since the rapid dialogue necessarily includes the constant alternation between the two languages involved.

[37] Interpreting, as an art and a skill is a far cry from "free interpretation" of what someone is saying. *See High School Dropout Rate Up: Poverty and Failure Blamed,* N.Y. Times, Nov. 3, 1976, at 84, col. 3, for the everyday problems faced by the "bilingual" children, who, though completely unskilled in translating and interpreting, must, of necessity, act in these capacities, in order to help their indigent non-English-speaking parents.

> Because of the language problems that persist in many Hispanic families living in Harlem, East Harlem, and the Southeast Bronx—the region served by the school—pupils from these families frequently do translating chores for their parents at government or business offices.
>
> "You'd be surprised how many of them have to go around escorting their parents, and have to miss school," said Mr. Drago. "I had a student last year who was the eldest of eight children. She was only 14, but had to take care of the other children and she got used to not coming to school because of them, and because she might have to go to court, to the bank, to the phone company, or something to translate."

Id. Note, additionally, the common confusion between interpreting and the misnomer "translating." *See* note 19 *supra*.

[38] For example, "casas públicas" at first blush would seem to mean "public housing," when the true meaning is "houses of ill-repute"!

words and phrases in context, the interpreter must necessarily communicate immediate and precise equivalents.

At the court proceedings, although the presence of an additional party in the form of an interpreter necessarily reduces the spontaneity of the proceedings, the rights of the non-English-speaking party must be weighed against this inconvenience. On balance, if we are not to violate the right of access to the courts and justice of non-English-speaking parties, we must provide for accurate and qualified interpreting of the proceedings, so that the role of the interpreter is that of a conduit, a facilitator, not an obstacle.

There exist three basic modes of interpreting: simultaneous, consecutive, and summary. The Senate Committee of the Judiciary Report accompanying the Court Interpreters Act of 1978 distinguishes the three modes, detailing the considerations which led to the recommendation that the consecutive mode be utilized as a general rule:

> It is the committee's intention that translations performed pursuant to section 1827 shall be in the consecutive mode unless all parties and the presiding judicial officer agree that the summary mode can be used for part or all of a witness' testimony. In the trade, phrases describing translation services are terms of art. Simultaneous translation requires the interpreter to interpret and to speak contemporaneously with the primary speaker whose monologue is being translated. No pauses by the primary speaker are required. It requires substantial equipment since both individuals are speaking at the same time. Consecutive translation requires that the primary speaker pause at regular intervals during his monologue in his native language, or form of communication, to allow the interpreter to convey his speech in another language or form of communication. Finally, summary translation allows the interpreter to condense and distill the speech of the primary speaker.
>
> Under present law most translations are presented in the consecutive mode. For example, if a non-English-speaking prosecution witness were on the stand there would be two interpreters in the courtroom—one at the witness stand, and also the defendant's interpreter who would be at his side. The interpreter at the witness stand would translate the question from English for the benefit of the witness. The interpreter listens as the witness responds in his native language or means of communication. When the witness pauses, at agreed-upon intervals, the interpreter then translates the

preceding segment of testimony into English for the benefit of all English-speaking individuals in the courtroom. Only the English version is recorded by the court reporter.[39]

In limiting the use of the simultaneous mode of interpreting, the Committee Report balances efficacy and economy:

> Section 1828 of the bill provides for the provision of "Special Translation Services." The special services envisioned are the establishment of a program to provide for simultaneous translation services in criminal action and in civil action initiated by the United States when the provision of such services will aid in the efficient administration of justice.
>
> Simultaneous translation services are used sparingly in the Federal court system today due to the great cost involved in providing this service. Cost figures approaching $4,000 per trial week, exclusive of recordation costs, are not uncommon. However, there is a point where the provsion of simultaneous translation services can be cost effective and will expedite the trial. Simultaneous translation definitely can conserve judicial resources (and the resources of the U.S. attorney) by allowing the trial to proceed at a much more expeditious rate. The number of interpreters needed in multiparty actions will also drop and a cost and time saving will be realized.[40]

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[39] S. Rep. No. 569, 95th Cong., 1st Sess. 8 (1977). Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040, 2042 (1978) (to be codified at 28 U.S.C. § 1827(k)) provides as follows:

> The interpretation provided by certified interpreters pursuant to this section shall be in the consecutive mode except that the presiding judicial officer, with the approval of all interested parties, may authorize a simultaneous or summary interpretation when such officer determines that such interpretation will aid in the efficient administration of justice. The presiding judicial officer on such officer's motion or on the motion of a party may order that special interpretation services as authorized in section 1828 of this title be provided if such officer determines that the provision of such services will aid in the efficient administration of justice.

[40] S. Rep. No. 569, 95th Cong., 1st Sess. 9 (1977). Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040, 2042 (1978) (to be codified at 28 U.S.C. § 1828(a)) provides as follows:

> The Director of the Administrative Office of the United States Courts shall establish a program for the provision of special interpretation services in criminal actions and in civil actions initiated by the United States (including petitions for writs of habeas corpus initiated in the name of the United States by relators) in a United States district court. The program shall provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions.

So long as either the simultaneous or consecutive modes are utilized, a complete verbatim rendering in the target language is the result. Problems and dangers are most frequently encountered when the summary mode is utilized.[41] Thus, the Act specifies that the use of summary interpretation—just as simultaneous interpretation, on the other hand—must be approved by all interested parties.[42]

Since the Act does not provide for the recording of any version of testimony (or party interpretation) except in English, the Senate Committee Report states that:

> [B]y the establishment of a program to make available certified, qualified interpreters to all litigants, the government has provided all the safeguards to a true and valid interpretation that can reasonably be expected.[43]

This provision refers to the following sections of the Act:

> (a) The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of interpreters in courts of the United States.
>
> (b) The Director shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in courts of the United States in bilingual proceedings and proceedings involving the hearing impaired (whether or not also speech impaired), and in so doing, the Director shall consider the educa-

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[41] For example, let us suppose that a witness is asked whether he was present during the commission of a crime, and the witness explains that he arrived after the actual crime was committed, but in time to see the fleeing perpetrators of the crime. The summary mode of interpreting may lead to condensations of the witness's answer ranging from "He said no," to "He was there for part of the time." The necessity to select and edit, as part of summarization, places an additional judgmental burden on the interpreter. In addition, though the interpreter in the simultaneous and consecutive modes will generally utilize the first person, thus acting as a mere conduit for the speaker, the interpreter in the summary mode may have to begin with "He said . . ." since he or she is *not* rendering a complete version of the words spoken by the witness, but rather periodically paraphrases a series of statements.

[42] Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040, 2042 (1978) (to be codified at 28 U.S.C. § 1827(k)).

[43] S. Rep. No. 569, 95th Cong., 1st Sess. 8 (1977). *See also* Annot., *supra* note 7, at 309-12, for a discussion of cases dealing with such issues as trial court's discretion in replacing an interpreter who committed errors so long as those errors were corrected during trial, the insufficiency of interpretative services, or erroneous equivalents used. The failure to object, frequently cited by the courts, is truly ironic, since the inability to knowingly waive such objection is what originally occasioned the need for the services of an interpreter.

> tion, training and experience of those persons. The Director shall maintain a current master list of all interpreters certified by the Director and shall report annually on the frequency of requests for, and the use and effectiveness of, interpreters. The Director shall prescribe a schedule of fees for services rendered by interpreters.
>
> (c) Each United States district court shall maintain on file in the office of the clerk of court a list of all persons who have been certified as interpreters, including bilingual interpreters and oral or manual interpreters for the hearing impaired (whether or not also speech impaired) by the Director of the Administrative Office of the United States Courts in accordance with the certification program established pursuant to subsection (b) of this section.[44]

Until the present time, without such a provision regarding interpreter qualifications, we have witnessed the injustices occasioned by inaccurate interpreting, which could never be disputed or proven, since only the English version forms a part of the final record. Once again the limitations of the Act become apparent. Why should the non-English-speaking litigant be any less entitled to the services of qualified and certified interpreters, simply because he is not the defendant in an action instituted by the United States government?

Until the present time, courts have tapped many resources, more or less felicitously, for use as court interpreters. Bilingual personnel in the court system are frequently utilized, though they may have been hired as legal secretaries, bailiffs, clerks, etc. While these people may have a somewhat greater knowledge of the legal system than the friend or relative who is enlisted to serve as interpreter, the skills necessary to interpret accurately as well as rapidly are by and large similarly lacking.[45]

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[44] Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040 (1978) (to be codified at 28 U.S.C. §§ 1827(a)-(c)).

[45] An extreme, but regrettably not unique, example is recounted in Kleiman, *Role of Interpreter Raises a New Issue in Plane Hijacking*, N.Y. Times, Nov. 7, 1976, at 48, col. 2. This account describes a hearing held to clarify accusations that the court interpreter assigned to the Croation nationalist hijacking case was a police informant. No interpreter was even assigned to the hearing regarding the original interpreter's informant relationship, and so, one of the defense attorneys "looked out into the courtroom packed with lawyers, court buffs, and Croation sympathizers, and recruited an elderly man in a double-breasted blue blazer," who, as it turned out, was a college professor of history, who said that he spoke Croation fluently. In addition to the haphazardness of the method of selection, what must not be overlooked is that this man's general educational level and even his professed fluency could *not* serve as substitutions for interpreter training skills. A final irony is that the official interpreter, who had been recommended for the case by the State Department had, according to the N.Y. Times article, *id.*, never before acted as an interpreter in a court case.

In addition to linguistic skill—assuming, of course, fluency in both languages—and an understanding of the legal process and procedures, the well-prepared interpreter will study, before trial, the specific vocabulary in the legal area involved, be it drugs, homicide, negligence, etc. Vocabulary difficulties do not, however, end here. Many of the common law legal concepts may not be comprehensible to the person who comes from a civil law country. They may be non-existent or there may be differences—subtle or obvious—in their function within a given legal system. It should also be noted that there is a remarkable lack of suitable dictionaries and other materials for use by court interpreters.[46]

Another important consideration is the possible disparity in economic, social, and educational backgrounds between the interpreter and the non-English-speaker. This may lead to a complete sub-cultural linguistic set, and so the interpreter may not be able to adequately communicate with the party or witness.[47] Slang, idiomatic expressions, and the gradual infiltration of English words into the non-native's vocabulary magnify the difficulty of the interpreter's task. Cultural differences may be heightened in a language such as Spanish where, in addition to the regionalisms characteristic of the varieties of the language spoken in over twenty countries, we have dialects within those countries as well as those of Chicanos, Puerto Ricans, and other partially assimilated linguistic minorities.[48] Yet, in these cases, the apparent understanding of some English words and phrases is deceptive. The problem lies in communicating with the party or witness in a comprehensible manner.[49]

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[46] *See* Special Project, *Attorneys Guide to the Use of Court Interpreters, With an English and Spanish Glossary of Criminal Law Terms*, 8 U. CALIF. D.L. REV. 471 (1975). The author mentions a total of four dictionaries, two of which are general Spanish-English vocabulary dictionaries. *Id.* at 471 n.3. One of the specialized legal dictionaries mentioned, published in 1945, is generally unavailable. *Id.* This leaves us with L.A. ROBB, DICTIONARY OF LEGAL TERMS: SPANISH-ENGLISH, ENGLISH-SPANISH (1955), and Zazueta's glossary of criminal terms, 8 U. CALIF. D.L. REV. at 486-522. Since Zazueta's writing, DICCIONARIO DE TERMINOS JURÍDICOS (1976) has been published by Equity de Puerto Rico. Despite the rapidly increasing need, materials for legal translators and interpreters remain grossly inadequate.

[47] *See generally* Special Project, *supra* note 46, at 475-77. Exception must be taken, however, to Zazueta's conclusion that: "The level of interpreter competency may vary with the seriousness of the crime and the use to be made of the translation." *Id.* at 472. There can be no justification for less than excellent interpreting at any level. Inaccuracy and misrepresentation are no less serious because the potential for punishment is greater.

[48] It has been said that a Spanish-dominant Hispanic American speaks "spangles," while with more time in this country and more corruption of Spanish by English, the resulting language is termed "Spanish."

[49] Though the cultural and non-verbal nuances involved in an awareness of differences lies outside the considerations of this article, it must be noted that they are a very real factor in the adequacy of interpreting.

The qualifications prescribed by the Director of the Administrative Office of the United States Courts pursuant to the mandate of the Court Interpreters Act[50] must deal with all of these considerations if the standards established for the certification of interpreters are to be meaningful. The Registry of Interpreters for the Deaf may serve as a model, since there already exists within the Registry a mechanism for certification, open only to members of the National Registry.[51] The Court Interpreters Act of 1978 *must* be followed by the development of guidelines for qualification and training of interpreters, if the legislation is to be at all effective.

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[50] Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040 (1978) (to be codified at 28 U.S.C. § 1827(b)).

[51] Registry of Interpreters for the Deaf, *Information for Candidates* (informal publication reprinted in part) provides as follows:

Certificates

Comprehensive Skills Certificate

The interpreter possessing this certificate has met at least the minimum requirements for expressive translating and interpreting. The interpreter possesses skills to handle reverse translating and interpreting situations represented by the various communication levels of the deaf.

Expressive Translating Certificate

The interpreter possessing this certificate has met at least the minimum requirements for expressive translating, which is used in situations that call for exact wording. Minimal reverse translating skills are required.

Expressive Interpreting Certificate

The interpreter possessing this certificate has met at least the minimum requirements for expressive interpreting. Minimal reverse interpreting skills are required.

Reverse Skills Certificate

The interpreter possessing this certificate has met at least the minimum requirements to do reverse translating and interpreting only. This may be done orally, manually, or be in writing as dictated by ability or necessity. (Hearing-impaired persons may also qualify for this certification.)

Special Certificates

A local chapter may award a special certificate in a particular methodology to an interpreter who may be eminently qualified to work in his local community but who, because of his limited acquaintance with the field, may not be able to pass the evaluation for a national certificate. (S.E.E., Rochester, etc.) The RID Certification Board will establish guidelines for these special evaluations.

Specialized Area Competency

The RID Certification Board will develop within the year certification in specialized areas of interpreting such as: legal, religious, etc. The certification will be built upon the Comprehensive Skills Certificate. The Specialized Area Competency cannot be awarded unless the interpreter holds a Comprehensive Skills Certificate.

Note: An interpreter need not hold all certificates. The Comprehensive Skills Certificate is the embodiment of all the three other certificates. The other certificates imply a specific skill. An interpreter may want to work up to the Comprehensive Skills Certificate by taking one or both expressive evaluations first.

If the breakdown represents threshold possibilities, within the specialized area of court interpreting, a similarly precise and exacting series of standards must be developed.

Despite the limitations in the Act which are imposed by the requirement that the United States be plaintiff in the court actions,[52] the Act marks a significant turning point in the recognition of the problems of access to the courts for linguistic minorities. If viewed by state legislatures as a model, it should herald even broader legislation at the state level.

II. THE CALIFORNIA PARADIGM: PROGRESS IN STATE LEGISLATION

A. Introduction

California, perhaps more than any other state, has made significant advances in providing qualified interpreter services to the non-English-speaking people in the state courts. The California constitution mandates that "a person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings."[53] Section 752 of the California Evidence Code provides:

> (a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself in the English language so as to be understood directly by counsel, court and jury, an interpreter whom he can understand and who can understand him shall be sworn to interpret for him.[54]

The County of Los Angeles is a prime example of the level to which interpreter services can and should be provided, once an awareness has been achieved of the needs of non-English-speaking people in terms of access to the courts. Studies by the Los Angeles County Superior Court in March, 1975, and May, 1976, led to the development of a Court of Interpreters Training Program administered in 1977 and again in 1978. Thereafter,

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[52] Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040 (1978) (to be codified at 28 U.S.C. § 1827(d)).

[53] CAL. CONST. art. I, § 14. At the time of the writing of Note, 25 Rutgers L. Rev. 145 *supra* note 7, at 147, it appears that only the New Mexico constitution contained any guarantee of the right to an interpreter, in the form of the right in all criminal prosecutions "to have the charge and the testimony interpreted to him in a language that he understands. . . ." N.M. CONST. art. 2, § 14. Subsequent writers have failed to note the crucial 1974 amendment to the California constitution, and continue to cite New Mexico as the only example of a state whose constitution purports to guarantee the right to an interpreter. *See, e.g.*, Special Project, *supra* note 46, at 473; Note, *supra* note 6, at 298.

[54] CAL. EVID. CODE §§ 750-754 (West 1966 & Supp. 1979) represents a comprehensive and thorough treatment of the area, encompassing: The applicability to the interpreter or translator law relating to witness (§ 750), the oath taken by the interpreter or translator to make a true interpretation or translation (§ 751), when an interpreter or translator is required (§§ 752-753), and interpreters for the deaf (§ 754).

written tests were given to all court interpreters in the county and only those with a passing grade were permitted to work in the courts of Los Angeles County.[55]

B. Case Law Developments

There is a wealth of California case law dealing with the several interpreter-related issues as presented in the context of both criminal and civil proceedings. These cases illustrate the degree to which the issues have crystallized in the California courts, while at the same time pointing out the limitations of judicial response.

The case of *People v. Annett*[56] demonstrates that by 1967 it was already firmly established that a defendant in a criminal action who was unable to communicate in English was entitled to an interpreter:

> Failure of a trial court to appoint an interpreter for a defendant who has requested one, or whose conduct has made it obvious to the court that he is unable because of linguistic difficulties knowingly to participate in waiving his rights, is "fundamentally unfair" and requires reversal of a conviction.[57]

The court in the instant case, however, refused to appoint an interpreter because it was determined on the particular facts that the defendant did not need one. Although the courts of California clearly recognize this right, the issue of whether an interpreter should in fact be appointed is "'a matter for judicial determination over which the trial court is permitted to exercise its discretion.'"[58]

A series of California cases has explored the application of the equal protection and due process clauses to the problems of linguistic minorities in areas other than criminal law. *Castro v. State*[59] declared unconstitutional the California constitution's mandate that a person must be able to read English before that person could vote. The court found that the key to informal

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[55] ALMEIDA & ZABLER, LOS ANGELES SUPERIOR COURT INTERPRETERS MANUAL (1978). At the time of this writing, copies of the Manual are not yet available for general distribution.

[56] 251 Cal. App. 2d 858, 59 Cal. Rep. 888 (1967).

[57] *Id.* at 860, 59 Cal. Rep. at 890. The court cites the following cases as precedents for this proposition: *People v. Bostick*, 62 Cal. 2d 820, 402 P.2d 529, 44 Cal. Rptr. 649 (1965); *People v. Montoya*, 235 Cal. App. 2d 789, 45 Cal. Rptr. 572 (1965).

[58] 251 Cal. App. 2d at 860, 59 Cal. Rptr. at 890, *quoting* People v. Estany, 210 Cal. App. 2d 609, 611, 26 Cal. Rptr. 757, 758 (1962).

[59] 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

voting is *literacy*, not limited to literacy in English.[60] The court found, however, under the equal protection clause, no constitutional mandate for the state to provide "perfect conditions under which such right is exercised."[61] Subsequent decisions have continued to limit access of linguistic minorities in the areas of welfare and unemployment benefits by concluding that while notification in Spanish would be desirable from the standpoint of public policy, it did not rise to the level of a constitutional mandate.[62] If the right to bilingual notice cannot be found in a constitutional imperative, then it must, as in *Lau v. Nichols*, be founded upon legislation, be it statutory schemes or regulations made pursuant to such statutes.[63]

The series of cases from *Castro* to *Guerrero* would seem to have laid the groundwork for judicial consideration of the right to a court interpreter in civil proceedings. An important case on the issue of when and where court interpreters are to be utilized is *Gardiana v. Small Claims Court In and For San Leandro-Haya*.[64] Eusebia and Jesus Gardiana were defendants in a small claims case brought against them for damages. Both were indigent and did not speak or understand English. They moved for an order to compel the small claims court to appoint an interpreter at no cost to them. The court

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[60] *Id.* at 239-43, 466 P.2d at 256-58, 85 Cal. Rptr. at 32-34.

[61] *Id.* at 242-43, 466 P.2d at 258, 85 Cal. Rptr. at 34-35.

[62] *See generally* Comment, *Breaking the Language Barrier: New Rights for California's Linguistic Minorities*, 5 PAC. L.J. 648, 651-53 (1974), for a commentary on Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973), *aff'g* 325 F. Supp. 1341 (N.D. Cal. 1971) and Guerrero v. Carlson, 9 Cal.3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973). Note however, that *Carmona* was a case brought in federal court, while *Castro* and *Guerrero* are California state court decisions. In contrast, see the persuasive dissent by Justice Tobriner in *Guerrero*:

> To postulate a "reasonable assumption" that recipients of the notice may seek out a translator is a far cry from finding that notices *are* "reasonably certain to inform" a Spanish-speaking recipient of the reasons for the reduction or termination of his benefits and of his right to a hearing.

Id. at 821, 512 P.2d at 842, 109 Cal. Rptr. at 210 (Tobriner, J., dissenting). Justice Tobriner found that the method of notice to clients, if not translated, would not be reasonably certain to inform persons not literate in English because they might not appreciate the need for translation or might be unable to obtain any translation at all. *Id.* He ends by characterizing the majority's opinion as "an unfortunate step backwards." *Id.* at 823, 512 P.2d at 843, 109 Cal. Rptr. at 211.

[63] Comment, *supra* note 62, at 657, concludes, after reviewing the *Castro*, *Carmona*, and *Guerrero* decisions: "Lastly, although bilingual requirements are highly desirable, they do not appear to be a question for the courts, but rather a matter of public policy for the legislature to act upon." This conclusion arises from the reluctance of the courts to extend linguistic minority rights under the constitutional mandates of the due process or equal protection clauses, as exemplified by the limitations in scope within the *Castro* decision, further narrowed in *Carmona* and *Guerrero*.

[64] 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976).

denied the request on the grounds that it had no inherent or statutory power to appoint an interpreter at the expense of the county or any other governmental entity.

On appeal, it was held that the court *does* have the inherent power to appoint an interpreter at public expense when a litigant is non-English-speaking and is proceeding *in forma pauperis*. The court stated that "independently of statute, every court has the 'inherent power to swear interpreters whenever such a course is necessary to the due administration of justice.'"[65] To hold otherwise would mean that whenever a court could not find a "volunteer" interpreter, the case would have to proceed with no interpreter at all. Since the most common method of conducting all court proceedings is by the use of language, the court would be unable to function without an interpreter.[66]

In addition, the court noted the statutory mandate of section 752(a) of the California Evidence Code[67] that an interpreter "shall" be appointed when a witness is incapable of communicating in or understanding English. Thus, the only conclusion reasonably to be drawn from the above is that the court has inherent power to appoint an interpreter free of charge to an indigent civil litigant:

> A conclusion to the contrary would have the practical effect of restricting an indigent's access to the courts because of his poverty [and would contravene] the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis.[68]

The Supreme Court of California held in *Jara v. Municipal Court*[69] that the courts are not constitutionally required to appoint interpreters at public expense to assist indigent non-English-speaking defendants who are represented by counsel.[70] Many observers view this result as a staggering setback for the rights of linguistic minorities which had seen substantial progress in the area of civil litigation as a result of the decision in *Gardiana*.

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[65] *Id.* at 423, 130 Cal. Rptr. at 681, *quoting* People v. Walker, 69 Cal. App. 475, 486, 231 P. 572, 576 (1924).

[66] 59 Cal. App. 3d at 423, 130 Cal. Rptr. at 681, *citing* People v. Pechar, 130 Cal. App. 2d 616, 618, 279 P.2d 570, 571 (1955).

[67] (West 1966 & Supp. 1979).

[68] 59 Cal. App. 3d at 424, 130 Cal. Rptr. at 682, *citing* Isrin v. Superior Court, 63 Cal. 2d 153, 165, 403 P.2d 728, 736, 45 Cal. Rptr. 320, 328 (1965).

[69] 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978).

[70] *Id.* at 186, 578 P.2d at 97, 145 Cal. Rptr. at 850.

In contrast to *Gardiana*, the *Jara* court found no statutory basis for appointment of an interpreter at public expense since it stated that section 752 of the California Evidence Code refers to interpreters for witnesses only, not litigants.[71] The *Jara* court went on to distinguish between witness interpreters and party interpreters and characterized the role of the witness interpreter as a "different and much less burdensome function" than that of a party interpreter.[72] Notwithstanding that statement, the court then said the witness interpreter is always essential to the proceeding and the party interpreter is not when counsel is present.[73]

The *Jara* court also stated that litigants in municipal courts could bring family members, friends, neighbors, acquaintances or private organizations to interpret for them.[74] Furthermore, the court stated: "Courtroom proceedings, of course, are controlled by counsel, and the absence of an interpreter for his client to explain court proceedings as they occur has not been shown to constitute a substantial burden."[75]

In attempting to justify its conclusion in light of *Gardiana*, the *Jara* court distinguished small claims proceedings from the municipal courts. Small claims courts function informally and expeditiously with no attorneys, pleadings or rules of evidence. By way of contrast, litigants in municipal courts can have an attorney to represent them capably in court.[76]

It is important to note that, as in *Guerrero*, Justice Tobriner dissented,[77] stating that the majority opinion in *Jara* insures that for the litigant "the proceeding will be an empty and meaningless ritual."[78] To require friends or family to assist in court, argues Justice Tobriner, could be "unduly burdensome" to the people involved and there was no proof that language assistance was in fact available to all litigants.[79] The Justice continues:

> I cannot agree with the majority's assessment of the confusion, the despair, and the cynicism suffered by those who in intellectual isolation must stand by as their possessions and dignity are stripped

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[71] *Id.* at 183, 578 P.2d at 95, 145 Cal. Rptr. at 848.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 184, 578 P.2d at 95, 145 Cal. Rptr. at 848.
[75] *Id.*
[76] *Id.* at 185, 578 P.2d at 96, 145 Cal. Rptr. at 849.
[77] *Id.* at 186, 578 P.2d at 97, 145 Cal. Rptr. at 850 (Tobriner, J., dissenting). *See* note 57 *supra*.
[78] *Id.* at 187, 578 P.2d at 97, 145 Cal. Rptr. at 850.
[79] *Id.* at 188, 578 P.2d at 97-98, 145 Cal. Rptr. at 850-51.

> from them by a Kafka-esque ritual deemed by the majority to constitute, nonetheless, a fair trial.[80]

Justice Tobriner focuses upon the ultimate goal of the movement to guarantee and provide better court interpreter services, *i.e.*, to improve the public's perception of justice. Just as important as achieving a fair and just result in every case is the notion that each litigant believes he will be given a chance to be heard and a chance for justice in our courts. The public's perception of justice and its belief that justice can be achieved is crucial to the development of respect for our laws and judicial system. Providing qualified court interpreters to all non-English-speaking parties and witnesses will not only guarantee better and more efficient justice but will also ensure understanding of and respect for our social system.

C. Legislative Solutions

Statutory developments have demonstrated California's leading role in the recognition and attempted resolution of the problems of non-English-speaking population.[81] The limitations in judicial response have placed the responsibility for instituting needed reforms squarely on the shoulders of legislators.

In the area of bilingual education, *Lau v. Nichols*[82] has led to the Bilingual Education Act of 1972[83] and the Bilingual-Bicultural Education Act of 1976.[84] In the area of use of foreign languages in public services, the Bilingual Service Act of 1973 was enacted.[85] However, despite the

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[80] *Id.* at 188, 578 P.2d at 98, 145 Cal. Rptr. at 851.

[81] Comment, *supra* note 62, at 659, points out that between 1971 and 1974, approximately ninety bills which affected linguistic minorities were introduced in the California Legislature. Although the percentage of such bills which have subsequently been enacted into law is low, Blaine finds that those which have been enacted are of great assistance to the linguistic minorities. *Id.*

[82] 414 U.S. 563 (1974).

[83] CAL. EDUC. CODE §§ 52100-52114 (West 1978) (repealed 1977). *See also* Comment, *supra* note 62, at 659-61, for a commentary on the scope of the 1972 Act.

[84] CAL. EDUC. CODE §§ 52160-52179 (West 1978). Kunzi, THE CALIFORNIA EDUCATION CODE, COMMENTARY 21 (West 1978), views the Bilingual-Bicultural Education Act of 1976 as legislation spawned by the United States Supreme Court decision in Lau v. Nichols, 414 U.S. 563 (1974):

> The Legislature's response to this decision was the enactment of the Bilingual-Bicultural Education Act of 1976, [Stats. 1976, c.978, p.2306] establishing an extensive program to be put into effect at the local level to more effectively bring into the educational programs pupils of limited-English-speaking abilities.

While a study of the 1976 Act is beyond the scope of this article, mention should be made of its comprehensive nature, covering areas from pretesting each limited-English-speaking pupil at the beginning of each school year, CAL. EDUC. CODE § 52171 (West 1978), through administration of programs within each district. *Id.* § 52177.

[85] CAL. GOVT. CODE §§ 7290-7299 (West Supp. 1979).

provision for facilitating effective communication where linguistic minorities are for all intents and purposes precluded from the utilization of government services, the 1973 Act's discretionary language has muted many hoped for results. The 1977 amendments,[86] which have added specificity and definitions to the 1973 Act, will hopefully increase its effectiveness.

A great achievement for the public and for the court interpreters was reached on May 24, 1978, when Governor Brown signed into law A.B. 2400.[87] As discussed above, existing law and court rules already allowed for the appointment of court interpreters when the court requires it. The importance of the 1978 Act is that it mandates the establishment of a program for training and testing court interpreters.[88] Experience has shown that court interpreters do not facilitate justice unless they are skilled in not only the foreign language but also in courtroom technique and legal terminology.

The Act provides for the collection of reliable and uniform data on the use of court interpreters to be utilized in the future to continously upgrade interpreter services.[89] Such data had heretofore been unavailable. The State Personnel Board is entrusted with the task of developing court interpreter testing programs.[90]

A list of qualified court interpreters is to be published in each county and only interpreters from this list may be used in the courts, unless good cause be shown.[91] Certification and testing of court interpreters is to be done annually by the State Personnel Board.[92]

Finally, in providing for the implementation and continued monitoring of interpreter services, the Act confers the following functions upon the Judicial Council:

> The Judicial Council shall collect, analyze, and publish pertinent interpreter utilization statistics, with commentary, as part of

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[86] CAL. GOVT. CODE §§ 7292-7299.8 (West Supp. 1979). For example, Comment, *supra* note 62, at 661-64, emphasizes the discretionary and subjective nature of such phrases as "substantial" or "sufficient" number. Cal. Govt. Code § 7296.2 (West Supp. 1979) defines "substantial number of non-English-speaking people" as groups who compromise five percent or more of the people served by the agency involved. However, *id.* § 7299.8 provides for the possibility of the establishment of bilingual provisions where the non-English-speaking population is less than 5 percent of the people served.

[87] CAL. GOVT. CODE §§ 68560-68564 (West Supp. 1979). *See generally* Blaine, *supra* note 62, at 664-70, for a survey of prior legislative action in the area of administration of justice.

[88] CAL. GOVT. CODE §§ 68561, 68564 (West Supp. 1979).

[89] *Id.* § 68563.

[90] *Id.* § 68562.

[91] *Id.*

[92] *Id.*

> the Council's Annual Report of the Administrative Office of the California Courts and shall report such statistics to the Governor and to the Legislature not later than December 31, 1980. In collecting these statistics, the Judicial Council shall request the standards used to determine the qualifications of interpreters serving in all courts and in all languages. Such information shall serve as a basis for determination of the need to establish interpreter programs in additional courts and in additional languages and the establishment of such programs through the normal budgetary process.
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> . . . .
>
> The Judicial Council shall adopt rules to implement this article and shall establish:
>
> (a) Standards for determining the need for a court interpreter in particular cases.
>
> (b) Standards for ensuring a court interpreter's understanding of the technical terminology and procedures used in the courts.
>
> (c) Standards of professional conduct for court interpreters.
>
> (d) A requirement for periodic review of each recommended court interpreter's skills and for removal from the recommended list of court interpreters who fail to maintain their skills.[93]

D. California Court Interpreters Association

In the Los Angeles County Superior Court, the testing, qualification, and assignment of interpreters is administered by the Executive Officer. The court utilizes a written examination for candidates, which includes sections covering the following areas:

> 1. Spanish to English, to choose the best word in English that would translate the meaning of the Spanish word.
> 2. Knowledge of Spanish idiom and expression. Also must choose the best translation from several possible.
> 3. Reading comprehension. A Spanish passage with questions in English about its meaning.
> 4. Word-meaning section from English to Spanish.[94]

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[93] *Id.* §§ 68563-68564.

[94] Special Project, *supra* note 46, at 481, *citing* National Center for State Courts, CALIFORNIA COURT SERVICES CONSOLIDATION PROJECT: CONSOLIDATION OF PROFESSIONAL SERVICES AND WITNESSES 22, 23 (1974).

For those candidates who pass the written examination, a mock trial is used to determine competency.[95] This combination demonstrates a recognition that oral interpreting skills and familiarity with the legal process and courtroom situation require on-the-job testing, in addition to the verification of language skills through written examination. The result is an improvement in the quality of interpreter service, due in large measure to this examination and standardization procedure. In a court system such as Los Angeles County, where on any given day up to seventy court interpreters may be working, such a system is essential if quality interpreting is to be the result.[96]

A dynamic, vital voice for change is that of the California Court Interpreters Association.[97] The first of its kind in the United States, this Association, comprised of over 100 members, has been most influential in bringing about the much needed consciousness of and subsequent improvement in interpreter services throughout the California court system. The Association has served as a model for the establishment of other similar associations throughout the nation, such as the newly-formed New Jersey Court Interpreters Association.

III. THE CASE FOR A NEW JERSEY COURT INTERPRETERS ACT

A. Introduction

A sharp contrast to the California response to the problems of linguistic minorities is provided by the rather limited progress which has thus far been achieved in the state of New Jersey. California has followed the Bilingual Education Act of 1972[98] with similarly broad legislative action in govern-

[95] *Id.* In the context of administrative hearings, the State Department of Benefit Payments has implemented a similar two-pronged procedure for interpreter certification involving a written multiple choice examination and a bilingual oral examination. The written examination, in English, addresses another important aspect of the interpreter's qualifications, familiarity with the welfare system. STATE HEARINGS HANDBOOK FOR INTERPRETERS WITH GLOSSARY OF SELECT WELFARE TERMS, *supra* note 26, at 24. We suggest that a similar component of familiarity with the courtroom setting, the legal process, and appropriate terminology is a vital component of the court interpreter's qualifications as well.

[96] In assessing and ultimately praising the thoroughness and competency of the Los Angeles County Court System's approach to interpreter service, it should be recalled that the Los Angeles County Court Interpreters Manual is also a product of this court system. *See* note 55 *supra* and accompanying text.

[97] H. McCarter, one of the authors of this article, attended the 5th Annual California Court Interpreters Association Conference in June, 1978, where he acquired a broad perspective on the current state and national situation of court interpreters. At that time, California had the first and only incorporated Court Interpreters Association. Since the Conference, in several states, among them New Jersey, steps have been taken toward the formation of a Court Interpreters Association, as an effort in the direction of recognition of the profession, standardization of qualifications, and upgrading the level of service.

[98] CAL. EDUC. CODE §§ 52100-52114 (West 1978) (repealed 1977).

ment services, judicial proceedings, and a subsequent Bilingual Education Act in 1976.[99] New Jersey, despite large populations of Hispanics and other linguistic minorities—a situation analogous to California's—has not directly addressed the language problems of its minorities except in the area of bilingual education.[100] This is not to minimize the very important strides made in the area of instruction to children whose dominant language is not English, but rather to stress that this should hopefully be viewed as the first step in a comprehensive treatment of the very real problems of large segments of New Jersey's population, the non-English-speaking minorities.[101]

An awareness on the part of the New Jersey Legislature of the large numbers of children coming from primarily non-English-speaking environments is demonstrated in the legislative findings of the Bilingual Education Programs Act:

> The Legislature finds that there are large numbers of children in the State who come from environments where the primary language is other than English. Experience has shown that public school classes in which instruction is given only in English are often inadequate for the education of children whose native tongue is another language. The Legislature believes that a program of bilingual education can meet the needs of those children and facili-

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[99] *Id.* §§ 52160-52179 (West 1978).

[100] *See* N.J. STAT. ANN. §§ 18A:35-15 to -26 (West Supp. 1978-1979). *Id.* § 18A:35-16 defines "Children of limited English-speaking ability" as those "whose primary language is other than English and who have difficulty performing ordinary classwork in English." The Act then deals with such areas as identification and classification of children affected, programs, periods of participation, as well as notice to and involvement of parents. *Id.* §§ 18A:35-17 to -20, -22.

[101] The lack of legislative, judicial or other mandates for adequate linguistic assistance in obtaining necessary services has been verified first-hand, time and again in terms of the Hispanic minority. Montclair State College's Spanish Community Program Internship in Law, under the direction of one of the authors of this article, M. Frankenthaler, has, over the past two years, been attempting to provide linguistic assistance to Spanish-speaking clients in areas from communication with clients in matters relating to civil proceedings, administrative hearings, translation of necessary documents, communication with administrative agencies, to party interpreters at many judicial proceedings. The needs being met by the Montclair program underscore the lack of interpreter and translator services at almost all levels. This does not imply a total lack of services, but a haphazard response which depends upon the sensitivity and budget of individual agencies. Additionally, it has very frequently been encountered that the bilingual personnel hired specifically to deal with the problems created by the language barrier may speak the two languages involved, but are untrained in the specialized skills of interpreting and/or translating. *See* notes 37-41 *supra* for a discussion of the different skills as applied to the area of court interpreting. A recognition of the difference between mere speaking ability, and specialized linguistic skills is an essential first step to remediation in this area.

> tate their integration into the regular public school curriculum. Therefore, pursuant to the policy of the State to insure equal educational opportunity to every child, and in recognition of the educational needs of children of limited English speaking ability, it is the purpose of this act to provide for the establishment of bilingual education programs in the public schools.[102]

This comports with Mr. Justice Blackmun's concurrence in *Lau*: "For me, numbers are the heart of this case and my concurrence is to be understood accordingly."[103]

Having acknowledged that there exist large numbers of *children* whose environments are primarily non-English-speaking, it is a small step to the conclusion that there are large numbers of *adults* in those very same environments. Just as numbers have been argued as the heart of the issue in the extention of *Lau* to other areas, the New Jersey Legislature must similarly recognize that adequate service to its linguistic minorities cannot begin and end with the classroom. The statutory developments in California and case law such as *Pabon v. Lavine*[104] in New York, should inspire similar amplification of the *Lau* rationale to other areas.

In the area of public notice, the case of *North Baptist Church v. Orange*[105] demonstrates, at this early date, a perceptive approach to the need to inform a linguistic minority. The question presented to the court was that the Charter of the City of Orange required that public notice of a proposed ordinance be given by publication in all three newspapers of the City of Orange.[106] Although one of the newspapers was printed in the German language, the notice was printed there, just as in the other two Orange newspapers, in the English language.[107] The court stated:

> This, we think, was a mistake. The primary meaning of the word publish is to make known. The medium through which intelligence is communicated in a German newspaper is the German language. The object to be attained by including such papers in

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[102] N.J. STAT. ANN. § 18A:35-15 (West Supp. 1978-1979).

[103] 414 U.S. 563, 572 (1974).

[104] 70 F.R.D. 674 (S.D.N.Y. 1976).

[105] 54 N.J.L. 111, 22 A.1004 (Sup. Ct. 1891). *See* Annot., 90 A.L.R. 500 (1934) as to the necessity that newspapers be published in the English language to satisfy requirements regarding publication of legal or official notice for a survey of cases in the area.

[106] 54 N.J.L. at 116, 22 A. at 1005.

[107] *Id.*

> the class of publications is to bring knowledge home to a body of readers by whom, as a rule, the English language is not readily or not at all legible. A notice contained in a German paper in a language other than the German is not published but only printed.[108]

Almost a century later, we are still grappling with the problem of mere printing versus intelligent and intelligible notice in such areas as termination of welfare benefits and unemployment compensation, not to mention problems of access to our judicial processes.

The court in *North Baptist* also addresses the issue of the publication of ordinances subsequent to passage. Once again, the Charter required publication in all three newspapers of the City of Orange. Yet, in that instance, the ordinance was published solely in German translation in the German language newspaper. The court observed:

> [T]his was also a mistake. There is a manifest distinction to be observed between the publication of a notice and the publication of an instrument or statute or ordinance.
>
> A notice requires no particular collocation of words so long as it conveys a clear notion of its subject.
>
> But a statute or ordinance has no legal existence except in the language in which it passed.
>
> No translation, however, accurate, can be adopted in the place of its original text for the purposes of construction in a legal proceeding.
>
> Until the legislature makes a provision for the printing of ordinances in German newspapers in translation, it is not perceived how they can be printed otherwise than litera et verbis. The publication of the translation may be regarded as a proper explanatory adjunct of the English copy, but cannot be accepted as a legal substitute for it.
>
> This view of the manner in which an ordinace should be printed under these conditions applies in some degree to the notice also. As already set forth, the charter requires that as part of such notice a copy of the proposed ordinance shall be published. For the reasons already stated, this copy should appear in English.[109]

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[108] *Id.*

[109] *Id.* at 116-17, 22 A. at 1005. *Compare* Annot., 90 A.L.R. 500, 506 (1934), which deals with the commentary on "printing" vs. "publication" but does not address the translation issue cited in the text at this note.

Just as the language of the population whom the notice is reasonably calculated to reach cannot be ignored, so too the fact that English is the official language for legal purposes of statutory publication must be respected. Yet this fact does not alter the need to inform the German-speaking population through a translation as an "explanatory adjunct to the English copy."[110] The key, as the court clearly perceived, is that notice be *bilingual* not substitutional.[111] Unfortunately, the current state of the law in New Jersey mandates the exclusive utilization of English. As regards legal advertisements, N.J. Stat. Ann. § 35:1-2.1[112] provides:

> Whenever it is required to publish resolutions, official proclamations, notices or advertising of any sort, kind or character, including proposals for bids on public work and otherwise, by this State or by any board or body constituted and established for the performance of any State duty or by any State official or office or commission, the newspaper or newspapers selected for such publication must meet and satisfy the following qualifications, namely: said newspaper or newspapers shall be entirely printed in the English language.

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[110] 54 N.J.L. at 117, 22 A. at 105.

[111] *Id.* In State v. Mayor of Jersey City, 54 N.J.L. 437, 24 A. 571 (Sup. Ct. 1892), the court interpreted *North Baptist Church* to mean: "When a statute directs notice to be published in a newspaper, the courts will presume, in the absence of any indication to the contrary, that the legislature designated the notice to be published in the same language as the newspaper itself." 54 N.J.L. at 438, 24 A. at 571. In contrast to *North Baptist Church*, the statute here in question required publication in only one daily newspaper in the city. *Id.* Thus, as in *North Baptist Church*, the statute is silent as to the language as well as the newspaper in which notice is to be given. The court found that a presumption arises requiring that notice be given in the ordinary language of the state, *i.e.*, in English and so in an English newspaper. *Id.* This reasoning is confirmed in State v. Inhabitants of the City of Trenton, 56 N.J.L. 469, 29 A. 183 (Sup. Ct. 1894). *North Baptist Church* was further distinguished in Tappan v. Dayton, 51 N.J. Eq. 260, 28 A. 1 (Prerog. Ct. 1893), where a statute silent as to the language of publication was interpreted to sanction notice in English printed in a German newspaper:

> The law of 1891 is silent as to the language in which the notice of sale shall be published, and does not forbid publication in English; hence no violence is done it to hold that it contemplates publication in that language. To imply that publication in the German language was intended is not a necessary implication. Holding that the publication is to be in English reasonably reconciles and harmonizes the provisions of both statutes. It may well be that the legislative intent in the passage of the act of 1891 was to place notices of sales where they would be seen by a notably industrious and saving people, who although able to read and understand English, prefer habitually to read a paper in their native tongue, and look to it for information.

Id. at 264, 28 A. at 2.

Regrettably, the court did not address possibility of translation—also explored in *North Baptist Church*—which combines statutory intent with intelligible notice.

[112] (West 1968).

The 1938 amendment adding the word "entirely" to the phrase "entirely printed in the English language" comports with the logic but not with the intent of *North Baptist Church*. The language of the newspaper is the same as the language of the notice, but in effect results in a complete absence of notice to non-English-speaking residents. In weighing administrative efficacy against the right to notice, N.J. Stat. Ann. § 52:36-4[113] similarly fails to strike any balance:

> No laws or public documents shall be printed, published or advertised by the authority or at the cost of the state, except in the English language.

As will be seen in the area of court interpreters, statutory recognition of the problems of linguistic minorities is sorely lacking.

B. Status of the Rights to an Interpreter in New Jersey: Rules and Statutes

The need for adequate understanding by the non-English speaker becomes most obvious in the judicial context. Without an interpreter, access to our court system is effectively foreclosed, and the rights of individuals and possibly their lives and liberty are thereby placed in a most precarious situation. We have already discussed this aspect in the federal as well as the California contexts. It is useful to survey the present state of the law in New Jersey before commenting upon needed reforms.

There is no constitutionally mandated right to an interpreter in New Jersey.[114] The only statutory mention of court interpreters, other than in

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[113] (West Supp. 1978-1979). Impetus toward increased access to information has been provided to the general public through the Open Public Meetings Act, N.J. STAT. ANN. §§ 10:4-6 to -21 (West Supp. 1978-1979), popularly known as the "Sunshine Law." This Act expressly provides for notice of all public meetings, so that the public may effectively participate in all phases of the democratic process. Perhaps the time has come to insist upon some "sunshine" in terms of notice reasonably calculated to reach linguistic minorities.

Other statutes reflect a similar requirement of the exclusive use of English. In terms of statutory filing requirements, N.J. STAT. ANN. § 47:1-2 (West Supp. 1978-1979) states that instruments must be written or printed in English to be entitled to recording or filing. N.J. STAT. ANN. § 14A:1-6 (West Supp. 1978-1979) includes a similar requirement of English usage for documents relating to corporations (with the exception of the corporate name).

[114] In Kopczinski v. County of Camden, 1 N.J. Super. 121, 127, 62 A.2d 737, 741 (App. Div. 1948), *rev'd*, 2 N.J. 419, 66 A.2d 882 (1949), the court characterized the position of interpreters in the following manner:

> In the absence of constitutional restriction, the power of the legislature to abolish the position, or, for the future, to lower the salary or to add new or additional requirements before the former salary can be effective, cannot be questioned.

title 43 dealing with pensions for court interpreters,[115] is found in N.J. Stat. Ann. §§ 2A:11-28,-28.1, and -29.[116] N.J. Stat. Ann. § 2A:11-28,[117] which describes the appointment and duties of interpreters, provides:

> Whenever the transaction of the public business of the Superior Court, the County Court and the juvenile and domestic relations courts, in and of the counties of the State, other than counties of the first class having a population of more than 800,000 inhabitants, and the business connected with such courts in the office of the county prosecutor, the sheriff, the county clerk, the surrogate, and of the grand jury, will be expedited or improved thereby, the judge of the County Court of any such county, or the judges of the County Court if there be more than one such judge in any such county, *may appoint, to serve at the pleasure of the appointing judge or judges,* interpreters of the following languages, namely, Italian, German, Polish, Russian, Spanish, Yiddish, Hungarian and Slavish [*sic*], and Greek, or any one interpreter for one or more of the aforesaid languages.[118]
>
> Interpreters appointed under authority of this section shall severally attend in person upon the courts mentioned in this sec-

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On appeal, the decision was reversed. *Id.* The New Jersey supreme court held that affirmative action by the county board of freeholders which was required by N.J. STAT. ANN. §§ 2A:11-28,-29 (West Supp. 1978-1979) in approving an interpreter's position and salary could not be applied retroactively to those interpreters already employed with fixed salaries, finding this to be an usurpation of powers conferred by statute upon the county judge. 2 N.J. at 424-25, 66 A.2d at 884-85. The holding leaves the appointment of interpreters to the discretion of the judge. *Id.* at 425, 66 A.2d at 885. Thus, while the resolution by the freeholders in the instant case was void as *ultra vires,* the right to an interpreter is not established as being constitutionally mandated.

[115] N.J. STAT. ANN. §§ 43:10-93 to -105.3 (West 1962) deal with pension funds for court interpreters in counties of the second class. It is ironic to contrast the cursory treatment given such expansive areas as interpreter duties, appointment, and mandated or recommended utilization, to the attention to detail in the above sections dealing with the pensions (including retirement for age and service, as well as for disability, pension to widow for interpreter dying in service, and exemption of pensions from tax).

[116] (West Supp. 1978-1979).

[117] *Id.* (emphasis added).

[118] At least one commentator has questioned the constitutionality of a statute which limits the use of interpreters to certain specified languages, posing the question: "Does a Chinese or Swedish-speaking accused have a statutory right to an interpreter in New Jersey?" This may be viewed as a discriminatory classification. Note, 25 Rutgers L. Rev. 145, *supra* note 7, at 148 n.14. In the 1952 amendment to the statute, An Act concerning court interpreters, and amending sections 2A:11-28 and 2A:11-29 of the New Jersey Statutes, ch. 181, 1952 N.J. Laws 606, Yiddish was added to the list of languages for which interpreters are authorized. However, the concept of a limited number of authorized languages remains unchanged.

tion during the several sessions thereof, and at chambers when requested so to do upon the judges of such courts, upon the sessions of the grand jury, upon the county prosecutor, upon the sheriff, upon the clerks of such courts, and upon the other officers, charged with the transaction of the public business of such courts, for the purpose of interpreting the languages and dialects for the interpretation of which they are appointed respectively.

In all counties of the first class having more than 800,000 inhabitants, the persons holding positions of interpreters of languages under authority of article 6 of chapter 16 of Title 2 of the Revised Statutes of 1937 shall be transferred to the office of the sheriff of the county. Such person shall retain all the rights and privileges under all laws relating to seniority, civil service, pensions and veterans, and shall perform the duties of interpreters of languages as set forth in this article. Hereafter interpreters of the languages specified in this section *may be appointed by the sheriff* in counties of the first class having more than 800,000 inhabitants, *with the approval of the board of chosen freeholders*, at a salary fixed for the position by the board.

It must initially be observed that this section is found within the statutory title, "Administration of Civil and Criminal Justice." Thus, the appointment of interpreters is not limited to the criminal context.[119] This provides an excellent basis for future legislation in the area. The appointment of an interpreter is completely discretionary. The only question to be posed would be in regard to where the discretion lies, *i.e.*, with the judge, the sheriff, or the freeholders,[120] and how it is determined whether or not

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[119] In spite of the manifestly discretionary wording of the statute, Hippchen, *supra* note 10, at 259, interprets the statute as requiring the court "to provide bilingual interpreters to Spanish-speaking defendants in all criminal cases." The authors of this article believe that Hippchen is mistaken on several counts: there is nothing mandatory in the language of the statute; nowhere in the statute is the word "defendant" used, and there is no distinction between civil and criminal cases in the statute.

[120] *See generally* Kopczinski v. County of Camden, 1 N.J. Super. 121, 62 A.2d 737 (App. Div. 1948), *rev'd*, 2 N.J. 419, 66 A.2d 882 (1949), for a discussion of this issue. Under the current law, discretionary appointment in counties of the first class rests with the sheriff with the approval of the board of chosen freeholders, while in all other instances, discretion lies "at the pleasure of the appointing judge or judges." N.J. STAT. ANN. § 2A:11-28 (West Supp. 1978-1979). In Hippchen's survey, *supra* note 10, at 267, he found a marked preference for continual local control and autonomy in the appointment of interpreters. Hippchen concludes, however, that, despite many logical and compelling reasons in support of local control of court interpreters,

> the local court is neither the best or most opportune administrative unit in which to expect further development in the important area of court function. What appears to be necessary is

the appointment of an interpreter will expedite or improve the business connected with courts as are enumerated in the statutes. There are, additionally, no guidelines, regulations, or standardization for the training, testing, certification, selection, or other regulation in the appointment of interpreters.

N.J. Stat. Ann. § 2A:11-28.1 [121] provides a much more comprehensive approach to the appointment of interpreters for the deaf and hearing impaired:

> Whenever upon application by a witness or upon his own motion the judge of any court determines that a witness is deaf or his hearing is so seriously impaired as to prevent his understanding of proceedings pending before the court, the judge shall appoint a qualified interpreter fluent in the use of sign language to assist the witness. The interpreter shall be a person listed in the Registry of Interpreters for the Deaf and shall serve at the expense of a party, the parties or at public expense as the judge shall order.

It is unfortunate that this section is limited to the provision of interpreters for the deaf or hearing-imparied *witness* only. However, there are guidelines presented here which are useful models for foreign language interpreters. For example, the interpreter must be listed on the Registry of Interpreters for the Deaf. Thus, the qualifications and certification of the interpreter are already provided for through that Registry's own rigorous standards.[122]

Court interpreters are scarcely mentioned in the New Jersey court rules. A perusal of the 1978 court rules finds the word interpreter utilized only twice. In Rule 3:6-6 of the Rules Governing Criminal Practice,[123] "inter-

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> for the legislature to rewrite the law and give administrative responsibility to a unit of state government which already is an effectively functioning office of the state court system. The new office of Chief of Court Interpreters can do much to professionalize this function, and to establish and maintain uniform standards of bilingual court interpreter selection, training, and performance.

Id. at 267. The authors of this study are in complete accord with *Hippchen* regarding this issue.

[121] (West Supp. 1978-1979). The only other section dealing with interpreters is N.J. STAT. ANN. § 2A:11-29 (West Supp. 1978-1979), which relates to the payment of salaries for interpreters in the languages specified in N.J. STAT. ANN. § 2A:11-28.

[122] *See* note 51 *supra* for guidelines for candidates desiring certification through the Registry.

[123] This rule reflects the decision in State v. Bolitho, 103 N.J.L. 246, 259, 136 A. 164, 171 (Sup. Ct.), *aff'd*, 104 N.J.L. 446, 146 A. 927 (E. & A. 1927), whereby the presence of an interpreter in the grand jury room to interpret the testimony of witnesses who could not speak English was found not to render void the grand jury indictment:

> We do not perceive any error in this. If it becomes necessary to have an interpreter in order to elicit testimony from a witness who cannot speak English, there seems to be no good reason why a grand jury may not summon to its assistance some reputable person who

preters when necessary" are among those who may be in attendance at a grand jury session, though not while the grand jury is deliberating. The only other reference to court interpreters is found in Rule 17-4 of the New Jersey Rules of Evidence: "An interpreter is subject to all the provisions of these rules pertaining to witnesses." This terse summarization is a counterpoint to the detailed sections on interpreters which are found in the California Rules of Evidence.[124] We may presumably extrapolate from the New Jersey court rules that, for example, the expertise of the interpreter may be put in question as that of any other expert witness. It is unclear, however, whether it is only the witness interpreter—whose words become a part of the official record—or also the party interpreter—whose words are only heard by the non-English-speaking party—who is subject to all of the New Jersey Rules of Evidence pertaining to witnesses.

C. Status of the Right to an Interpreter in New Jersey: Case Law

The New Jersey case law on interpreter-related issues is rather sparse.[125] Existing case law is confined almost completely to the criminal area. In *State v. Abbatto*,[126] the defendant, an Italian, could not speak or thoroughly understand English, and so his confession to a murder charge involved the utilization of an interpreter. The defendant objected to the interpreter being called as a witness and asked the following question:

> Was the statement made by Mr. Jenkins [the prosecuting attorney] to you as interpreter, repeated by you as interpreter. This question was objected to; the reason for such objection being that the paper—i.e., the transcript of the stenographer's notes—must

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understands the foreign language of the witness, and can speak English, to interpret what is said in the foreign tongue, even though he be not an interpreter appointed by the court. Unless this be so, investigations of grand juries into matters affecting the peace, safety and welfare of a community might be seriously hampered and thus lead to injurious delay and obstruction of justice.

[124] Contrast note 54 *supra* and accompanying text.

[125] The only interpreter case which is cited with great frequency is Kopczynski v. County of Camden, 2 N.J. 419, 66 A.2d 882 (1949), for the general proposition of non-retroactivity of legislation, *not* for an issue directly relating to interpreters as a separate and distinct profession. *See e.g.*, City of Newark v. Paduda, 24 N.J. Super. 483, 487, 94 A.2d 859, 861 (Ch. Div. 1953):

> In Kopczynski v. County of Camden, 2 N.J. 419, 66 A.2d 882, 884 (1949), our Supreme Court said: "A cardinal rule in the interpretation of statutes is that words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied."

[126] 64 N.J.L. 658, 47 A. 10 (E. & A. 1900).

> speak for itself. Except for the grave importance of the case, this assignment is so frivolous as not to merit mention, much less consideration. It was not only competent, but necessary, to prove by the oath of the interpreter on the witness stand, that he had truly interpreted between the prosecutor and the prisoner, in order to justify the subsequent admission of the stenographer's transcript of what was said by them at the examination that he reported; and this was so without regard to whether the stenographer's notes did or did not contain a statement that the witness had so interpreted.[127]

This decision is reflected in Rule 17-4 New Jersey Rules of Evidence, whereby it is recognized that the interpreter is subject to all the rules applicable to witnesses.[128]

Two New Jersey cases deal with the issue of potential prejudice to defendants because of comments made concerning the need for an interpreter. In *State v. Catania*,[129] the court held that remarks by the trial judge, with reference to one defense witness not requiring an interpreter and a second witness requiring one, did not indicate "any prejudice or bias towards either the defendant or the witnesses. The court merely indicated in the words used in its opinion as to whether or not an interpreter was required. We see no merit in the contention."[130] More recently, in *State v. Sato*[131] the appellate court held that it was not reversible error for the trial judge to express doubt as to the defendant's need for an interpreter in the presence of the jury. Noting that "the remarks would have been better left unsaid," the court stated however that "they were hardly of a character to constitute prejudicial error."[132]

State v. Milosh[133] establishes that the decision regarding a defendant's application to testify through an interpreter clearly lies within the sound discretion of the trial judge:

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[127] *Id.* at 660, 47 A. at 11.

[128] State v. Abbatta, 64 N.J.L. 658, 47 A. 10 (E. & A. 1900), is subsequently cited in State v. Kubaszewski, 86 N.J.L. 250, 252, 92 A. 387, 388, (E.&A. 1914), for the proposition that: "The state had to call both the scribe and the interpreter, in order to cover the point that the prisoner's statement was correctly translated and put down as translated."

[129] 102 N.J.L. 569, 134 A.110 (Sup. Ct. 1926).

[130] *Id.* at 575, 134 A. at 113.

[131] 119 N.J. Super. 186, 290 A. 2d 739 (App. Div. 1972).

[132] *Id.* at 189, 290 A. 2d at 741.

[133] 5 N.J. Misc. 120, 135 A. 658 (Sup. Ct. 1927).

> At the trial the judge, deeming the defendant able to speak English, refused to permit the greater part of his testimony to be taken through an interpreter, and this refusal is assigned for error. Our examination of the proofs leads us to the conclusion that no error is exhibited in the ruling. Such an application is addressed to the discretion of the trial judge, who in such cases must determine the ability of the witness to speak and to make himself understood in the English language. 16 C.J. p. 808. There was evidence that the defendant could speak well enough in English when it suited his purpose, and the application for an interpreter bears the earmarks of desire rather than that of a necessity therefor.[134]

In consonance with the general rule in this area, the trial court's decision will not be disturbed, absent a showing of abuse of discretion.[135]

A different kind of discretion is considered by the court in *State v. Nardella*.[136] The defendant charged that the trial judge had delegated a judicial function to the interpreter, in instructing the interpreter not to give an answer of the defendant which included hearsay statements. The interpreter, it was contended, would, in effect, be passing upon the admissibility of testimony. Nevertheless, the Court of Errors and Appeals, did not find it to be error, based upon the following reasoning:

> Of course, the authority to pass upon the admissibility of evidence cannot be delegated by the trial judge to any person. While it is true that the judge did instruct the interpreter not to give any hearsay answers, he did not, in fact, attempt to delegate the duty of saying what answers were admissible. In each instance complained of, the interpreter translated enough of the answer to inform the court of its purport, and the court directed that the answer be not completed. In each instance, the answer was either completed or ruled upon by the court, and counsel for defendant did not take any exception to such rulings. The record fails to disclose that any testimony offered on behalf of defendant was excluded, but his case was fully and completely presented. If the direction of the judge to the interpreter not to translate hearsay statements was technically erroneous, no harm was done to the

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[134] *Id.* at 121, 135 A. at 659.

[135] *Id. See* notes 29-32 *supra* and accompanying text for an analysis of federal case law consistent with this proposition.

[136] 108 N.J.L. 148, 154 A. 834 (E. & A. 1931).

> defendant because it appears that the court and not the interpreter passed upon the admissibility of the answers. There is no merit in this point.[137]

The court seems to indicate that the admissibility of all proffered testimony was passed upon by the trial judge. If the interpreter had been asked to render judgmental decisions, that would clearly have gone beyond his linguistic function. It should be noted, however, that interpreters are sometimes asked to perform judgmental functions at other junctures; for example, when using the summary mode of interpreting, they must pick and choose in paraphrasing and summarizing. This is far from a complete and faithful version rendered in the target language.[138]

Kopitnikoff v. Lowenstein Bros., Inc. [139] presents a rare example of litigation on interpreter-related issues in the New Jersey state courts outside of the criminal context. The use of an interpreter whose qualifications and impartiality were in question was held to be an abuse of discretion by the Deputy Director in a worker's compensation suit.[140] The interpreter who had been pressed into service was a fellow patient of Kopitnikoff at the Newark Convalescent Home.[141] Though Kopitnikoff was unable to speak as a result of two cerebral hemorrhages, the "interpreter" asserted that Kopitnikoff understood him when he spoke to him in Russian.[142] This understanding was necessarily indicated by a shaking of the head.[143] The "interpreter" was, incidentally, on medication which made him dizzy.[144] The court soundly concluded:

> We recognize that the exercise of discretion by the deputy director in permitting Margolis to act as interpreter ought to be viewed liberally in view of the unusual circumstances of the case. But its exercise must be examined with fair and reasonable regard to the substantial right of the employer to have the injured workman bear the burden of proof. And under all of the facts appearing in the record, we feel compelled to conclude that Margolis was not

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[137] *Id.* at 150-51, 154 A. at 835.

[138] *See* notes 39-41 *supra* and accompanying text for a discussion and comparison of the three modes of interpreting.

[139] 24 N.J. Super. 434, 94 A.2d 854 (App. Div. 1953).

[140] *Id.* at 440, 94 A.2d at 857.

[141] *Id.* at 436, 94 A.2d at 855.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 436-37, 94 A.2d at 855.

> qualified to act as an interpreter, that his impartiality was questionably, and that his employment for that purpose constituted a mistaken use of discretion. We conclude further that the completely leading character of the questions put to Kopitnikoff, as well as the unreliable nature of his answers, render his testimony valueless as evidence. Thus, if no other evidence of a compensable accident appeared in the record, the judgment would have to be reversed.[145]

This case attests in an extreme but pointed manner to the need for standards for interpreter competency.

D. The Need for Reform . . . A Call for Legislative Action

The New Jersey Court Interpreters Association was recently formed with the idea and goal of accomplishing reforms such as brought about in California. Yet, before any progress can actually take place, there must be a recognition of the professional status of court interpreters. Court interpreters are highly skilled bilingual (or multi-lingual) persons who possess the ability to communicate in the precise meaning of what is said in the target language, accurately, rapidly, and under stressful courtroom conditions. They must possess the requisite understanding of the judicial process as well as the technical and specialized subject matter vocabulary involved in the case at hand.

Until there is a realization of the difference between the mere ability to speak more than one language and the expertise necessary to adequately serve as interpreter, we shall continue to read horror stories about people who are mistakenly convicted of crimes, whose businesses are ruined, who lose all of their savings, who are evicted without cause, or who lose custody of their children based upon the incompetence of untrained interpreters.

It is hoped that the New Jersey Court Interpreters Association may be a prime mover in bringing about this necessary recognition.[146] With recognition should come acceptance of professionalism, so that untrained bilingual

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[145] *Id.* at 440, 94 A.2d at 857.

[146] The current status of the profession of court interpreters in New Jersey is comparable to a patchwork quilt. There have been some isolated attempts by state agencies, counties, local courts, and agencies to organize the selection and qualification of court interpreters. There exists a Civil Service classification for court interpreters, but positions remain largely unfilled. There is, at present, no statewide licensing or certification program for interpreters. Likewise, there do not exist programs, schools, or facilities for the training of qualified court interpreters.

clerks, secretaries, bailiffs, or constables will no longer be forced into the uncomfortable and improper role of court interpreters. Nor will attorneys be pressed into dual service as both interpreter and lawyer, a situation which diminshes their effectiveness as counsel while asking them to perform a linguistic function for which they have not been trained.

Other avenues of reform must also be urged. If the consciousness and sensitivity of the legislative and judicial branches of state government are aroused, then reform is possible. As the California paradigm has shown us, judicial action can go only so far. The ultimate burden rests with the New Jersey Legislature. The key lies in statutory reform. The federal and California court interpreters acts provide models, inspirations, and ideas. New Jersey must deal with the same problems—from training and certification through appointment and mandated utilization of interpreters. Yet the answers are not necessarily the same.

With each passing day of legislative inaction, the right of access to our judicial system is being foreclosed to more members of the burgeoning groups which constitute our linguistic minorities. In other cases, though they are seemingly not barred from the courtroom, their participation is reduced to mere meaningless physical presence—unable to comprehend and so incapable of availing themselves of fundamental rights. In civil as well as criminal court proceedings, in administrative hearings or pre-trial and post-trial proceedings, irreparable damage is being done to the rights of individuals. The solution brings us full circle, back to the title of this article: The Case for a New Jersey Court Interpreters Act: A Call for Legislative Action.