

# HEINONLINE

Citation:

Michele LaVigne; McCay Vernon, Interpreter Isn't  
Enough: Deafness, Language, and Due Process, 2003 Wis.  
L. Rev. 843 (2003)

Provided by:

Ross-Blakley Law Library

Content downloaded/printed from [HeinOnline](#)

Tue Jul 17 14:49:29 2018

-- Your use of this HeinOnline PDF indicates your acceptance  
of HeinOnline's Terms and Conditions of the license  
agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from  
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope  
of your HeinOnline license, please use:

## [Copyright Information](#)



Use QR Code reader to send PDF to  
your smartphone or tablet device

# AN INTERPRETER ISN'T ENOUGH: DEAFNESS, LANGUAGE, AND DUE PROCESS

MICHELE LAVIGNE\*  
MCCAY VERNON\*\*

|  |     |
|--|-----|
| Introduction.....  | 844 |
| I. The Beginning: Deafness and Language .....  | 851 |
| A. Prelingual Deafness and Language Acquisition .....                                      | 852 |
| 1. Troublesome English.....  | 852 |
| 2. American Sign Language .....  | 859 |
| 3. "No Race": When English and American Sign<br>Language Collide .....                     | 861 |
| B. Side Effects .....  | 862 |
| 1. Language and Knowledge .....  | 862 |
| 2. Language and Cognition .....  | 865 |
| C. How Many?.....  | 865 |
| II. The Interpreting Profession and Process .....  | 868 |
| A. Myths and Misconceptions .....  | 868 |
| B. English-Based Interpretation.....   | 870 |
| C. American Sign Language .....  | 874 |
| D. All Places in Between .....   | 878 |
| E. Interpreting for the Deaf Person with<br>Minimal Language Skills .....                  | 879 |
| F. The Mode of Interpretation:<br>Simultaneous Versus Consecutive.....                     | 882 |
| III. The Legal Implications of Deafness and<br>Language Impairment .....                   | 883 |
| A. Examples from the Courtroom.....  | 883 |
| 1. Jesse .....   | 883 |
| 2. Maryellen .....   | 884 |
| B. Beyond the Right to an Interpreter .....  | 886 |
| 1. Constitutional Right to More than an Interpreter .....                                  | 888 |
| a. A Matter of Due Process.....  | 888 |
| b. Due Process Outside the Courtroom.....  | 892 |
| 2. The Statutory Right to More than an Interpreter.....                                    | 894 |
| a. The Federal Court Interpreters Act of 1978.....   | 894 |
| b. State Interpreter Statutes .....  | 896 |
| c. The Rehabilitation Act of 1973 and the<br>Americans with Disabilities Act of 1990 ..... | 898 |
| 3. Who Is Responsible? .....   | 901 |

|  |     |
|--|-----|
| C. When Comprehension Is Impossible .....  | 902 |
| 1. Linguistic Incompetency: What Is It?.....   | 903 |
| 2. Case Law Recognizes Linguistic Incompetency.....  | 907 |
| 3. Linguistic Incompetency ≠ No Language;<br>Linguistic Incompetency = Not Enough Language ..... | 910 |
| IV. What Do You Propose We Do Now, Counsel?:   |     |
| Suggested Solutions .....  | 913 |
| A. Ensuring Communication.....   | 914 |
| 1. Modified Discretion .....   | 914 |
| 2. Certified Interpreters Only .....   | 916 |
| 3. Assessing and Monitoring Comprehension .....  | 919 |
| a. A Reality Check on Contemporaneous<br>Objections.....   | 919 |
| b. Counsel-Table Interpreter.....  | 921 |
| c. Videotaping .....   | 923 |
| d. Questioning the Deaf Person .....   | 925 |
| 4. Changes in Courtroom Procedure .....  | 926 |
| B. When Competency to Stand Trial Is an Issue .....  | 927 |
| 1. Assessing the Competency of the Deaf Defendant.....   | 928 |
| a. The Assessment Process—<br>A Multidisciplinary Approach .....                                 | 928 |
| b. The Assessment Process—<br>A Realistic Approach.....  | 929 |
| 2. Attorney Input.....   | 932 |
| 3. Treatment That Fits .....   | 933 |
| C. Cost .....  | 934 |
| V. Conclusion .....  | 935 |

## INTRODUCTION

*Jesse R.*

Jesse R.,<sup>1</sup> age twenty-four, has been deaf since birth. Jesse's deafness, combined with minimal brain dysfunction (though Jesse could not be classified as "retarded"<sup>2</sup>) and miseducation in inner-city schools, has left him with language skills so limited that they rank in the bottom ten to fifteen percent of the entire deaf population. Jesse uses sign language to communicate, but his signing is a confusing mixture of basic American Sign Language (ASL), English, home signs,<sup>3</sup> and "street" signs. He reads at a high first-grade to low second-grade level.<sup>4</sup>

---

\* Clinical Associate Professor, University of Wisconsin Law School; Director, Frank J. Remington Center's Public Defender Project, University of Wisconsin Law School; Director, Wisconsin School for the Deaf Mock Trial Project; Assistant State Public Defender, Madison, Wis. (1978-1988). Research assistance was

At the age of nineteen, Jesse entered a plea of no contest to a count of second degree sexual assault and was sentenced to fifteen years in prison. During the two years that the case was pending in the trial court, Jesse's trial counsel repeatedly questioned his client's competency to stand trial. The trial court disagreed, finding that Jesse was competent so long as he was provided a good interpreter.

On appeal, the issue of Jesse's competency was raised again. It was apparent to Jesse's postconviction attorneys that Jesse had little grasp of the procedure that led to his conviction and imprisonment and, if such a thing were possible, even less grasp of the appellate process.<sup>5</sup>

provided by Jose Irizarry, Jane Coffey, Kim Swissdorf, Robert Ames, Sarah Waldeck, Mary Kasperek, Daniel Chanen, Kira Loehr, and Barbara Gerber.

\*\* Professor Emeritus of Psychology, McDaniel College (formerly Western Maryland College); Psychological Consultant, Unit for Deaf Mentally Ill, Springfield Hospital Center, Sykesville, Md. (1989-1995); Editor-in-Chief, *American Annals of the Deaf* (1969-1990); author of six books on deafness, including *THE PSYCHOLOGY OF DEAFNESS* (with Jean Andrews), and over 250 articles on various aspects of deafness.

1. *State v. Jesse R.* Jesse R.'s name has been changed to protect his privacy. The examples from this case are used primarily for illustrative purposes. Because of the sensitive nature of the material involved, the authors have decided to keep this case confidential.

Coauthor Michele LaVigne, along with her colleague at the University of Wisconsin Law School, Clinical Associate Professor Keith Findley, represented Jesse R. during postconviction proceedings. Coauthor McCay Vernon was an expert witness who evaluated Jesse R. for competency to stand trial and to assist with his appeal. References to this case are from the court record. The record includes transcripts, as well as affidavits and competency evaluations that were filed with the court. The citations to the record are only provided where materially relevant or when material has been quoted or cited directly from the record. The record is on file with coauthor Michele LaVigne. There are also several references to the type of interpretation used during court proceedings. These are based on the in-court observations of coauthor Michele LaVigne. There are no references to any information not available to the court or to both parties. This case was in the trial court for postconviction proceedings because Wisconsin appellate rules allow for return to the trial court to create a record. WIS. STAT. § 809.30(2) (2001-2002). This case involved two distinct proceedings: the pretrial, plea, and sentencing phase, which took place between the years of 1996-1998, and the postconviction proceeding, which took place during 1999-2000.

2. As measured by IQ, the cutoff for the classification "retarded" is generally set at seventy. *See Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002). Jesse's performance IQ (verbal IQ measures are not considered valid on deaf subjects) was seventy-five, which placed him in the borderline range. *See id.*

3. Home signs are a series of idiosyncratic signs that deaf children in hearing families develop when they do not have other sources of sign language input. JOSEPH H. BOCHNER & JOHN A. ALBERTINI, *Language Varieties in the Deaf Population and Their Acquisition by Children and Adults*, in *LANGUAGE LEARNING AND DEAFNESS* 3, 34 (Michael Strong ed., 1988).

4. Jesse would be classified as having minimal language skills. *See discussion infra* text accompanying notes 92-94.

5. Appellate counsel framed the issue, in part, as one of incompetency for appeal, which is a concept recognized by the Wisconsin Supreme Court. *See State v. Debra A.E.*, 188 Wis. 2d 111, 119, 523 N.W.2d 727, 729-30 (1994).

Jesse claimed that the plea he entered was one of “no race”; to him, this term meant that the lawyers did not compete against each other, and the judge determined guilt or innocence. Jesse described his offense—second degree sexual assault, which in Wisconsin requires a showing of sexual contact by force—as “touching two women, first and second.” Jesse stated that he entered the “no race” plea because he did not wish to be forced by the lawyer who was against him (the prosecutor) to answer questions in front of a jury. Such extreme, and often bizarre, misconceptions about the legal process persisted despite the fact that the court and trial and appellate counsel had used some of the most talented and innovative interpreters in the Midwest to communicate with Jesse. After a protracted postconviction hearing, the trial court reversed itself and found that Jesse had been incompetent at the time he entered his plea and that he was unlikely to ever regain competency.

*Maryellen H.*

Maryellen H.,<sup>6</sup> age thirty-five, has been deaf since birth. She was raised in a hearing family that never learned to sign. Maryellen initially attended a mainstream public school program. At the age of ten, it was decided that she was not progressing in the mainstream program, and she was sent to a residential school for the deaf.

Maryellen is semilingual; that is, she has some ability to communicate but never fully acquired any language. She prefers to sign but is fluent in neither manually coded English nor ASL and mixes the two forms of sign together when she communicates. Reading tests put her at grade 2.7 to 3.3 (functionally illiterate), though her individual word recognition ability is somewhat higher. On performance IQ tests, Maryellen scored in the low-normal range, but she has some cognitive

---

6. *In the interest of Maryellen H.* Maryellen’s name and identifying characteristics, other than her language, have been changed. The examples from this case are used primarily for illustrative purposes. Because of the sensitive nature of the material involved and because this case was in juvenile court, the authors have decided to keep this case confidential.

During the termination portion of the proceedings, coauthor Michele LaVigne represented the father of the child. The father’s interests were directly aligned with Maryellen’s, and he raised Maryellen’s inability to understand as his own defense. References to the case are taken from the court record. This record includes transcripts, as well as letters and psychological assessments filed with the court. The citations to the record are provided only where materially relevant or when material has been quoted or cited directly. The record is on file with coauthor Michele LaVigne. There are also several references to the type of interpretation used during court proceedings. These are based on the observations of the coauthor Michele LaVigne. There are no references to information not available to all parties. Permission to discuss this case under these conditions without a formal court order has been given by the judge who presided over the termination proceedings.

deficits (not retardation) that are probably due to maternal prenatal rubella.

For four years, Maryellen was involved in a child custody case that was brought when the county Department of Human Services removed her daughter from her home. At first, the case was a child-protection action in which Maryellen was required to meet a list of conditions in order to get her child back. The court regularly recited the conditions that were interpreted in court hearings and provided them to her in written form. In addition, the court required that the social worker provide a written translation of the warnings.<sup>7</sup>

Subsequently, the case became a termination of parental rights action. Maryellen's case was originally seen as something of a "slam dunk" for the county. After all, the court had provided a certified interpreter at every court proceeding, and both the court and the Department of Human Services had tightly adhered to the procedural requirements of state laws governing warning and notice of conditions that Maryellen would have to meet for the return of her child. Ultimately, though, the termination case was dismissed when it was acknowledged that for all of the supposed accommodations and precautions, Maryellen probably did not understand what she was supposed to do to get her child back.

### *Legal Framework*

A deaf defendant has the right to an interpreter in a criminal case and in a heightened due process case such as a child-protection action or a civil commitment.<sup>8</sup> While no explicit federal constitutional provision or U.S. Supreme Court case mandates that the court provide an interpreter for a deaf defendant, the right to an interpreter is widely recognized by federal and state statutes. Lower court rulings also recognize that a deaf defendant is entitled to an interpreter as a matter of fundamental due process, judicial efficiency, and access to the courts.<sup>9</sup>

---

7. During the child protection phase of the proceedings, the court and the social worker believed that it was possible to translate English into written sign language by changing the syntax and word choice. In fact, there is no such thing as written sign language.

8. For purposes of this Article, heightened due process cases, also called quasi-criminal cases, refers to those cases where the defendant or subject has a right to be present and an absolute or qualified right to counsel and to confrontation. In addition to criminal, child-protection, and civil commitment cases, this would include probation and parole revocations, juvenile matters, and civil contempt. For purposes of efficiency, we often refer to the subjects of these cases generically as defendants or subjects.

9. See generally Deirdre M. Smith, Comment, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 ME. L. REV. 87 (1994).

The judges in Jesse's and Maryellen's cases certainly had no quarrel with the concept that these two litigants were entitled to interpreters and that it was the court's obligation to provide those interpreters. Indeed, experienced, certified interpreters were present at every stage of the proceedings in both cases. In fact, Jesse usually had *two* interpreters, one hearing and one deaf, because his communication skills were so poor.

Yet, contrary to expectations, Jesse and Maryellen did not understand the proceedings against them. The trial courts followed the law, but Jesse and Maryellen still could not grasp what was being said and what it meant. Jesse and Maryellen's experiences are not unique. There are defendants like Jesse and Maryellen all over the country that have interpreters with them every step of the way yet remain unable to comprehend a system that sends them to prison or takes away their children. One wonders how this is possible.

Curiously, the answer does not lie with hearing loss or rather with hearing loss alone. There are deaf lawyers, deaf judges, deaf psychologists, deaf educators, deaf factory workers, deaf artists, deaf stay-at-home moms, who, with the appropriate interpreter and procedures—or in a few cases, real-time captioning<sup>10</sup>—are quite capable of understanding what is happening in the courtroom. But too often environment, education, and biology conspire against a deaf person and deprive her of the opportunity to acquire a solid base of language of any kind, be it English or ASL. This language deficiency will invariably interfere with communication about most abstract matters such as the law and will throw communication in the courtroom or the lawyer's office into a tailspin.

Compounding this already difficult situation is the legal profession's own confusion about deafness, language, communication, and the interpreting process. There is a pervasive belief within the legal system that if we put an interpreter in front of a deaf person, the interpreter will instantly (and perfectly) convert spoken language to the appropriate language for the deaf person and the communication problem will be solved, thereby freeing everyone from further worry or inquiry and allowing business to proceed as usual. Occasionally this approach works, though not nearly as often we let ourselves believe. Even a highly educated, highly literate deaf person will be forced to fill in blanks when she is subjected to the typical high-velocity American courtroom. And most deaf litigants in criminal and quasi-criminal cases, just like their hearing counterparts, tend to be neither highly literate nor highly educated.

---

10. This accommodation is included with reluctance because the vast majority of prelingually deaf people will not be able to use real-time captioning effectively.

The sad truth is that fundamentally flawed assumptions about the interpreting process are depriving many, and perhaps even most, deaf defendants of critical information both in and out of court. Even when the communication gap does not amount to a due process violation, the failure to recognize and make allowances for the realities of interpreting routinely compromises deaf people's ability to understand and participate in criminal and quasi-criminal proceedings. When the legal system confronts an individual like Jesse or Maryellen whose language skills are below average even for the deaf population, its faith that the interpreter will be able to make the deaf defendant understand is a surefire recipe for disaster of constitutional proportions.

An interpreter isn't enough for Jesse and Maryellen and the segment of the deaf and hard-of-hearing population<sup>11</sup> that suffers from some level of language deficiency. For these people, an interpreter alone cannot possibly satisfy even minimal notions of due process. Deaf people with limited language skills present a dilemma that is not readily recognized by the legal system. They also present a dilemma that is not readily resolved by the legal system.

Within the American legal system there are two resources that are in short supply and jealously guarded—time and money. A deaf defendant with limited language skills takes up a great deal of both. But concerns about time and money must bow to a person's fundamental due process right to understand what is happening when his liberty or his child is being taken away.

This Article looks at the intertwined issues of deafness, language acquisition, interpretation, and their cumulative impact on deaf people's ability to participate meaningfully in the justice system. We draw from several different disciplines—law, psychology, and linguistics—in part because the coauthors come from different professions, and in part because deafness is a broad field that encompasses those disciplines. In this Article, we have tried to separate the discussions of the central issues that accompany the linguistically impaired deaf defendant—language acquisition, interpreting, and law—in order to achieve some clarity in dealing with a complex and often elusive subject.

We have also tried to start at the beginning. We assume no previous knowledge of deafness and recognize that deafness does not make much sense to the hearing world. We spend much more time trying to explain the basics of deafness, language acquisition, and interpreting than with legal analysis. That may make this Article seem front-heavy, but our experiences at counsel table and on the witness stand have taught us that without a step-by-step discussion of the hows and whys of deafness and language acquisition, a legal argument that a

---

11. See *infra* notes 87–91 for a discussion of the terms “deaf” and “hard-of-hearing.”



defendant did not understand because he never fully acquired language is likely to be met with skepticism, if not incredulity. This skepticism does not arise from some antideaf sentiment but from the counterintuitive quality of the subject matter. For those of us who have heard all of our lives, and especially for those of us who use words for a living, the idea that a person could be left without a language is beyond imagining.

Part I of the Article provides some basic information on deafness and language acquisition, and attempts to explain and demystify some of the linguistic issues that commonly arise with a substantial segment of the deaf and severely hard-of-hearing population. This Part looks at the very different challenges of learning English and of learning ASL and why so many deaf people end up fluent in neither. Part I also discusses an often overlooked side effect of failure to acquire language—lack of the kind of background knowledge that is as necessary to meaningful communication as language itself.

Part II discusses the role of the interpreter and considers what an interpreter for the deaf can and cannot do within the legal context. This Part includes a brief survey of the salient characteristics of the two primary languages with which an interpreter for the deaf is likely to work: English and ASL, and a discussion of why so many of the law's notions about interpreting simply do not fit when we are traversing between the two.

Part III is an overview of the legal implications of limited language acquisition, with special emphasis on due process considerations. As we will see, the due process question present in the case of an individual deaf defendant depends in great part upon the level of language that person acquired. There is a good chance that Jesse will never understand what is being said in court no matter how many interpreters he has and no matter how many additional accommodations are made. Maryellen, on the other hand, can be made to understand on a level that is consistent with due process, if the appropriate accommodations, *beyond an interpreter*, are made.

Not surprisingly, Part IV proposes changes to ensure that deaf defendants adequately understand legal proceedings. A few of the suggestions involve changes in the law itself, but those recommended changes are neither sweeping nor complicated. Actually, the laws that govern competency, confrontation, due process, effective assistance of counsel, provision of interpreters, and other accommodations are overall more than adequate to meet the needs of practically every deaf defendant. What is lacking are the flexibility, understanding, and creativity to apply those laws in a manner that is relevant to deaf individuals who were unable to acquire sufficient language.

The case law and statutes that have given rise to the right to an interpreter for a deaf defendant have been a good beginning. But for the linguistically impaired deaf person they are just that, a beginning. Due process requires that the legal system take the next step. It must ask, *what else does this deaf person need?* And then it must deliver.

## I. THE BEGINNING: DEAFNESS AND LANGUAGE

The hearing world does not understand deafness. It defies our assumptions and undermines our paradigms. Nowhere is deafness more complex, elusive, and seemingly unknowable than in the area of language.

Among the deaf, language is highly variable, to an extent almost unimaginable in the hearing world. A dozen deaf American college students may possess a dozen levels of proficiency<sup>12</sup> in English,<sup>13</sup> or ASL,<sup>14</sup> or a creole known as Pidgin Signed English<sup>15</sup> (PSE).<sup>16</sup> Among the larger deaf population, there is an even more complex continuum of languages and language competencies.<sup>17</sup> An expert witness in Jesse's case explained that:

12. See BARBARA KANNAPELL, *LANGUAGE CHOICE, IDENTITY CHOICE* 33-110 (Linstock Press Dissertation Series 1993). Dr. Kannapell studied the language preferences and communication skills of 205 students at Gallaudet University.

13. Proficiency in English among the deaf is usually measured in terms of reading. However, there are English-based sign systems that attempt to code English manually.

14. ASL is the preferred language of deaf individuals who identify with the deaf community and deaf culture. ASL is a distinct language with its own complex of vocabulary and grammar. Like English, ASL also has a number of regional dialects. JEROME D. SCHEIN, *AT HOME AMONG STRANGERS* 29-30 (1989).

15. PSE is a contact language, created when "two languages, English and ASL meet." KANNAPELL, *supra* note 12, at 10. It has features of both languages (usually ASL signs in English order). PSE is actually a variety of languages. *Id.* at 10-12; see also BOCHNER & ALBERTINI, *supra* note 3, at 33-34.

16. Language is also a highly charged issue for the deaf. It is a hot-button topic that manages to implicate cultural identity, human rights, and educational philosophy. For deaf people, the decision to use English (spoken or signed), ASL, or a contact language, may be as much about politics as education. See, e.g., SCHEIN, *supra* note 14, at 37-39. This Article does not deal with the politics of language within the deaf population, but judges and lawyers should be aware of the issue as it affects an individual's communication needs.

17. JAMES WOODWARD, *Some Sociolinguistic Problems in the Implementation of Bilingual Education for Deaf Students*, in *HOW YOU GONNA GET TO HEAVEN IF YOU CAN'T TALK WITH JESUS: ON DEPATHOLOGIZING DEAFNESS* 21, 38-43 (James Woodward ed., 1982) (1980); Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge*, 26 *ARIZ. ST. L.J.* 163, 175-76 (1994).

[w]ithin a typical deaf community, there exist various levels of abilities to express oneself, from a gross level of communication that is via gestures and mimicry accompanied by a minimum of signed concepts, to a level that suggests a complete mastery of signed concepts in accurate ASL lexicon and including a mastery of English.<sup>18</sup>

"The majority of deaf individuals," he noted, "fall somewhere in between those two extremes."<sup>19</sup>

The factors that have led to this complex linguistic condition are equally complex, and include family dynamics, school funding policies, and even Alexander Graham Bell.<sup>20</sup> A major contributor has been the lack of effective policy toward educating the deaf. Over the years, educators and policymakers have subjected deaf students to a steady stream of "new and improved" methods of teaching language (usually English), many of which have failed miserably. As one researcher in the field of deafness put it, the history of deaf education has been filled with "dogma, fashion, and wild guess."<sup>21</sup> The result has been an extraordinarily wide range of communication styles and competencies.

The bottom line for the legal system is that lawyers and judges cannot make assumptions about the type of language or the amount of language that a deaf person has acquired. Lawyers and judges should probably never assume that a deaf person has English proficiency or that the deaf person has ASL proficiency.

### A. *Prelingual Deafness and Language Acquisition*

#### 1. TROUBLESOME ENGLISH

It is impossible to overstate the significance of hearing and sound to the process of acquiring an oral language like English. It is also impossible to overstate the enormity of the task that confronts the person who tries to learn English without hearing. From the moment the

---

18. *Jesse R.* (May 10, 1999) (Report to the court by Timothy A. Jaech, Sch. Admin. Consultant, Wis. Dep't of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., Superintendent, Wis. Sch. for the Deaf). Jaech assessed Jesse's linguistic capacity in order to assist counsel.

19. *Id.*

20. Bell was a major proponent of oralism, a philosophy that favored speech over sign language and, at its most extreme, attempted to ban all sign language education and use in deaf schools. See generally RICHARD WINEFIELD, NEVER THE TWAIN SHALL MEET: BELL, GALLAUDET, AND THE COMMUNICATIONS DEBATE (1987).

21. R. Conrad, Results of Deaf Education in the U.K.: Facts and Fantasies (May 31, 1979) (on file with author) (paper presented to the Counseling and Home Training Program for Deaf Children, Children's Hospital Diagnostic Center, Vancouver, Canada).

hearing child first shows up in the world, she is surrounded by the sound of the human voice. A chorus made up of mother, father, grandmother, big brother, with a little Sesame Street thrown in, gives her a native language. The hearing child does not learn her native language in school. As linguist Noam Chomsky observed, "language is not really something you learn. Acquisition of language is something that happens to you; it's not something you do."<sup>22</sup>

For those of us in the hearing world, the way language happens to us is by hearing. And it happens in a big way. By kindergarten, the average hearing child already has an expressive and receptive vocabulary of some 14,000 words, along with a sophisticated syntax and language structure.<sup>23</sup> It keeps on growing until adulthood, where it is estimated that our vocabulary can be anywhere from 17,000 to 110,000 words.<sup>24</sup> One study estimates that a college undergraduate will know up to 156,000 words.<sup>25</sup>

When a child's hearing loss is prelingual (born deaf or hard-of-hearing, or the onset of hearing loss occurs before two to five years of age), his deafness has a profound and lifelong effect on his ability to acquire and understand English or any other oral language.<sup>26</sup> Deaf children raised in nonsigning, English-speaking households have, by age five, an average English language vocabulary of under 500 words, and little understanding of English syntax.<sup>27</sup> These children enter school with a severely limited sense of English, and they never catch up.

22. NOAM CHOMSKY, *LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 173-74* (1988).

23. Susan Carey, *The Child as Word Learner*, in *LINGUISTIC THEORY AND PSYCHOLOGICAL REALITY* 264, 264 (Morris Halle et al. eds., 1978).

24. Stephen D. Krashen, *The Input Hypothesis and Its Rivals*, in *IMPLICIT AND EXPLICIT LEARNING OF LANGUAGES* 45, 58-59 (Nick C. Ellis ed., 1994).

25. Nick Ellis, *Vocabulary Acquisition: The Implicit Ins and Outs of Explicit Cognitive Mediation*, in *IMPLICIT AND EXPLICIT LEARNING OF LANGUAGES* 211, 215 (Nick C. Ellis ed., 1994); see also Krashen, *supra* note 24, at 58.

26. There is no agreement about the exact cutoff between prelingual and postlingual onset of hearing loss. Suggested ages range from two to five. JEFFREY P. BRADEN, *DEAFNESS, DEPRIVATION, AND IQ* 20-21 (1994). The issues discussed in this Article relate to those who lost their hearing from birth or as young children. Those who suffered hearing loss later in life are not affected by problems of language acquisition.

27. See L. Earl Griswold & Janet Commings, *The Expressive Vocabulary of Preschool Deaf Children*, *AM. ANNALS DEAF*, Feb. 1974, at 16, 27. We recognize that these statistics were compiled before the development of the controversial cochlear implant. Proponents of the implant maintain that the implant improves a deaf child's ability to acquire English. At this point, however, large segments of the deaf population do not have an implant either because they do not want an implant or they are not suitable candidates. Additionally, many deaf adults and children received the implant, but it was not successful. See MARC MARSCHARK, HARRY G. LANG & JOHN A. ALBERTINI, *EDUCATING DEAF STUDENTS: FROM RESEARCH TO PRACTICE* 108-11 (2002);

English language proficiency among the deaf is necessarily measured in terms of reading skills and the results are discouraging.<sup>28</sup> Among the prelingually deaf and severely hard-of-hearing, the median reading level for seventeen- and eighteen-year-olds is grade four. *Thirty percent* of deaf students leave school functionally illiterate, i.e., they read at grade level 2.8 or below.<sup>29</sup> Only ten percent of deaf eighteen-year-olds reach a tenth-grade reading level or better.<sup>30</sup> While in school, the average deaf child gains only eight months in reading achievement from age eleven to age sixteen,<sup>31</sup> a level of “progress” that would be intolerable for an average hearing child.<sup>32</sup>

At first glance, these statistics defy logic. While most of us would concede that spoken English would be difficult to master if you cannot hear it, it seems that written English ought to be a different matter altogether. By virtue of its visibility, written English would seem to be accessible even to the person born deaf. However, when we consider the nature of written English, these low reading scores not only make sense, they seem inevitable.

Written English, despite the fact that we can see it, is in reality nothing more than a symbolization of the sounds of the spoken language. The process of reading requires that those symbols be decoded. British critic and journalist Francis Spufford has described reading as a “high speed . . . act of double translation,”<sup>33</sup> directly related to the ability to connect the symbols to the sounds. To start with, “you turn the printed characters into sounds, [because] [t]he alphabet is a set of arbitrary signs standing for the sounds of the spoken language; though not on a straightforward one-to-one basis.”<sup>34</sup> From there, the reader mentally translates the “writing into speech, and speech into meaning.”<sup>35</sup>

---

*see also* Documentary Film: *Sound & Fury* (Roger Weisberg, Producer 2001) (on file with authors); *infra* note 451.

28. Unlike a hearing person who has access to spoken language regardless of literacy, reading is the primary method available for English language acquisition among the deaf. *See* DONALD F. MOORES, *EDUCATING THE DEAF: PSYCHOLOGY, PRINCIPLES, AND PRACTICES* 270–76 (3d. ed. 1987).

29. Thomas E. Allen, *Patterns of Academic Achievement Among Hearing Impaired Students: 1974 and 1983*, in *DEAF CHILDREN IN AMERICA* 161, 162–68 (Arthur N. Schildroth & Michael A. Karchmer eds., 1986). Widespread testing by the Gallaudet Research Institute indicates that these scores have remained consistent. Gallaudet Research Inst., *GRI Research Areas: Literacy* (Oct. 30, 2003), at <http://gri.gallaudet.edu/Literacy> (last visited Dec. 1, 2003).

30. MOORES, *supra* note 28, at 273.

31. *Id.*

32. Research indicates that progress in reading tends to plateau around age thirteen for deaf students while hearing students continue to increase their comprehension and vocabulary skills through adolescence. *Id.*

33. FRANCIS SPUFFORD, *THE CHILD THAT BOOKS BUILT* 67 (2002).

34. *Id.*

35. *Id.*

The act of reading is premised on familiarity with the spoken language. That means that even the most precocious hearing child will not learn how to read before acquiring a foundation in spoken language.<sup>36</sup> It also means that most deaf children will struggle with reading all of their lives, which will in turn affect the quality and quantity of English they acquire.

Neither will English be accessible to the deaf person by what would seem to be another logical method—converting it to signs. There is a language system known as manually coded English—a form of English that codes English words and syntax into signed form.<sup>37</sup> But the ability to understand manually coded English depends directly on familiarity with English in the first place. A deaf person who lacks proficiency with English vocabulary, grammar, and syntax will not be helped by the fact that it is presented to him in signs rather than in spoken words. In fact, many deaf people's ability to understand written English, however limited, is actually better than their ability to understand the signed version.<sup>38</sup>

Nor can one expect a deaf person to acquire English by lip reading (more properly known as "speech-reading").<sup>39</sup> Contrary to the widespread myth about the utility of speech-reading for the deaf, it does not provide an effective means of communication except for a few rare individuals. No more than twenty to thirty percent of spoken English is visible on the lips,<sup>40</sup> and even the most talented deaf speech-readers routinely experience miscommunication. Speech-reading is really only of use when the deaf person knows the context and the conversation is simple.<sup>41</sup> As a method for acquiring English, speech-reading is almost worthless. The average deaf child can understand about five "percent of what is said through speech-reading."<sup>42</sup> To borrow a frequently used point of comparison, speech-reading to learn English is akin to trying to learn Japanese (or Russian or French) through a soundproof booth.

36. The correlation between reading and access to sound underlies the current push in some circles to teach reading through phonics.

37. For further discussion of manually coded English, see *infra* Part II.B.

38. This claim is based on anecdotal evidence from deaf people and interpreters. Researchers in the field of deafness and linguistics indicate that there is no research attempting to directly correlate the ability to understand manually coded English and written English. E-mail Communication with Carol Erting, Professor of Education, Director, Signs of Literacy Project, Gallaudet Univ. (June 17, 2002) [hereinafter Erting]. Research does, however, indicate that manually coded English can be very difficult to understand because it must accommodate so many grammatical features and a wide-ranging vocabulary. BOCHNER & ALBERTINI, *supra* note 3, at 6–10.

39. McAlister, *supra* note 17, at 172.

40. See McCAY VERNON & JEAN F. ANDREWS, *THE PSYCHOLOGY OF DEAFNESS: UNDERSTANDING DEAF AND HARD-OF-HEARING PEOPLE* 100 (1990).

41. See *id.* at 102.

42. *Id.* at 100.

The result is that for most prelingually deaf people, English is functionally a second language. This is true if it was the first language they were exposed to—or if it is the only language they were exposed to. The English of even college-educated deaf people will tend to contain idiosyncratic vocabulary and syntactical shortcomings found in hearing people who speak English as a second language.<sup>43</sup> There are, of course, prelingually deaf people—professors, lawyers, doctors, business people, journalists, and writers—who have native fluency in English, but they remain a minority. And in the less-educated population, the difficulties with English are magnified exponentially.

The deaf population experiences common types of difficulties with English comprehension (whether the English is signed or printed). These errors occur within syntax, usage, and vocabulary. Significantly, these errors are often present even among educated deaf people with a solid foundation in ASL and reasonable proficiency in English.<sup>44</sup> These errors also happen to be of a type that will guarantee confusion for deaf people in the courtroom whenever they are forced to rely on real-time captioning, notes from their lawyer, or an interpreter who is using manually coded English.

Probably the greatest source of misery for anyone who did not learn English as a native speaker is its massive vocabulary. The number of words in the English language has been estimated at 500,000 to 600,000<sup>45</sup> and, as many writers have learned, “‘there [is] only one word which [will] express a particular shade of meaning.’”<sup>46</sup> Most of us use only a fraction of those half-a-million words, but even average Americans still make regular use of tens of thousands of words, and we express those shades of meaning through deliberate word choice. Thus, the generic mood we call “angry” can take on decidedly different characteristics depending on whether we are furious, enraged, annoyed, miffed, ticked-off, irritated, or seeing red.

Deaf and hard-of-hearing people are hit particularly hard by the vocabulary of English. The English vocabulary of an average deaf fifteen-year-old is nowhere near that of a hearing nine-year-old and,

---

43. See JACQUELINE JOY ANDERSON, DEAF STUDENT MIS-WRITING, TEACHER MIS-READING: ENGLISH EDUCATION AND THE DEAF COLLEGE STUDENT 69 (Linstock Press Dissertation Series, 1993); PETER V. PAUL & STEPHEN P. QUIGLEY, LANGUAGE AND DEAFNESS 212–19 (2d ed. 1994).

44. Anderson studied the difficulties that deaf college students encounter with the English language and made the following observation: “For both groups of deaf learners—those trained to be oral (speaking/lip reading) and those proficient in ASL—the surface features and semantic structures of English will never be available in the same way that they are available to hearing students of all economic and ethnic backgrounds.” ANDERSON, *supra* note 43, at 17.

45. ELLIS, *supra* note 25, at 215.

46. JUDITH SKELTON GRANT, ROBERTSON DAVIES: MAN OF MYTH 9 (1994) (quoting Canadian author Robertson Davies).

unlike the vocabulary of the nine-year-old, will probably not improve significantly.<sup>47</sup> Simply put, many deaf people do not understand the words we are using, even if the words are put into a visible form by writing or finger-spelling. In fact, many relatively educated deaf people will not recognize English words that are known by uneducated, functionally illiterate hearing people.<sup>48</sup> In a word-based adversarial arena like the courtroom, the inability to cope with the vocabulary can be disastrous if the appropriate accommodations are not made.

Another source of difficulty (one which could be easily predicted) is the multitude of idioms contained in the English language. Anybody, hearing or deaf, who does not learn English as a native speaker is likely to be confused by expressions such as “on edge,” “keyed up,” “off the wall,” “edge of the envelope,” “over the top,” “below the radar screen,” or “outside of the box.”<sup>49</sup> Taken literally, they make no sense, and in translation they lose some of their meaning, not to mention their punch. Even deaf law students, who obviously have strong expressive and receptive skills in English, have confessed to having trouble with law professors’ pet phrases such as “Monday-morning quarterbacking” and the dreaded “slippery slope.”<sup>50</sup>

Beyond vocabulary and language usage, English presents other language trouble spots. Many deaf individuals experience problems with concepts of time. Stock phrases about time, such as “at least a month” or even “six months ago” can cause confusion even among relatively educated deaf people because of the manner in which such phrases are expressed.<sup>51</sup> Similarly, sequencing events will also be a source of miscommunication. It will not be unusual for a deaf person and a hearing person trying to communicate to experience misunderstandings around the questions of “which comes first?”; “did this happen before or after?”; and “what happened next?”<sup>52</sup>

47. See MOORES, *supra* note 28, at 272–75.

48. A functionally illiterate hearing person will still have access to English vocabulary through hearing, and his oral receptive vocabulary may be many times that of his written receptive vocabulary. See *id.*

49. Annie G. Steinberg et al., *The Diagnostic Interview Schedule for Deaf Patients on Interactive Video: A Preliminary Investigation*, 155 AM. J. PSYCHIATRY 1603, 1604 (1998); see also PAUL & QUIGLEY, *supra* note 43, at 168–69.

50. Coauthor Michelle LaVigne’s informal ongoing conversations with Univ. of Wis. law students, Madison, Wis. (1994–1998) [hereinafter *Conversations with Univ. of Wis. law students*]; see also Steinberg et al., *supra* note 49, at 1603.

51. McCay Vernon & Katrina Miller, *Linguistic Incompetence to Stand Trial: A Unique Condition in Some Deaf Defendants*, 2001 J. INTERPRETATION 99, 100–01. These phrases can also be difficult to effectively interpret into ASL. Steinberg et al., *supra* note 50, at 1603–04.

52. While working with deaf students in the Wisconsin School for the Deaf Mock Trial Program, coauthor Michele LaVigne has found that communication is likely to break down around order of events and the related question of cause and effect. This is true even though interpreters are always present. Teachers and interpreters have



Syntax presents its own series of difficulties. English at its most basic is a subject-verb-object language, but English is rarely at its most basic.<sup>53</sup> In both spoken and written English, we make heavy use of subordinate clauses and passive voice, both of which will alter subject-verb-object word order. However, researchers have found that deaf readers continue to impose a subject-verb-object word order on English sentences even when it does not fit.<sup>54</sup> Such an imposition of word order routinely leads to misunderstandings about who was doing what to whom.

Hypotheticals present another common problem. This can be especially problematic for deaf persons in the courtroom. The meaning of a phrase or sentence set off by "if" or marked with more subtlety by use of the subjunctive, is often missed and can lead to miscommunication. Jesse's case presented an extreme example of a deaf person's inability to cope with a hypothetical:

- Q: Do you know what it means to withdraw a guilty plea?  
 A: That they just take the guilty part away.  
 Q: Okay. Now, could bad things happen to you if they take the guilty part away?  
 A: I'm not going for a jury trial. I already said that I was guilty.  
 Q: Well, what happens if you take the guilty away? What happens if you take it away?  
 A: Before when judge asked me I was under the medicine and they forced me to tell them I was guilty.<sup>55</sup>

Over the years, there has been a steady series of "new and improved" methods for teaching English to the deaf. Some of these methods have become museum pieces, but others are still in use.<sup>56</sup> Ironically, there are indicators that a bilingual method, which teaches ASL as a first language and English as a *second* language, appears to be having some success in improving English skills.<sup>57</sup> But generally

---

suggested that the difficulty arises because the case materials the students use are in written English. Similarly, attorneys with deaf clients report difficulty in obtaining an accurate chronology of events.

53. See, e.g., Paul & Quigley, *supra* note 43, at 11.

54. See MOORES, *supra* note 28, at 276.

55. Jesse R., R. at 103-04 (Oct. 1, 1999). The interpreters were not using pure English with Jesse. However, they tried to clear up his confusion by continually emphasizing the sign "if."

56. See PAUL & QUIGLEY, *supra* note 43, at 231-52.

57. Keith E. Nelson, *Toward a Differentiated Account of Facilitators of Literacy Development and ASL in Deaf Children*, TOPICS IN LANGUAGE DISORDERS 73, 77 (Aug. 1998). The issue of literacy among the deaf is very controversial. There are

English language acquisition continues to be the thorn in the side of the deaf community.<sup>58</sup>

## 2. AMERICAN SIGN LANGUAGE

Strong English language skills are hardly a prerequisite to a full, informed life or, for that matter, to meaningful participation in the legal system, provided a deaf person has had the opportunity to acquire fluency in some other language. For many deaf people in the United States and Canada, that language is ASL, which is a separate language with its own unique syntactic and expressive features. However, fluency in ASL by a deaf person cannot be assumed. For many deaf people this proves to be a double whammy. They do not acquire English because it is a spoken language that is enormously difficult to acquire absent hearing, and they do not acquire ASL because they are not exposed to it until too late, if they are exposed to it at all.

The lack of access to ASL experienced by many deaf people is the result of a number of historical, social, and linguistic factors. These factors affect both the quantity and the quality of the ASL that a deaf person may acquire. The most pervasive factor that has long affected acquisition of ASL has been the tortured history of education for the deaf. For a number of complex (and many would say tragic) reasons, educators, policymakers, and lawmakers restricted the use of sign languages in the classroom and even the dorm room.<sup>59</sup> Deaf students

---

other educators who maintain that the only way to improve literacy among the deaf is through oral education combined with the use of hearing aids or cochlear implants.

58. There are a number of other difficulties with English that the deaf population experiences. One comes from the Minimum Distance Principle. Applying this principle, the deaf person assumes that when there are two nouns in a sentence, such as in a subordinate clause, the noun closest to the verb is intended to complete the action. The sentence, "John promised Mary to kill Frank," would be interpreted as Mary was the one to do the killing. Other examples of the Minimum Distance Principle involve tag questions such as "He will work, won't he?" This would be interpreted by many deaf readers as "He won't work."

An even more serious error that is prevalent with deaf readers has to do with the word "have." English uses the word to indicate both possession and the present perfect tense of a verb. These uses serve radically different functions: "I have a dog," versus "I have been playing." But deaf readers will often interpret the word "have" in the second sentence as indicating possession. Another source of confusion experienced by deaf readers centers around indefinite pronouns such as "anyone" or "everyone" and personal pronouns such as "he," "she," and "it." When personal pronouns appear in a complex sentence, some deaf readers will not know the antecedents to which these pronouns refer. For example: "Jeff, Joe and Mary were playing with a cat when a ball rolled by. Joe and Mary chased it. He found it first." Many deaf readers would have trouble understanding that it was Joe who found the ball. See Vernon & Miller, *supra* note 52, at 99-101.

59. The restriction of sign languages could be either explicit or implicit. For example, in 1885, the Wisconsin state legislature, at the urging of Alexander Graham

reported having their hands slapped for signing in school as late as the 1980s.<sup>60</sup> Even today, sign languages are discouraged, if not forbidden, as a matter of educational policy in some schools for the deaf.<sup>61</sup>

Compounding the historical refusal of educational programs for the deaf to teach or even allow sign language is the lack of access to adults who sign and can act as linguistic role models. Sign languages are the only languages in the world that children do not routinely learn from their parents unless they are in the less than ten percent of the deaf population who have deaf parents.<sup>62</sup> In fact, “64.7% of families . . . do not use signs . . . with their deaf children,” and even when signing occurs, it “is often not adopted until the deaf child is of preschool or school-entry age.”<sup>63</sup> Moreover, the signing that most parents and other family members use is of poor quality. Hearing adults who learn sign language after childhood will generally not be effective language models for a deaf child. ASL is extremely difficult for hearing people to learn and master, and most hearing people, including many teachers of the deaf, do not use it well.<sup>64</sup>

ASL is traditionally a peer-to-peer language.<sup>65</sup> A University of Wisconsin law student who attended a mainstream oral program from kindergarten through high school reported literally learning to sign in the street from a friend who attended the state residential school and came home on weekends.<sup>66</sup> However, many deaf children of hearing families, educated in mainstream programs, have no access to other signing peers and thus no source of the language throughout their childhood.

---

Bell, adopted a policy of special payments to a city or town for every deaf student placed in a local public school as opposed to the state residential school for the deaf. John Vickrey Van Cleve, *The Academic Integration of Deaf Children: A Historical Perspective*, in *LOOKING BACK: A READER ON THE HISTORY OF DEAF COMMUNITIES AND THEIR SIGN LANGUAGES* 333, 336-38 (Renate Fischer & Harlan Lane eds., 1993). Though the state legislature never officially decreed a method of instruction (sign versus oral), it was understood that the students would be taught by speech and speech-reading. *See id.* at 338. Restrictions on the use of sign language at school was not limited to the United States but was common throughout the world. *See generally id.*

60. Conversations with Univ. of Wis. law students, *supra* note 50.

61. On its web site, St. Joseph Institute for the Deaf in St. Louis advertises: “In our programs, children develop oral language and speech without the use of sign language.” St. Joseph Inst.: Educational Programs, at <http://www.stjosephinstitute.org/edprograms.html> (last visited Dec. 1, 2003) (on file with author).

62. *See* CAROL PADDEN & TOM HUMPHRIES, *DEAF IN AMERICA: VOICES FROM A CULTURE* 5 (1988).

63. BRADEN, *supra* note 26, at 35.

64. *See id.*

65. SCHEIN, *supra* note 14, at 36.

66. Conversations with Univ. of Wis. law students, *supra* note 50.

It is true that many deaf people who are not exposed to ASL early in life will learn it as teenagers or young adults. However, the quality of ASL that these individuals are able to learn later in life will usually pale in comparison to that of a deaf person who started signing as a toddler or preschooler. The prime years for language acquisition—spoken or sign—are over around age five.<sup>67</sup> Even highly intelligent and motivated deaf people will have a difficult time becoming fluent in ASL as adults at age twenty-five.

### 3. “NO RACE”: WHEN ENGLISH AND AMERICAN SIGN LANGUAGE COLLIDE

Jesse and Maryellen are in many ways typical of deaf people whose education and life experiences left them with incomplete English and incomplete ASL. They both have some ability to communicate but their range of communication is limited. Those who try to communicate directly with them in sign language find that they must constantly “code switch.” That is, they jump back and forth from English to ASL, often within one sentence. Interpreters, particularly those for Jesse, also found it necessary to incorporate mime, gestures, and pictures to supplement his meager language. One native ASL user who attempted to communicate with Jesse, said that Jesse’s language was “painful to watch.”<sup>68</sup> This unpredictable combination of languages has been termed “an undesirable mix.”<sup>69</sup>

The “undesirable mix” of languages obstructed communication for Jesse and Maryellen. Their English and ASL did not work in union but in opposition to each other. It was as if Jesse and Maryellen were trying to do a mathematical calculation using a little base ten and a little base four but with no idea which symbols did what or why.

Jesse’s “no race” was a perfect example of how a smattering of each language, along with limited knowledge of the world, can create havoc. “No race,” as signed by Jesse, combined the sign for “no”—as in “no, I won’t let you”—and the sign for “contest”—as in sports. A deaf person who was fluent in ASL and familiar with legal English

67. See BOCHNER & ALBERTINI, *supra* note 3, at 18–19.

68. *Jesse R.*, R. at 67 (Oct. 25, 1999).

69. *Id.*, R. at 2 (May 10, 1999) (Report to the court by Timothy A. Jaech, Sch. Admin. Consultant, Wis. Dep’t of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., former Superintendent, Wis. Sch. for the Deaf). It is important to note that this term “undesirable mix” does not refer to PSE. See *supra* note 15 and accompanying text. PSE combines ASL signs and English syntax and is frequently used in communication between deaf and hearing people. In PSE, English and ASL work effectively together essentially supplementing each other. When a deaf person’s language is an “undesirable mix” of incomplete ASL and incomplete English, the two languages interfere with each other and with the communication process.

could make the leap from those two conceptually nonsensical signs to “no contest,” the name of a plea, but for Jesse that was impossible. He treated “no race” not as a symbolic representation of the English name for his plea but as a representation for what was going on. This interpretation left him with the belief that the lawyers would not be racing against each other.

### B. *Side Effects*

#### 1. LANGUAGE AND KNOWLEDGE

There are several aspects of language deprivation that are often overlooked in literature about deafness and the law but which have as much effect on a person’s ability to communicate as lack of words. The first is a lack of the background information and knowledge central to comprehension and meaningful discourse.

Lack of information and background knowledge will often appear as unexplained holes in the deaf person’s fund of knowledge. These holes may be startling or disorienting to a hearing person who takes it for granted that “everybody knows that.” These holes also result in considerable miscommunication if they are not addressed.

In the hearing world, we overhear. This stream of sound washes over us and provides us with untold amounts of information. The hearing child who is privy to the after-dinner conversations at the “grown-ups’ table” is introduced to everything from relationships to politics.<sup>70</sup> Through our lives we continue to siphon off information from this network of talk in order to fill in the blanks about our immediate world and the world at large. So much of the richness and texture of our knowledge comes from what we overhear—first from our parents, and later from our coworkers, friends, and even the checker in the grocery line.

This invaluable source of information about the world is not available to most deaf children. Unless a deaf child has deaf people around him whom he can “oversee,” he is denied “the accidental, casual, and informal language input that bombards normal-hearing children every day.”<sup>71</sup> The deaf child in a hearing family does not have access to the after-dinner talk, or to mom and dad chatting in the next room, or to the kids gossiping at the local swimming pool. “The

---

70. Deaf author Shanny Mow specifically mentions the dinner table as a source of exclusion for the deaf child in a hearing family: “You were left out of the dinner table conversation. It is called neutral isolation. . . While everyone is talking or laughing, you are . . . far away.” Carol J. Erting, *Deafness & Literacy: Why Sam Can’t Read*, 75 SIGN LANGUAGE STUDIES 97, 100 (Spring 1992) (quoting Shanny Mow, *How Do You Dance Without Music?*, in ANSWERS (James A. Little ed., 1976).

71. BRADEN, *supra* note 26, at 29.

problem with deaf children is not that they can't hear, it's that they can't overhear."<sup>72</sup>

The information gap has another source—the inability of most hearing people to communicate fluently with deaf children. Most hearing people, even those who know some sign language, do not know how to communicate well with deaf children, which affects the quality and quantity of the communication. “To communicate with deaf children requires special efforts; therefore, the only language to which they are exposed is language delivered by the deliberate, intentional efforts of others.”<sup>73</sup> The language used in these deliberate, intentional efforts will be very different from the free stream of words with which a hearing parent would engage his hearing child.<sup>74</sup> The exchanges between a hearing parent and a deaf child will tend to be minimalist, either because the parent is speaking and knows the child cannot hear him, or because the parent is attempting to sign but is far from fluent in sign language. Therefore, “even deliberate efforts to provide language exposure typically lack intensity due to the restricted media through which language can be provided.”<sup>75</sup>

A psychologist in Madison, Wisconsin, who is experienced in assessments of deaf people, provided a simple and poignant example.<sup>76</sup> Two children, one hearing, one deaf, are asked by their hearing mothers to set the dining room table for dinner and to use the fancy dishes because it is their hearing father's birthday. For the hearing child, there will be a great deal of linguistic input. For example: “Let's set the table and let's use the nice dishes because it is daddy's birthday. We want everything to be special. I am making him his favorite food, lamb chops, and I've made a chocolate cake.” For the deaf child in a hearing family whose members may (or may not) know a few signs, the exchange will look something like this: “Put dishes on table. Dad's birthday.” The child will be deprived of all the filler information about the nice dishes and the good food having any connection with the father's birthday. Again, this must be traced not to hearing loss but to language deprivation.

This panoply of background information plays a vital role in communication and is the foundation upon which language rests. When we talk to each other, we essentially talk in a code that assumes the listener can draw the inferences that allow him to know what we are talking about without detailed explanations. When we say “I am going

---

72. *Id.* (internal quotations omitted).

73. *Id.*

74. A deaf parent with a deaf child would similarly engage in wide-ranging communication.

75. BRADEN, *supra* note 26, at 31.

76. Conversation with Dr. Jack Spear, a consulting psychologist, in Madison, Wis. (1998).

to the mall,” we are operating on the belief that the listener knows what a mall is and why one would go there. One communication expert has observed that:

Nothing identifies an outsider more quickly than the way a person talks. The problem is that it is not just what a socialized person says and how she says it that so identifies her, but what she does not say, because what a person does not say is what the community takes for granted—the common knowledge of the community.<sup>77</sup>

For example, “[n]o one doing English literary history has to say that Shakespeare was a prominent Elizabethan playwright.”<sup>78</sup>

We have all experienced those moments when we feel like the outsider because we cannot figure out what is being said even though we understand the words. This typically occurs when we hear a joke and do not get it, or look at a *New Yorker* cartoon and wonder why it is funny. We are out of the loop because we are not privy to the shared background knowledge. For many deaf people, their “outsiderness” goes far beyond not getting jokes. Even if they have the ability to understand every word that we say, they still miss what it is we are talking about because they have never been given the background knowledge they need to fill in the blanks.<sup>79</sup>

---

77. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 16 (1991).

78. *Id.*

79. A startling example of how badly communication can break down when a deaf person understands what we are saying but does not know what we mean, comes from a young Helen Keller. Helen’s mother told her that her grandfather had died. Helen replied, “Did father shoot him? I will eat grandfather for dinner.” Anne Sullivan, *Anne Sullivan’s Letters and Reports, January 1, 1888*, in HELEN KELLER: THE STORY OF MY LIFE 178 (Roger Shattuck & Dorothy Herrmann eds., Restored Classic ed. 2003). Helen’s teacher Anne Sullivan explained that up to that point “[Helen’s] only knowledge of death is in connection with things to eat. She knows that her father shoots partridges and deer and other game.” *Id.* at 178–79. One observer has noted that “Helen’s miscue[] sound[s] more like program errors than like the gropings of a child.” Michael Bérubé, *Written in Memory*, THE NATION, Aug. 4, 2003, at 40 (reviewing HELEN KELLER, THE STORY OF MY LIFE (Roger Shattuck & Dorothy Herrmann eds., Restored Classic ed. 2003)).

## 2. LANGUAGE AND COGNITION

Language deprivation also affects a deaf person's cognitive functioning. There have been some suggestions that lack of linguistic input actually causes changes in neurological functioning, though this remains only an unproven hypothesis.<sup>80</sup> But it is certain that reduced exposure to language leads to a reduction in the amount of language that the deaf person will internalize and which in turn will reduce the deaf person's ability to facilitate or mediate "cognitive, academic, and linguistic tasks."<sup>81</sup>

Without language to understand and process input, cognition in areas that depend on language will necessarily be grossly limited.<sup>82</sup> In an extreme case like Jesse's, a person will have the ability to understand sexual function, food, and whatever else it takes to get by, but dealing in the abstract will be virtually impossible.<sup>83</sup> We cannot simply explain the abstractions and give Jesse the requisite background knowledge because he still needs language in the first place to enable him to understand and learn. In terms of ability to process information, Jesse is rather like an obsolete computer with only a small amount of memory and almost no capacity for even the most basic software. You cannot get information into him, and he cannot give it back.

C. *How Many?*

The number of deaf and hard-of-hearing people affected by the condition of linguistic deprivation cannot be precisely determined. Because so much about hearing loss and language exists on a continuum, there is no standard measure that can neatly categorize people into groups. However, there is a body of demographic and social science data available that, taken together, gives a sense of the potential pool of people affected by linguistic deficits.

There are approximately twenty million people in the United States (8.6% of the total population) who would be classified as "hearing impaired" to some degree.<sup>84</sup> Of these, over half have a bilateral (both ears) hearing deficit that falls short of deafness but is "significant."<sup>85</sup>

---

80. See BRADEN, *supra* note 26, at 24.

81. *Id.* at 41.

82. *Id.* at 9.

83. *Jesse R.*, R. at 25-26 (Oct. 25, 1999).

84. See NAT'L CTR. FOR HEALTH STATS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., SERIES NO. 10: DATA FROM THE NAT'L HEALTH SURVEY NO. 188, VITAL AND HEALTH STATISTICS: PREVALENCE AND CHARACTERISTICS OF PERSONS WITH HEARING TROUBLE: UNITED STATES, 1990-1991, 2, 24-25 (1994) [hereinafter HEALTH STATISTICS]. This number includes the 1.2 to 2 million people who are deaf.

85. SCHEIN, *supra* note 14, at 9.



Put another way, approximately five percent of the general population has a hearing loss severe enough to warrant speech pathology, audiology, special education, and rehabilitation services.<sup>86</sup> Within this group, those whose hearing loss is prelingual are at risk for linguistic deficit.<sup>87</sup>

The highest risk is borne by those people whose prelingual hearing loss, as measured in decibels, would place them in the category of "deaf" or "severely hard of hearing."<sup>88</sup> These individuals all "experience substantial difficulty perceiving sounds and speech."<sup>89</sup> A prelingual loss of this magnitude will be a significant impediment to "acquiring, understanding, and producing spoken language."<sup>90</sup>

Experts in the field of deafness estimate that up to fifteen percent of the profoundly deaf population<sup>91</sup> have been so deprived of language that they would be categorized as having minimal language skills or minimal language competency.<sup>92</sup> These people "may have picked up individual words or signs, but [they have] developed [little or] no language base"<sup>93</sup>

86. See McCay Vernon & Sheldon F. Greenberg, *Violence in Deaf and Hard-of-Hearing People: A Review of the Literature*, 4 *AGGRESSION AND VIOLENT BEHAVIOR* 259, 261 (1999).

87. Again, when we talk about hearing loss in this context, we are talking about loss at an early age. BRADEN, *supra* note 26, at 26. Hearing loss brought about by advancing age or too much loud music would not affect language acquisition. Approximately three out of four hearing impaired people in the United States had onset of hearing loss after age eighteen. See HEALTH STATISTICS, *supra* note 85, at 42.

88. There is no legal definition for deaf like there is for blind. Judith Holt et al., Center for Assessment and Demographic Studies, *Demographic Aspects of Hearing Impairment: Questions and Answers*, at 3 (3d ed. 1994), available at Gallaudet Research Inst., <http://gri.gallaudet.edu/Demographics/factsheet.html> (last viewed Dec. 1, 2003). Sources do not agree on the exact cutoff point between deaf and severely hard-of-hearing. BRADEN, *supra* note 26, at 16-23; MOORES, *supra* note 28, at 9-10. However, the two taken together refer to people with a hearing loss of greater than sixty to seventy decibels. See BRADEN, *supra* note 26, at 22.

89. BRADEN, *supra* note 26, at 22. The hearing loss in this range would be classified as severe loss (seventy to ninety decibels) to profound loss (greater than ninety decibels). See McAlister *supra* note 17 at 170-71. Some sources refer to those with a hearing loss of less than ninety decibels as severely hard-of-hearing rather than deaf. See *id.* Regardless of what it is called, any loss greater than sixty decibels has a major impact on ability to communicate via spoken language.

90. Braden, *supra* note 26, at 22.

91. Profoundly deaf refers to a hearing loss of greater than ninety decibels. See *supra* note 89; see also MOORES, *supra* note 28, at 9-10.

92. See e-mail from Timothy Jaech, Sch. Admin. Consultant, Dep't of Pub. Instruction, Deaf and Hard-of-hearing Outreach Servs., to coauthor Michele LaVigne (Jan. 17, 2003) (on file with the author); *supra* note 89.

93. NAT'L INST. ON DISABILITY AND REHAB. RESEARCH, U.S. DEP'T OF EDUC., NIDRR PRIORITY-MENTAL HEALTH SERV. DELIVERY TO DEAF, HARD-OF-HEARING, AND DEAF-BLIND INDIVIDUALS FROM DIVERSE RACIAL, ETHNIC, AND LINGUISTIC BACKGROUNDS, at <http://www.ed.gov/fund/grant/apply/nidrr/prioritybkg-mhds.html> (last visited Dec. 1, 2003) [hereinafter NIDRR PRIORITY].

and have scant knowledge of the world, even the deaf world.<sup>94</sup> This group would include Jesse. Another thirty-five percent of the profoundly deaf would be semilingual; that is, they possess some language base, but it is limited and they lack fluency in any language.<sup>95</sup> Maryellen would be in this group.

Extreme language deficit is not as prevalent among the prelingually hard-of-hearing; however, language deficit brought about by inadequate exposure to language is still pervasive. In fact, high-school graduates who are classified as severely hard-of-hearing have reading scores that are hardly better than graduates classified as deaf.<sup>96</sup>

Although the overall number of people affected by language deficit is small relative to the entire population, it is certainly larger than most would think possible in the twenty-first century. Judges and lawyers are very likely to encounter language-deficient deaf or hard-of-hearing individuals because deaf and hard-of-hearing people are substantially overrepresented in the criminal and quasi-criminal justice system. A series of studies of prisons all over the United States revealed that hearing loss severe enough to interfere with everyday functioning is *two to five* times more prevalent among prison inmates than among the regular population.<sup>97</sup> Moreover, deaf and hard-of-hearing people who come into the criminal justice system tend to be uneducated and poor, which greatly increases the odds of semilingualism and minimal language skill,<sup>98</sup> even compared with the rest of the deaf and hard-of-hearing population.

---

94. *Id.*; WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 161 (1995); *see also* McAlister, *supra* note 17, at 181-85.

95. E-Mail from Timothy Jaech, *supra* note 92. Semilingual is not a fixed category but exists in degrees. One semilingual person may be just above minimal language skill, another may have good basic mainstream skills but have difficulty with any concepts that are in any way abstract, sophisticated, or technical.

96. The median achievement level of eighteen-year-olds with severe hearing loss is just above the fourth grade. The median achievement level of eighteen-year-olds with a hearing loss considered less than severe is only one year higher—approximately the fifth grade. T.E. Allen & S.R. Schoem, *Educating Deaf and Hard-of-Hearing Youth: What Works Best*, tbl.1 (May 14, 1997) (paper presented at the combined Otolaryngological Spring Meetings of the Am. Acad. of Otolaryngology, Scottsdale, Ariz.).

97. Vernon & Greenberg, *supra* note 86, at 261-62.

98. Semilingualism and minimal language skills are directly connected to undereducation. In addition, among those who are semilingual and have minimal language skills, there is a higher incidence of additional disabilities, many of which are cognitive. These conditions exacerbate linguistic deficits. NIDRR PRIORITY, *supra* note 93. It should be noted that deaf and hard-of-hearing people in general are more likely to be poor and less educated. In 1991, those with a family income of less than \$10,000 were twice as likely to have a hearing impairment as those with a family income of more than \$50,000. HEALTH STATISTICS, *supra* note 84, at tbl.4.

## II. THE INTERPRETING PROFESSION AND PROCESS

*Interpretation "is a metaphysical act: an incomprehensible set of words becomes comprehensible, or nearly so. . . . But [interpretation] is also, strictly speaking, impossible."*<sup>99</sup>

## A. Myths and Misconceptions

In order to understand the complicated communication needs of so many deaf and hard-of-hearing individuals, the legal system must understand the function of the person who bears the burden of making communication a reality—the interpreter. Within the legal system, interpreters and their profession are often as misunderstood as deafness itself. Judges and lawyers, like most hearing people in general, routinely operate under a peculiar and intractable set of beliefs about interpreters and interpreting. Much of what judges and lawyers believe is wrong.<sup>100</sup> These beliefs, and the legal system's insistence on imposing those beliefs on interpreters, invariably interfere with the quality of communication that occurs between the actors in the legal system, and deaf defendants or subjects, especially those with a language deficit.

Perhaps the most fundamental misconception about interpreting is that it is rather like mathematics—that there is such a thing as a right answer and that one interpreter's rendering will be pretty much like that of another. But nothing could be further from the truth. For thousands of years, interpreters and translators have been unable to agree on what an interpretation or a translation is even supposed to accomplish. The debate over whether literal translation<sup>101</sup> is preferable to free translation<sup>102</sup> harkens as far back as the ancient Greeks and ancient Romans.<sup>103</sup> This debate continues today.

The controversy becomes even more complicated when we are talking about interpreters for the deaf. Within that profession, there is an added layer of disagreement over the role of the interpreter. The

---

99. Guy Davenport, *People of the Book: A New History of All King James's Men*, HARPER'S MAG., May 2001, at 66, 68. This statement was originally made about translation, the written word's version of interpretation.

100. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM* 2 (1990).

101. Liberal translation "pursue[s] equivalency with regard to the form, rather than the content, of the text." MELANIE METZGER, *SIGN LANGUAGE INTERPRETING: DECONSTRUCTING THE MYTH OF NEUTRALITY* 4 (1999).

102. Free translation focuses on the meaning and attempts "to convey the same sense as the source text." *Id.* at 7.

103. *Id.* at 12. "Aristotle encouraged pursuit of 'accurate' translations, [while] Cicero attempted to serve the consumers of his text by making dialect and register choices that matched the needs of his audience." *Id.*

Registry of Interpreters for the Deaf (RID), the largest national professional association and certifying body of interpreters for the deaf, currently favors a “bilingual, bicultural specialist” model.<sup>104</sup> But a substantial number of interpreters do not belong to RID, and even those who do see their roles in a variety of other ways. Some interpreters see themselves as helpers,<sup>105</sup> others as conduits,<sup>106</sup> still others as communication facilitators.<sup>107</sup>

These divergent views of the best method of interpreting and the appropriate role of the interpreter carry over into the courtroom and influence the type of interpretation that is delivered, the conduct of the interpreter in the courtroom, and the ability of a deaf individual to understand a particular interpreter. Judges and lawyers cannot assume that an interpreter is an interpreter is an interpreter—or that an interpretation is an interpretation is an interpretation—because that is simply not true.

Other misconceptions can have even more devastating impacts on the quality of interpretation, and ultimately, the quality of justice. One of the most common is that anyone who knows two languages is competent to interpret. This has led to courtroom use of high-school language teachers, neighbors, children, spouses, arresting officers, complaining witnesses, and even the judge’s wife (who had taken a couple of sign language classes) as interpreters.<sup>108</sup>

Yet another misconception is that one language can be interpreted word for word into another. Lawyers, judges, and police officers routinely admonish an interpreter to “just tell him what I’m saying, word for word,” and become quite irritated if the interpreter demurs. But no two languages in the world interpret word for word. Any attempt to do so will distort the meaning of what is being said and make even the most articulate speaker sound foolish. Put into word-for-word

---

104. Cynthia B. Roy, *The Problem with Definitions, Descriptions, and the Role Metaphors of Interpreters*, 6 J. INTERPRETATION 127, 146–47 (1993). The bilingual, bicultural model recognizes that there are cultural as well as linguistic issues present in communication between deaf and hearing people. *Id.*

105. A helper is an interpreter who also acts as a social worker or parent substitute in certain situations. *Id.* at 139–40.

106. The conduit model is a mechanical notion of interpreting in which the interpreter attempts to transmit every spoken word into visible English. *Id.* at 140–44; see also ANNA WITTER-MERITHEW, INTERPRETING IN THE AMERICAN LEGAL SYSTEM 14–15 (1995).

107. The communication facilitator adapts her interpretation to the language choice of the deaf person. WITTER-MERITHEW, *supra* note 106, at 15–17; Roy, *supra* note 104, at 144–46.

108. Dianne Molvig, *Overcoming Language Barriers in Court*, WIS. LAW., Feb. 2001, at 10–11. The example of the judge’s wife was provided at a September 2000 meeting of client services coordinators from the Wisconsin Office of the Deaf and Hard-of-Hearing, Madison, Wisconsin.

English, the French for “how are you?” (*Comment allez-vous?*) comes out “how go you?” The ASL for “I have been to Chicago” would be voiced as “touch finish Chicago.”

All languages also have words, phrases, or signs that just cannot be translated or interpreted accurately at all, let alone word for word. The German *angst* is sometimes translated as “anxiety,” but that misses the depth, breadth, and sense of foreboding that *angst* implies. ASL has a sign of heartfelt derision (a distinct jabbing motion), which tends to be interpreted as a popular English-language expletive or a cleaned up variant. This too misses the point.<sup>109</sup>

Many consumers of interpreting services also have a mechanized view of interpreting. They assume that any interpreter worth her salt ought to be able to spit out a top-notch product while remaining unobtrusive and not interfering with the proceedings.<sup>110</sup> This is sheer fantasy. Interpreters are not computers or magicians. No matter how qualified, an interpreter still requires time, energy, and the occasional break in order to process what is being said and then accurately convey it in another language.

In other words, interpreting between any two languages is a complicated business that is not appropriate for amateurs. The complications multiply when we are talking about interpreters for the deaf who must traverse between a spoken language and a visual language, and who must further contend with a wide range of language competencies. When the interpreter for the deaf works in the legal arena, she enters an entirely new dimension altogether.

The qualified legal interpreter is both a highly skilled technician and an artist (and a brave one at that). Her art lies in the sometimes miraculous act of bringing the deaf individual (whatever his educational, social, and linguistic history) and the judge, lawyer, and witness (with all of their linguistic baggage and eccentricities) onto the same wavelength. Not only must the interpreter connect these two wildly divergent linguistic communities, she must do it in a way that satisfies due process.

### B. *English-Based Interpretation*

The role of the interpreter for the deaf is probably easiest to understand if we begin at the English end of the spectrum. The most English form of interpretation is known as transliteration. Transliteration is the means by which spoken English is converted *word*

---

109. Because English has such an extensive vocabulary compared with other languages, there are numerous English words that do not have single word counterparts in translation. For example, there is no specific French word for “lint.”

110. BERK-SELIGSON, *supra* note 100, at 2.

for word into visual English. Within the interpreting field, transliteration is acknowledged as a skill separate from interpreting.<sup>111</sup>

Transliteration conveys the words being spoken. It does not decode the spoken English—that is, it does not get to the meaning. Rather, it recodes the English, making the spoken word visible, either in signed form or orally. Oral transliteration is a type of interpretation in which the interpreter repeats the words of the speaker verbatim.<sup>112</sup> Signed transliteration utilizes manually coded English<sup>113</sup> and reproduces the words via hand signs and finger-spelling.

The signing method used in transliteration is, in essence, a combination of ASL signs used to represent English words. The signs are chosen for their relation to the words rather than for their meaning.<sup>114</sup> Very often, sign choice is a function of the sound and the spelling of a word. “Run as in a run in the park and run as in a run on the bank are both signed the same way, because the English spelling and pronunciation are the same.”<sup>115</sup> Home run, run for office, a run in your nylons, running water, and a runny nose would be included under that same sign.<sup>116</sup>

Transliteration is attractive to the legal system. It is efficient in that it requires less lag time (the period between the start of the spoken words to the start of the interpretation) than would be required if the language were undergoing structural or syntactical changes.<sup>117</sup> An interpreter can begin transliterating almost simultaneously with the spoken words because she is making no judgments about meanings. A good transliterator is essentially a court reporter, transforming the words while asking little of the hearing participants, other than to speak one at a time.

111. For example, the RID grants a separate Certificate of Transliteration (CT), as opposed to a Certificate of Interpretation (CI).

112. Verbatim oral interpreting has utility only for a miniscule number of deaf people, generally professionals, and will not be discussed in detail here. See BONNIE POITRAS TUCKER, *THE FEEL OF SILENCE* 166–69 (1995). However, signed transliteration is another matter. Many signing deaf people have been exposed to manually coded English in one form or another, and some interpreters use it routinely, whether it is appropriate or not. Roy, *supra* note 104, at 148.

113. The term “manually coded English” as used here refers to the number of systems that have been developed in attempts to reproduce English in sign form. See PAUL & QUIGLEY, *supra* note 43, at 127–31. One of these systems has the specific name “Signed English.”

114. MOORES, *supra* note 28, at 208–09.

115. *Id.* at 209.

116. *Id.* at 208.

117. Dennis Cokely, *The Effects of Lag Time on Interpreter Errors*, in *SIGN LANGUAGE INTERPRETERS AND INTERPRETING* 39, 42 (Dennis Cokely ed., 1992). However, manually coded English cannot keep pace with spoken English. Hand signs and finger-spelling in particular, take longer to execute than spoken words, which means that the spoken language and the signed language will not be synchronized.

Transliteration also appeals to the legal system because it lets judges and lawyers believe that they have control over what the deaf person is told and, therefore, understands.<sup>118</sup> It also fits prevailing notions of what an interpreter should be doing. Indeed, judges and lawyers are often suspicious of the interpreter who cannot, or will not, match courtroom dialogue word for word. These suspicions appear frequently in the popular war stories about the “interpreter[] who engage[s] in a lengthy conversation with a witness, only to then turn to the court and ‘declare he says, No.’”<sup>119</sup>

The problem with transliteration is that most prelingually deaf defendants cannot understand it well enough to afford them adequate comprehension of legal proceedings. Admittedly, legal English is not known for its accessibility to anybody—deaf or hearing. But for deaf people, their inability to comprehend word-for-word English in the courtroom extends far beyond the obtuse jargon.

In 2000, Professor Jean Andrews of Lamar University analyzed transcripts of a guilty plea and sentencing, a suppression hearing, and several jury trials in order to determine the level of English used by the judges, lawyers, and witnesses, and its accessibility for deaf defendants.<sup>120</sup> This was a relatively straightforward two-part experiment in which Dr. Andrews computer-scanned the transcripts and applied seven different readability formulas.<sup>121</sup> She then ran “a program called ‘Vocabulary Assessor’ which identifies potentially difficult words for fifth graders and below.”<sup>122</sup> The results were unequivocal. The English language ability necessary to understand what was said in these cases was considerably above the ability of most of the deaf population, regardless of whether the words were converted into a visual form.<sup>123</sup>

The lowest average reading levels necessary to understand proceedings occurred in the language of the jury trials. Trial I averaged a reading grade level of approximately grade 7.3, Trial II averaged approximately grade 7.8, and Trial III, averaged approximately grade 5.7.<sup>124</sup> That the jury trial scores were the lowest makes sense because the main event at a trial is the testimony of witnesses who tell a story

---

118. See Kathy Laster, *Legal Interpreters: Conduits to Social Justice?*, 11 J. INTERCULTURAL STUD. 15, 17-18 (1990).

119. *Id.* at 18 (internal quotations omitted).

120. Vernon & Miller, *supra* note 51, at 103-05 (analyzing transcripts from Wisconsin cases that were in the appeals process).

121. *Id.* at 103, 109. The readability formulas analyzed included: Dale-Chall Grade Level, Flesch Reading Ease, Flesch Grade Level, FOG Grade Level, Powers Grade Level, SMOG Grade Level, FORCAST Grade Level and Fry. *Id.* These are run by software developed by Micro Power & Light Company.

122. *Id.* at 103.

123. *Id.* at 103-05.

124. *Id.* at 112-18 (results of Andrew’s testing are on file with coauthor Michele LaVigne).

about what happened out on the street or in the station house. But even these proceedings were at a level of English that could be completely understood by only slightly more than ten percent of deaf people.<sup>125</sup>

The highest reading level necessary to understand proceedings (grade 9.2) was found in the language of the most common criminal proceeding of all—the guilty plea and sentencing.<sup>126</sup> This is also the proceeding that requires the most intense involvement of the defendant, first in making the crucial decision whether to plead and then in understanding the array of constitutional rights that are waived by the plea. Unfortunately, the reading level necessary to understand the English language in guilty plea proceedings is reached by only five to six percent of the prelingually deaf population.<sup>127</sup>

In addition, all of the proceedings were laden with words, both legal and nonlegal, that the Vocabulary Assessor classified as difficult for fifth-grade readers.<sup>128</sup> Some of these “difficult words” have a corresponding sign, but many are in general usage only among relatively educated deaf people.<sup>129</sup> Others have no signs, meaning that a faithful English transliteration would require finger-spelling. Finger-spelling of course, requires that the deaf person know what word the letters spell and then what the word means.

Further compounding the difficulties with vocabulary, as noted by Dr. Andrews, is the legal system’s fondness for idioms and the eccentric use of seemingly ordinary words.<sup>130</sup> Take, for example, the stock phrase “the court finds.” To communicate those words in manually coded English, an interpreter would rely on signs that conceptually mean that the courtroom has finally located the item it had been looking for.<sup>131</sup> Such a construction would make sense only to a person who is so well versed in English and the ways of the courtroom that he can divine the meaning of the words behind the signs.<sup>132</sup> Similarly, Jesse’s “no race”

125. See Barbara A. Brauer, *Adequacy of a Translation of the MMPI into American Sign Language for Use with Deaf Individuals: Linguistic Equivalency Issues*, 38 REHAB. PSYCHOL. 247, 247–48 (1993) (noting that “only 10% of deaf 18-year-olds nationally can score at [an] 8th-grade level or better”).

126. Vernon & Miller, *supra* note 51, at 110–18.

127. *Id.* at 103.

128. *Id.* at 103, 110–18.

129. For example, there is a sign for “constitution,” but neither Jesse nor Maryellen was familiar with it.

130. Most law students encounter this for the first time with the term “standing.” A computer-generated language assessor would not necessarily pick up jargon-like usages of words like “standing.”

131. Coauthor Michele LaVigne observed this interpretation of “the court finds” in a child protection case. Fortunately, there was an interpreter at counsel table who clarified what the court found.

132. A typical deaf person reading the words “the court finds” would be no more likely to understand its idiomatic nature than the deaf person observing the signed English version.



would only be understood by someone who has both the language skills and the knowledge base to recognize that one of the English equivalents of the sign "race" is contest (as in competition) and that within the legal world there is a concept known as "no contest," which is like a guilty plea (though not exactly).

This Article does not suggest that an interpreter should not use English-based interpreting in the courtroom. There are many, many prelingually deaf people whose primary language is English, either signed or oral, and they are entitled to have the proceedings presented in the language they understand. However, an overwhelming percentage of these people will not understand true word-for-word transliteration because they cannot understand the English that is being spoken by the judges and lawyers.

The role of the responsible interpreter in these cases will, of necessity, be quite different from that of the transliterator. Instead of replicating the speaker's English, the interpreter must adjust the syntax and vocabulary of the speakers' English to create English that can be understood by the deaf person. In doing so, the interpreter continually exercises judgment about which English words and word usages the deaf person can and cannot understand, and which words or concepts<sup>133</sup> will act as meaningful substitutes. Certainly she would never leave "the court finds" to its literal self, but would change it to "the judge decides" or (the judge says) "I have decided."

### *C. American Sign Language*

When working with a deaf person whose primary language is ASL, the interpreter can no longer rely on English syntax or word usage. An interpretation that adheres too closely to spoken English will strike an ASL user "as awkward or garbled, just as a too-literal English translation of a foreign language results in unwieldy sentences and, sometimes, bizarre meanings."<sup>134</sup> When she is interpreting for the ASL user, the interpreter must transform the spoken language into a new language altogether, a task that is complex and difficult. In order to understand why English to ASL interpretation can be so difficult, it is necessary that we appreciate just how different English and ASL are from each other.

---

133. Even for the deaf person whose language has more English features than ASL, the interpreter must often rely on a conceptual interpretation because there are no alternative words that would convey the meaning accurately. For example, if the deaf person is not familiar with the term "jury," there is no substitute word. At least the first time through, the interpreter must explain about the "twelve people who are called the J-U-R-Y."

134. Brauer, *supra* note 125, at 249.

ASL is frequently thought of as English in signed form. It is not. ASL is frequently thought of as spelling out every English word via the deaf alphabet. It is not. ASL is its own unique language, one that is far from English. ASL has been likened to written Chinese in that it is ideographic, meaning that "the character correlates directly with the meaning."<sup>135</sup> Though one language is written and one is not, the languages share the common trait of presenting ideas, thought, and comment in spatial form.<sup>136</sup>

There are many structural differences between ASL and English brought about by the fact that ASL is designed to be seen and English is designed to be heard. But the biggest difference between the two languages lies in vocabulary. As discussed in Part I, English is a sprawling behemoth of a language with a word for everything. As measured by a strict counting of vocabulary (one sign equals one word), ASL appears strikingly small compared to English. The largest commercially available ASL dictionary has approximately 5600 hand signs. This is not to say that ASL can only express the equivalent of 5600 words. ASL is quite capable of a full range of expression, but the expression will not resemble the English version.

Significantly, ASL lacks a body of standardized technical terms, a situation brought about by a number of circumstances related to its controversial history and its usage as a people's language. English, on the other hand, is replete with hyperspecific technical terms, a large number of which permeate the legal system. Again, ASL can communicate the concepts behind the technical English, but the manner in which the concepts are expressed in each language will be worlds apart. For example, the term "prosecutor" has no standard ASL counterpart, but can be conceptually expressed as "blame-person," "government lawyer," "complaining lawyer," "other lawyer," or "against lawyer."<sup>137</sup>

ASL and English are also dissimilar in their function. Like so many languages, the two are fundamentally "misfits"; they do different things.<sup>138</sup> English is a language of words while ASL is a conceptual

---

135. SPUFFORD, *supra* note 33, at 68.

136. E-mail from Timothy Jaech, Sch. Admin. Consultant, Dep't of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., to coauthor Michele LaVigne (Oct. 20, 2002) (on file with the author).

137. See FRANK CACCAMISE ET AL., SIGNS FOR LEGAL AND SOCIAL WORK TERMINOLOGY 17-18 (1998) (including the signs for a complaining person and a government lawyer). Coauthor Michele LaVigne has also observed interpreters use "blame person," "other lawyer," and "against lawyer." Please note that these are all glosses (crude translations) of what was signed. The signed letters D-A may also be used if the deaf person knows that they stand for district attorney and what a district attorney is. *Id.* at 17.

138. Alastair Reid, *Neruda and Borges*, NEW YORKER, June 24 & July 1, 1996, at 56, 64 (commenting about Spanish and English).

language—a language of “what is going on here.” In ASL, the sign for running a marathon looks nothing like the sign for running a machine because running a marathon bears no relation to running a machine. Unlike English, which conveys meaning through precise word choice, ASL achieves its shades of meaning through the execution and grouping of signs. So, for example, while there is no discrete sign for hobby, a person who is using ASL can sign the equivalent of “what I do in my free time,” which is of course exactly what “hobby” means.<sup>139</sup> And in ASL, “angry” can become just as ticked off, annoyed, peeved, or livid as in English by making the “angry” sign bigger or smaller, or faster or slower, or more or less emphatic, and by coupling it with the appropriate facial expression and body language.<sup>140</sup>

This may all seem simple enough—an interpreter need only know what phrase or sign execution to substitute for what word and *voilà*—ASL. However, as the complexity and difficulty of the words and the subject increase, so do the complexity and difficulty of the interpreting process. If the deaf person has enough English, the interpreter can, of course, take the easy route and finger-spell the words for which there are no signs. “Arraignment” becomes A-R-R-A-I-G-N-M-E-N-T; “carotid artery” becomes C-A-R-O-T-I-D A-R-T-E-R-Y.

For the majority of the deaf population, however, the interpreter must figure out how to get from those specific words to the meaning behind those words. The interpreter must make subjective decisions about linguistic and cultural equivalents and how best to express them to the particular deaf person. On top of this, the interpreter must adjust for the syntactical differences between ASL and English, and make constant editorial and structural decisions. Common sense indicates that these adjustments by the interpreter take considerable skill, intuition, and—most valuably—time.

When thinking about time in relation to the process of interpreting between any two languages, it must be considered in two segments. The first is the conversion time necessary for an accurate interpretation. The second is the expression time necessary to convey the converted message accurately.

Time is required to process what is being said and to make the professional judgments necessary to accurately convert it to another language. Among some interpreters, and certainly among the hearing

---

139. This might also be a situation where an ASL user would finger-spell the English word.

140. DAVID F. ARMSTRONG ET AL., *GESTURE AND THE NATURE OF LANGUAGE* 86–87 (1995). Linguists David Armstrong, William Stokoe, and Sherman Wilcox describe in detail how the signer of “I have decided” can change the meaning from authoritative to equivocal to nonchalant simply by changing the action of the signing itself. *Id.* at 87.

consumers of interpreter services, “perfect temporal synchrony”<sup>141</sup> with the speaker (the UN model)<sup>142</sup> is widely assumed to be the gold standard. When we are talking about interpreting between ASL and English, such a standard is an illusion. It is also a guaranteed formula for miscommunication. Research has shown that forcing a sign language interpreter to attempt to keep pace with the speaker dramatically increases the rate of interpreter errors.<sup>143</sup> In the process of interpreting from English to ASL, interpreter accuracy correlates directly with lag time. The longer the lag time, the less prone the interpreter will be to errors, miscues, or omissions. The explanation is quite simple, “[t]he greater the lag time, the more information available; the more information available, the greater the level of comprehension.”<sup>144</sup> And, of course, the greater the level of interpreter comprehension, the greater her ability to accurately convey “what is going on here” in ASL.

The second segment critical to the interpreting process is the amount of time it takes to express a message in the idiom of one language as opposed to another language. When comparing spoken language to any signed language, it is a given that speaking will almost always be much faster than signing. But the time differential between English and ASL is far more complicated than that.

Equivalent messages in any two languages will generally not match in terms of length, because no two languages translate word for word and because there are many differences in syntax. This observation is certainly true for Spanish, which, when compared with the equivalent English, tends to be longer.<sup>145</sup> The same is true, under certain circumstances, for ASL and must be taken into account when we consider the circumstances under which we expect interpreters for the deaf to operate.

In the world of deaf studies and linguistics, the question of whether English or ASL can make a point more efficiently is the source of frequent debate. In many narrative situations, particularly in describing spatial relationships and certain types of action, ASL can be faster and even clearer. But when communicating technical concepts, English, by virtue of its one-word-equals-one-concept system of verbal economy, will often prove more efficient.

The time differential for expressing a concept in English as compared to ASL has been observed in the context of administering

---

141. Cokely, *supra* note 117, at 39.

142. The “UN Model” refers to a model of interpreting, by which the interpreter seamlessly, simultaneously, and invisibly transforms the language of the speaker.

143. See Cokely, *supra* note 117, at 39.

144. *Id.* at 67.

145. BERK-SELIGSON, *supra* note 100, at 120.

psychological tests. Dr. Barbara Brauer of the Gallaudet University Mental Health Research Program had the Minnesota Multiphasic Personality Inventory (MMPI) interpreted into ASL on videotape.<sup>146</sup> The MMPI is a widely administered psychological test written at a sixth-grade reading level.<sup>147</sup> To read it aloud in English takes approximately forty-two minutes.<sup>148</sup> The ASL version lasted over two hours.<sup>149</sup> "In other words, it took about three times as long to sign it as to say it."<sup>150</sup>

This is not to suggest that English is better than ASL because it is allegedly more efficient, anymore than English is better than Spanish. The question for the legal system is not which language is better but rather what happens when the two are forced to exist side by side with an interpreter running the gauntlet in between.

#### D. All Places in Between

Even though English and ASL are distinct languages (which they are), in reality, sign languages, as used within the deaf world, do not fall so neatly into mutually exclusive camps. The languages of the deaf community exist on a "bilingual[] continuum between ASL and English, with pidgin-like varieties in between."<sup>151</sup> Within the middle you will find "English-y ASL and ASL-like English for Deaf people and ASL-like English for a few Hearing people and English-y English for most Hearing people."<sup>152</sup> Language competencies within the deaf community exist on a similar continuum. The majority of deaf individuals fall into the vast expanse of linguistic territory in between fluency in ASL and English and minimal language skill.<sup>153</sup>

The job of the interpreter is to figure out where in between each deaf individual's language is, both in terms of type and competency. This calculation cannot be readily guided by any objective criteria

146. Brauer, *supra* note 125, at 247.

147. Vernon & Miller, *supra* note 51, at 102.

148. *Id.*

149. Brauer, *supra* note 125, at 252; *see also* Vernon & Miller, *supra* note 51, at 102.

150. Vernon & Miller, *supra* note 51, at 102. It is important to note the ASL interpretation was made under optimal conditions. The interpretation had already been carefully planned before the final videotape was made and required no lag time to permit the interpreter to understand what the speaker was saying. Any attempt to provide an interpretation of equal quality in conjunction with a spoken rendition that is being heard by the interpreter for the first time would require lag time and thus would last significantly longer than two hours. Brauer, *supra* note 125, at 250-52.

151. WOODWARD, *supra* note 17, at 39.

152. *Id.*

153. *Jesse R.*, (May 10, 1999) (Report to the court by Timothy A. Jaech, Wis. Dep't of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., former Superintendent, Wis. Sch. for the Deaf).

because the interpreter is essentially trying to hit a moving target. An avowed ASL user may be perfectly comfortable with the substitution of English-type signs or finger-spelling in place of a sign or a series of signs,<sup>154</sup> but the interpreter would need to make accurate judgments about which signs or words to use. Another deaf person with English signing skills may have an idiosyncratic and incomplete network of background knowledge requiring the interpreter to switch to conceptual communication where least expected. Or that person may intersperse "ASLisms" throughout his English without even realizing that he is changing language. Still another deaf person might prefer to use PSE but the PSE of a college graduate will bear little resemblance to the PSE of a high-school graduate who reads at a third-grade level.<sup>155</sup>

#### *E. Interpreting for the Deaf Person with Minimal Language Skills*

If interpreting for a deaf person with strong language skills can be challenging and time consuming, then where does this leave interpreting for the deaf person who has little functional language and knows almost nothing about how the world operates?

Meaningful communication, with or without an interpreter, requires language and background information with which to share meaning. The deaf person with minimal language skills lacks both. Even if the interpreter can find a set of basic signs that the deaf person understands, the deaf person with minimal language skills may still not understand their meaning in the context of the discussion.

"Interpreting with a[] . . . deaf person [with minimal language skills] stretches the skills and creativity of the interpreter," notes Nancy Frishberg, who has written on interpreting.<sup>156</sup> Because interpreting for a deaf person with minimal language skills can be so difficult and unpredictable, she recommends that before setting out to interpret, the interpreter do considerable homework to find out in what contexts the deaf person is able to communicate.<sup>157</sup> While interpreting, Frishberg recommends the use of sources that go far beyond traditional language: "props and environmental objects to aid communication: maps, clocks, calendars, pictures, tactile stimuli and the like may be useful."<sup>158</sup> She encourages the interpreter to use "pantomime, gestures, and adopt or adapt the . . . individual's own store of gestures."<sup>159</sup>

---

154. Virtually all deaf people in the United States have had exposure to and have retained some English. The question is always how much.

155. See *supra* note 15 (discussing PSE).

156. NANCY FRISHBERG, *INTERPRETING: AN INTRODUCTION* 153 (1986).

157. *Id.* at 149.

158. *Id.*

159. *Id.*

Frishberg further recommends “the involvement of a . . . deaf interpreter [i.e., an interpreter who is deaf herself], to assist in the communication, particularly when the consequences of the communication may affect the health or welfare of the deaf person classed as [minimally language skilled].”<sup>160</sup> The deaf interpreter, known as a relay interpreter, works in tandem with a hearing interpreter and is often more effective in communicating with a linguistically limited deaf person for the same reason that an interpreter from Mexico is more effective in communicating with another person from Mexico than the high-school Spanish teacher would be.<sup>161</sup> A deaf interpreter shares cultural experiences and knowledge with the deaf person and is able to draw upon those connections in order to facilitate communication.<sup>162</sup>

Even with these seemingly unconventional methods of communicating, certain ideas may be difficult to communicate with someone who does not have a base of language. “Expressing relationships in time (X happened before Y; three weeks ago . . . ), pronouns, especially where several people or objects are discussed at once, comparatives (A is more \_\_\_\_\_ than B, C is as \_\_\_\_\_ as D), and negation are all potential stumbling blocks in interpreting and communicating with a[] . . . deaf person [with minimal language skills].”<sup>163</sup> And there will be many instances that despite the interpreter’s best efforts, communication with a deaf person with minimal language skills simply cannot happen, especially in a setting where concepts are abstract and complex, and where linguistic subtlety is the order of the day.

It goes without saying that the law and the person with minimal language skills are horribly ill-suited to each other. An experienced legal interpreter has called the process of legal interpreting for the person with minimal language skills “painstaking.”<sup>164</sup>

---

160. *Id.* The use of a deaf relay interpreter with the deaf person with minimal language skills is widely recommended within the interpreting field. McAlister, *supra* note 17, at 184. However, the use of a deaf relay interpreter should not be limited to situations with person with minimal language skills.

161. See Phyllis Wilcox, *Dual Interpretation and Discourse Effectiveness in Legal Settings*, 7 J. INTERPRETATION 89, 90–91 (1995).

162. See *id.* The use of a deaf interpreter will be discussed further *infra* Parts III.A.2 and IV.A.4.

163. FRISHBERG, *supra* note 156, at 149.

164. *Id.*

The interpreter must operate slowly on a concept by concept process. Each new concept that is introduced may take quite some time to establish itself in the client's understanding. References to that concept must be reestablished in the client's memory and the relationship to the new concept must then be made clear.<sup>165</sup>

To the outside observer, "[t]he movement in such interpretation looks very much like the old 'one step forward, and two steps backward.' Fortunately, it sometimes does move two steps forward and one step backward."<sup>166</sup>

Several years ago, veteran educator of the deaf, Timothy Jaech, was asked to make a videotape of a passage contained in a standard guilty plea questionnaire using three different sign forms—Signed English (a form of manually coded English), ASL, and a version for a person with minimal language skills.<sup>167</sup> The passage states: "I understand that by pleading guilty I will be giving up the right to a twelve person jury. I understand that any verdict by a jury must be agreed to by each member of the jury."<sup>168</sup> The purpose of this exercise was to demonstrate to audiences not familiar with signed languages (notably, judges and lawyers) just how different the three forms are from each other.<sup>169</sup>

Whenever this tape is shown, the version that gets the most reaction is the one for people with minimal language skills. First, the minimal language skills portion lasts almost three minutes, as opposed to ten seconds for the spoken version, forty-four seconds for the Signed English version, and thirty-seven seconds for the ASL version.<sup>170</sup> Even more striking are the extraordinary contortions that Jaech goes through in order to get across a point that seems so basic. At times he looks like he is attempting to convey the concept of the jury through an exaggerated set of charades. Significantly, Jaech thought that a deaf person with minimal language skills would only be able to understand

---

165. *Id.*

166. CACCAMISE ET AL., *supra* note 137, at 204, app. J (quoting Sharon Neumann Solow, *Interpreting in the Legal Setting: Involving Minimally Linguistically Competent Deaf Adults*, RID VIEWS 39-41 (1996) (vol. 13(7))).

167. Videotape: Sign Language (prepared by coauthor Michele LaVigne & Timothy Jaech, Sch. Admin. Consultant, Wis. Dep't of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., former Superintendent, Wis. Sch. for the Deaf, June 2000) (on file with author).

168. *Id.*

169. *Id.*

170. *Id.* This is an instance where ASL makes the point faster and with fewer signs than English in signed form. The Signed English used in this demonstration tape was a version that represents all word endings. Another less precise version could conceivably take less time but would still use more signs than the ASL version.



his simple step-by-step interpretation of jury unanimity if counsel and interpreters (including a relay interpreter) had spent considerable time beforehand explaining and reviewing the concept and function of a jury. He estimated that the entire process would take up to several hours.<sup>171</sup>

It should be noted that Jaech specifically chose to demonstrate that particular section of the guilty plea questionnaire because he felt that it was the most concrete and visual, and could be conveyed with some degree of success to a person with minimal language skills. He did not believe that he could ever begin to communicate proof beyond a reasonable doubt to such a person.<sup>172</sup>

#### F. *The Mode of Interpretation: Simultaneous Versus Consecutive*

In addition to the language choice and competency of the deaf person, the interpreter must also contend with another issue—the mode of interpretation she is expected to provide. There are two modes of interpretation: simultaneous and consecutive. “Simultaneous interpret[ation] is rendering an interpretation continuously at the same time someone is speaking.”<sup>173</sup> It is the type of interpretation we would expect to see at a meeting or performance, or in any other situation where the deaf person is not an active participant. Consecutive interpretation occurs when the interpreter conveys a message after the speaker has finished.<sup>174</sup> Ordinarily, this would be used where the deaf person is in a conversation or is being addressed directly, such as at a doctor’s office.

The mode of interpretation directly implicates the all-important factor of time. Consecutive interpretation, by its nature, affords more time for the interpreter to understand what is being said and to transform the language. Simultaneous interpretation is less forgiving because the speaker continues whether the interpreter is finished or not.

In the courtroom, interpreters are expected to interpret simultaneously. In fact, they are usually required to do so, unless otherwise authorized by the judge.<sup>175</sup> The only exception is when the deaf defendant or subject testifies, or when the court or counsel directly

171. Interview with Timothy A. Jaech, Sch. Admin. Consultant, Wis. Dep’t of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., former Superintendent, Wis. Sch. for the Deaf, in Madison, Wis. (June 2000).

172. *Id.*

173. Bruce Goodman, *Understanding Interpreters*, WIS. DEFENDER, Winter 2003, at 16, 17 (quoting Wis. CT. SYS., WIS. CT. INTERPRETER TRAINING PROGRAM: ORIENTATION TRAINING NOTEBOOK, tab.2, at 1).

174. Heather Pantoga, *Injustice in any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 643 (1999).

175. *See, e.g.*, 28 U.S.C. § 1827(k) (2000).

addresses the deaf person, such as during a guilty plea. During those times, consecutive interpretation is used.

From the perspective of the hearing participants, simultaneous interpretation is the natural choice for most legal proceedings because it is unobtrusive and adapts to the flow of courtroom discourse. Consecutive interpretation, by comparison, is slow and clumsy, and frankly, can be excruciating for the speakers who must continually stop and start.

Nevertheless, the requirement of simultaneous interpretation is often in direct conflict with the communication needs of many deaf people in the legal system and often inflicts a distinct hardship.<sup>176</sup> The language of the courtroom is so far beyond the range of linguistically deficient deaf and hard-of-hearing people that we cannot possibly expect an interpreter to keep pace with the spoken language without sacrificing comprehension. Simultaneous interpretation has also been associated with a high rate of interpreter error,<sup>177</sup> which further increases the potential for miscommunication and confusion. While simultaneous interpretation will be appropriate in certain situations, its limitations and its effects on the quality of interpretation should be carefully weighed.

### III. THE LEGAL IMPLICATIONS OF DEAFNESS AND LANGUAGE IMPAIRMENT

There will be instances when deaf person's communication difficulties are not readily apparent to the court or even to his or her own lawyer. As the following excerpts demonstrate, that was not the case with Jesse or Maryellen.

#### A. *Examples from the Courtroom*

##### 1. JESSE

THE DEFENDANT [Jesse]: I want to enter no contest.

THE COURT: What does "no contest" mean to you?

THE DEFENDANT: I have a hard time explaining it. I think it means like I'm not going to compete for anything. I'm not—that's what it means.<sup>178</sup>

---

176. We would argue that rigidly enforced simultaneous interpreting is at odds with communication needs of most deaf people in court; however, those who are linguistically deprived will be more seriously affected.

177. David Gerver, *Simultaneous Listening and Speaking and Retention of Prose*, 26 Q. J. EXPERIMENTAL PSYCHOL. 337, 340 (1974).

178. *Jesse R.*, R. at 8-9 (Mar. 26, 1998).

\* \* \* \*

THE DEFENDANT: I don't want to have a jury or a trial.  
 THE COURT: I understand that you do not want to have a trial. However if there was a trial, do you understand that you would have the rights that we're talking about?  
 THE DEFENDANT: I still don't want a jury or a trial?  
 THE COURT: Tell me why you don't want a jury, Mr. [R.].  
 THE DEFENDANT: I don't know.  
 THE COURT: Let me ask you again Mr. [R.]. You have told me several times that you do not want a trial. Tell me why you do not want a trial.  
 THE DEFENDANT: Because I don't like to have a jury, trial or court. I just don't like it. I don't want it.  
 THE COURT: Have you ever had a trial before?  
 THE DEFENDANT: No. Never.  
 THE COURT: So why have you decided that you don't like them?  
 THE INTERPRETER: No word response. . . .<sup>179</sup>

. . . .

THE COURT: I'm therefore satisfied the defendant based upon the record before this court today has knowingly and intelligently waived his right to trial in these matters, has entered a plea of no contest as to count two of the information knowingly and intelligently.<sup>180</sup>

## 2. MARYELLEN

[MARYELLEN'S] COUNSEL: I don't think she is understanding this part.

THE COURT: Well, you can go over it with her.<sup>181</sup>

\* \* \* \*

[From Dr. Spear's evaluation]: [Maryellen] would not likely be able to learn and deal well with a list of rules as has already been presented to her. Such a list demands that [she] be able

---

179. *Id.*, R. at 10-11 (Apr. 1, 1998).

180. *Id.* at 10-11, 27. The court started to take Jesse's no contest plea on March 26, 1998, but continued the proceedings for a week to give Jesse more time to meet with his lawyer.

181. *Maryellen H.*, R. at 10 (Jan. 18, 1996).

to draw upon past experience and generalize from both her past experience as well as the meaning of the language inherent within the written rules.<sup>182</sup>

\* \* \* \*

COUNSEL: I mean this [psychological evaluation] points to some serious concerns and I think really calls into question the extent to which my client has had an understanding of everything that's gone on for the last two years. I understand interpreters were in the room . . . but a verbatim recitation [of the conditions for return of her child] may not be sufficient.<sup>183</sup>

. . . .

THE COURT: I'll read the conditions for return as set forth on Page six . . . . I'll try to read them slow.<sup>184</sup>

The signals indicating that Maryellen and Jesse were having severe communication problems were hard to miss. Had there been no "interpreters in the room," both of the trial court judges would most certainly have stopped the proceedings in their tracks. But there were interpreters, and the pleas from trial counsel, the psychological reports, the illogical answers, and non sequiturs—all of which screamed out, "lack of comprehension"—were seemingly ignored or disregarded. It was as if the presence of an interpreter rendered comprehension a nonissue.

Ultimately, of course, comprehension proved to be *the* issue. Comprehension, or the lack of it, was reason that the termination of parental rights action against Maryellen was dismissed;<sup>185</sup> it was reason that the conviction against Jesse was vacated.<sup>186</sup> But the process was arduous and painful, and it revealed, once again, the extent to which the intricacies of communication and language remain unresolved by the legal system, even with an interpreter.

---

182. *Id.*, R. at 11 (Nov. 19, 1996) (court-ordered evaluation by Dr. Jack Spear, a consulting psychologist).

183. *Id.*, R. at 53-54 (Feb. 11, 1997).

184. *Id.* at 65.

185. The county informed the court that it would have problems proving its case and moved to dismiss. The court granted the motion and no transcript of this hearing was prepared. Coauthor Michele LaVigne was present at this hearing.

186. The trial court vacated Jesse's conviction because the trial court found that Jesse was not competent at the time he entered his guilty plea. No transcript of the proceeding was prepared. Coauthor Michele LaVigne was present when the trial court issued both its rulings on October 25, 1999, and February 7, 2000.

In discussing the law as it applies to Maryellen, Jesse, and others, it is important to remember that languages and language competencies within the deaf community exist on a continuum. Maryellen is in the diverse group of deaf individuals who will be capable of some acceptable level of understanding with the appropriate accommodations tailored to the individual's needs. Jesse is in the much smaller group of individuals who will never understand no matter what the court does. This distinction, a function of the degree of language impairment, will dictate how a court should approach a particular deaf defendant or subject.

In talking about applicable and relevant law, we have separated the law that applies to Maryellen and the law that applies to Jesse. While their linguistic deficiencies are all part of the same spectrum and there is overlap in the legal principles, especially the constitutional principles, the end result for each is radically different. The following Section discusses people like Maryellen, individuals who are capable of understanding with additional accommodations. The Section entitled "When Comprehension Is Impossible," *infra* Part III.C, discusses individuals like Jesse.

### B. *Beyond the Right to an Interpreter*

The right to an interpreter, while it seems so basic to us now, has come a long way since 1906 when the U.S. Supreme Court affirmed the murder conviction of an "unfortunate" deaf defendant who "did not hear a word of the evidence that was given upon his trial."<sup>187</sup> In a brief opinion, the Court found no due process violation even though the trial court "fail[ed] . . . to see to it that the testimony in the case was repeated . . . through the ear trumpet which he had with him."<sup>188</sup> The next year, the Supreme Court took up the issue of an in-court interpreter for a Serbian-speaking defendant and gave it even shorter shrift than Mr. Felts's ear trumpet.<sup>189</sup> In affirming the murder conviction, the Court wrote, "[o]ther matters referred to in the assignment of errors require but slight notice. One is that the court erred in refusing to appoint an interpreter."<sup>190</sup>

Times have changed. Over the last thirty years, federal and state courts have weighed in on the side of providing interpreters for any non-English-speaking defendant, including the deaf. Some courts have

---

187. Felts v. Murphy, 201 U.S. 123, 128 (1906).

188. *Id.* at 129. Justice Peckham did admit that "the conviction and punishment of the appellant . . . may seem to be somewhat hard." *Id.* at 130.

189. See Perovich v. United States, 205 U.S. 86, 91 (1907).

190. *Id.* (emphasis added).

found an outright constitutional right to an interpreter.<sup>191</sup> More often, courts have acknowledged that even if there is no constitutional right to an interpreter *per se*, the right is a hybrid derivative of due process rights to be present, to confrontation, and to effective assistance of counsel. With the widespread adoption of statutes regarding the appointment of interpreters and other statutes requiring accommodations for the disabled, the right to an interpreter for deaf defendants is now becoming a relatively unambiguous matter of statutory application.

In the wake of these legislative guarantees and judicial concerns, it is the truly rare and obstinate judge who will refuse to appoint some sort of an interpreter for a deaf defendant or subject. This trend can be seen in the striking scarcity of case law on the subject, especially over the last decade.<sup>192</sup>

But what if the deaf defendant or subject cannot fully understand the interpreter that the court has so dutifully provided? What does the law say then? Or put another way, how much of the interpreter's work is a deaf defendant entitled to understand, and what—if anything—must the parties do to ensure that the deaf person in fact understands that much?

These issues are not so cut-and-dried and not as easily resolved as the question of whether to appoint an interpreter in the first place. They may also appear to be secondary to the appointment of an interpreter. Yet, as statutory and case law make clear, these so-called secondary issues figure as heavily in the communication mix and are as worthy of serious consideration as the presence or absence of an interpreter in the first place.

---

191. *See, e.g.*, *United States ex rel. Negron v. New York*, 434 F.2d 386, 387 (2d Cir. 1970).

192. A review of state and federal law from 1987 through 2002 revealed no appellate cases where the trial court had refused to appoint an interpreter for a deaf defendant or subject after a request had been made. In one case, *Commonwealth v. Wallace*, 641 A.2d 321 (Pa. Super. Ct. 1994), the Superior Court of Pennsylvania found that the trial court had not erred by failing to appoint a sign language interpreter *sua sponte* for a deaf defendant. *Id.* at 327. However, the appellate court found that trial counsel was arguably ineffective for failing to request the appointment of an interpreter. *Id.* at 328; *cf. Salazar v. State*, 93 S.W.3d 339, 341 (Tex. App. 2002). In contrast, refusal to provide an interpreter for hearing litigants who are not native English-speakers remains a contentious issue. Despite the federal and state statutes and case law, trial judges may refuse to appoint an interpreter for a nonnative English speaker if the court determines that the defendant has sufficient understanding. *See, e.g., Salazar*, 93 S.W.3d at 341.

## 1. CONSTITUTIONAL RIGHT TO MORE THAN AN INTERPRETER

a. *A Matter of Due Process*

The right to understand the interpreter in a criminal or quasi-criminal case is a constitutional matter at heart. It is the logical extension of the due process principles that affords the right to an interpreter.<sup>193</sup>

In 1970, with the decision in *United States ex rel. Negron v. New York*, the notion that the Constitution may mandate an interpreter began to gain acceptance.<sup>194</sup> In *Negron*, the U.S. Court of Appeals for the Second Circuit held that a non-English-speaking defendant in a criminal case had a constitutional right to an interpreter throughout the proceedings.<sup>195</sup> The court considered this right to be the product of the rights to confrontation, to be present, to consult with counsel and assist in one's own defense, and to be competent.<sup>196</sup> As an aside, the court also observed that "as a matter of simple humaneness, [the defendant] deserved more than to sit in total incomprehension as the trial proceeded."<sup>197</sup>

*Negron* has since become the leading case on the question of interpreters for defendants in criminal cases. While many state and federal courts have since held that the right to an interpreter is not a constitutional right unto itself, but derivative or "quasi-constitutional," or in some instances, a "matter of fairness and sound judicial administration,"<sup>198</sup> *Negron* continues to exert influence in cases relating to the provision of interpreter services.<sup>199</sup>

The right to an effective interpretation, i.e., one that the individual can understand, cannot be separated from the right to an interpreter. The two are as inextricably intertwined as the right to counsel and the right to counsel who provides effective representation. A "warm body"

193. See, e.g., *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990).

194. 434 F.2d at 387. Forty-five years earlier, in 1925, the Alabama Court of Appeals found that trying a deaf criminal defendant without an interpreter violated the state's constitutional guarantee of the right to confrontation. *Terry v. State*, 105 So. 386, 387 (Ala. Ct. App. 1925). As the court noted, the right to confrontation is not just a matter of looking at the witnesses but of understanding their testimony. *Id.* Without the ability to understand testimony, the court said that confrontation "would be useless, bordering upon the farcical." *Id.*

195. *Negron*, 434 F.2d at 387. *Negron* was the impetus behind the Federal Court Interpreters Act (FCIA). Jennings Kohlberger, Note, *Using Principles of International Law to Reshape American Legislation of State Official English Laws*, 29 J. LEGIS. 253, 258 (2003). This Article discusses the FCIA *infra* Part III.B.2.a.

196. *Negron*, 434 F.2d at 389-90; see also *McAlister*, *supra* note 17 at 185-89.

197. *Negron*, 434 F.2d at 390.

198. *State v. Neave*, 117 Wis. 2d 359, 361, 344 N.W.2d 181, 182 (1984).

199. See, e.g., *id.*

will not satisfy the Sixth Amendment right to counsel,<sup>200</sup> nor will it satisfy the due process right to an interpreter. In fact, an inadequate interpreter may create as many due process problems as no interpreter at all.<sup>201</sup>

Unlike the *Strickland v. Washington*<sup>202</sup> test applied in ineffective assistance of counsel cases, there is no clearly defined standard for determining the effectiveness of interpretation services in a particular case. Generally, courts have adopted a holistic approach that asks whether "the translation was on the whole adequate and accurate."<sup>203</sup> Or, put another way:

[W]here the incompetence of the interpreter is claimed by a defendant to have deprived him of a fair trial, the crucial question is: Was the testimony as presented through the interpreter understandable, comprehensible, and intelligible, and if not, whether such deficiency resulted in the denial of the defendant's constitutional rights?<sup>204</sup>

The U.S. Court of Appeals for the Seventh Circuit has articulated a more detailed variation of the translation standard. In *United States v. Cirrincione*,<sup>205</sup> the Seventh Circuit held that in criminal proceedings, a defendant:

is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and

---

200. See *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1015 (7th Cir. 1988).

201. E.g., *Negron*, 434 F.2d at 388-89 (the defendant actually had an interpreter of sorts who provided summaries of the testimony at breaks). There is also a significant body of federal and state case law relating to the adequacy of interpreters provided and the constitutional implications. See generally Thomas M. Fleming, Annotation, *Right of Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings is not Proficient in the Language Used*, 32 A.L.R.5th 149 (1995).

202. *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, a defendant must demonstrate that counsel's performance was deficient (i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"), and "that the deficient performance prejudiced the defense." *Id.* at 687.

203. See *State v. Mitjans*, 408 N.W.2d 824, 831 (Minn. 1987) (internal quotations omitted).

204. *State v. Casipe*, 686 P.2d 28, 32 (Haw. Ct. App. 1984).

205. 780 F.2d 620 (7th Cir. 1985).



the district court fails to review the evidence and make appropriate findings of fact.<sup>206</sup>

The constitutional adequacy of interpretation considers whether the nature and quality of the interpretation substantially interfered with the defendant or subject's right to understand the proceedings or communicate with counsel and ultimately, whether the proceedings were rendered fundamentally unfair.<sup>207</sup> It boils down to two simple questions: could the defendant understand, and was the proceeding fair?

But how much must a defendant understand in order for the proceedings to be fundamentally fair? According to one criminal court in New York, the answer is one-hundred percent.<sup>208</sup> In that case, the court found that a hard-of-hearing defendant had heard at most ninety-two percent of her trial and determined "that percentage is not enough to satisfy due process."<sup>209</sup> That view, however, is unique.

State and federal courts do not require perfection in either interpretation or understanding. Courts have recognized that interpretation is an art, which by its very nature is not capable of scientific perfection.<sup>210</sup> Neither do courts require that a defendant comprehend "with the precision of a Rhodes Scholar or appreciate the nuances of a witness' expressions or behavior with the skill of a doctor of psychology."<sup>211</sup> An interpretation of testimony need not convey every single word, and interpretation of legal terminology need not provide "a rigid, technically precise translation."<sup>212</sup> Certainly courts would prefer that a defendant be afforded a "word for word translation of everything relating to the [proceeding that] a defendant conversant in English would be privy to hear,"<sup>213</sup> but they do not require that

206. *Id.* at 634.

207. *United States v. Osuna*, 189 F.3d 1289, 1293 (10th Cir. 1999).

208. *People v. Doe*, 602 N.Y.S.2d 507, 510 (Crim. Ct. 1993).

209. *Id.*

210. *See, e.g., Mitjans*, 408 N.W.2d at 832.

211. *Ferrell v. Estelle*, 568 F.2d 1128, 1131 (5th Cir. 1978), *opinion withdrawn*, *Ferrell v. Estelle*, 573 F.2d 867 (5th Cir. 1978). *Ferrell* dealt with a defendant who had become deaf as an adult. The decision remanding this case for a new trial was withdrawn several months after issuance when the defendant died. *See id.*

212. *See, e.g., Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1495 (9th Cir. 1991), *rev'd and remanded on other grounds*, 504 U.S. 1 (1992). The interpretation of specific terms can also have due process implications beyond rights such as confrontation that we traditionally associate with a trial. An inadequate interpretation may make a guilty plea fail the "knowing and voluntary" test because a defendant cannot understand the constitutional rights he is giving up or the key elements of the offense to which he is pleading. *See, e.g., Tamayo-Reyes*, 926 F.2d at 1494. In Maryellen's case, an ill-fitting interpretation of the language of a court order deprived her of her due process right to notice of the conditions she must meet in order to have her child returned.

213. *Joshi*, 896 F.2d at 1309.

standard. "Occasional lapses" or "minor deviations" are tolerated under the Constitution.<sup>214</sup>

There is, of course, a bottom line. One state court has suggested that twenty percent comprehension in the courtroom is too low<sup>215</sup> though language and comprehension ordinarily elude that type of quantification. The more likely approach is impressionistic in nature. For witnesses' testimony, an interpretation should communicate "the substance and meaning,"<sup>216</sup> and for legal terminology and concepts, the interpretation must convey "the general import of [the] terms"<sup>217</sup> mentioned.

The level of error, omission, miscommunication, and confusion that can be tolerated under due process is a critical issue for any non-English-speaking defendant or subject. Unfortunately, those standards devised by the case law—"occasional lapses," "substance and meaning," and "general import of the terms"—are inadequate tools for measuring the quality of accommodations for a deaf person with a language deficit.

As we might expect, an overwhelming majority of the cases relating to the constitutional sufficiency of legal interpretation have arisen in the foreign language context—cases involving hearing people who do not speak English, or more commonly, speak English as a second language. And in terms of due process principles, users of English as a second language have a great deal in common with deaf defendants and subjects.<sup>218</sup> But, for a deaf defendant who never became fully competent in any language, there is a substantial difference.

The typical user of English as a second language, unlike the linguistically deprived deaf person, is fluent in his first language. Additionally, in the course of acquiring that first language, the typical user of English as a second language will have acquired a fund of knowledge with which he can make comparisons and fill in the gaps that inevitably arise when he is dealing with the English-speaking world.<sup>219</sup> A user of English as a second language can often grasp the essence of what we are saying even if the exchange is not properly interpreted. The occasional lapses in the quality or quantity of interpretation, or an interpretation that conveys only the substance and meaning or general import of the terms can be managed because the user of English as a second language has the raw materials (including the knowledge and

---

214. *Id.*

215. *See State v. Douangmala*, 2002 WI 62, ¶ 43, 253 Wis. 2d 173, 190, 646 N.W.2d 1, 9.

216. *See State v. Guzman*, 712 A.2d 1233, 1242 (N.J. Super. Ct. App. Div. 1998) (quoting *Liu v. State*, 628 A.2d 1376, 1385 (Del. 1993)).

217. *Tamayo-Reyes*, 926 F.2d at 1495.

218. *See People v. James*, 937 P.2d 781, 783 (Colo. Ct. App. 1996).

219. *See generally* Rod Ellis, *A Theory of Instructed Second Language Acquisition*, in *IMPLICIT AND EXPLICIT LEARNING OF LANGUAGES* 79 (Nick C. Ellis ed., 1994).

ability to draw on experience, context, and probability) with which to make the necessary connections.<sup>220</sup>

The deaf person who grew up deprived of substantial linguistic input, however, lacks those raw materials and has a very limited facility for making sense of what is being said. We simply cannot assume that a deaf person has the same ability to tie up the loose ends left by inadequate accommodations that we would find in a hearing user of English as a second language. An interpretation that meets a minimal standard of due process and conveys the substance and meaning of testimony and the general import of legal terms for a hearing person will almost always leave a linguistically deficient deaf individual in the dark. What may be an "occasional lapse" or "minor deviation" for a hearing person can be a gaping hole for a deaf person. Due process requires that these holes be filled.

*b. Due Process Outside the Courtroom*

The due process question in Maryellen's case arose in connection with a statutory requirement that a parent whose child is removed from the home in a child protection action be given not only oral notification (by the court) of the conditions she must meet in order for her child to be returned home but a written copy as well.<sup>221</sup> While the due process ramifications of oral notification are obvious, the requirement of written notice has also been elevated to a substantive and procedural due process right in order to "give the parent an opportunity to conform his or her conduct appropriately to avoid termination."<sup>222</sup>

The court did comply with the technical requirements of the law in that the notification and warning were read aloud in court and then provided in written form. But as the record reflects, Maryellen could not understand a large portion of the interpreted version of the in-court recitation<sup>223</sup> and more importantly, she could not read the written version that had been provided to "help" her.<sup>224</sup> The written version was

---

220. The same principle can be applied to hearing people who may not understand all of the language of the courtroom but are able to get the gist of what is being said. Assuming the hearing person does not have a cognitive problem, he will be able to rely on experience, context, and probability to compensate for words or phrases he does not understand. See SPUFFORD, *supra* note 33, at 71-76; see also CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (1963).

221. WIS. STAT. § 48.356.

222. *In re D.F.*, 147 Wis. 2d 486, 496, 433 N.W.2d 609, 613 (Ct. App. 1988).

223. The trial court was informed that Maryellen could not understand the court during the reading of the notification of conditions for return and the potential grounds for termination. The trial court instructed counsel to explain these matters to Maryellen after court.

224. All experts who evaluated Maryellen held this opinion.

challenged on due process and equal protection grounds because it failed to serve its intended due process purpose—to specifically inform Maryellen what she needed to do in order to get her child back. The county ultimately dismissed the case. In subsequent hearings, a certified interpreter and a deaf relay interpreter were used in court, and the notification and warnings were interpreted into a version of sign language that Maryellen could understand. Outside of court, the interpreters created a videotape of the sign language version of the written warnings and Maryellen was given a copy, along with the written version.

Although Maryellen's case involved the due process aspects of a very specific state statute, it is illustrative of the extent to which due process is as connected to communication outside of court as in court. Her case is also illustrative of the extent to which a case can—and should—fall apart when out-of-court communication is constitutionally inadequate.

Consistent with due process, the system is driven by the requirement that defendants and subjects have a baseline understanding of the process, of the decisions they must make, and of the consequences of those decisions. The system is also driven by the assumption that the requisite level of understanding is usually arrived at before the case is ever called.

A typical example is the guilty plea. In order for the court to accept a plea of guilty or no contest it must find the plea was knowing and voluntary, i.e., that the defendant knows the constitutional rights he is giving up and the nature of the charge to which he is pleading.<sup>225</sup> In making that finding, a court ordinarily will not have a dialogue with a defendant about civics but will rely on extrajudicial sources of information: previous discussions with trial counsel, the ubiquitous plea questionnaire, or both.<sup>226</sup>

Obviously, this process only works if the defendant understands what counsel or the guilty plea questionnaire is telling him. For a defendant who lacks sufficient fluency in English, that will require the services of an interpreter. Once again, however, the mere presence of an interpreter will not suffice. The interpretation of conversations with counsel or the guilty plea questionnaire must be accurate, complete, *and* in a language that the defendant can understand.<sup>227</sup> An inaccurate or

---

225. *E.g.*, *Henderson v. Morgan*, 426 U.S. 637, 646–47 (1976); *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969).

226. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987). The guilty plea questionnaire (also called a waiver of rights form) is used in both state and federal court and is considered to be a more effective method of informing a defendant of his rights. *Id.* at 826–28, 416 N.W.2d at 629–30.

227. *See Tamayo-Reyes*, 926 F.2d at 1495.

incomprehensible out-of-court interpretation will render a guilty plea constitutionally invalid.<sup>228</sup>

On a more pervasive level, the very right to counsel is premised largely on communication that occurs outside of the courtroom. Trial court judges routinely ask attorneys if they have discussed the case with their client. Courts even allow testimony about out-of-court attorney-client discussions to determine whether a defendant or subject understands the proceedings.<sup>229</sup> If communication with counsel is compromised, the right to counsel is compromised. Inadequate interpretation of meetings between attorney and client may substantially interfere with, and in certain instances actually deny, the right to counsel.<sup>230</sup>

## 2. THE STATUTORY RIGHT TO MORE THAN AN INTERPRETER

### a. *The Federal Court Interpreters Act of 1978*

The Federal Court Interpreters Act (FCIA)<sup>231</sup> is a curious law that on its face seems unambiguous in directing courts to appoint interpreters, yet has spawned a raft of case law justifying trial courts' refusal to do so.<sup>232</sup> The FCIA is also very narrow in purpose and scope, and claims of inadequate interpretation under this statute should always be coupled with a constitutional claim. Despite these limitations, however, a deaf defendant or subject in federal court seeking accommodations beyond the routine appointment of an interpreter can find support under the FCIA.

The FCIA states that the court shall provide an interpreter for a party who "(A) speaks only or primarily a language other than the English language; or (B) suffers from a hearing impairment . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer."<sup>233</sup>

228. *See id.* In the same vein, the mere presence of an interpreter during the reading of *Miranda* warnings will not be sufficient to allow a court to make a finding that a defendant's knowingly, intelligently, and voluntarily waived his *Miranda* rights. In order to meet that standard, the warnings must be interpreted accurately *and* into a language that conveys the substance of the warnings to the particular suspect, even if that requires special accommodations. An interpretation that falls short will be grounds for suppression. *State v. Hindsley*, 2000 WI App 130, ¶¶ 23-24, 28-29, 237 Wis. 2d 358, 372-75, 614 N.W.2d 48, 55-57.

229. *See, e.g., Henderson*, 426 U.S. at 639-40; *State v. Bangert*, 131 Wis. 2d 246, 270-71, 389 N.W.2d 12, 24-25 (1986).

230. *See United States v. Ademaj*, 170 F.3d 58, 62 (1st Cir. 1999).

231. 28 U.S.C. §§ 1827-1828.

232. Almost all case law under the FCIA relates to defendants who speak foreign languages.

233. 28 U.S.C. § 1827(d)(1).

An additional subsection places special emphasis on the appointment of an interpreter for deaf and hard-of-hearing individuals.<sup>234</sup> In the case of a party with “a hearing impairment,” the FCIA permits the appointment and compensation of a sign language interpreter even without a finding that the individual’s impairment inhibits comprehension of the proceedings or communication with counsel.<sup>235</sup>

The FCIA has one purpose: “to mandate the appointment of interpreters under certain conditions and to establish statutory guidance for the use of translators in order to insure that the quality of the translation does not fall below a constitutionally permissible threshold.”<sup>236</sup> In other words, the FCIA is specifically intended to ensure that the constitutionally required level of communication in the courtroom is met.<sup>237</sup>

An adequate interpretation under the FCIA is one that translates “everything relating to the trial a defendant conversant in English would be privy to hear.”<sup>238</sup> One early decision suggested that the FCIA is satisfied “if an interpreter is by the defendant’s side ‘continuously interpreting the proceedings.’”<sup>239</sup> Another court hinted that perhaps the FCIA “is only applicable to issues concerning [the] appointment of translator rather than adequacy of translation.”<sup>240</sup>

But the plain language of the FCIA itself makes it clear that the law is not satisfied if the defendant cannot understand the interpreter by her side. Subsection (e)(1) requires that the court replace an interpreter who is not “[a]ble to communicate effectively with . . . a party (including a defendant in a criminal case).”<sup>241</sup> The FCIA also gives the presiding judicial officer additional discretion to monitor the quality of the interpretation by recording the proceedings<sup>242</sup> and to authorize a shift from simultaneous to consecutive interpreting “when such officer determines after a hearing on the record that such interpretation will aid in the efficient administration of justice.”<sup>243</sup>

---

234. *Id.* § 1827(b)(1).

235. *Id.* This language probably contributes to courts’ increased willingness to provide interpreters to deaf defendants as opposed to hearing people who are not native English speakers.

236. *Joshi*, 896 F.2d at 1309.

237. *See also Osuna*, 189 F.3d at 1293. The constitutional standard for adequacy of interpretation and the standard under the FCIA are identical.

238. *See Joshi*, 896 F.2d at 1309.

239. *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (quoting *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980)).

240. *Joshi*, 896 F.2d at 1310 (interpreting *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989)).

241. 28 U.S.C. § 1827(e)(1).

242. *Id.* § 1827(d)(2).

243. *Id.* § 1827(k).

Moreover, the adequacy of interpretation provided under the FCIA has been held by subsequent federal court decisions to be a basis for postconviction relief in a criminal case if, among other things, a defendant can show that the inadequate interpretation undermined the purpose of the FCIA and inhibited his ability to comprehend the proceedings or to communicate with counsel.<sup>244</sup> While communication need not be perfect under the FCIA—just as under the Constitution, occasional lapses are acceptable<sup>245</sup>—the interpretation cannot be so inappropriate or inadequate in meeting the needs of the deaf individual as to make the proceedings “fundamentally unfair.”<sup>246</sup> In the case of a linguistically deficient deaf individual, an interpretation that is not specially tailored and modified to accommodate the language deficiency should not pass FCIA muster.

*b. State Interpreter Statutes*

In the lives of most deaf defendants and subjects, state interpreter statutes probably matter much more than the FCIA. First, the cases of deaf defendants and subjects are far more likely to be in state court.<sup>247</sup> Second, unlike the federal statute, which is somewhat conservative and restrictive in its approach, the states are more expansive and are on the rising wave that appreciates that communication is complicated and often ephemeral. A number of states have begun to recognize the importance of ensuring actual comprehension and have rejected a one-size-fits-all approach.

Every state except Alaska has a statute regarding the provision of interpreters for the hearing impaired in court.<sup>248</sup> Of those, almost half

244. See, e.g., *Gonzalez v. United States*, 33 F.3d 1047, 1050 (9th Cir. 1999) (citing *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991)).

245. *Joshi*, 896 F.2d at 1309.

246. *Valladares*, 871 F.2d at 1566 (quoting *Tapia*, 631 F.2d at 1210).

247. Only a handful of cases with deaf or hard-of-hearing criminal defendants have originated in the federal court system in the last twenty years. See, e.g., *Phillips v. Miller*, No. 01 Civ. 1175 (DF), 2001 U.S. Dist. LEXIS 19793 (S.D.N.Y. Dec. 3, 2001); *Meaders v. Carroll*, No. 92-15048, 1993 WL 385441 (9th Cir. Sept. 29, 1993).

248. ALA. CODE § 12-21-131 (1995); ARIZ. REV. STAT. ANN. § 12-242 (West 2003); ARK. CODE ANN. § 16-64-112 (Lexis Supp. 2003); CAL. EVID. CODE § 754 (West 1995 & Supp. 2003); COLO. REV. STAT. ANN. § 13-90-204 (West 1997); CONN. GEN. STAT. § 46a-27 (1993 & Supp. 2003); DEL. CODE ANN. tit. 10, § 8907 (1999); D.C. CODE ANN. § 2-1902 (2001); FLA. STAT. ch. 90.6063 (1991); GA. CODE ANN. § 24-9-100 (1995); IDAHO CODE § 9-205 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/8-1402 (West 1993); IND. CODE ANN. § 4-21.5-3-16 (Michie 1996); IOWA CODE ANN. § 622B.2 (West Supp. 2003); KAN. STAT. ANN. § 75-4351 (1997); KY. REV. STAT. ANN. § 30A.410 (Michie 1998); LA. REV. STAT. ANN. § 15:270 (West 1992); ME. REV. STAT. ANN. tit. 5, § 48 (West 2002); MD. CODE ANN., CTS. & JUD. PROC. § 9-114 (2002); MASS. ANN. LAWS ch. 221, § 92A (Law. Co-op 1999); MICH. COMP. LAWS ANN. § 393.503 (West 1997); MINN. STAT. ANN. § 611.32 (West 2003); MISS. CODE

have set a minimum standard for the level of communication beyond the textbook translation of language. The standards mandate that interpreters “readily communicate,”<sup>249</sup> “communicate accurately,”<sup>250</sup> or be “sufficiently able to communicate”<sup>251</sup> with the particular subject.

A number of states have taken additional steps. Kansas, for example, has adopted statutory language that acknowledges the special interpreting needs of a defendant with language deficits.<sup>252</sup> In addition to a knowledge of legal concepts and “sound skills” in English and the foreign language, the statute requires that an interpreter have: “(1) [a] general understanding of cultural concepts, usage and expressions of the foreign language being interpreted, including the foreign language’s varieties . . . [and] (2) the ability to interpret and translate in a manner [relative to] the educational level and understanding of the person” being translated for.<sup>253</sup>

In 2002, Wisconsin—using a slightly different tack—adopted a statute and Interpreter Code of Ethics that place responsibility on both the interpreter and the trial court for ensuring the ongoing quality of communication.<sup>254</sup> The Code of Ethics for Court Interpreters states: “Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, the interpreters shall immediately

ANN. § 13-1-303 (1999); MO. ANN. STAT. § 476.753 (West Supp. 2003); MONT. CODE ANN. § 49-4-503 (2003); NEB. REV. STAT. ANN. § 20-153 (Lexis 2002 & Supp. 2003); NEV. REV. STAT. ANN. § 50.050 (Lexis 2002) (effective July 1, 2005); N.H. REV. STAT. ANN. § 521-A:2 (1997); N.J. STAT. ANN. § 34:1-69.7 (West 2000); N.M. STAT. ANN. § 38-9-3 (Michie 1998); N.Y. JUD. LAW § 390 (1992); N.C. GEN. STAT. § 8B-2 (2003); N.D. CENT. CODE § 28-33-02 (1991); OHIO REV. CODE ANN. § 2311.14 (Anderson 2001); OKLA. STAT. ANN. tit. 22, § 1278 (West 1986); OR. REV. STAT. § 45.285 (2001); 2 PA. CONS. STAT. ANN. § 505.1 (1982); R.I. GEN. LAWS § 8-5-8 (1997 & Supp. 2002); S.C. CODE ANN. § 15-27-15 (Law. Co-Op. 2002); S.D. CODIFIED LAWS § 19-3-10 (Michie 1995); TENN. CODE ANN. § 24-1-211 (2000 & Supp. 2003); TEX. CRIM. PROC. CODE ANN. § 38.31 (Vernon Supp. 2004); UTAH CODE ANN. § 78-24a-2 (2002); VT. STAT. ANN. tit. 1, § 332 (1996); VA. CODE ANN. § 19.2-164.1 (Lexis 2000); VA. CODE ANN. § 8.01-348.1 (Lexis 2000); WASH. REV. CODE ANN. § 2.24.010 (West Supp. 2004); W. VA. CODE ANN. § 5-14A-3 (Michie 2002); WIS. STAT. § 46.295; WYO. STAT. ANN. § 5-1-109 (Michie 2003).

249. See, e.g., ALA. CODE § 12-21-131; ARK. CODE ANN. § 16-64-112; FLA. STAT. ch. 90.6063.

250. See, e.g., D.C. CODE ANN. § 2-1901; IDAHO CODE § 9-205; MASS. GEN. LAWS ch. 221, § 92A; MINN. STAT. ANN. § 611.33; MO. ANN. STAT. § 476.750; NEB. REV. STAT. ANN. § 20-151; NEV. REV. STAT. ANN. § 50.050; OR. REV. STAT. § 45.285; R.I. GEN. LAWS § 8-5-8.

251. See, e.g., NEB. REV. STAT. ANN. § 20-151.

252. See KAN. STAT. ANN. § 75-4351 to -4355d.

253. *Id.* § 75-4353(c).

254. See WIS. STAT. ANN. § 885.38 (Supp. 2002); WIS. SUP. CT. R. 63.08 (2001-2002).



convey that reservation to the appropriate judicial authority."<sup>255</sup> The statute confers a corresponding authority on the trial court to "remove [an otherwise] qualified interpreter for good cause,"<sup>256</sup> and to "appoint more than one qualified interpreter in a court proceeding when necessary."<sup>257</sup>

Several states have also specifically recognized that many deaf defendants have specialized communication issues that may not be addressed adequately by traditional methods of judicial appointment and oversight of the interpreter. Four state statutes require input from the deaf person when the interpreter's ability to communicate is being assessed.<sup>258</sup> Eight statutes go so far as to authorize the appointment of a deaf relay interpreter if the deaf individual has "minimal language skills," uses "variants of sign language," or if the deaf person, the judge, or the first interpreter do not believe that the single interpreter is adequate.<sup>259</sup>

For defendants and subjects in states covered by these statutes, they are important tools in fashioning in-court accommodations that achieve the desired level of communication. For others, these statutes provide additional support for the position that a court-appointed interpreter is not ipso facto synonymous with communication.

*c. The Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990*

The Rehabilitation Act of 1973 (Rehabilitation Act)<sup>260</sup> and the Americans with Disabilities Act of 1990 (ADA)<sup>261</sup> were sweeping pronouncements designed to end discrimination against the disabled. These laws are not criminal laws, and it is unlikely that they could ever be the sole basis of relief for a deaf defendant or subject challenging her criminal conviction, civil commitment, or termination of parental rights.<sup>262</sup> Nor are they interpreter statutes per se. However, these laws

255. WIS. SUP. CT. R. 63.08.

256. WIS. STAT. ANN. § 885.38(6).

257. *Id.* § 885.38(3)(a)(5)(b).

258. *See* ALA. CODE § 12-21-131; ARIZ. REV. STAT. ANN. § 12-242; CAL. EVID. CODE § 754; FLA. STAT. ch. 90.6063.

259. *See* ARIZ. REV. STAT. ANN. § 12-242; CAL. EVID. CODE § 754; COLO. REV. STAT. ANN. § 13-90-206; D.C. CODE ANN. § 2-1905; MICH. COMP. LAWS ANN. § 393.503; MONT. CODE ANN. § 49-4-505; N.J. STAT. ANN. § 34:1-69.8; WASH. REV. CODE § 2.24.110; *see also* HEWITT, *supra* note 94, at 162.

260. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in scattered sections of 29 U.S.C.).

261. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

262. For example, the Wisconsin Court of Appeals held that a violation of the ADA by a county social services department is not a defense in a termination of parental

can provide guidance as we consider the range of accommodations that the legal system is legally obligated to provide and the need for creativity in fashioning those accommodations.

Section 504 of the Rehabilitation Act prohibits "any program or activity receiving Federal financial assistance" from precluding a disabled person from participating.<sup>263</sup> Title II of the ADA extends the provisions of the Rehabilitation Act to all state and local entities, including courts.<sup>264</sup>

Under these laws, and their implementing regulations, "[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to insure *effective communication*."<sup>265</sup> The list of potential auxiliary aids and services includes "[q]ualified interpreters, notetakers, computer-aided transcription services . . . or *other effective methods* of making aurally delivered materials available to individuals with hearing impairments."<sup>266</sup> The list of possible auxiliary aids and services provided in the regulations is not exclusive,<sup>267</sup> and could conceivably include an accommodation as mundane as more time for a meeting, an appointment, or a hearing.<sup>268</sup> It could also include an accommodation as exotic as a deaf relay interpreter. The ultimate goal of any auxiliary aid or service is "to ensure that communication with a disabled person is as effective as communication with others."<sup>269</sup>

"[W]hat constitutes effective communication is a question of fact"<sup>270</sup> and depends not only on the setting but on the communication needs of the deaf individual. If an interpreter is provided, that interpreter's skills must match the language and ability of the deaf person.<sup>271</sup>

rights action. *State v. Raymond (In re Torrance P.)*, 187 Wis. 2d 10, 15–16, 522 N.W.2d 243, 245–46 (1994). The court stated:

The fact that the ADA may impose additional obligations on the County does not change our inquiry. The duty to make a diligent effort to provide court-ordered services is defined by the [termination of parental rights] statutes and not the ADA. The ADA does not increase those responsibilities or dictate how those responsibilities must be discharged.

*Id.* at 15, 522 N.W.2d at 245.

263. § 504, 87 Stat. at 394 (codified at 29 U.S.C. § 794).

264. §§ 201–203, 104 Stat. at 337 (codified at 42 U.S.C. § 12133).

265. 28 C.F.R. § 36.303(c) (2003) (emphasis added).

266. *Id.* § 36.303(b) (emphasis added).

267. *Majocho v. Turner*, 166 F. Supp. 2d 316, 321 (W.D. Pa. 2001).

268. In the field of disability rights, additional time—for example, to complete a final examination—is a very common accommodation.

269. *Chisolm v. McManimon*, 275 F.3d 315, 325 (3d Cir. 2001).

270. *Bravin v. Mount Sinai Med. Ctr.*, 58 F. Supp. 2d 269, 273 (S.D.N.Y. 1999) (quoting *Bravin v. Mount Sinai Med. Ctr.*, 186 F.R.D. 293, 302–03 (S.D.N.Y. 1999)) (internal quotations omitted).

271. *See, e.g., Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996) (allowing a deaf state prisoner to maintain claims under the ADA and the Rehabilitation Act for monetary

Neither the Rehabilitation Act nor the ADA bestows the right to an interpreter. These statutes bestow the right to communication, with a special emphasis placed on access to the same level of communication for the deaf and hard-of-hearing as for the hearing. But it may also require more. These laws mandate only that the public entity provide whatever accommodations are necessary to ensure equal and effective communication. Depending on the situation and the individual deaf person, the necessary accommodation may be less than an interpreter, or it may be more.<sup>272</sup>

In economic terms, provision of an interpreter under the Rehabilitation Act and the ADA might seem to be the ultimate accommodation. Interpreters are expensive and working around their schedules can inconvenience all of the parties. But neither law accepts the provision of an interpreter as a guarantee of effective communication. Indeed, courts have allowed claims against governmental entities that have actually provided interpreters.<sup>273</sup> In those cases, courts have focused “‘on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public entity and the individual with disabilities.’”<sup>274</sup> Among the factors to be taken into account in assessing whether an interpreter facilitated effective communication are the language skills of the deaf individual.<sup>275</sup>

As we noted earlier, the ADA and the Rehabilitation Act provide only civil remedies,<sup>276</sup> which may be cold comfort to a young man serving a prison sentence or a mother who has lost her child. Even so, these statutes are bold policy statements. They command courts to provide access to effective, equal communication and remind judges and lawyers that our obligation may not end with the phone call to the interpreter agency.

---

and injunctive relief against state prison officials who denied his request for a certified interpreter at prison discipline and classification hearings).

272. *Majocho*, 166 F. Supp. 2d at 321.

273. *E.g.*, *Duffy*, 98 F.3d at 447, 453.

274. *Id.* at 456 (citing 28 C.F.R. pt. 35, app. A).

275. *See id.* at 455–56; *see also Majocho*, 166 F. Supp. 2d at 323 (discussing a deaf man’s language skills in relation to his ability to understand the auxiliary aids and services offered in a medical setting).

276. *See supra* note 262 and accompanying text.

## 3. WHO IS RESPONSIBLE?

Under the Fifth and Sixth Amendments of the Constitution and the various court interpreter statutes, trial courts are granted wide latitude and discretion in matters of interpretation.<sup>277</sup> But they are also given responsibility in the exercise of that discretion. Courts may not "assume that the court interpreter's translations [are] sacrosanct or, indeed, that his qualifications could not be challenged."<sup>278</sup>

When a trial court becomes aware that an interpreter is falling short of the mark for whatever reason, it has the express or inherent authority, as well as the duty, to step in and make the necessary adjustments.<sup>279</sup> Adjustments may include: (1) pauses between each question and answer (modified consecutive interpretation);<sup>280</sup> (2) taking breaks so that the interpreter and attorney can clarify what is being said;<sup>281</sup> (3) forcing all of the parties to speak slower; (4) taping the proceedings and reviewing the tapes for errors;<sup>282</sup> (5) providing a defense interpreter to act as a check on the court interpreter;<sup>283</sup> or (6) replacing the interpreter.<sup>284</sup>

Attorneys with deaf clients have corresponding ethical and constitutional obligations to ensure their clients' due process right to communication.<sup>285</sup> An attorney must take reasonable steps to ascertain whether her client understands the proceedings. When an attorney becomes aware that her client is having difficulty with comprehension, she must inform the court<sup>286</sup> and should then utilize all accommodations made available by the court.<sup>287</sup> Errors and inadequacies in interpretation must be objected to in a timely fashion.<sup>288</sup>

Counsel also bears responsibility for the quality of communication in attorney-client conferences. An individual's ability to relay important information about his case and to make critical decisions about such matters as settling the case or testifying depends on communication

277. See *Valladares*, 871 F.2d at 1566; *United States v. Bennett*, 848 F.2d 1134, 1141 (11th Cir. 1988).

278. *People v. Rolston*, 486 N.Y.S.2d 768, 769 (App. Div. 1985).

279. See *United States v. Mosquera*, 816 F. Supp. 168, 172-76 (E.D.N.Y. 1993); see also *Ferrell*, 568 F.2d at 1132-33; *James*, 937 P.2d at 783; *People v. Starling*, 315 N.E.2d 163, 168 (Ill. App. Ct. 1974).

280. See *Thongvanh v. State*, 494 N.W.2d 679, 681-82 (Iowa 1993).

281. See *United States v. Diaz Berrios*, 441 F.2d 1125, 1127 (2nd Cir. 1971).

282. See *State v. Van Pham*, 675 P.2d 848, 858, 861 (Kan. 1984).

283. See *People v. Aranda*, 230 Cal. Rptr. 498, 501-02 (Ct. App. 1986).

284. See *Starling*, 315 N.E.2d at 168; *Van Pham*, 675 P.2d at 861.

285. See generally Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Use or Nonuse of Interpreter at Prosecution of Foreign Language Speaking Defendant*, 79 A.L.R.4th 1102, 1106 (1990).

286. See *Wallace*, 641 A.2d at 328-29.

287. See *Ferrell*, 568 F.2d at 1133.

288. See, e.g., *Valladares*, 871 F.2d at 1566.

outside of court, and cannot be cured by an interpreter at a hearing or trial.<sup>289</sup>

### C. *When Comprehension Is Impossible*

The trial court did not stint when it came to accommodations for Jesse. A team of highly trained, legally certified interpreters was present throughout all proceedings and during most meetings between Jesse and his lawyers. A certified deaf relay interpreter was part of this team. The court permitted consecutive interpretation for the more complex proceedings. During postconviction proceedings, counsel brought in an experienced educator of the deaf to assess Jesse's abilities to learn whatever was necessary to participate with counsel both at the trial and at the appellate level. This teacher attempted to explain legal concepts through basic language, mime, role-playing, and drawing. Jesse was also evaluated by three psychologists who specialize in deafness. The psychologists used tests specifically standardized for the deaf in an attempt to find out what he was in fact capable of. They also attempted to explain some of the legal concepts that Jesse would need in order to participate. All of these people ultimately came to believe that rational understanding and communication for Jesse simply was not attainable.

Jaech, the educator who met and assessed Jesse, is widely considered by the deaf and interpreter communities in Wisconsin to be one of the most effective sign language communicators in the state. Jaech is prelingually deaf himself, a native ASL user, and an educator of the deaf for forty years. Postconviction counsel believed that if anyone could find a way to effectively communicate with Jesse, it was him. But even Jaech failed. He described communication with Jesse as "painful." "It was not fluent or fluid. It took a lot of effort. It did not flow easily. There was not an easy exchange of information."<sup>290</sup> During their meeting, Jaech even had difficulty getting Jesse to tell him the year.

JAECH: "[R]ight now, the year is what?"  
 [JESSE R.]: (No response)  
 JAECH: "Today is what year?"  
 [JESSE R.]: "I don't know."  
 JAECH: "Today is April, the month is April, April 6th, what year?"

---

289. See, e.g., *Tamayo-Reyes*, 926 F.2d at 1495; *Mosquera*, 816 F. Supp. at 175.

290. *Jesse R.*, R. at 60-88 (Oct. 25, 1999) (Testimony of Timothy Jaech, Wis. Dep't of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., former Superintendent, Wis. Sch. for the Deaf).

[JESSE R.]: (A shrug)  
 JAECH: "19 what?"  
 [JESSE R.]: "I don't know."  
 JAECH: "199 what?"  
 [JESSE R.]: (No answer)  
 JAECH: "1999. It's 1999, April 6, 1999."  
 [JESSE R.]: "OK."<sup>291</sup>

The psychologists who assessed Jesse were selected for their expertise. They all were fluent in ASL and Signed English, and between them had evaluated well over 5000 deaf people. After meeting with Jesse and reviewing the records, they placed him in the bottom ten to fifteen percent of the *entire deaf population* in terms of language. They noted that though Jesse was not retarded in the technical sense, he was simply incapable of dealing in abstractions or understanding what any of his attorneys were trying to accomplish.

Needless to say, Jesse's attorneys fared no better. One of Jesse's postconviction attorneys testified:

I felt like we could communicate with him in terms of small talk, chitchat about whether he's in a good mood, whether he's not; but whenever it turned to any kind of a legal analysis, anything that was more conceptual in nature, his responses seemed almost random and it seemed—he seemed incapable of being able to understand what we were saying.<sup>292</sup>

In the end, after hundreds of hours and tens of thousands of dollars, Jesse still did not understand. Jesse thought that if he told the judge he was not guilty he would go home. He believed that his no contest plea was somehow like a canceled track meet. He thought that the word "constitution" referred to the prison where he was incarcerated (Columbia Correctional Institution). He also had no idea that his trial attorney and the prosecutor had entered into any kind of plea agreement or what that meant.

#### 1. LINGUISTIC INCOMPETENCY: WHAT IS IT?

Jesse's case raised several perplexing questions. Does there come a place on the language acquisition scale where a person's language acquisition is so low that he or she simply cannot understand no matter

---

291. *Id.*, Aff. of Michele LaVigne (Att'y for Jesse R., coauthor), filed with Motion for Postconviction Relief.

292. *Id.*, R. at 142 (Oct. 1, 1999) (Testimony of Att'y Keith Findley, Clinical Associate Professor, Univ. of Wis. Law Sch.).

how many accommodations are made? And if so, what should that place be called as a matter of law?

After meeting with Jesse on several occasions, Jesse's trial counsel concluded that no amount of interpreters could effectuate meaningful attorney-client communication or an acceptable level of comprehension of the process. Counsel framed Jesse's inability to communicate as a one of incompetency to stand trial—a bedrock due process concept older than Blackstone himself.<sup>293</sup> Even after the court initially found Jesse competent to stand trial, his counsel declared that Jesse was the most incompetent person he had represented in twenty-five years of practicing law. Ultimately, the court agreed. The process, however, was long and arduous, and reflected confusion as to whether language deficit can be the basis for a claim of incompetency to stand trial, as well as reluctance and inability to make the connection.

A threshold question that arose in Jesse's case was whether the label "incompetent to stand trial" could apply to a defendant whose disability is linguistic deprivation as opposed to mental illness or mental retardation. In Jesse's case, that question was first posed not by an attorney but by a forensic psychiatrist who evaluated Jesse for competence to stand trial. The psychiatrist testified that he read Wisconsin's competency statute to say "incompetency to proceed emanates from mental impairment due to a mental disease or mental retardation, same as mental responsibility must emanate from mental disease or defect."<sup>294</sup> He went on to say that while Jesse would certainly have problems communicating with counsel, absent retardation or mental illness, a communication problem "in itself does not render you incompetent to stand trial."<sup>295</sup> Jesse's communication deficit, meanwhile, was deemed an "interesting issue" but irrelevant to the question of competency.<sup>296</sup>

The psychiatrist who rendered that opinion is hardly alone in his belief that language and communication disabilities have no bearing on competency. Some evaluations and court orders may unequivocally articulate a mental disease or defect model of competency.<sup>297</sup> More

293. See *Dusky v. United States*, 362 U.S. 402, 402 (1960); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 454 (1967).

294. *Jesse R.*, R. at 90-91, 95 (Dec. 5, 1996) (Testimony of Dr. Frederick Fosdal, forensic psychiatrist).

295. *Id.* at 93-94 (Testimony of Dr. Frederick Fosdal, forensic psychiatrist).

296. *Id.* at 90 (Testimony of Dr. Frederick Fosdal, forensic psychiatrist).

297. For example, in a 1983 trial in Kenosha, Wisconsin, a forensic psychiatrist at the state mental health facility assessed the competency of a defendant with an unusual hearing impairment that had resulted in a severe language deficit in any language, including his native Spanish. The doctor found:

that there is no evidence of a significant mental disease or defect . . . and that any difficulties he may (and probably will) experience . . . are based on his poor command of English and his speech impediment, neither of which

likely though, it is the evaluator, the judge, and even the lawyer, who will simply assume that language and communication are irrelevant to the competency question. In such a scenario, there will typically be no language or reading assessment.<sup>298</sup> The evaluation or court order will focus on signs of mental illness such as delusional thinking, lack of orientation to person or place, or hallucinations, and on signs of organic brain dysfunction, along with a basic inability to describe the allegations and the functions of the various players in the criminal justice system. To the extent that communication is addressed at all, it will be in commentary such as that offered in Jesse's case by the trial court judge ("Mr. [R.] is not, for many reasons, a normal defendant . . . [T]he court plans to make reasonable procedural accommodations to suit the needs of this defendant"<sup>299</sup>) and by another psychiatrist who evaluated Jesse for competency ("Mr. [R] will not be the ideal defendant . . . it is strongly recommended that the court provide a deaf sign language interpreter."<sup>300</sup>).

This approach is flawed in several respects. First, it reflects a faulty understanding of the meaning of competency. Language acquisition and communication by a deaf person are of course social issues, parenting issues, environmental issues, and educational issues.<sup>301</sup> But they are also at the core of competency. To be competent under the standard articulated in 1960 by the Supreme Court in *Dusky v. United States*, the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."<sup>302</sup> The Supreme Court has since defined "present ability to consult with his lawyer" as the

---

conditions can be expected to respond to any form of treatment in even an 18 month period.

Appellant's Brief at App. 103, *State v. Cruz*, 201 Wis. 2d 813, 549 N.W.2d 285 (Ct. App. 1996) (No. 94-0837-CR) (citing Letter from Dr. Robert Miller, Director, Forensic Training, to the Honorable Michael Fisher, Kenosha County Circuit Court (Apr. 7, 1983)). The trial court agreed with the psychiatrist's assessment, stating "there is not evidence that there is any delusional problem, hallucinations or thought disorder or difficulty in thinking clearly." Appellant's Brief at 6, *Cruz* (No. 94-0837-CR) (*Cruz* was represented during postconviction proceedings by coauthor Michele LaVigne.); *see also State v. Smith*, 471 So. 2d 954, 956 (La. Ct. App. 1985).

298. The only reading and language assessments in Jesse's case were made by the evaluators who were experienced in the field of deafness. Neither of the forensic psychiatrists evaluated Jesse's language.

299. *Jesse R.*, Decision at 13 (July 8, 1997).

300. *Id.*, R. at 3 (June 11, 1996) (Report of Dr. John Pankewicz, psychiatrist).

301. Psychologist Howard Dickman of the Health and Wellness Program for the Deaf and Hard-of-Hearing in St. Paul, MN, testified that all of these factors, along with a mild neurological impairment, contributed to Jesse's communication deficit. *Id.*, R. at 192 (Oct. 1, 1999) (testimony of Dr. Howard Dickman, psychologist).

302. *Dusky*, 362 U.S. at 402 (citations omitted).



ability to “communicate effectively with counsel.”<sup>303</sup> Neither a rational understanding of proceedings nor effective communication with counsel is possible without adequate language of some sort.

Failure to consider language deficiency as a basis for a finding of incompetence is also misguided because it treats a deaf defendant’s communication deficits as a subset of the foreign language problem. A hearing defendant who does not speak English<sup>304</sup> is not the functional or legal equivalent of a deaf defendant with a severe language deficit. While the hearing defendant who does not speak English and the linguistically impaired deaf defendant present the court with a condition rooted in the same due process concerns in that they lack the “capacity to understand the proceedings, to consult with counsel or to assist in the preparation of his defense,”<sup>305</sup> the hearing defendant is not incompetent. In the words of the Second Circuit, the non-English-speaking defendant’s “disability” is “more readily ‘curable’ than any mental disorder”<sup>306</sup> or severe linguistic deficiency. The cure is a qualified interpreter. But an interpreter cannot cure a deaf defendant who does not possess sufficient language. Interpreters require adequate raw materials with which to work. Even the best interpreters cannot give a person language. They can transform language, they can simplify language, and they can explain language, but they cannot create language where none exists.

More importantly, courts and evaluators who disregard language acquisition in assessing competency overlook the powerful interrelationship between language and cognition. In order to understand concepts, a person must first have language with which to obtain knowledge, which in turn creates the foundation for understanding.<sup>307</sup> Without that foundation, all of the explanations in the world will fall flat. An attorney with a severely linguistically deprived deaf client can explain the process until lawyer, client, and interpreter are all exhausted and the client will still not understand.

It does not matter that a particular deaf person once had the capacity to learn a complete language, and in a better world—with savvier parents, appropriate schools, and deaf friends—would be fully competent linguistically. The point is that in this world he or she has

303. *Cooper v. Oklahoma*, 517 U.S. 348, 351–52 (1996).

304. The same could be said for a deaf defendant with solid language skills in ASL.

305. *Mosquera*, 816 F. Supp. at 173.

306. *Negron*, 434 F.2d at 390.

307. For one explanation of the effects of language acquisition on a child’s cognition and acculturation, see Alison Gopnik, *Theories, Language, and Culture: Whorf Without Wincing*, in *LANGUAGE ACQUISITION AND CONCEPTUAL DEVELOPMENT* 45 (Melissa Bowerman & Stephen C. Levinson eds., 2001). See generally BRADEN, *supra* note 26.

reached adulthood with an incomplete, primitive language system and it is probably too late for any meaningful input. The impact on cognition is devastating and irreversible.

Nor does linguistic incompetency hinge on whether a deaf person scores in the "retarded" range on an IQ test or whether language loss is classified as a mental disorder in the Diagnostic and Statistical Manual. Language deficit *is* a cognitive or developmental disability,<sup>308</sup> most especially in an arena like the legal system that is utterly dependent on language, and abstract language at that. Language deficit is a disability that affects thought and the ability to process information at least as much as any official mental illness or mental defect.<sup>309</sup> Linguistic incompetency is as real as incompetency caused by schizophrenia or brain damage.

Linguistic incompetency is obviously an extreme legal situation affecting only a very small segment of the entire deaf population, which itself represents only a very small percentage of the population as a whole. If the legal system makes the appropriate accommodations, then the overwhelming majority of deaf people can be competent participants in all aspects of the criminal or civil justice system.<sup>310</sup> But for people like Jesse, there may simply be nothing we can do to make them understand. As the Supreme Court of New York said about one linguistically impaired deaf defendant, "[w]hile the . . . court viewed the defendant as incompetent to stand trial, a more accurate view is that the judicial system was incompetent to constitutionally try the handicapped defendant."<sup>311</sup>

## 2. CASE LAW RECOGNIZES LINGUISTIC INCOMPETENCY

Federal and state courts have acknowledged linguistic incompetency for several decades. The U.S. Supreme Court faced this issue in 1972 in *Jackson v. Indiana*.<sup>312</sup> The case dealt with "a mentally defective deaf

---

308. See generally BRADEN, *supra* note 26. In a letter to a county social worker, a psychologist who assessed Maryellen put it more bluntly: "I am not sure what you mean when you ask if [Maryellen's] cognitive defects can be addressed in ways similar to those with developmentally disabled adults. By definition, [she] is a developmentally disabled adult." *Maryellen H.*, (Letter from Jack Spear, social worker for the trial court (Feb. 3, 1997)).

309. BRADEN, *supra* note 26, at 40.

310. Failure to make the appropriate accommodations may leave anywhere from twenty-five to forty percent of all prelingually deaf and severely hard-of-hearing defendants incompetent to stand trial. Katrina R. Miller & McCay Vernon, *Linguistic Diversity in Deaf Defendants and Due Process Rights*, 6 J. DEAF STUDIES & DEAF EDUC. 226, 231 (2001). Such a result would be intolerable.

311. *People v. Rivera*, 480 N.Y.S.2d 426, 433 n.11 (Crim. Ct. 1984).

312. 406 U.S. 715 (1972).

mute," who could not "read, write, or otherwise communicate."<sup>313</sup> The defendant had been found incompetent based in part on linguistic incompetency or what the Court called his "almost nonexistent communication skill, together with his lack of hearing."<sup>314</sup>

At least one lower federal court has also accepted the existence of linguistic incompetency. In *Shook v. Mississippi*,<sup>315</sup> the U.S. District Court for the Northern District of Mississippi considered the competency of a deaf defendant who claimed to be unable to understand written language or the oral interpreter provided by the court.<sup>316</sup> There was no evidence whatsoever that the petitioner in *Shook* suffered from any mental disease or defect. His claim of incompetency rested solely on the linguistic deficit caused by his deafness. He asserted that "he was incompetent to stand trial because his deafness rendered him unable to understand the criminal proceedings against him and prevented him from consulting with or assisting his attorney in preparing his defense."<sup>317</sup> At the time of his trial, the petitioner did not know sign language. The court did not dismiss the petitioner's claim because there was no showing of mental disorder. The court allowed for the possibility of linguistic incompetency, finding that the sole issue before the court "is whether he had the present ability to communicate."<sup>318</sup>

State courts have given more attention to the potential for linguistic incompetency among certain deaf defendants. The most famous instance of linguistic incompetency arose in the case of Donald Lang, an Illinois man described as "a deaf-mute who [could not] hear or speak, was never taught to read or write or to use sign language, and is unable to communicate with anyone in any language system."<sup>319</sup> Lang was charged in Cook County Circuit Court with two murders, the second of which occurred after he had been released on the first. In a series of cases that spanned twenty-five years,<sup>320</sup> the Illinois appellate courts

313. *Id.* at 717.

314. *Id.* at 718. Jackson was also classified as retarded. One of the doctors who evaluated Jackson testified that "even if Jackson were not a deaf mute, he would be incompetent to stand trial." *Id.* at 719. It would be interesting to know whether Jackson would still be considered retarded if he were subjected to current methods of assessing the nonverbal IQ of deaf persons.

315. No. 2:93CV118-D-B, 2000 WL 877008 (N.D. Miss. June 8, 2000).

316. *Id.* at \*1-2.

317. *Id.* at \*1.

318. *Id.* at \*5.

319. *People v. Lang*, 224 N.E.2d 838, 839 (Ill. 1967).

320. *Id.*, *habeas corpus proceeding*, *Myers v. Briggs*, 263 N.E.2d 109 (Ill. 1970), *later proceeding*, *People v. Lang*, 325 N.E.2d 305 (Ill. App. Ct. 1975), *habeas corpus proceeding*, *People v. Lang*, 378 N.E.2d 1106 (Ill. App. Ct. 1978), *aff'd in part and rev'd in part*, *People v. Lang*, 391 N.E.2d 350 (Ill. 1979), *rev'd after remand*, *People v. Lang*, 468 N.E.2d 1303 (Ill. App. Ct. 1984), *aff'd in part and rev'd in part*, *People v. Lang*, 498 N.E.2d 1105 (Ill. 1986), *later proceeding*, *People v. Lang*, 545

struggled with the fate of a defendant who was probably guilty of killing two women and was a “danger[] to himself and others.”<sup>321</sup> He was not mentally ill or mentally retarded<sup>322</sup> but lacked the language with which to communicate. Ultimately, the courts concluded that the only appropriate response under *Dusky* and progeny was a finding that Lang was not mentally or physically competent to stand trial for the homicides because he did not meet the minimum standard, coupled with a civil commitment for a long-term course of treatment which would attempt to teach him language.<sup>323</sup>

Other states have followed suit. The Louisiana Court of Appeals specifically rejected any claim that a deaf defendant must be mentally ill or retarded in order to be found incompetent.<sup>324</sup>

The decision as to a defendant's competence to stand trial should not turn solely upon whether he suffers from a mental disease or defect, but must be made with specific reference to the nature of the charge, the complexity of the case, and the gravity of the decisions which he faces.<sup>325</sup>

The court observed that:

It would be illogical, discriminatory, and a deprivation of his due process right to a fair trial to force defendant to stand trial when he is unable to assist in his defense because of his physical disability and not force him to do so if he suffered from a mental disease or illness.<sup>326</sup>

In *Holmes v. State*,<sup>327</sup> the Florida Court of Appeals found that a deaf defendant with limited language skills should have been found incompetent when it became apparent that he could not communicate on the witness stand and “could not answer questions crucial to his defense.”<sup>328</sup> In applying the *Dusky* standard, the *Holmes* court said that:

---

N.E.2d 327 (Ill. App. Ct. 1989), *later proceeding*, *People v. Lang*, 587 N.E.2d 490 (Ill. App. Ct. 1992).

321. *Lang*, 545 N.E.2d at 330.

322. *Myers*, 263 N.E.2d at 112.

323. *See generally Lang*, 545 N.E.2d 327.

324. *Smith*, 471 So. 2d at 957.

325. *Id.* at 956.

326. *Id.* at 957. *See also State v. Williams*, 381 So. 2d 439, 440 (La. 1980).

327. 494 So. 2d 230 (Fla. Dist. Ct. App. 1986).

328. *Id.* at 233.

A defect that impairs a defendant's comprehension or hampers his ability to consult with his counsel effectively, whether arising from physical or mental impairment, may lead to a finding of incompetence. . . . [W]here a defendant is unable to understand and participate in the legal proceedings because of his inability to communicate, the state is precluded from subjecting him to a trial.<sup>329</sup>

As in *Lang*, there was no evidence that the defendant was mentally ill or impaired. His disability was linguistic and that was sufficient to render him incompetent.

Courts in a number of other states, including New York, have concluded that inability to communicate because of deafness combined with limited language skills may form the basis of a finding of incompetency.<sup>330</sup> The Wisconsin Court of Appeals is in accord, stating in *State v. Haskins*<sup>331</sup> that "communication handicaps," which create an "inability to rationally communicate" with counsel, may raise a reason to doubt competency.<sup>332</sup>

### 3. LINGUISTIC INCOMPETENCY ≠ NO LANGUAGE; LINGUISTIC INCOMPETENCY = NOT ENOUGH LANGUAGE

During the initial competency proceedings, the state presented testimony about Jesse's ability to communicate by a sheriff's deputy who had taken two courses in sign language. The deputy testified that during numerous disciplinary hearings Jesse was able to admit or deny jail infractions such as exposing himself or refusing to lock his cell door by checking off guilty or not guilty on a form or nodding yes or no. He did not offer any explanations or participate in the hearings in any other way.<sup>333</sup> The deputy also testified that Jesse filled out inmate communication forms. In one form, Jesse asked to be removed from segregation. He stated: "I would like to upstairs please to I tell you staff upstairs be good."<sup>334</sup> In another form, Jesse asked for a haircut. He stated: "I would to like haircut I will it's haircut I tell you please to staff."<sup>335</sup>

---

329. *Id.* at 232.

330. *E.g.*, *Doe*, 602 N.Y.S.2d 507; *Rivera*, 480 N.Y.S.2d at 433-34. Coauthor McCay Vernon has testified about linguistic incompetence in trial courts in fourteen states.

331. 139 Wis. 2d 257, 407 N.W.2d 309 (Ct. App. 1987).

332. *Id.* at 263 n.2, 407 N.W.2d 309, 311 n.2.

333. *Jesse R.*, R. at 66-67, 91 (Apr. 29, 1997).

334. *Id.* at 75.

335. *Id.* at 77.

In initially finding Jesse competent, the trial court made particular mention of the deputy's testimony, stating that "[t]his court feels her testimony shows the defendant's ability to function in a quasi-legal environment. The skills and abilities he displayed in the jail hearings are comparable to the ones to be displayed in these proceedings."<sup>336</sup>

The court's reliance on the deputy's testimony reflected a typical misconception about language and deafness that frequently creeps into play when a deaf person's ability to understand is raised in the legal arena. The misconception appears when a court or an evaluator discovers that a deaf person has some ability to communicate about day-to-day matters such as job tasks or the weather and subsequently takes this as proof of the ability to communicate effectively within the criminal justice system.

This presumption is wrong.<sup>337</sup> But it lingers nevertheless, perhaps because on some level we are skeptical—or even suspicious—of the adult who claims he can communicate at the factory but not in the courtroom.

In reality, though, the idea that a person could have enough language to get by in daily life but not to participate in the legal system fits neatly into a linguistic model which most of us accept quite readily—the language of children. A typical six-year-old has the language to communicate about a whole range of matters that may affect her life, from favorite foods to a fight she had with her best friend. And there are even a few precocious six-year-olds who can read the word "government" and make some sense of it. But no one would suggest the six-year-old's ability to discuss a preference for pepperoni over sausage on a pizza, play house, create a Christmas list, or recite the date of the Declaration of Independence means that the child could assist with presenting a defense or ponder the workings of the criminal justice system. We recognize that even if the child can decipher the words we are using, the child does not have the experience or background to know what we are talking about and to communicate rationally.<sup>338</sup>

A deaf adult is not a child, of course, but language acquisition and related developmental issues among both children and linguistically deprived deaf adults can and do overlap. A deaf adult with a grossly

---

336. *Id.*, Decision at 11, July 8, 1997.

337. *See State v. Hindsley*, 2000 WI App 130, ¶ 19–20, 237 Wis. 2d at 370, 614 N.W.2d at 54.

338. *See generally* Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629 (1995); Thomas Grisso, *Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trials Defendants*, 27 LAW & HUM. BEHAV. 333 (2003).

underdeveloped language system may seem childlike or primitive<sup>339</sup> in his understanding of the many nonconcrete aspects of the world.

Courts are coming to recognize that a deaf person need not match Donald Lang's complete lack of a language system to fall below constitutionally acceptable levels of capacity for communication. In *Holmes*, the Florida case discussed above, the defendant possessed ability to communicate about everyday matters in ASL and in fact was initially found to be competent based upon an expert opinion that he "possessed satisfactory communicative skills."<sup>340</sup> Yet, there came a time in the proceedings when Holmes's language was not sufficient to enable him to testify. This inability was not due to stage fright or fear of public speaking<sup>341</sup> but to an insufficient level of linguistic ability.<sup>342</sup> The appellate court held that Holmes's "difficulty in presenting his defense raised a bona fide and reasonable doubt as to his competence to stand trial."<sup>343</sup>

In a related context, in *State v. Hindsley*, the Wisconsin Court of Appeals upheld a ruling that even though a deaf defendant had functional skills in English, those skills were insufficient to enable him to understand and knowingly waive his *Miranda* rights in either written or signed English forms.<sup>344</sup> In *Hindsley* the court noted that there was:

evidence that Hindsley does use English and can communicate "beyond ASL, that he involves himself with other people using English; that he writes notes; that he can obtain most of his daily needs and necessities in that way; that he can communicate at least to some degree about more subtle issues than that." However, the court found that none of that evidence suggested he communicated in detail about intangible ideas in English.<sup>345</sup>

---

339. Some deaf people with severe language deficits have been diagnosed with primitive personality disorder. Although primitive personality disorder is not included in the Diagnostic and Statistical Manual, it is recognized by a number of experts in the field of deafness. Primitive personality disorder is characterized by an IQ of seventy or above, severe language deprivation resulting in lack of communicative ability in any signed or spoken language, functional illiteracy, an impoverished educational background, and a lack of awareness of basic social structures, mores, and knowledge considered common information to the average citizen. See Miller & Vernon, *supra* note 310, at 230-31. Jesse would fit into this category.

340. *Holmes*, 494 So. 2d at 231.

341. Cf. *United States v. Barnes*, 30 F.3d 575, 577 (5th Cir. 1994).

342. *Holmes*, 494 So. 2d at 232-33.

343. *Id.* at 233.

344. 2000 WI App 130, 237 Wis. 2d 358, 614 N.W.2d 48.

345. *Id.* ¶ 20, 237 Wis. 2d at 370, 614 N.W.2d at 54 (citation omitted).

In so ruling, the court recognized the world of difference between the language of “daily needs and necessities”<sup>346</sup> and the language of abstractions such as rights.

Unfortunately, much of the legal system continues to grapple with this distinction. Courts still make assessments of communication skills<sup>347</sup> based upon ability to communicate in the ordinary course of life,<sup>348</sup> to answer high-frequency questions (such as, “where do you live?” and “how old are you?”), to inform the court exactly what is and is not being understood,<sup>349</sup> or in Jesse’s case, to ask for a haircut and admit that he refused to lock his cell door. But such conclusions miss the crucial point—that the language of living and the language of the courtroom are not in the same ballpark. Arguably they are not even the same sport. To borrow from testimony at Jesse’s postconviction competency hearing, “[y]ou can pantomime taking a shower; you can pantomime getting a haircut. You can’t pantomime plea bargain. I know that.”<sup>350</sup>

#### IV. WHAT DO YOU PROPOSE WE DO NOW, COUNSEL?: SUGGESTED SOLUTIONS

For the conscientious lawyer or judge faced with a language-deprived deaf defendant or subject, the obstacles to comprehension can seem insurmountable. At some point, the judge or lawyer may be sorely tempted to throw up her hands and say, “we’re doing the best we can” and then hope for the best.

But the issue of comprehension for these individuals, while admittedly difficult and at times frustrating, can be managed if approached systematically. It is well within the system’s capabilities to create conditions under which a majority of linguistically impaired deaf

346. *Id.*

347. Most of the case law involving assessments of a defendant’s language arise with hearing defendants who are non-English speakers who have challenged the court’s refusal to provide an interpreter or the quality of the interpreter provided. While determination of ability to understand court proceedings without the assistance of an interpreter is not the same as a competency evaluation, the principles are similar. *See, e.g., United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973).

348. For example, the Mississippi Supreme Court found that “the rules which apply to persons who are deaf, illiterate, and mentally retarded do not apply to the deaf who are able to complete high school and do, with moderate success, academic work at the college level.” *Shook v. State*, 552 So. 2d 841, 846 (Miss. 1989), *aff’d, Shook*, No. 2:93CV118-D-B, 2000 WL 877008.

349. *See, e.g., Valladares*, 871 F.2d at 1565; *State v. Besso*, 72 Wis. 2d 335, 339, 240 N.W.2d 895, 896 (1976); *State v. Yang*, 201 Wis. 2d 725, 735–37, 549 N.W.2d 769, 773–74 (Ct. App. 1996); *see also Pantoga*, *supra* note 174, at 611–18.

350. *Jesse R.*, R. at 39, Oct. 25, 1995 (Testimony of coauthor McCay Vernon, Professor of Psychology at McDaniel College, and psychological consultant).



people can understand. The steps that we recommend are all very concrete and straightforward; they are made with the full understanding that the justice system does not have unlimited resources and that judges and lawyers do not have the time to take a crash course in linguistics.

The most sweeping change this Article recommends is for increased definition or limitation in the exercise of judicial discretion when accommodating the deaf defendant or subject. Among the limits recommended is mandatory use of a certified interpreter, appointment of a counsel-table interpreter to monitor comprehension and accuracy, and videotaping to ensure an accurate record. Additionally, this Article offers recommendations for assessing whether a deaf person understands what is being said or whether he needs additional, specialized accommodations. In cases where serious doubts remain about a defendant's ability to rationally understand and communicate, we have made recommendations about the competency assessment process so that the assessments accurately measure a deaf person's competency to stand trial.

### A. *Ensuring Communication*

#### 1. MODIFIED DISCRETION

It is now close to a century that courts have been exercising control over in-court interpretation. Since 1907, with the decision in *Perovich v. United States*,<sup>351</sup> trial courts have been afforded virtually unfettered discretion in deciding whether to appoint an interpreter, whom to appoint, whether the interpreter is adequately fulfilling her duties, and whether the defendant understands what the interpreter is saying.<sup>352</sup> The theory behind this broad grant of discretion is that the trial judge knows the case and can watch the defendant and is therefore in the best position to know whether communication needs are being met. According to the U.S. Court of Appeals for the First Circuit, "wide discretion" is "necessary" in the interest of "judicial economy" "[b]ecause the determination is likely to hinge upon various factors, including the complexity of the issues and testimony presented during trial and the language ability of the defendant's counsel" and because the trial court is in "direct contact with the defendant."<sup>353</sup>

In determining whether a defendant understands the proceedings, courts have looked at any number of factors, some of which may be legitimate, others of which are not. Trial courts have found sufficient

---

351. 205 U.S. 86.

352. See, e.g., *Ademaj*, 170 F.3d at 63; *Valladares*, 871 F.2d at 1566; *Carrion*, 488 F.2d at 14-15; *Thongvanh*, 494 N.W.2d at 682.

353. *Carrion*, 488 F.2d at 14.

ability to understand based on everything from seemingly responsive answers to the court's questions<sup>354</sup> and trial counsel's testimony that he had no difficulty communicating,<sup>355</sup> to testimony that a defendant asked for a drink of water<sup>356</sup> or was able to get a fishing license and make arrangements to go fishing.<sup>357</sup>

A decision regarding accommodations for a deaf defendant or subject will be reversed only when the decision is "clearly erroneous"<sup>358</sup> or "manifestly arbitrary, unfair, or unreasonable."<sup>359</sup> This abuse of discretion standard means that a trial court's decision will not be disturbed unless the evidence of the defendant's inability to understand practically leaps from the pages of the record.<sup>360</sup>

At first glance, broad discretion may seem entirely appropriate because the judge is in the position to watch a deaf defendant converse with his attorney, to listen to the answers to the court's questions, and to observe the defendant's demeanor during testimony or arguments by counsel. In reality though, judges do not have the expertise to know what a nonnative English user is capable of understanding or not.<sup>361</sup> One commentator observed that asking a judge to determine language ability of a nonnative English speaker "is akin to a lawyer deciphering an x-ray in a medical malpractice action."<sup>362</sup>

The truth is that courts are not terribly adept at ascertaining whether any nonnative English user—hearing or deaf—understands the proceedings or not. The additional subtleties of deaf psychology and culture mean that courts are even more likely to misconstrue body language and verbal responses when dealing with deaf defendants and subjects. For example, an appellate court in Alabama affirmed the trial court findings that a deaf defendant understood the proceedings because "[t]he circuit judge who arraigned the defendant 'looked the defendant in the face' as he spoke to him . . . . The defendant 'nodded' when asked if he understood."<sup>363</sup> To a hearing person not familiar with the deaf world, reliance on nodding as evidence of comprehension seems

354. *Wallace*, 641 A.2d at 326.

355. *Yang*, 201 Wis. 2d at 740, 549 N.W.2d at 775.

356. *Besso*, 72 Wis. 2d at 339, 240 N.W.2d at 896.

357. *State v. Carlson*, 2001 WI App 296, ¶ 10, 249 Wis. 2d 264, 269, 638 N.W.2d 646, 649, *rev'd*, 2003 WI 40, 261 Wis. 2d 97, 661 N.W.2d 51 (evaluating a juror's ability to understand).

358. *Yang*, 201 Wis. 2d at 742, 549 N.W.2d at 775.

359. *James*, 937 P.2d at 784.

360. *See State v. Barber*, 617 So. 2d 974, 976 (La. Ct. App. 1993) ("[W]hen the defendant was asked if he had drugs on him at the time of arrest he responded, 'The money came out of this little folder here.'").

361. *Pantoga*, *supra* note 174, at 618.

362. *Id.*

363. *Turner v. State*, 429 So. 2d 645, 646 (Ala. Crim. App. 1983).

entirely reasonable. But it is enough to make a person knowledgeable about deafness cringe.<sup>364</sup>

Figuring out whether an interpreter is qualified, whether she is a good match with a deaf individual, whether the deaf person understands what is being said at the moment and how much he is actually capable of understanding in general are all complicated processes. The assessment of a nonnative English speaker's ability to understand has been analogized to the assessment of a mentally disabled defendant's competency to stand trial in both its complexity and the potential effect on the fairness of the proceedings.<sup>365</sup> We agree with that comparison and with the conclusion that the process of determining comprehension should not be left up to the individual observations of the trial court.<sup>366</sup>

The broad, unguided discretion allowed by *Perovich* and its progeny is not appropriate in the case of any deaf defendant or subject, especially one with linguistic deficits. The communication issues attending such a person are not readily understood by a person untrained in deafness and cannot be divined by observations from the bench.

Judicial discretion needs to be more carefully circumscribed, and courts should follow clearly delineated guidelines and procedures when exercising discretion. Specific suggestions are discussed below. The guidelines and procedures proposed are not intended to strip courts of discretion in the area of communication and accommodation. Rather, they are offered to better inform the exercise of that discretion and to ensure that decisions rationally relate to the individual deaf person's communication needs.

## 2. CERTIFIED INTERPRETERS ONLY

A first step in any case involving a deaf litigant or witness should be the appointment of a certified interpreter. By certified, we mean an interpreter who has received, at the minimum, a Certificate of Interpretation (CI) and Certificate of Transliteration (CT) from the RID, a Level 5 from the National Association of the Deaf, or a state equivalent.<sup>367</sup> In complex proceedings, the appointment of an interpreter

---

364. Within the deaf population there is a phenomenon known as "the deaf nod." "Such nodding does not necessarily indicate agreement or approval [or understanding] but rather that someone is paying attention." Smith, *supra* note 9, at 101.

365. See Pantoga, *supra* note 174, at 615.

366. *Id.* at 615-16.

367. See Stephanie Kerkvliet, *Hearing Justice: An Interpreter's Perspective on the Deaf Experience in the Courtroom and Other Legal Settings*, WIS. DEFENDER, Winter 2003, at 12-13. Some state chapters of the RID offer a state certification. Other states have a certification process that is equally rigorous. In contrast, some states such as Wisconsin, use a verification process that is less comprehensive than the RID

who has an additional certification in Legal Interpreting (SC:L) is strongly encouraged. In an ideal world, the best practice would be the use of a legally certified interpreter only—especially for complex proceedings—but the scarcity of legally certified interpreters<sup>368</sup> makes that impractical for the foreseeable future.

This recommendation is important for a very simple reason—assurance of quality. Just as a law license ensures that a lawyer has at least a minimal level of competence, as attested by her law school and the bar examiners, so too does the certification of an interpreter. A certified interpreter has had her skills thoroughly assessed and tested by persons who are themselves experts in the field of interpretation and knowledgeable about the linguistic issues within the deaf community. Certification also means that an interpreter is bound by a code of ethics and a standard of professionalism.

We are not suggesting that certification is an absolute guarantee that an interpreter can adequately communicate with a deaf person.<sup>369</sup> Despite her certification, an individual interpreter may not have the skills, intuition, judgment, or knowledge needed to interpret for a particular deaf person in a particular case.<sup>370</sup> The appointment of a certified interpreter in no way absolves the court and the attorney for the deaf person from their own obligations to continually ensure comprehension. However, certification does tell the court and the parties that the interpreter they are considering at least has the baseline skills.

Right now, the requirement of certification for court interpreters is a distinctly minority view. Only a handful of state statutes and the

---

certification. The Wisconsin Office of Deaf and Hard-of-Hearing does not recommend using an interpreter whose sole qualification is verification by the state. *Id.* Beginning in 2004, the RID and the National Association of the Deaf will collaborate on interpreter testing and certification. The first part of the assessment and certification examination of the National Council on Interpreting's knowledge and performance test is scheduled to debut in June 2004. See RID, National Testing System (NTS), at <http://www.rid.org/nts.html> (last visited Dec. 1, 2003); RID, National Council on Interpreting (NCI), at <http://www.rid.org/nci.html> (last visited Dec. 1, 2003). This test is expected to become the national standard examination for interpreters. See National Association of the Deaf (NAD), Interpreter Assessment and Certification Program, at <http://www.nad.org/openhouse/programs/NIC/PR112502upgrades.html> (last visited Dec. 1, 2003).

368. In Wisconsin, for example, there are currently four practicing interpreters with SC:L. In 2000, there were 100 interpreters with SC:L in the entire United States. Miller & Vernon, *supra* note 310, at 232.

369. See, e.g., *Hindsley*, 2000 WI App 130, ¶¶ 4, 24, 237 Wis. 2d at 362, 373, 614 N.W.2d at 50, 55 (finding that an interpreter who had received a CT rendered an inadequate interpretation of the *Miranda* warnings for a deaf suspect whose primary language was ASL and thus required interpretation rather than transliteration).

370. *Id.* ¶ 16, 237 Wis. 2d at 368, 614 N.W.2d at 53; see also McAlister, *supra* note 17, at 167–68, 177.

FCIA require that a court interpreter have some sort of certification. And even those requirements are not ironclad. For example, the FCIA, the most stringent statute when it comes to interpreter qualifications, states that a certified interpreter shall be used unless “no certified interpreter is reasonably available, as determined by the presiding judicial officer.”<sup>371</sup> Moreover, failure to use a certified interpreter is not grounds for reversal of a criminal conviction and courts will not presume that an interpreter was inadequate based on lack of certification.<sup>372</sup>

Instead, courts—including those with a stated preference for certified interpreters—generally operate under a “rebuttable presumption [that] an interpreter in the performance of his official duty has acted regularly.”<sup>373</sup> As long as the interpreter is providing “continuous . . . translation”<sup>374</sup> courts will usually assume the interpretation is adequate.<sup>375</sup> Whether an interpreter is capable of communicating appropriately with the deaf person is left to the discretion of the trial court judge.<sup>376</sup>

However, most trial judges have no way of knowing whether an interpreter is communicating adequately with a deaf person or not. The fact that she is interpreting continuously tells us nothing about whether she is interpreting accurately or whether the deaf person understands what she is saying.<sup>377</sup> Nor can a court simply ask the interpreter whether she can communicate with the deaf person because interpreters are not always in a position to judge their own work and, unfortunately, some interpreters overestimate their own abilities.<sup>378</sup> Requiring the

371. 28 U.S.C. § 1827(d)(1). Other jurisdictions use a “good cause” standard. *See, e.g.*, *People v. Estrada*, 221 Cal. Rptr. 922, 924 (Ct. App. 1986).

372. *See United States v. Nazemian*, 948 F.2d 522, 528 (9th Cir. 1991); *Estrada*, 221 Cal. Rptr. at 924; *Redman v. United States*, 616 A.2d 336, 337 (D.C. 1992); *see also United States v. Gonzalez*, 339 F.3d 725, 728–29 (8th Cir. 2003). Despite the fact that the Southern District of Iowa used uncertified interpreters in nearly ninety percent of proceedings, the defendant was not entitled to postconviction relief absent a showing of fundamental unfairness. *See Gonzalez*, 339 F.3d at 728–29.

373. *Van Pham*, 675 P.2d at 860 (citation omitted). The widely applied standard is that absent an objection, the interpreter’s performance will be presumed adequate.

374. *Joshi*, 896 F.2d at 1309.

375. One exception is the U.S. Court of Appeals for the Ninth Circuit, which refused to “confer upon the State the benefit” of the presumption that an interpretation was complete and accurate. *Tamayo-Reyes*, 926 F.2d at 1495.

376. *E.g.*, *Montoya v. State*, 811 S.W.2d 671, 672 (Tex. App. 1991).

377. *Pantoga*, *supra* note 174, at 624.

378. *See id.* This inability to judge one’s own work is not limited to noncertified interpreters. *See State v. Jenkins*, 81 S.W.3d 252, 268 (Tenn. Crim. App. 2002); *see also Hindsley*, 2000 WI App 130, ¶ 7, 237 Wis. 2d at 363–64, 614 N.W.2d at 51.

appointment of a certified interpreter will bring a measure of rationality and dependability to the process.

We recognize that locating a certified interpreter for a specific hearing date and time can be yet another time consuming task in an already overburdened system. We also recognize that in the crush of time and budgetary constraints, a judicial finding that no certified interpreter is reasonably available can be easy to make and will likely be sustained.<sup>379</sup> But findings that a certified interpreter is not available should be discouraged. To that end, the presumption that any interpreter who is interpreting continuously is adequate is not sufficient. Specifically, a better approach would be a rebuttable presumption that if an interpreter is *not certified*, the interpretation was not adequate. This rebuttable presumption may seem harsh, but the potential for miscommunication and harm is so great that, on balance, it is worth whatever inconvenience or discomfort it may cause.

### 3. ASSESSING AND MONITORING COMPREHENSION

#### *a. A Reality Check on Contemporaneous Objections*

Even with the appointment of a certified interpreter, lapses in comprehension and accuracy are still possible. This potential for inaccuracy means that the parties, and in particular the attorney for the deaf person, must continually monitor communication. State and federal law are quite clear that any errors or inadequacies in interpretation must be objected to contemporaneously or will be deemed waived.<sup>380</sup> Failure to object or complain will also be considered as evidence that the defendant or subject “knew exactly what was going on in [the] courtroom.”<sup>381</sup>

From a reviewing court’s perspective, the requirement of contemporaneous objections makes a great deal of sense because “[t]o allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.”<sup>382</sup> It also permits trial courts to step in immediately and make the necessary changes before the problem escalates. From the perspective of those who contend with the practicalities of interpretation in the courtroom, however, the requirement of contemporaneous objections is often illusory because it

---

379. See, e.g., *United States v. Paz*, 981 F.2d 199 (5th Cir. 1992); Fleming, *supra* note 201, at 399–400.

380. See *Gonzalez*, 339 F.3d at 728; *Joshi*, 896 F.2d at 1310; *Bennett*, 848 F.2d at 1141; *Lim*, 794 F.2d at 471.

381. *Valladares*, 871 F.2d at 1565.

382. *Id.* at 1566.

places responsibility squarely on the shoulders of parties who (like the judge) are rarely able to assess whether there is a problem with the interpretation or not—the defense attorney and the deaf person.

As for the defense attorney, the dilemma is obvious: how would he or she know whether an interpretation is adequate or not? Very few attorneys have any facility at all in ASL or PSE, and even those who do are in no position to monitor the interpreter because their attention is devoted to the proceedings themselves. Furthermore, unlike an attorney-client meeting, courtroom proceedings by their nature do not afford the lawyer an opportunity to actively assess what the deaf person does or does not understand.

The other part of the contemporaneous objection equation places responsibility on the deaf person himself to inform the court or his attorney if he does not understand. While this, too, might seem sensible, it does not mesh with reality. First, it wrongly assumes that the deaf person knows what he does not understand. While there occasionally will be interpretations that are blatantly defective or mismatched, the more likely situation will be the deaf individual who thinks he understands but whose understanding is wrong.<sup>383</sup>

This approach also forces the deaf person to know whether an interpretation accurately reflects what is being said, which begs the question: how would he know? In order to make the objection that the interpretation is not accurate, the person would have to know what is being said in English and what it means, and then be able to compare it with the non-English version. Such a task is impossible for any number of reasons.

The more insidious problem with requiring objections from the defendant or subject himself has nothing to do with language or interpreters but with human nature. No one wants to appear ignorant or unintelligent, and deaf people are no different. But unlike hearing people, deaf people have spent their whole lives around people they cannot understand, and as a result, many have developed a set of coping mechanisms designed to make themselves appear as if they understand, when in fact they do not.<sup>384</sup> Even Jesse, with his limited communication ability, had acquired some sophisticated techniques for pretending to understand. One of the competency evaluators made the observation that Jesse “obviously likes to please some people and he does a pretty good job of mimicking comprehension, such as smiling and guessing

---

383. See SHANNON & WEAVER, *supra* note 221, at 4; McAlister, *supra* note 17, at 190-92. For example, Jesse thought he understood the concept of no contest (“no race”) but was completely mistaken about what it meant.

384. In this respect, a deaf person is very much like the hearing American with four years of high school French who travels to France. When confronted with the native language, the American may find herself nodding and smiling and feigning comprehension in order to avoid looking unintelligent.

'yes' or 'no,' a tactic frequently employed by deaf (and even hard-of-hearing persons), so as to appear 'with it' during social contact."<sup>385</sup> The assessor also made note of the fact that "[Jesse] has been fairly successful in masking incomprehension by a series of responses designed to imply comprehension. When confronted with a second request to respond to a question that he is unable to understand, he tends to bring in an unrelated topic or an illogical response."<sup>386</sup>

It is simply unrealistic to expect a deaf person with limitations like Jesse's or Maryellen's to abandon lifelong methods for getting by in a hearing world, and to suddenly become an assertive advocate for communication that meets constitutional standards. To put it bluntly, can we really expect such a person, sitting in a courtroom, surrounded by hearing professionals, to interrupt his lawyer or the court, and say, "I don't know what you're talking about"?

We are not suggesting that the requirement of contemporaneous objections be abandoned. An after-the-fact claim of lack of understanding does a disservice to the entire system and wastes time and money. However, the requirement of contemporaneous objections is in desperate need of assistance in order to be more than wishful thinking. Two potential resources would be counsel-table interpreters and videotaped proceedings. Both of these options would assist counsel and the court with monitoring the interpretation process throughout the case so that timely objections and corrections can be made and allow for meaningful review in those cases where mistakes are made despite the best efforts of all parties. These steps are important even with a certified interpreter. If, for whatever reason, the court is using a noncertified interpreter, these steps are imperative.

#### *b. Counsel-Table Interpreter*

Perhaps the most efficient and effective method of ensuring the adequacy of interpretation is to provide a second interpreter seated at counsel table with the defendant and the attorney. Such an interpreter can serve several functions. Commonly, counsel-table interpreters are present so that the defendant or subject can communicate with his attorney throughout the proceeding. However, the second interpreter can serve an equally important function of checking the interpretation and the communication process in general.

A counsel-table interpreter is in a position to act as communication facilitator and advocate. Most likely, she will have served as the

---

385. *Jesse R.*, R. at 2 (May 10, 1999) (Report to the court by Timothy A. Jaech, Wis. Dep't of Pub. Instruction, Deaf and Hard-of-Hearing Outreach Servs., former Superintendent, Wis. Sch. for the Deaf).

386. *Id.*



interpreter during attorney-client meetings. She would then know the deaf person and his style and level of communication. She would be familiar not only with the vocabulary of the case but also with the defendant's vocabulary of the case. She would be attuned to the subtleties that indicate a lack of understanding and be able to communicate directly with the deaf person to ascertain the source of the problem. When problems arise, this interpreter could inform the attorney, who could in turn register the appropriate objection or complaint.

The law on the subject is ambiguous. The issue has ordinarily been raised as one of communication between attorney and client.<sup>387</sup> In that context, most courts have not found an absolute constitutional right to a separate counsel-table interpreter in order to ensure the Sixth Amendment right to communicate with counsel, provided that the defendant is afforded an adequate opportunity to speak with his attorney and with an interpreter during breaks in the testimony.<sup>388</sup> Like the appointment of the court interpreter, the decision to appoint a counsel-table interpreter is left to the discretion of the court.<sup>389</sup>

As a practical matter, many courts in fact afford the opportunity for counsel-table interpreters, if only because permitting the defense to take a break and to use the court's interpreter every time attorney and client want to communicate can be cumbersome and time-consuming.<sup>390</sup> The Wisconsin Supreme Court has explicitly placed the stamp of approval on the use of counsel-table interpreters, stating that "the better practice . . . may be to have two interpreters, one for the accused and one for the court,"<sup>391</sup> in order to ensure adequate interpretation for all parties and to avoid the appearance of conflict.<sup>392</sup>

Certainly, the appointment of a counsel-table interpreter is the better practice and should be authorized anytime there is any question about the ability of a deaf person to understand an interpreter. The presence of a counsel-table interpreter will benefit all parties: the attorney with the deaf client, the court, and of course, the deaf person himself. For the attorney and the deaf defendant, it offers an escape from the catch-22 of being required to object but having no way of discovering what is objectionable. For the court, it offers the

---

387. See, e.g., *United States v. Johnson*, 248 F.3d 655, 662 (7th Cir. 2001) (allowing multiple defendants to use a single interpreter in the same court proceeding).

388. *Id.* But cf. *Estrada*, 221 Cal. Rptr. at 924 (stating that the defendant is entitled to a counsel-table interpreter under the state constitution).

389. *Johnson*, 248 F.3d at 663; *Bennett*, 848 F.2d at 1141.

390. Cf. *Sin v. Fischer*, No. 01CIV.9376(GEL), 2002 WL 1751351, at \*3 (S.D.N.Y. July 26, 2002).

391. *State v. Santiago*, 206 Wis. 2d 3, 24, 556 N.W.2d 687, 695 (1996).

392. *Id.* at 24, 556 N.W.2d at 695; see also *Sin*, 2002 WL 1751351, at \*3.

opportunity to fashion a solution on the spot rather than having to wait until the appeals process to discover that there was a problem.

c. *Videotaping*

A simple, unobtrusive, and inexpensive way to further ensure the quality of communication afforded a deaf person is through extensive use of videotaping. Videotaping can serve two functions: ongoing review of communication and record preservation.

Videotaping the proceedings provides an opportunity for the interpreter and the parties to continually assess the interpreting process. If, for example, there is a disagreement between the court interpreter and counsel-table interpreter about the way that an important comment or concept was interpreted (either from spoken English into ASL or vice versa), then the court can replay the videotape during a recess with all parties and interpreters, resolve the conflict, and make the necessary corrections.<sup>393</sup>

Videotaping will also assist the interpreter in her professional and ethical obligation to continually assess her ability to deliver services in the case.<sup>394</sup> Any good interpreter will have doubts from time to time about certain aspects of the interpretation she has just provided, especially when she is working with a linguistically deficient deaf person. Obviously, the speed of the proceedings will prevent her from reassessing her work on the spot, but a videotape will give her the opportunity to review during a break in the proceedings and to take remedial steps.

Videotaping the interpretation of the proceedings also has the potential to address a more pervasive problem that affects practically all defendants and subjects who rely on an interpreter in court—the absence of a record. Under common practice, the only official record is the spoken English that is recorded in the transcript.<sup>395</sup> Unless the trial court grants a request for taping, there is no record of what was said in the foreign language or signed language, which means in essence there is no record of the hearing, trial, guilty plea, probation revocation, or commitment that the deaf defendant or subject attended and experienced.

Without a videotaped record, a reviewing court has no adequate way of knowing whether or not the defendant or subject understood or whether the interpretation was accurate. Appellate courts routinely

---

393. See *Van Pham*, 675 P.2d at 858.

394. See WIS. SUP. CT. R. 63.08 (“Assessing and reporting impediments to performance. Interpreters shall assess at all times their ability to deliver services.”).

395. See 28 U.S.C. § 753(b); *United States v. Damon*, No. CRIM. 96-21-B, CIV. 98-204-B, 1999 WL 1995196, at \*3 n.3 (D. Me. Feb. 11, 1999); *United States v. Hernandez*, No. 89-7725, 1990 WL 125519, at \*1 (4th Cir. Aug. 31, 1990); Fleming, *supra* note 202, § 101, at 624-25.

arrive at their conclusions about a person's ability to comprehend interpreted proceedings by looking at the transcript,<sup>396</sup> yet a transcript tells nothing about the manner in which a statement or concept was conveyed through interpretation, the amount of time a particular interpretation took, or whether the interpreter had to go through extraordinary contortions to get a point across. One question by the judge during a guilty plea colloquy may take five minutes to interpret sufficiently so that the defendant is able to answer, yet will appear in the transcript as a tidy "Do-you-understand? Yes-I-do."

The legal basis for any request for videotaped proceedings seems clear enough: meaningful appeal is impossible because the record is incomplete.<sup>397</sup> Without a videotaped recording of the proceedings, there is no record of what the deaf person has been told or if she testifies, what she herself actually said.

So far, many courts have either sidestepped the issue or been resistant unless the defendant can specifically show the type of errors that were made or what he did not understand.<sup>398</sup> This forces the defendant or subject to reconstruct the interpretation—a difficult task at best. But, there are definite signs that courts are changing direction on this question. Courts are beginning to recognize that it is impossible to know whether the interpretation meets the requirements of the law without a record of the interpretation itself.<sup>399</sup> As the legal system is forced to rely on interpreters more and more, we should expect courts to become more open to the use of videotaped recording of interpreters for deaf defendants and subjects.

The other argument for videotaping is more functional and in some respects more compelling. Without a record of the interpretation, the condition of deaf and hard-of-hearing defendants in court remains invisible. Reviewing courts have remained generally oblivious to the state of communication for deaf defendants and subjects because a transcript can mask even the most inept interpretation or the most

---

396. See, e.g., *Gonzalez*, 33 F.3d at 1050; *State v. Green*, 564 A.2d 62, 64 (Me. 1989); *People v. Rivera*, 480 N.Y.S.2d 426, 428–29 (Sup. Ct. 1984).

397. See *Hardy v. United States*, 375 U.S. 277, 279–80 (1964); *State v. Perry*, 136 Wis. 2d 92, 97–98, 401 N.W.2d 748, 751 (1987).

398. See, e.g., *Hernandez*, 1990 WL 125519, at \*7; *State v. Stanley*, 700 N.E.2d 881, 895 (Ohio Ct. App. 1997).

399. See, e.g., *Rice's Toyota World, Inc. v. Southeast Toyota Distribs., Inc.*, 114 F.R.D. 647, 648–49 (M.D.N.C. 1987) ("[C]ourts should be amenable to technological advances, which provide opportunities to improve judicial procedures . . . [I]t is the better practice to permit electronic recodation of depositions."); *Santiago*, 206 Wis. 2d at 28, 556 N.W.2d at 696 (finding that interpreted *Miranda* warnings could be taped so that a reviewing court can determine whether the suspect was accurately advised of rights); see also Elsa Lamelas, *New Interpreter Code of Ethics*, WIS. LAW., Mar. 2003, at 10, 60 (pointing out that more courts are beginning to order a separate recording of the interpretation of testimony).

confused defendant. Consistent videotaping of court interpreters would provide an opportunity for reviewing courts to confront the quality of justice for deaf defendants and subjects and to weigh in more extensively on the question of meaningful accommodations.

*d. Questioning the Deaf Person*

A simple method of assessing a defendant's comprehension is to directly ask her questions to determine what she understands. Courts already attempt to use this procedure to some extent in certain proceedings, including guilty pleas and competency determinations. Unfortunately, the method of questioning used in most courts is probably the least effective way possible of measuring comprehension.

The standard method of questioning by trial courts goes something like this: the court informs the defendant or subject of a fact (e.g., "you have the right to a jury trial") and then asks, "Do you understand?" More often than not, the answer is yes, whether the person understands or not.<sup>400</sup>

In order to gauge actual comprehension, the court must deviate from the standard script and ask open-ended questions, preferably questions to which the court already knows the answer.<sup>401</sup> For example, instead of asking if a defendant understands that he has a right to a jury, the court should ask the deaf person to describe what he understands about the trial process. The court must also follow up the answers provided by the deaf person. If the defendant tells the court that he has a "right to a jury," the court should ask what that means. Otherwise, the court may be misled by the person's seemingly sensible, coherent, and correct answers.<sup>402</sup>

This technique should also be employed by the attorney for the deaf person whenever she is communicating with her client. Although the court may be the final arbiter of comprehension, the attorney for the deaf person has an ethical obligation to know whether a client understands or does not. Moreover, because she has genuine access to her client, the attorney is almost always in a better position to glean

---

400. See Pantoga, *supra* note 174, at 617. This form of questioning is frequently found in bench books that judges rely on during colloquies with the defendant.

401. Telephone Interview with Brenda Schick, Professor, Univ. of Colo. Dep't. of Linguistics (July 2001); see also Kerkvliet, *supra* note 369, at 14.

402. This disconnect between the defendant and the court occurred in Jesse's case. Jesse told the court that he was pleading to "second-degree sexual assault," which the court took to mean that Jesse understood the charges he was pleading to. *Jesse R.*, R. at 7 (Apr. 1, 1998). During postconviction proceedings, it was discovered that Jesse thought the term meant that he had touched two women "first and second." *Id.*, R. at 49 (Jan. 3, 2000).

what the deaf person in fact understands. Open-ended questions coupled with meaningful follow-up during attorney-client meetings can be quite revealing and will often be a first step toward improving communication.

#### 4. CHANGES IN COURTROOM PROCEDURE

Courts are afforded great latitude in devising accommodations, both orthodox and unorthodox, for any party who has communication problems.<sup>403</sup> A court that becomes aware of difficulties experienced by a language-impaired deaf person has any number of options available to improve the communication process.

One option is to permit extensive use of consecutive interpreting, especially during those portions of the proceedings where the issues are more technical in nature or deal with abstractions. Consecutive interpreting will allow the interpreter the extra time she needs to further simplify and alter the language into a form that can be understood by the defendant or subject. Consecutive interpretation also cuts down on the possibilities of error and the confusion that error is likely to cause.<sup>404</sup>

A second option, one that is now recognized by a number of state statutes, involves the use of a deaf relay interpreter. As we discussed earlier, a deaf relay interpreter often has an uncanny ability to communicate concepts that elude even the most talented hearing interpreter. Deaf interpreters are able to draw upon connections and examples that make sense only in the deaf world. As a result, deaf relay interpreters should be liberally used whenever there are communication difficulties. "When a fluent hearing interpreter is coupled with an equally competent deaf interpreter, the cognitive and modality load of that communicative assignment is shared. This allows for a greater focus on the many subtle or not-so-subtle differences found between American mainstream culture and the deaf culture."<sup>405</sup>

One question that often arises when courts use consecutive interpretation or a deaf interpreter is whether the interpreter is going

---

403. See *Ferrell*, 568 F.2d at 1133; *Lincoln v. State*, 999 S.W.2d 806, 809 (Tex. App. 1999).

404. However, in order for consecutive interpretation to be effective and complete, the speaker cannot go on at great length without stopping. Otherwise the interpreter will be forced to paraphrase and summarize, both of which are constitutionally inadequate. See *Negron*, 434 F.2d at 388; see also *Goodman*, *supra* note 173, at 17, 28.

405. *Wilcox*, *supra* note 161, at 94. The National Center for State Courts takes the position that the use of a deaf relay interpreter will *always be required* with a deaf individual with minimal language skills. HEWITT, *supra* note 94, at 162. This Article posits that semilinguals should also have a deaf relay interpreter when dealing with the legal system.

beyond her role and is offering explanations about what is being said.<sup>406</sup> The issue arises because it is obvious in both of these situations that the interpreter is doing much more than word-for-word transliteration. However, the interpreter, by virtue of professionalism and ethics, is doing no more than transmitting the message and the intent of the speaker. Even the deaf interpreter who may be providing some cultural references is not “construct[ing] a context any larger than is needed in order to arrive at an interpretation” and to enable the deaf person “to judge what the purpose of an utterance might be.”<sup>407</sup>

Other options available to the court might include breaks to permit educational sessions with counsel and the interpreters, role playing, pictures, instructing the witnesses to use simpler language, and even requiring the attorneys to use simpler language and to explain themselves. Some of the options we have discussed will cost money and take time, but others will not. The bottom line is that with creativity, the legal system can accommodate the needs of most deaf defendants, even those who lack a solid linguistic foundation. The system should be encouraged to draw on that creativity.

#### *B. When Competency to Stand Trial Is an Issue*

In those cases like Jesse's, trial counsel or the court may question whether communication will ever be possible even with every accommodation in the book. In those cases,<sup>408</sup> competency to stand trial must be raised. When the issue is raised, the court must ensure that the deaf person's competency is accurately and adequately assessed.

The nature and quality of competency evaluations are often a source of great exasperation for any judge or lawyer who is attempting to communicate meaningfully with a mentally, emotionally, or cognitively disabled defendant. Experienced forensic psychiatrists have referred to many competency assessments as “drive-by evaluations.”<sup>409</sup> In those cases, “a psychiatrist or psychologist sees an incarcerated person once briefly, and then issues a report.”<sup>410</sup> The report contains “an assessment of the accused's basic neurological functioning and orientation in the

---

406. See *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990).

407. *Wilcox*, *supra* note 161, at 95 (citation omitted).

408. Competency to stand trial is an issue only in criminal, juvenile delinquency, probation, and parole revocation proceedings. In Wisconsin, competency to assist with an appeal is also an issue. *Debra A.E.*, 188 Wis. 2d at 126, 523 N.W.2d at 732.

409. Michael N. Burt & John T. Philipsborn, *Assessment of Client Competence: A Suggested Approach*, THE CHAMPION, June 1998, at 18, 18, available at <http://www.criminaljustice.org/champion/articles/98jun04.htm> (last visited Dec. 1, 2003).

410. *Id.*

three spheres and may mention observations of the accused's apparent understanding of the charges, the function of the judge, and the function of the lawyers."<sup>411</sup> The report will then "conclude, based on this evaluation, that the accused is competent."<sup>412</sup>

As bad as the "drive-by evaluation" can be in the case of a hearing defendant, in the case of a deaf defendant with language deficits, such an evaluation can be irrelevant and dangerous. In order to assess a deaf person's competency, the court must direct the methods for assessing competency away from a cookie-cutter model to one that will address the specific issues that are unique to the language-deprived deaf defendant.

## 1. ASSESSING THE COMPETENCY OF THE DEAF DEFENDANT

### a. *The Assessment Process—A Multidisciplinary Approach*

Upon a request for a competency examination, a trial court will automatically appoint a psychiatrist or psychologist, usually one of the regulars who may conduct dozens, perhaps even hundreds, of forensic assessments every year.<sup>413</sup> A forensic psychiatrist or psychologist is certainly equipped to diagnose mental illness, personality disorder, and cognitive deficit, and to render an opinion as to whether the mental impairment would likely interfere with a person's ability to rationally understand the proceedings and assist counsel.

But a forensic psychiatrist or psychologist is ordinarily not qualified to render an opinion about the language issues that permeate the life of a deaf person.<sup>414</sup> For example, neither of the forensic psychiatrists who initially assessed Jesse had ever acquired any knowledge about deafness or evaluated a deaf person for competency to stand trial. They were unaware of how a mental-health professional would test the IQ of a deaf person.<sup>415</sup> A forensic psychiatrist or psychologist may also misinterpret what he observes during his assessment. Both of the forensic psychiatrists in Jesse's case encountered many nonanswers or tangential answers and immediately attributed them to lack of cooperation or motivation. "Mr. [R.] answered many questions with '... I don't know,' but it appeared that his responses were often a consequence of

411. *Id.*

412. *Id.*

413. The two court-appointed forensic psychiatrists who originally evaluated Jesse and found him competent had conducted over 1400 assessments between them.

414. See Brauer, *supra* note 125, at 248; NIDRR PRIORITY, *supra* note 93 (stating that effective mental-health assessments and treatment for a deaf or hard-of-hearing individual requires a provider familiar with their cultural and linguistic backgrounds).

415. *Jesse R.*, R. at 36, 57 (Dec. 5, 1996); *id.*, R. at 68 (Oct. 8, 1996).

his motivation as opposed to his real knowledge.”<sup>416</sup> To those not familiar with deafness and language deficit, malingering or unwillingness to cooperate may seem like the only logical explanation for an inability to answer the obvious. But to those who have worked with the deaf population, lack of language and background knowledge provide an explanation that is equally compelling.

Sole reliance on forensic psychiatrists and psychologists is clearly inappropriate in the case of a deaf defendant with severe language issues. Unfortunately, we have become so accustomed to the presence of the forensic psychiatrist or psychologist in competency cases that many lawyers and judges erroneously believe that mental-health professionals are the only experts who can render an opinion on the subject.<sup>417</sup> In fact, the statutes of a number of states provide that in addition to a psychiatrist or licensed psychologist, the court shall appoint *any* expert the court may deem appropriate.<sup>418</sup>

In order for the court to be able to make an informed ruling on a deaf person's competency, the opinion of a forensic psychologist or psychiatrist should be supplemented with the assessment and testimony of a psychiatrist or psychologist versed in the complexities of deafness, language, and development.<sup>419</sup> Expert testimony on the issue of the deaf person's communication ability may also come from a linguist who specializes in analyzing language style or an educator experienced in language assessments of deaf students.

#### *b. The Assessment Process—A Realistic Approach*

A common complaint about so many evaluations for competency to stand trial is that they approach the process like a civics exam, testing knowledge of the actors and procedures but missing the central question

---

416. *Id.* (June 11, 1996) (Report of Dr. John Pankiewicz, Psychiatrist).

417. When Jaech's testimony was offered on the topic of Jesse's capacity to rationally understand and communicate with counsel, the prosecutor objected that he was not a psychiatrist or psychologist and therefore not qualified to render an opinion. *Id.*, R. at 85 (Oct. 25, 1999). The objection was overruled. *Id.*

418. The Wisconsin Statutes state that when the question of a defendant's competency to stand trial is raised “[t]he court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant.” WIS. STAT. § 971.14(2). Chapter 725, section 5/104-13 of the Illinois Compiled Statutes provides that a court may appoint a psychiatrist, psychologist, physician or “such other experts as it may deem appropriate to examine the defendant and to report to the court regarding the defendant's condition.” 725 ILL. COMP. STAT. ANN. 5/104-13(b) (West 2003); *see also* United States v. Passman, 455 F. Supp. 794, 797 (D.D.C. 1978). Even in jurisdictions where competency statute discusses only mental competency, the trial court must also determine physical competency, which requires medical as opposed to psychiatric evidence. *Passman*, 455 F. Supp. at 797.

419. *See* McAlister, *supra* note 17, at 193-95.



of whether a defendant has a rational understanding and ability to communicate.<sup>420</sup> This simplistic method of evaluation has been criticized not only by defense attorneys,<sup>421</sup> but by courts as well. In a scathing opinion, the U.S. District Court for the Western District of Louisiana found that a competency assessment that dealt only with a defendant's factual knowledge—as opposed his ability to engage with the system rationally—did not even meet the Supreme Court's test for the admissibility of expert evidence.<sup>422</sup> The court observed that there is a substantial difference between understanding “trial elements” and the ability to “make intelligent legal decisions,”<sup>423</sup> and that “rote responses” do not mean that the defendant actually understands.<sup>424</sup> While those comments were made in connection with a retarded defendant, they apply equally to a language-deprived deaf defendant who has gotten through school and life by providing pat answers but with no idea of their meaning.

In order to move toward realistic assessments of deaf individuals' competence, a number of steps should be taken in the evaluation process itself. First, competency assessments of deaf individuals should include use of a competency testing instrument that measures more than the defendant's knowledge of the criminal justice system and also reflects more than the impressionistic, subjective conclusions of the examiner. The MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA) has been specifically cited for taking a more functional view of competency than other instruments<sup>425</sup> and for testing capacity to think rationally and appreciate the consequences of decisions. This test asks the defendant to draw inferences and to demonstrate decision-making. The test also focuses on capacity to plead guilty.

A forensic assessment instrument such as the MacCAT-CA cannot replace the clinical interview because the test cannot not “assess all dimensions relevant to ‘competence to stand trial’”<sup>426</sup> but it should be included as part of the evaluation process. The MacCAT-CA will provide the court with examples of the defendant's thinking and communication processes and information about the extent to which language deficit interferes with rational communication and thinking.

---

420. Burt & Philipsborn, *supra* note 409, at 18–19.

421. *Id.*

422. *United States v. Duhon*, 104 F. Supp. 2d 663, 677–78 (W.D. La. 2000).

423. *Id.* at 671.

424. *Id.* at 677.

425. GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS, A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 145–50 (1997) (referring to MacCAT-CA as MacSAC-CD); *see also* Burt & Philipsborn, *supra* note 409, at 26.

426. Burt & Philipsborn, *supra* note 409, at 26.

Among the other tests that should be used is an IQ test to measure the possibility of cognitive deficits above and beyond those connected to the language deficit. Administering this test will require special accommodations because only certain IQ tests are valid for deaf individuals.<sup>427</sup> In addition, the results should be interpreted by a professional who is knowledgeable about testing within the deaf and hard-of-hearing population. Too often, mental-health professionals with no experience in deafness misconstrue the results of a deaf person's standardized tests.<sup>428</sup>

A realistic assessment of a deaf person's competency to stand trial must include measures of the person's language ability. A court simply cannot determine competence without knowing whether the deaf individual possesses the necessary linguistic raw materials.

English should be tested by a reading exam (one or more) that is a valid and reliable measure of the vocabulary and comprehension of deaf people.<sup>429</sup> Like the IQ test, the reading test should be interpreted by a person trained in deafness.

Sign language skills must also be tested, which can be accomplished in several ways. In most instances, the most readily accessible method would be to appoint an educator or linguist skilled in sign-language assessment to conduct the test. This test will be clinical and impressionistic in nature but can provide the court with a reasonable estimate of where the deaf person's signing skills fall in relation to the general deaf community. A more quantitative analysis—the Sign Communication Proficiency Interview (SCPI)—is available in limited areas with larger deaf populations, such as Washington, D.C.<sup>430</sup> This instrument tests different aspects of signing skill and rates the sign language ability of a deaf person from “superior” to “survival.” However, the SCPI can be administered only by a specially trained team of testers and is not widely available at this point.<sup>431</sup>

---

427. For example, the performance sections of the WAIS-III and the WISC-III intelligence tests are normed for deaf people. Gallaudet Research Inst., *Review of Four Types of Assessment Instruments Used with Deaf and Hard-of-hearing Students: Cognitive Assessment*, at <http://gri.gallaudet.edu/~catraxle/INTELLEC.html> (last visited Dec. 1, 2003).

428. Brauer, *supra* note 125, at 248.

429. The Reading Comprehension subtest of the Stanford Achievement Test (SAT), 9th Edition, is one reading test that is normed for deaf people. Gallaudet Research Inst., *Literacy & Deaf Students*, at <http://gri.gallaudet.edu/Literacy> (last visited Dec. 1, 2003).

430. This test is used to assess sign language skills of college students at Gallaudet University and the National Technical Institute for the Deaf in Rochester, New York.

431. For a description of this test, see Frank Caccamise & William Newell, *The Sign Communication Proficiency Interview (SCPI): A Brief Description*, Sept. 2000, at Rochester Inst. of Tech., <http://www.rit.edu/~wjnncd/scpi/Desc.html>.

Finally, all competency interviews should be videotaped, especially when the assessor must rely on an interpreter.<sup>432</sup> Whether intentionally or not, the interpreter can affect the competency interview, which may in turn affect the assessor's conclusions.<sup>433</sup> A videotape will make the entire process available for independent review.

## 2. ATTORNEY INPUT

A realistic, multidisciplinary approach must also include input from the deaf person's attorney. As scholars in the field of forensic assessments have noted, "one prong of the competency standard is directly concerned with the relationship between the attorney and the client, and the other prong partially depends on the success of the attorney's efforts to educate the defendant about the nature of the proceedings."<sup>434</sup> One noted jurist, the Honorable David Bazelon, similarly encouraged attorney input in the competency determination. "[C]ounsel's first-hand evaluation of a defendant's ability to consult on his case and to understand the charges and proceedings against him may be as valuable as an expert psychiatric opinion on his competency."<sup>435</sup>

Attorney testimony is all the more valuable in a case where the alleged incompetency is based on language deficiency because that disability goes to the heart of the attorney-client relationship. At its most basic, an attorney-client relationship is premised on the client's ability to understand and process information provided by the attorney.<sup>436</sup>

The information provided by counsel to the court, either in the form of testimony or a report, should carefully focus on the specifics of the communication process as opposed to conclusory statements about ability or inability to assist with the defense. The record should include details about what was said by the attorney and responses by the client. In particular, counsel should be prepared to describe exactly how the client responded during discussions of procedure, potential options, consequences of decisions, and likely outcomes. Counsel should provide specifics about areas of misunderstanding and how this could affect the course of the defense. Where applicable, counsel should also offer testimony about alternative methods of communication that were attempted, such as picture drawing or role playing (e.g. "pretend I am the prosecutor") and the success or lack of success with each. All of this information is both relevant and necessary to any determination by

---

432. *Cf. Stanley*, 700 N.E.2d at 895.

433. *See generally* METZGER, *supra* note 101.

434. MELTON ET AL., *supra* note 425, at 150.

435. *United States v. David*, 511 F.2d 355, 360 (D.C. Cir. 1975).

436. *See* Cowden & McKee, *supra* note 338, at 641-44.

the court of whether the deaf client is capable of a meaningful attorney-client relationship based on rational communication.<sup>437</sup> Arguably, no court should ever make a competency determination without it.

### 3. TREATMENT THAT FITS

A finding of incompetency to stand trial is not a popular resolution to any case. There is a common belief that a finding of incompetency to stand trial allows criminals to avoid responsibility and lets murderers go free.<sup>438</sup> At the other end of the spectrum, practitioners and mental-health professionals have expressed concern that incompetency statutes are too easily exploited when the criminal system would rather not deal with a person, especially in cases involving minor offenses.<sup>439</sup> There is increased potential for misuse of the incompetency statutes when dealing with a deaf person whose communication needs are both time-consuming and expensive to accommodate.<sup>440</sup>

Yet however imperfect incompetency to stand trial may be in theory or in practice, there will be deaf people like Jesse who must be placed in this category. When this happens, it is incumbent on the court to not only commit the defendant for treatment but also to ensure that the treatment fits.<sup>441</sup>

No medication will give language to a linguistically deficient deaf person. No behavior modification program will give language to a

---

437. Obviously, attorney testimony raises a number of potential ethical and practical concerns. The trend generally has been to permit attorney testimony in competency proceedings. *But see* *State v. Meeks*, 2003 WI 104, ¶¶ 1-2, 263 Wis. 2d 794, 798, 666 N.W.2d 859, 861 (holding that the former counsel's testimony that defendant was competent violated attorney-client privilege). However, counsel should be circumspect and not provide details that do not bear directly on the quality of communication. In those occasional cases where attorney testimony on the issue of competency may do irreparable damage to the attorney-client relationship and the client has not waived attorney-client privilege, the court and counsel may want to consider an attorney-expert who conducts an independent assessment and interview and then reports to the court. *See generally* Burt & Philipsborn, *supra* note 409; Norma Schrock, Note, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEO. J. LEGAL ETHICS 639 (1996).

438. *See* Smith, *supra* note 9, at 121.

439. Walter Dickey, *Incompetency and the Nondangerous Mentally Ill Client*, 16 CRIM. L. BULL. 22 (1980).

440. A study in Great Britain found that deaf people were found "unfit for trial" in numbers far exceeding their representation in the general population and even within the criminal justice system. Alys Young et al., *Deaf people with Mental Health Needs in the Criminal Justice System: A Review of the UK Literature*, 11 J. OF FORENSIC PSYCHIATRY 556, 563 (Dec. 2000). Further inquiry showed that the primary cause of their "incompetency" was the fact that they were not fluent in English and relied on British Sign Language, a fact that made the deaf defendants more difficult to accommodate. *Id.*

441. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

linguistically deficient deaf person. The best option—the only option—is education by specialists in the area of deafness.

As part of the commitment order, the trial court should include an order for an education program specifically designed to meet the needs of the deaf individual. This type of program requires much more than the ubiquitous competency classes that attempt to teach the incompetent person about procedures in the criminal justice system.<sup>442</sup> A deaf person with a severe language deficiency will simply not respond to that type of indoctrination, even with an interpreter. He does not have the linguistic foundation with which to process the information. Forcing a linguistically deficient deaf person to memorize the definitions of judge, lawyer, jury, and guilty plea will ensure only that he can recite the answers, not that he can communicate rationally. In order for rational communication to happen, a program centered on the slow, laborious process of building a linguistic foundation must be in place.

Educating a deaf person like Jesse to the level of competency is not an easy process. Jesse is well past the prime age for language acquisition and the experts who evaluated him were not particularly hopeful. As the most optimistic expert put it, "I think anything is possible in his case, but I can't tell you if it would happen in a short period of time."<sup>443</sup> But all of the experts were in agreement about one thing: it was worth a try.

### C. Cost

No discussion of accommodating linguistically deficient deaf defendants and subjects in the legal system is complete without acknowledging the issue of cost. It is a very real consideration in legal systems hard-pressed for time and money, and even the most generous court will legitimately factor cost into its decisions about accommodations for a deaf defendant. However, when concerns over budget, court calendar, and convenience take precedence and dominate the process, those concerns are unreasonable.<sup>444</sup>

Due process does not require that accommodations for a deaf person force a county to the brink of financial ruin or turn a one-day misdemeanor trial into a month-long ordeal.<sup>445</sup> Due process does not require that a defendant be afforded every possible accommodation under the sun or that she be evaluated by the leading expert in the nation. Due process does not require the perfect trial.<sup>446</sup> Appropriate

---

442. See *Duhon*, 104 F. Supp. 2d at 677-78.

443. *Jesse R.*, R. at 87 (Oct. 25, 1999).

444. *Mosquera*, 816 F. Supp. at 176.

445. *Ferrell*, 568 F.2d at 1131.

446. *Id.*

accommodations are achieved by balancing the “defendant’s constitutional rights to confrontation and due process against the public’s interest in the economical administration of criminal law.”<sup>447</sup>

But due process does come with a price, and whether the funding sources like it or not, the legal system is expected to pay that price.<sup>448</sup> The fact that adequately meeting the communication needs of a linguistically deficient deaf defendant or subject will tap resources does not excuse a court from meeting its obligations to due process. As Judge Weinstein put it, “[i]f the government cannot afford to provide due process to those it prosecutes, it must forego prosecution.”<sup>449</sup>

## V. CONCLUSION

In this age of special education, technological advances, and disability rights, it is hard to believe that there are still so many deaf and hard-of-hearing Americans who never fully acquired a language. The fact that language continues to bedevil so many deaf people is a testament to the magnitude of the problem.

There is some cause for optimism. Advances in technology for the detection of hearing loss, including infant screening programs, have assisted in earlier discovery of hearing loss. It is still not certain “whether early diagnosis is necessarily coupled with early provision of language, but it is logical to assume some connection between diagnosis and attempts to provide language exposure.”<sup>450</sup>

On the downside, education for deaf and hard-of-hearing children in the United States is still the victim of politics, budget cuts, shifting educational philosophies, and bitter debate. There is still no consensus about the best way to teach deaf children or whether there even is a best way.<sup>451</sup> Depending on where they go to school, deaf children can be taught in ASL (with English taught as a second language), via Total Communication (speaking and signing English at the same time), in

447. *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980).

448. *See, e.g., Mosquera*, 816 F. Supp. at 176.

449. *Id.*

450. BRADEN, *supra* note 26, at 28.

451. In 2003, the father of a deaf nine-year-old who had successfully received a cochlear implant wrote an opinion piece in *Newsweek* in which he declared that oralism has prevailed over those who advocate instruction via sign and called his daughter a “walking, talking billboard for the effectiveness of oralism.” Jim Reisler, *Technology: Improving Sound, Easing Fury*, *NEWSWEEK*, Feb. 24, 2003, at 16. A teacher of the deaf responded with a letter to the editor stating:

As a teacher of the deaf and hard-of-hearing, I see many cases where the implant has not been successful. . . . The bottom line is that implants do not bring success for each child and that other methods, such as sign language, need to be explored so that all kids can reach for their dreams.

Darlene Combs, Letter, *NEWSWEEK*, Mar. 10, 2003, at 16.

manually coded English, in spoken English, or in some combination.<sup>452</sup> Mainstream programs in public schools often rely on interpreters (some are certified, but many are not); others try to use amplification in order to save money.<sup>453</sup>

Of course, some education programs for the deaf are successful, as demonstrated by the growing number of deaf students in college and professional school, but on the whole, educating the deaf is still a struggle. The median reading level among deaf high-school seniors continues to hover around fourth grade,<sup>454</sup> which suggests that for all of the developments in methodology over the past thirty years, deaf education is still haunted by the ghosts of Peet's language system, Jacobs's primary lessons, Wing's symbols, and Barry's five slate system.<sup>455</sup>

Language deficit among so much of the deaf and hard-of-hearing population is a complicated issue—one that is difficult to even understand, let alone fix. In many respects, it almost seems unfair to expect judges and lawyers to address the problem adequately when experts in the field are still searching for answers. Nevertheless, these deaf individuals will enter the justice system, and, like every other person, they have the right to due process and access to justice, which the legal system must provide.

Working with the deaf person who is semilingual or has minimal language skills can at times be mysterious, time-consuming, and frustrating. To suggest otherwise would be both dishonest and foolish. Perhaps the largest hurdle for players in the justice system is the acknowledgment of language deficit in the first place. Language deficit hardly seems possible in the twenty-first century, but it is very real. Once we acknowledge that reality, accommodations that ensure genuine communication make both constitutional and practical sense. In fact, the legal system already has most of the tools. We just have to use them.

---

452. The Wisconsin School for the Deaf uses a bilingual-bicultural method. ASL is the primary language of communication, but English is taught. Sign language is emphasized, but a number of students sign and speak. St. Joseph Institute and Central Institute for the Deaf in St. Louis, by contrast, are oral schools, where speech-reading and speech are emphasized.

453. See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. 176, 184 (1982).

454. Marlon Kuntze, *Literacy and Deaf Children: The Language Question*, 18 TOPICS IN LANGUAGE DISORDERS, Aug. 1998, at 1, 1; see also *supra* note 29.

455. These were models developed in the 1800s to systematically teach English to deaf children. Over the years, they have all been found to be ineffective. DONALD F. MOORES, *EDUCATING THE DEAF: PSYCHOLOGY, PRINCIPLES, AND PRACTICES* 214 (1st ed. 1978).