Procedural Due Process: A Deaf Defendant's Right to Be Heard Should Encompass a Right to "Hear" Civil Trials Through Interpretation

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NOTES

PROCEDURAL DUE PROCESS: A DEAF DEFENDANT'S RIGHT TO BE HEARD SHOULD ENCOMPASS A RIGHT TO "HEAR" CIVIL TRIALS THROUGH INTERPRETATION

Deaf persons, like other persons who become the object of a civil lawsuit, are compelled to participate in the adversary system to protect their liberty and property. For a deaf defendant, however, a civil trial without some form of interpretive language assistance is reduced to an unintel-

1. For a definition of deaf persons, see J. SCHEIN & M. DELK, JR., THE DEAF POPULATION OF THE UNITED STATES 132 (1974) [hereinafter cited as THE DEAF POPULATION]. There is no universally accepted definition of the term "deaf"; the definition varies with the particular discipline that propounds it. Id. at 132. This article adopts the functional definition used by social scientists who conducted the National Census of the Deaf Population (a 1970 survey of the deaf population in the United States): "[D]eafness . . . refers to the inability to hear and understand speech." Id. at 133. For another functional definition of deafness, see H. DAVIS & S. SILVERMAN, HEARING AND DEAFNESS 88 (4th ed. 1978) [hereinafter cited as HEARING AND DEAFNESS].

In 1979, Black's Law Dictionary adopted a functional definition, classifying as deaf "any person whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone." BLACK'S LAW DICTIONARY 359 (5th ed. 1979). The fourth edition contained only one reference to deafness; namely, "deaf and dumb" with the following definition: "A man that is born deaf, dumb, and blind is looked upon by the law as in the same state with an idiot, he being supposed [sic] incapable of any understanding." BLACK'S LAW DICTIONARY 487 (4th rev. ed. 1968).

Deafness should be distinguished from hearing disorders of less severity such as being hard of hearing. See HEARING AND DEAFNESS, supra at 87-89. See also R. HARDY & J. CULL, EDUCATIONAL AND PSYCHOSOCIAL ASPECTS OF DEAFNESS 52-62 (1974) [hereinafter cited as PSYCHOSOCIAL ASPECTS OF DEAFNESS]. It should also be distinguished from neurological conditions such as dumbness, idiocy, imbecility, or muteness. For some insights into the perceptions of a deaf person, as related by a deaf attorney, see L. MEYERS, THE LAW AND THE DEAF 8-13 (1964).

2. For purposes of this Note, the term "civil trial" denotes standard civil courtroom litigation, both at law and in equity, of liberty and property interests. Note, however, that the arguments presented in support of a right to interpretation in civil trials may apply with equal force to other proceedings that fall within the broad class of noncriminal adjudication. State statutes providing for mandatory or permissive interpretation use a variety of terms to characterize the type of proceeding to which the statute applies, including "civil action," "civil proceeding," and "civil trial." For a list of these statutes, see note 30 infra.
ligible and empty ritual. In an uninterpreted trial, a deaf defendant’s right to be heard in his own defense is significantly impaired, i.e., identification by the deaf defendant of factual misstatements is highly improbable and the opportunity for effective confrontation is correspondingly diminished. Furthermore, participation in defensive strategy through communication with counsel during the trial phase is critically impaired. In effect, deaf defendants are functionally excluded from uninterpreted trials. One court, noting the impact of functional exclusion upon a deaf defendant’s constitutional rights, characterized mere physical appearance at an uninterpreted trial as “[u]seless, bordering on the farcical.”

Despite the apparent injustice of proceeding in the functional absence of a deaf defendant, language assistance is generally not a legal entitlement in civil trials. The common law does not recognize a right to interpretation. Moreover, a survey of federal statutory law reveals that a right to interpretation of civil trials is not available in federal actions between private parties, which comprise the vast majority of federal civil actions. At the state level, twenty-two jurisdictions and the District of Columbia do not provide a statutory right to interpretation of civil trials. In the remaining twenty-eight states, the right to interpretation is often circumscribed by provisions that place responsibility for compensation of an interpreter upon the deaf defendant. Finally, an entitlement to interpretation of civil trials cannot be found in the textual provisions of the state or federal constitutions. Yet, it is a well-established constitutional principle that persons threatened by governmental deprivation of liberty or property possess a right to be heard in their own defense. This procedural due process guarantee, derived from the fifth and fourteenth amendments, has been held implicitly to re-

3. Terry v. State, 21 Ala. 100, 102 (1925) (court refused to appoint an interpreter for deaf defendant accused of murder; held reversible error even though the deaf defendant was represented by counsel). While Terry involved a criminal proceeding, arguably the judge’s observations regarding the impact of functional exclusion upon the deaf defendant’s ability to participate meaningfully in the proceeding is equally applicable to a civil proceeding. See Jara v. Municipal Court, 21 Cal. 3d 181, 189, 578 P.2d 94, 98, 145 Cal. Rptr. 847, 851 (1978) (Tobriner, J., dissenting), cert. denied, 439 U.S. 1067 (1979) (Spanish-speaking defendants who are denied a court-appointed interpreter are “forced to stand by while their possessions and dignity are stripped from them”).

4. See note 39 infra.

5. See note 30 infra.

6. See note 31 and accompanying text infra.

7. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (“no doubt exists that notice and hearing are prerequisite to due process in civil proceedings”); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950) (at a minimum, due process requires notice and opportunity for an appropriate hearing prior to deprivation of life, liberty, or property); Grannis v. Ordean, 234 U.S. 385, 394 (1914) (“the fundamental requisite of due process law is the opportunity to be heard”).
quire a variety of procedures that are incidental to adjudicative processes. Although the right to interpretation has not been subjected to a due process analysis, it may be precisely the type of incidental procedure that is necessary to achieve fairness in civil trials that involve deaf defendants.

To assess the constitutional sufficiency of an uninterpreted trial, Section I of this Note examines the nature and extent of functional impairment experienced by a deaf defendant who does not receive interpretive language assistance of any kind. In addition, the utility of interpretive and noninterpretive modes of communication as means of securing participation in the trial will be evaluated. Section II surveys state and federal law to identify existing sources of a right to interpretation. Finally, Section III applies the Supreme Court's current due process methodology established in Mathews v. Eldridge to determine whether interpretation is a constitutionally required incident of procedural due process for deaf defendants. 8


10. The arguments presented in this article apply not only to deaf defendants but also to deaf plaintiffs to the extent that a plaintiff's inability to bring suit due to the lack of the right to interpretation deprives him of the right to protect property and liberty interests. See 44 Fed. Reg. 54,961 (1979) (to be codified at 28 C.F.R. § 42.523) ("[Court systems] shall provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills.") (emphasis added); id. at 54,955 (auxiliary aids to include interpreters for the deaf).

This Note is not based upon decisions involving the constitutional necessity of interpretation for non-English speaking persons. Rather, the deaf are subjected to a separate due process analysis since their relatively small number within the population distinguishes them from some non-English speaking persons for the purposes of the Mathews formulation. For constitutional arguments in support of interpretation for non-English speaking defendants, see Note, The Right of an Indigent Non-English Speaking Defendant to an Interpreter in Civil Proceedings, 40 OHIO ST. L.J. 677 (1979); Comment, Breaking the Language Barrier: New Right for California's Linguistic Minorities, 5 PAC. L.J. 648 (1974); Note, The Right to an Interpreter, 25 RUTGERS L. REV. 145 (1970).

This Note does not explore possible equal protection arguments of a deaf defendant foreclosed from meaningful access to trial due to his inability to pay an interpreter. Courts generally have not looked favorably on such equal protection arguments raised by indigent foreign language speakers. See, e.g., Jara v. Municipal Court, 21 Cal. 3d 181, 185, 578 P.2d 94, 96, 145 Cal. Rptr. 847, 849 (1978), cert. denied, 439 U.S. 1067 (1979). Arguably, a due process claim could be made, however, since the procedural due process standard of fairness guaranteed by the services of an interpreter should not be defined by the financial status of the individual who seeks to invoke its protection. See S. REP. No. 569, 95th Cong., 1st Sess. 7-8 (1977) [hereinafter cited as SENATE REPORT] ("role played by the interpreter [is] . . . so basic that it should be considered part of the service offered to citizens as a cost of maintenance of the courts, and not a cost of litigation"). This Note also does not explore the possibility of a right to interpretation under § 504 of the Rehabilitation Act of 1973, although it is believed this may become an important basis for entitlement to interpretation in civil proceedings. 29 U.S.C. § 794 (1976). See note 34 infra.
I. FUNCTIONAL EXCLUSION FROM UNINTERPRETED CIVIL TRIALS

As an analytical prerequisite to a due process inquiry, it should be established that the absence of the proposed procedure — some form of language assistance — results in the impairment of a deaf defendant’s right to be heard. Such an impairment may be proved by reference to the nature of deafness, the situational uselessness of noninterpretive modes of communication, and their impact upon a trial proceeding. By definition, a deaf person cannot hear or understand normal speech.\(^1\) Thus, without language assistance, a deaf defendant cannot hear or understand testimony of witnesses, the judge's comments, or the attorneys' remarks. Moreover, speechreading, which is the ability to understand a speaker's thought by watching his lips and facial expressions,\(^2\) cannot be considered as an alternative mode of communication for the purposes of a trial. Although speechreading is occasionally useful in the comprehension of ordinary conversations, its value in a courtroom is negligible due to the number of detrimental conditions that exist, such as the number of persons involved in a trial, dim lighting, distance from the defense table to the various speakers, individual articulation styles of the speakers, and the unavailability of contextual cues due to the average defendant's lack of familiarity with legal proceedings and terminology.\(^3\) Additionally, other noninterpretive alternatives to speech such as public address systems and hearing aids are of minimal value since they merely transform inaudible courtroom discourse into noise for the many deaf defendants who experience distortion problems as well as a volume loss in hearing.\(^4\) Finally, tran-
scription of the trial proceeding is, for all practical purposes, infeasible as a method of communication during trial because a transcriber would not keep pace with the proceedings. Even if simultaneous transcription were possible, its effectiveness would be severely eroded since deaf persons' reading skills generally are lower than those of the general population.15

Upon establishing the existence of functional impairment, it is necessary to determine whether the impairment is de minimis, thus presenting no real constitutional question, or substantial, thus interfering impermissibly with a deaf defendant's right to be heard. The precise degree of functional impairment attendant to an uninterpreted trial is difficult to ascertain, but quantification may be attempted by reference to the physical characteristics of speech articulation, the inherent limitations of speechreading technique, the difficulty of mastering speechreading, and environmental conditions existing in the courtroom.16 Under ideal conditions, only about one-third of English words are visible on a speaker's lips.17 Thirty to forty percent of these visible words are homophenous, that is, they appear as identical lip and facial formations.18 Thus, to understand a spoken message, a deaf person must reconstruct, or synthesize, communicated concepts by piecing together component parts of the message and by deriving meaning from nonspeech devices such as contextual cues, knowledge of English grammar and syntax, and knowledge of current affairs.19 There is a high potential for error and misinterpretation inherent in the process of synthesizing. The usefulness of speechreading as a speech supplement both in and out of the courtroom is seriously diminished by the fact that

15. See generally The Deaf Population, supra note 1, at 51 (more than half of the adult deaf population has not completed high school, and 28% have completed only the eighth grade or less). Studies have shown that the majority of deaf students in the United States do not possess native competence in English. Charrow & Fletcher, English as the Second Language of Deaf Children, 10 Developmental Psychology, No. 4, 463-70 (1974).

16. Factors other than environmental conditions that affect speechreading include physical and psychological factors such as articulation, rate, homophenous words (words that appear as identical formations on the lips, e.g., "pill" and "bill"), stress, intonation, phrasing, visual acuity, distance, angle of vision, age and intelligence levels, vocabulary and language skills, self-confidence, emotional stability, concentration, alertness, patience, and perseverance. A. Sortini, Speechreading — A Guide For Laymen 7-11 (2d ed. 1958). See also Speechreading, supra note 12, at 20-35.

17. See Hearing and Deafness, supra note 1, at 375. See also L. Katz, S. Mathis III & E. Merrill Jr., The Deaf Child in the Public Schools 15 (2d ed. 1978).

18. Interview with Carol Garretson, Assistant Professor of Communication Arts, Gallaudet College, Washington, D.C. (May 23, 1980).

19. The ability to derive meaning from speech, where a significant portion of the sensory information is missing or not perceived, is called synthesizing. See generally Speechreading, supra note 12, at 25-30.
many deaf persons do not learn to speechread effectively. 20 Finally, whatever level of comprehension is possible by speechreading under ideal conditions is dramatically decreased by the less than perfect conditions in the ordinary courtroom. Unfavorable conditions and the inherent limitations of speechreading combine to reduce a deaf defendant's unaided comprehension of courtroom proceedings to a virtual nullity 21 and thus result in his functional exclusion.

To alleviate the functional exclusion experienced by a deaf defendant, some form of language assistance must be provided. 22 Sign language may be the preferable mode of communication for most deaf defendants since sign language of one form or another is understood by the majority of deaf adults in the United States today. 23 Sign language features many of the

20. PSYCHOSOCIAL ASPECTS OF DEAFNESS, supra note 1, at 66.
21. This quantification of exclusion is derived by considering that: (1) 52.2% of deaf adults who completed grade 12 considered themselves only "poor" to "fair" speechreaders in a 1970 survey, THE DEAF POPULATION, supra note 1, at 63; (2) estimates show that only a small percentage of the deaf population learns to speechread effectively; PSYCHOSOCIAL ASPECTS OF DEAFNESS, supra note 1, at 66; and (3) a significant reduction of the effectiveness of speechreading is caused by courtroom conditions, note 13 and accompanying text, supra.
22. Deaf persons may benefit from manual interpretation based upon American Sign Language (ASL) or manual interpretation using an English based code with simultaneous lip movement ("simultaneous communication"). They may also benefit from oral interpretation (lip and facial movements only) or some other form of interpretation. This Note does not advocate limiting the modes of interpretation utilized to ensure communicational participation by a deaf defendant; the deaf defendant's understanding of the trial proceeding is at issue, not the establishment of an official form of language assistance. Due to the practical limitations of speechreading, however, some form of sign language interpretation is necessary to prevent functional exclusion. It should be noted that the use of the term "language assistance" is not intended to convey the idea of entitlement to aid such as welfare. Language assistance, rather, is intended to mean that form of procedure necessary to accommodate the physical characteristics of the deaf defendant. See Willner v. Committee on Character and Fitness, 373 U.S. 96, 107 (1963) (Goldberg, J., concurring) ("circumstances determine the necessary limits and incidents implicit in the concept of a fair hearing"). Thus, the provision of interpretation should be viewed as a means of securing compliance with the minimum requirements of due process rather than a conferral of extra benefits or privileges upon the deaf defendant.
23. Although scientifically derived statistics do not exist, it is believed that the vast majority of deaf persons understand sign language of one form or another. Interview with Michael Karchmer, Director of the Office of Demographic Studies, Gallaudet College, Washington, D.C. (Jan. 2, 1980). Moreover, deaf adults at all levels of education rate their sign language skills as superior to their speechreading skills. THE DEAF POPULATION, supra note 1, at 63. The predominant sign language system used by deaf adults in the United States is American Sign Language (ASL). ASL, linguistically distinct from English, is a language in which manual gestures represent concepts. H. MARKOWICZ, AMERICAN SIGN LANGUAGE: FACT AND FANCY 9 (2d ed. 1978). Signs are discretely structured movements in much the same way that words are structured sounds. Id. at 22. See also C. BAKER & C. PADDEN, AMERICAN SIGN LANGUAGE — A LOOK AT ITS HISTORY, STRUCTURE AND COMMUNITY 1 (1978) [hereinafter cited as AMERICAN SIGN LANGUAGE]. The rate and amount
linguistic characteristics of a full communication system and has been recognized by linguists in the academic community as a "formal" language.\textsuperscript{24} Sign language is capable of transmitting the same range of abstract and concrete concepts as English.\textsuperscript{25} Additionally, intonation, syntax, and other linguistic variations may be conveyed to the deaf defendant through sign language interpretation.\textsuperscript{26} As a practical matter sign language interpretation is perhaps the only feasible way to prevent the functional exclusion of deaf defendants from civil trials.\textsuperscript{27}

of information conveyed in sign and speech communications are about the same. Bonvillian, Nelson & Charrow, \textit{Language and Language Related Skills in Deaf and Hearing Children}, 12 \textsc{Sign Language Studies} 211. A common misconception about sign language is that it is universal. H. Markowitz, \textit{supra}, at 7, 30. Actually, national sign languages are mutually distinct, \textit{id.}, and regional and cultural variations exist even within the United States. \textit{id.} at 28-29.

Systems of sign language other than ASL are also used by deaf adults. These systems are sometimes used by some deaf adults to make themselves understood by hearing people. \textit{id.} Among the signed codes for English are Signed English and Signing Exact English (S.E.E.). For general information on sign language, see E. Klima & U. Belluzzi, \textit{The Signs of Language}, (1978); L. Friedman, \textit{On the Other Hand: New Perspectives on American Sign Language} (1977); P. Siple, \textit{Understanding Language Through Sign Language Research} (1978); Stokoe, \textit{Sign Language Diglossia}, 21 \textsc{Studies in Linguistics} 27-41.


27. It should be noted that a certified sign language interpreter may not always be available. In the United States, only 1,007 interpreters possess a comprehensive skills certificate (C.S.C.) issued by the National Registry of Interpreters for the Deaf. Interview with Edna R. Kahn, Administrative Assistant, National Registry of Interpreters for the Deaf, Inc., Sil-
II. HISTORICAL BACKGROUND: A SURVEY OF COMMON LAW AND STATUTORY SOURCES OF A DEAF DEFENDANT'S RIGHT TO INTERPRETATION OF CIVIL TRIALS

At common law, a deaf defendant does not have a right to interpretation of a civil trial. Rather, the decision to provide interpretation rests within the discretion of the trial judge. The trial judge is considered competent to determine both the necessity for and the qualifications of an interpreter. Although the competence of judges to make these determinations has been questioned, the broad power of discretionary appointment still prevails in jurisdictions where appointment of an interpreter is controlled by the common law.

Twenty-eight states have modified the common law rule by requiring interpreters for deaf defendants in civil proceedings. In practice, however Spring, Md. (Jan. 16, 1980). A C.S.C. is awarded to those interpreters who possess a high degree of skill in a broad range of interpretive disciplines: expressive interpreting, expressive translating, reverse interpreting, and reverse translating. Only 75 interpreters across the country have a Legal Skills Certificate (L.S.C.) and 135 have a provisional Legal Skills Certificate. Id. Interpreters who possess an L.S.C. or a provisional L.S.C. are presumptively, though not always, competent to interpret legal proceedings. The various state and federal statutes often require their enlistment over uncertified interpreters. See, e.g., 28 U.S.C.A. § 1827(b)-(e) (West Supp. 1979); Ga. Code Ann. § 99-4001-4006 (1976); S.C. Code § 15-27-110 (1977). In the event a certified interpreter is unavailable, arguably an uncertified interpreter may be used so long as he is able to communicate effectively with the deaf defendant. Indeed, effective communication—not certification—should be the standard of qualification for an interpreter. In the event that no qualified interpreter, whether certified or not, is available, the trial should not proceed unless some other form of language assistance is implemented that is appropriate for the particular defendant.


ever, the statutory entitlement to interpretation is circumscribed in many
states because the deaf defendant must bear the costs of the interpreter's
services. 31 Despite wide differences in their language, the statutes appear
to be premised upon the belief that an interpreter is necessary to ensure the
factual accuracy of a deaf defendant's trial. 32 The effect of state interpreter
statutes is to limit the discretion of trial judges to determine whether, upon
a threshold showing of need, to appoint an interpreter for a particular deaf
defendant. However, due to the limited availability of state interpreter

interpreter for a deaf party within the discretion of the trial judge. see, e.g., REV. R. CIV. P.
43(f); VA. R. CIV. P. 43(f), or have maintained the common law rule of discretion. see note
28 and accompanying text supra. Significantly, most of the mandatory interpreter statutes
provide a right to interpretation for parties, presumably meaning party-plaintiffs as well as
party-defendants.

The following states require the court to provide an interpreter for a deaf witness: ARK.
STAT. ANN. § 27-835 (1979); CAL. EVID. CODE § 752 (West 1966); CONN. GEN. STAT. ANN. §
17-137k (West Supp. 1979); DEL. CODE ANN. tit. 10, § 8907 (Supp. 1978); FLA. STAT. ANN. §
90.243 (West Supp. 1978); GA. CODE ANN. § 99-4002 (1976); IDAHO CODE § 9-205 (1979);
ILL. ANN. STAT. ch. 51, § 48.01 (Smith-Hurd 1978); IND. CODE ANN. § 34-1-14-3 (Burns
1973); IOWA CODE ANN. § 622A.2 (West Supp. 1979-80); KAN. STAT. ANN. § 75-4351 (1977);
LA. CODE CIV. PRO. ANN. art. 192.1 (West Supp. 1980); MD.CTS. & JUD. PROC. CODE ANN.
§ 9-114(a) (West Supp. 1979); MASS. GEN. LAWS ANN. ch. 221, § 92A (West Supp. 1979);
MINN. STAT. ANN. § 546.43 (West Supp. 1980); MISS. CODE ANN. § 13-1-16 (Supp. 1979);
MONT. REV. CODES ANN. § 93-514 (Supp. 1975); NEB. REV. STAT. § 25-2403 (1975); NEV.
REV. STAT. § 50.050 (1975); N.J. STAT. ANN. § 2A 11-28.1 (West Supp. 1979-80); N.Y. JUD.
LAW § 390 (McKinney Supp. 1979-80); N.C. GEN. STAT. § 8A-1 (Supp. 1979); N.D. CENT.
CODE § 31-01-11 (Supp. 1979); OHIO REV. CODE ANN. § 2311.14 (Page Supp. 1978); OR.
REV. STAT. § 44.095 (1977); R.I. GEN. LAWS § 8-5-8 (1970); S.C. CODE § 15-27-110 (1977);
S.D. COMPILED LAWS ANN. § 19-3-7 (Supp. 1977); TENN. CODE ANN. § 24-108(d) (Supp.
1979); TEX. REV. CIV. STAT. ANN. art. 3712(a) (Vernon Supp. 1980); WASH. REV. CODE
ANN. § 2.42.030 (Supp. 1978); W. VA. CODE § 57-5-7 (Supp. 1979).

The following states expressly provide for the discretionary appointment of an interpreter
for a deaf witness: ALA. CODE tit. 12, § 21-131 (1975); ARIZ. REV. STAT. § 12-241 (1956);
COLO. REV. STAT. § 13-90-113 (1973); HAWAII REV. STAT. tit. 32, § 606-9 (1976); MO. ANN.
STAT. § 476.060 (Vernon 1949); N.M. STAT. ANN. § 16-1-6 (1953); 42 PA. CONS. STAT. ANN.
§ 2301 (Purdon 1979).

In the remaining states, appointment of an interpreter for a deaf witness is discretionary
by a state rule of procedure or the common law. Two states, Nebraska and Washington,
expressly state that an interpreter for deaf witnesses and parties is necessary to protect the
defendant's right to a fair trial. NEB. REV. STAT. § 25-401 (1975); WASH. REV. CODE ANN. §
2.42.010 (Supp. 1978).

31. See, e.g., OR. REV. STAT. § 44.095 (1977) (costs to the party who needs the inter-
preter). Many states with interpreter laws also require the interpreter to be certified. See,
e.g., GA. CODE ANN. § 99.4002 (1976); TENN. CODE ANN. § 24-108 (Supp. 1979); VA. CODE
§ 19.2-164 (Supp. 1979); W. VA. CODE § 57-5-7 (Supp. 1979). Several states, however, simply
require that the interpreter be "qualified," without defining the term. See, e.g., MASS.
GEN. LAWS ANN. ch. 221 § 92A (West Supp. 1979); MISS. CODE ANN. § 13-1-16 (Supp.

32. See, e.g., NEB. REV. STAT. § 25-2461 (1975) (deaf persons cannot be fully protected
against error unless interpreters are available to assist them in legal proceedings).
laws, the usefulness of a statutory entitlement to a particular deaf defendant necessarily depends upon the location of the trial. In contrast, a constitutional right to interpretation would prevent the availability of interpretation from resting upon a factor as fortuitous as venue.

Until 1978, the only federal statute expressly providing for the appointment of interpreters in federal court civil proceedings was rule 43(f) of the Federal Rules of Civil Procedure. Like many of the state statutes, the rule is permissive in that it places the decision to appoint an interpreter within the discretion of the trial judge. In 1978, Congress enacted the Court Interpreter Act, which provides for mandatory appointment of interpreters in civil or criminal trials initiated by the United States where a party or witness is non-English speaking or hearing-impaired such that “comprehension of the proceedings or communication with counsel or the

33. Fed. R. Civ. P. 43(f) provides:
The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

34. Compare id. with Fed. R. Crim. P. 28 (decision to appoint interpreter within the trial judge’s discretion) and 3006 of the Criminal Justice Act, 18 U.S.C. 3006A(e)(1) (1976) (services necessary for an adequate defense shall be authorized upon counsel’s request) (emphasis added). See also Fed. R. Evid. 604 (implements Fed. R. Civ. P. 43(f) and Fed. R. Crim. P. 28(b) by subjecting interpreter to Fed. R. Evid. 702 relating to experts and by requiring an oath that interpreter will make a true translation). Another federal statutory scheme, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), and the proposed Department of Justice implementing regulations, 44 Fed. Reg. 54,958-63 (1979) (to be codified in 18 C.F.R. §§ 42.501-42.540), might change the responsibility of both federal and state courts to provide interpreters. As proposed, § 42.523 requires the provision of “auxiliary aids” (e.g., interpreters) to handicapped persons where refusal to make such a provision would “exclude the participation of such persons in a program receiving Federal financial assistance.” 44 Fed. Reg. 54,961 (1979). The proposed regulations would have only limited application, however, since the Department of Justice has expressly stated that agencies responsible for complying with the regulations will only include “programs receiving financial assistance.” Id. at 54,959. It should be noted that the adoption of regulations by the Department of Justice does not militate against the recognition of a constitutional right to interpretation. To the contrary, the enactment and legislative history of such regulations arguably support the contention that interpretation has become the settled mode for accommodating the physical disability of the deaf in state proceedings. See notes 50-55 infra. Furthermore, regulations such as those now proposed need not fall into desuetude upon recognition of a constitutional right to interpretation. Rather, they may usefully serve as models for the particularized implementation of a constitutional right to interpretation.

35. 28 U.S.C.A. § 1827-1828 (West Supp. 1979). Although different versions of the Act had been considered, but not enacted, in earlier years, it encountered no strong opposition in 1978 and was passed by the Senate upon a voice vote and by the House by unanimous consent. See Comm. on the Judiciary, U.S. House of Representatives, Legislative Calendar (Final) 278, 348 95th Cong. (1978). According to a Senate report, the legislative history of the earlier proposed versions applies to the Court Interpreters Act with equal force. See Senate Report, supra note 10, at 2.
presiding judicial officer” is inhibited. Although it is nowhere specified, the effect of the Act is to repeal in part rule 43(f) by mandating interpretation in civil actions initiated by the United States. In federal civil cases not initiated by the United States, however, rule 43(f) continues to have vitality. Thus, the decision to appoint an interpreter remains within the discretion of the trial judge in the overwhelming portion of federal civil litigation.

Finally, there is no recognized federal constitutional right to the interpretation of a civil trial. No express textual provision affords such a right and the question has not been considered directly by the Supreme Court.

37. Where there exists a clear conflict between two federal provisions (e.g., the permissive appointment provision of rule 43(f) and the mandatory appointment provisions of § 1827(d)), the later enactment impliedly repeals the earlier provision to the extent of the conflict. See, e.g., United States v. Greathouse, 166 U.S. 601, 605 (1897). In construing such a conflict, the legislative intent is of prime importance. 1A SUTHERLAND STATUTORY CONSTRUCTION § 23.09 (C. Sands, ed., 4th ed. 1972). The impact of the Court Interpreters Act upon other federal statutes was mentioned only briefly by the House subcommittee report, H.R. REP. No. 1687, 95th Cong., 2d Sess. 6 (1978) (the statutory right to an interpreter “is not intended to supersede other nonconflicting statutory rights regarding appointment of an interpreter”) (emphasis added). The intent of the new statute apparently is to supersede conflicting statutes. While the federal rules of civil procedure are not statutes, it is generally accepted that they have no more force or effect than statutes. Therefore, arguably, the effect of the Court Interpreters Act is to supersede rule 43(f) insofar as that rule applies to civil actions initiated by the United States. The Court Interpreters Act also arguably supersedes and repeals Federal Rule of Criminal Procedure 28 to the extent that the rule characterizes the decision to appoint an interpreter as discretionary in criminal trials initiated by the United States. 28 U.S.C. § 1827(d). The proposition that a congressional enactment may impliedly repeal a federal rule of civil procedure, 28 U.S.C. § 2072 notwithstanding (unless expressly designated, nothing in tit. 28 shall supersede rules of procedure prescribed by the Supreme Court), is not a novel one. For some examples of abrogation of the federal civil rules by a statute (Federal Rules of Evidence) see MOORE'S FEDERAL PRACTICE, FEDERAL CIVIL RULES (1975) at 694-96 (rule 32(c) no longer “necessary” in light of the Rules of Evidence); 835-36 (rule 43(b) and 43(c) no longer “needed or appropriate” since matters it deals with are treated by the Rules of Evidence).

38. Id.
39. The bulk of federal civil litigation consists of actions initiated by private parties, not the United States. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS App. Table C2, A-14 (period ending June 30, 1979) (of the 154,000 civil cases brought last year in federal courts, 123,663 did not involve the United States as an initiating party).
40. There is some support in case law, however, for the proposition that a procedural due process right to interpretation exists for non-English speaking defendants in criminal trials. See, e.g., United States ex rel. Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (defendant entitled to interpretation as a matter of 14th amendment right and notions of fairness, integrity of the fact-finding process, and the potency of the adversary system); United States v. Carrion, 488 F.2d 12 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974) (non-English speaking defendant may have constitutional right to court-appointed interpreter under certain circumstances); Terry v. Alabama, 21 Ala. App. 100, 105 So. 386 (Crim. App.
In the only reported state case that analyzes a civil defendant's right to interpretation in federal constitutional terms, *Jara v. Municipal Court*, the California Supreme Court refused to appoint and compensate an interpreter for a Spanish-speaking indigent defendant. That court concluded that, because "counsel controls the proceeding," neither due process nor equal protection mandates court-appointed and -compensated interpretation of civil trials. The *Jara* court based its decision primarily upon the questionable assumption that adequate community services of language assistance were readily available to non-English speaking defendants. As discussed below, the availability of interpreter services varies from community to community and, in any event, is not properly the sole determinant of whether interpretation must be provided.

III. A CONSTITUTIONAL ANALYSIS OF THE RIGHT TO INTERPRETATION

Procedural due process protects an individual from wrongful or arbitrary deprivation of property or liberty through governmental action. Its guarantee of procedural fairness is triggered by a threatened deprivation of protected property or liberty interests. This Note, however, does not consider the question of whether due process protections are available to a deaf defendant since it is generally accepted that due process guarantees

1925) (defendant has right to confront and understand the testimony of witnesses); Garcia v. Texas, 151 Tex. Crim. 593, 210 S.W.2d 574 (1948) (defendant's right to cross-examine witnesses who speak another language is meaningless without interpretation). These decisions, while rendered in criminal cases, contain judicial observations about functional exclusion, judicial economy, and the preservation of dignity that are of equal application to civil proceedings.

41. 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), cert. denied, 439 U.S. 1067 (1979). *Jara* involved the right to a court-appointed and court-compensated interpreter for a Spanish-speaking indigent defendant, whereas the question examined in this article is whether there exists a constitutional right to interpretation for deaf defendants, indigent and nonindigent alike.

In a second California case, *Gardiana v. Small Claims Court*, 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976), the court of appeals decided that, independent of any statute, "ever court has the 'inherent power to swear interpreters whenever such a course is necessary to the due administration of justice.'" Id. at 423, 681 (quoting People v. Walker, 69 Cal. App. 475, 486, 231 P. 572, 577 (1924)). It should be noted that a deaf defendant's right to interpretation would differ from a criminal defendant's right to assistance of counsel in that interpretation in a civil proceeding is a prerequisite to threshold access to a trial rather than a method of ensuring effective representation.

42. 21 Cal. 3d at 849-50. This opinion failed to employ the due process analysis of Mathews v. Eldridge, 424 U.S. 319 (1976), currently favored by the Supreme Court. See note 61 and accompanying text *infra*.


44. Board of Regents v. Roth, 408 U.S. 564, 569-70, 576-78 (1972).
inhere in civil proceedings. Nor does it discuss the timing of interpretation because the appropriate time for its provision is arguably during the trial itself. Rather, this Note examines the language and subsequent court interpretations of the due process clauses of the fifth and fourteenth amendments to determine whether the procedural protections due a deaf defendant include sign language interpretation. Early articulations of the essential elements of due process stressed intrinsic fairness as the standard to be achieved. In recent years, however, the Supreme Court, in *Mathews v. Eldridge*, has developed another formulation that defines fairness in terms of utilitarian considerations. Since the trend of Court opinions has moved away from the fundamental fairness test, this Note will consider it only briefly, and focus at length on the *Mathews* test as it applies to a deaf defendant.

**A. Early Articulations of Fundamental Fairness**

The classical test of fundamental fairness has been articulated in a variety of ways. The unifying principle that emerges from these formulations is that judicial procedures which threaten to deprive a person of property or liberty must conform to settled usages, historical or contemporary, for ensuring fairness and justice. Representative versions of due process standards include “that which comports with the deepest notions of what is fair and right and just,” and “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Specific procedures that comport with fundamental fairness have been de-

45. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (“no doubt exists that notice and hearing are prerequisite to due process in civil proceedings”). See also Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

46. See Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (upon determining the applicability of due process, the question remains what process is required by the demands of the particular situation).

47. See, e.g., Palko v. Connecticut, 302 U.S. 319, 325 (1937) (due process implies respect for rights “implicit in the concept of ordered liberty”); Hebert v. Louisiana, 272 U.S. 312, 316 (1926) (the 14th amendment requires state action to be consistent with the “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”).

48. Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (the process that is due depends on the private interest affected, the risk of erroneous deprivation and the value of additional safeguards, and the government’s interest in the fiscal and administrative burdens entailed).

49. Id. In 28 states, the statutorily prescribed method for ensuring procedural protection for deaf parties is providing interpretation. See note 30 and accompanying text supra.


51. Snyder v. Massachusetts, 291 U.S 97, 105 (1934) (felony defendant has due process right to be present at his prosecution).
fined by the "canons of decency and fairness which express the notions of justice of English-speaking peoples,"52 the lessons of history,53 and, where appropriate, contemporary practices.54

The provision of interpretation in a civil trial appears to be required by currently accepted conceptions of fairness,55 despite the existence of a common law tradition of discretionary appointment. Analyzed in terms of these contemporary notions, it would be difficult to justify deprivation of the property or liberty of a defendant who cannot functionally participate in his trial.56 Certainly, a trial that is utterly incomprehensible to the defendant does not comport with "canons of decency" or deeply rooted principles of justice. Historical modes of procedure may have allowed the deprivation of a deaf person's property or liberty due to antiquated conceptions of a deaf person's legal capacity.57 Today, however, it is generally recognized that a deaf person possesses all the rights and privileges of other citizens, particularly the right to be heard in his own defense. The twenty-eight state statutes that mandate interpretation reflect recognition of a right to participation in civil trials.58 Moreover, national policy, as manifested in federal statutes, mandates the accommodation of handicapped persons into programs administered by recipients of federal financial assistance59 and into educational programs supported by federal

52. Malinski v. New York, 324 U.S. 401, 416-17 (1945) (separate opinion of Frankfurter, J.) (due process denied where involuntary confession used to convict criminal defendant).

53. Rochin v. California, 342 U.S. 165, 169 (1952) (pumping suspect's stomach to search for narcotics is a denial of due process).

54. To define due process in a particular situation, the Supreme Court has referred to the prevailing practice in the states. See generally Solesbee v. Balkcom, 339 U.S. 9, 11-12 (1950).

55. Moreover, any conflict between historical procedures and modern notions of fairness should be resolved in favor of the latter since recognition of the right to interpretation may ultimately result in judicial economy and secure other important interests of a deaf defendant. See notes 64-69 and accompanying text infra.

56. For additional state court decisions recognizing a state and/or federal constitutional right to an interpreter, based on procedural due process, see The Right of An Indigent Non-English Speaking Defendant to an Interpreter in Civil Proceedings, 40 OHIO ST. L.J. 677 n.90 (1979).

57. A. Gaw, THE LEGAL STATUS OF THE DEAF 83-86 (1907). Until the early 20th century, American jurisprudence presumed deaf persons to be legally incompetent to enter into a contract or write a will. Id. at 83, 86.

58. For a list of states where appointment of an interpreter in civil trials is mandatory, see note 30 supra. See also Leland v. Oregon, 343 U.S. 790 (1952) ("fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'").

Thus, in view of the current recognition of a handicapped person's entitlement to participate in activities that are integral to society, denial to deaf persons of the opportunity to participate directly in their own trials would appear to be in sharp conflict with contemporary notions of fundamental fairness.

B. Balancing Utilitarian Considerations: A Mathews v. Eldridge Analysis of A Deaf Defendant's Right to Interpretation of Civil Trials

While fundamental fairness has not been discarded as a standard of due process, the due process methodology currently favored by the Supreme Court consists of the three-tiered utilitarian analysis enunciated in Mathews v. Eldridge. This modern formulation has been used to determine the specific requirements of due process in noncriminal proceedings by balancing three distinct factors: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

1. Private Interest of Defendant

The Mathews Court first identified the specific private interest the defendant seeks to protect by securing the requested procedure. A deaf defendant's interests in a civil trial may be characterized in a variety of ways:

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62. 424 U.S. 319, 334-35 (1976). There is no mathematical formula, however, and new factors emerge as the test evolves. See Bell v. Wolfish, 441 U.S. 520 (1979) (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)) (there "must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application"). Additionally, the Mathews test has been labeled excessively subjective and unpredictable. See Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection, 127 U. PA. L. REV. 111, 113 (1978).
in protecting himself from a mistaken or wrongful deprivation of prop-

erty or in preservation of his freedom to act in a particular manner which

may be threatened by injunctive proceedings. In addition, deaf defendants

share throughout a civil trial an interest in the preservation of their digni-

ty which interest finds explicit affirmation in Supreme Court deci-

sions and in the codes of professional conduct. It is difficult to dispute

the assertion that an uninterpreted trial has a serious impact upon the digni-

ty of a deaf defendant. Without interpretation, a person's power to influ-

ence the proceedings is severely impaired. Decreased self-esteem is likely
to result from the experience of being "processed" by an incomprehensible

system, especially when vital personal interests are in jeopardy.

For purposes of comparing the private interest factor to the third analy-
tical factor, the government's interest in minimizing administrative bur-
dens, the Mathews analysis calls for the assignment of a hierarchical value
to the defendant's private interests. While such an assignment is essen-
tially a subjective task, the Court has announced that it will examine the
nature and severity of the particular deprivation and the surrounding cir-
cumstances to determine the weight to be accorded a particular private


63. The Supreme Court has recently recognized the importance of the following private
interests: a welfare recipient's "brutal need" for welfare benefits prior to a final administra-
tive termination of benefits, Goldberg v. Kelly, 397 U.S. 254, 261 (1970); a social security
recipient's interest in continued receipt of benefits prior to final termination, Mathews v.
Eldridge, 424 U.S. 319, 342 (1976); a student's interest in procedural safeguards that mini-
mize the risk of wrongful corporal punishment, Ingraham v. Wright, 430 U.S. 651, 676
(1977); and a truck driver's interest in maintaining his license to operate a motor vehicle,
interest, see Friendly, Some Kind of Hearing, supra note 63, at 1295-1304.

64. See, e.g., Kadish, Methodology and Criteria in Due Process Adjudication — A Survey

65. Carey v. Piphus, 435 U.S. 247, 261-64 (1978) (mental and emotional distress associ-
ted with "feeling of unjust treatment" is compensable pursuant to a showing that such
injury actually was caused by procedural deficiencies); Goldberg v. Kelly, 397 U.S. 254, 264-
65 (1970) (although characterized as a government interest, dignity and sense of well-being
termed part of "Nation's basic commitment"); Joint Anti-Fascist Refugee Comm. v. Mc-
Grath, 341 U.S. 123, 162, 171-72 (1951) (Frankfurter, J., concurring) (due process guarantees
the feeling that justice has been done). See also Meachum v. Fano, 427 U.S. 215, 233 (1976)
(Stevens, J., dissenting) (defendant retains "an unalienable interest in liberty — at the very
minimum the right to be treated with dignity — which the Constitution may never ignore")
(emphasis added).

66. ABA CANONS OF PROFESSIONAL ETHICS No. 7. Ethical Consideration 7-36 states:
"Judicial hearings ought to be conducted through dignified and orderly procedures designed
to protect the rights of all parties."

67. Friendly, Some Kind of Hearing, supra note 63, at 1278 (such a balancing test is
uncertain and subjective). Judge Friendly discusses the weight a court should accord partic-
ular interests. See id. at 1295-1304.
interest. A particular civil judgment may deprive a deaf defendant of property indefinitely, or it may impose a long-term monetary obligation. Alternatively, a civil judgment may permanently prohibit a defendant from conducting himself in a self-determined manner. Finally, while the private interest in preserving dignity is important to any person involved in the judicial system, it would appear to be particularly crucial to defendants who are involuntarily subjected to the massive power of the judicial system. Subjugation to unintelligible, formalistic procedures may deeply affect a deaf defendant's feelings of self-esteem and sense of social worth. Indeed, compulsion to resort to uninterpreted adversary proceedings may foist upon deaf defendants a profound sense of social impotence since they may perceive themselves as effectively foreclosed from meaningful participation in society's most powerful mechanism for dispute resolution.

2. Risk of Error

The second inquiry in determining what process is due, according to Mathews, involves an examination of the functional appropriateness of a particular procedure in light of the decision to be made and all the attendant circumstances. The burdens associated with the adoption of an additional procedure at defendant's request are weighed against the probability that the requested procedure will reduce the risk of error. The precise risk of error resulting from lack of interpretation is difficult to calculate, but it is clear that a high potential for error exists where functional exclusion prevents discovery of substantive inaccuracy in the trial process. Inconsistencies in testimony, for example, cannot be detected by the unaided deaf

68. See, e.g., Board of Curators v. Horowitz, 435 U.S. 75, 86 n.3 (dismissal from medical school was more severe than 10 days of suspension for high school students).

69. While a deaf defendant's interests may not amount to "brutal need," as was the welfare recipient's interest in Goldberg v. Kelly, 397 U.S. 254, 261, 264 (1970), they are arguably as significant as a utility customer's interest in continued receipt of services, Memphis Gas, Light and Water Div. v. Craft, 436 U.S. 1, 18 (1978) or a high school student's interest in avoiding short-term exclusion from the educational process, Goss v. Lopez, 419 U.S. 565, 579 (1975). See also Paync v. Superior Court, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405, 411 (1976) (importance of a defendant's interest in avoiding uncompensated deprivation of his property characterized as equal in constitutional significance to the interest in dissolving a marriage through the legal process).

70. See notes 11-27 and accompanying text supra. In Mathews, the court noted that "procedural due process rules are shaped by the risk of error as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344 (emphasis added).
Moreover, he cannot assess the tone of comments by counsel or the judge. Therefore, he cannot be expected to make appropriate and informed decisions concerning strategic matters, such as compromise or settlement, when his perception of the trial is based upon scanty information and largely unbased conclusions regarding the course of the trial. As a practical matter, the deaf defendant's counsel, who only rarely speaks sign language, will make most of the tactical trial decisions. The trial proceeding may thus be reduced to a crude approximation of an informed decisional process.

Apparently addressing the risk of error, the California Supreme Court concluded in *Jara v. Municipal Court* that a non-English speaking defendant's due process rights are not jeopardized by an untranslated trial since "counsel controls the proceeding." The court further observed that "a

71. *See* notes 12-15 and accompanying text *supra*.
72. Due in part to communication difficulties that may exist between counsel and his deaf client, it is improbable that a deaf defendant will be able to perceive clearly the dispositions of judge and jury and to participate in choosing appropriate strategic options.
73. The importance of communication with counsel is recognized in the Court Interpreters Act, 28 U.S.C.A. § 1827(d) (West Supp. 1979). Yet, pretrial preparation by a deaf defendant's attorney is typically complicated by communication difficulties with the deaf client. While attorneys have a professional duty to understand fully the details of their client's case, pretrial client conferences without an interpreter are often mere exchanges of generalities. An attorney, however, has a professional responsibility to accommodate the disabilities of his client where it is necessary to obtain information relevant to a case. *See* ABA CANONS OF PROFESSIONAL ETHICS No. 6, "A Lawyer Should Represent a Client Competently." Ethical Consideration 6-3 states: "Proper preparation and representation may require the association by the lawyer of [*sic*] professionals in other disciplines." Disciplinary Rule 6-101(A)(2) mandates that "[a] lawyer shall not . . . handle a legal matter without preparation adequate in the circumstances." This duty may require hiring an interpreter for client consultations, or if it is appropriate for the client, conducting conferences in writing or some other manner that facilitates communication. *See also* W. VA. CODE § 57-5-7(a) (Supp. 1979) (interpreter to be provided for deaf defendant at every stage of the trial, including pretrial preparation).
74. *Jara v. Municipal Court*, 21 Cal. 3d 181, 186, 578 P.2d 94, 96-97, 145 Cal. Rptr. 847, 849-50 (1978), cert. denied, 439 U.S. 1067 (1979). While the court expressly rejected the argument for a constitutional right to interpretation, it nevertheless appeared to accept implicitly that the defendant had a due process right to communicational participation. By stressing the availability of community-based language assistance (e.g., friends, relatives, community groups), the *Jara* court seemed to consider the defendant's due process rights to be vindicated. The majority's decision incorrectly assumed the availability of volunteer interpreters in a non-English speaking community. Such a volunteer corps of interpreters, likewise, is not always available within the deaf community since friends and relatives of deaf people most often are hearing persons who never acquire fluency in American Sign Language. In any event, *Jara* does not control where a deaf defendant's right to interpretation is at issue since the due process rights of deaf and Spanish-speaking civil defendants are not identical. Each group possesses different characteristics that produce different results when they are factored into the utilitarian calculation of *Mathews*. *See generally* note 1 & 10 *supra*.
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non-English speaking defendant with counsel is in no worse a position than a civil defendant who chooses not to appear at trial at all."75 In reaching these conclusions, the court failed to utilize either the utilitarian due process analysis established in Mathews76 or the traditional fundamental fairness test.77 More importantly, the court's conclusions reflect conceptual confusion and serious constitutional short-cutting. Specifically, the court first erred in equating the position of a non-English speaking defendant with that of an English speaking defendant who elects not to attend his trial. Where interpretation is not provided as a matter of right, a non-English speaking defendant does not actually have an opportunity to choose whether to participate meaningfully at trial with or without an attorney. Meaningful presence is foreclosed by virtue of the language barrier whether or not a non-English speaking defendant elects to make a physical appearance. The court's conclusion, in other words, overlooks a vital element of the non-English speaking defendant's or, by analogy, a deaf defendant's, right to be heard, namely, the opportunity for a defendant to assert the right by participating knowingly in the conduct of his case. Second, the court was only partially correct when it concluded that counsel "controls" a proceeding and that, therefore, a non-English speaking defendant's due process rights are adequately protected. Counsel does, to an almost exclusive extent, determine the procedural and strategic course of a trial. That control, however, is intended to be exercised with full knowledge of a defendant's case and, if the defendant wishes to be present, with full awareness of the defendant's observations and opinions of the witnesses and their testimony. Representation by counsel cannot be characterized as a substitute for a deaf defendant's due process right to be heard since mere representation does not always accomplish the goals of due process, i.e., to be free from mistaken or arbitrary deprivations. This is especially true in light of the likely communication difficulties existing between counsel and his deaf client. Furthermore, there is no legal basis for concluding that a non-English speaking defendant impliedly waives his right to be heard by retention of counsel, which is, in essence, the effect of the conclusion of the California court. Such a conclusion would categorically impose functional exclusion upon non-English speaking as well as deaf defendants who retain counsel.

The final inquiry in the Mathews examination of the risk of error seeks to determine the probable value of a requested procedure in minimizing

75. 21 Cal. 3d at 186, 578 P.2d at 96-97, 145 Cal. Rptr. at 849-50.
77. See notes 50-55 and accompanying text supra.
errors in the fact-finding process. The probable value of an interpreter as a means of reducing the risk of error is substantial. As mentioned previously, the majority of deaf adults understand some form of sign language. As a mode of communication, sign language is as effective as other languages in conveying legal concepts. Its use in a proceeding would promote factual accuracy by permitting the deaf defendant to understand the trial and to participate in his defense. This assertion is bolstered by the fact that a majority of the states now mandate interpretation of civil proceedings for both deaf parties and witnesses.

3. The Government's Interest in Minimizing Administrative Burdens

In the final phase of the Mathews analysis, the Supreme Court identified the government's interest in minimizing fiscal and administrative burdens and examined any countervailing government interests that conflicted with its interest in summary procedures. If the government's interest outweighs both a defendant's private interest and the risk of error in the absence of the requested procedure, it will justify the denial or postponement of the requested procedure. The Court has declared that the government's interest in minimizing its financial and administrative burdens is a legitimate reason to withhold particular procedures where the burdens it poses are substantial.

A deaf defendant who offers to secure and compensate an interpreter presents no fiscal or administrative burden to a court. Yet this type of request is regularly denied by judges who believe that interpretation will

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79. See note 23 and accompanying text supra.
80. See notes 23-25 and accompanying text supra.
81. See note 30 supra. Interpretation of a trial would allow a deaf defendant to understand the testimony and also communicate with counsel during the trial. The potential for intrusion into the confidential communications between an attorney and his client is minimized by the fact that the Interpreter Code of Ethics, promulgated by the National Registry of Interpreters for the Deaf, prohibits interpreters from disclosing interpreted information.
82. 424 U.S. at 335.
83. Id. at 348.
unduly disrupt the trial. A fear of disruption, however, has no basis in fact or experience. It has been proven in the educational field, for example, that only minimal distraction occurs when an interpreter is used in a classroom and that distraction dissipates quickly as the novelty wears off. The only burden conceivably posed by a deaf defendant's request to secure and compensate his own interpreter is the judge's responsibility to prevent undue prejudice to the defendant caused by an incompetent or unscrupulous interpreter. This duty, however, is merely a part of a judge's preexisting and continuing duty to ensure the fairness of a civil proceeding. Such a responsibility would probably only arise where a deaf defendant expressly challenges the competence of his interpreter. In light of the nature of sign language and the necessity of effective communication with the deaf defendant, it would seem reasonable to impose the burden on the deaf defendant who obtains and pays for the interpreter to raise the issue of the interpreter's competence.

A different analysis results where a deaf defendant does not, for various reasons, offer to procure and compensate his interpreter. Concededly, interpretation in this type of civil trial would present some financial and administrative burdens for the court. Nevertheless, these burdens are incremental and insubstantial when compared to the countervailing government interest in preserving the dignity of deaf defendants, cultivating respect for the integrity of the judicial process, and incorporating the handicapped into society.

The cost of interpretation in civil trials for deaf defendants probably would be relatively insubstantial. First, the number of deaf defendants appearing in civil trials will represent only a small fraction of the total number of civil defendants. The statistical infrequency of deaf persons

87. Id.
88. See notes 64-66 and accompanying text supra.
89. ABA CANONS OF PROFESSIONAL ETHICS No. 8. Ethical Consideration 8-1 states that the "system should function in a manner that commands public respect."
90. See notes 59-60 and accompanying text supra.
91. The cost relative to other expenses of maintaining a court system, not the number of dollars, is suggested as the appropriate value to consider when assessing the governmental burdens presented by court-appointed and compensated interpretation. Otherwise, a large nationally based expenditures could be characterized as a substantial burden, when, in fact, implementation of a particular procedure may only present a small burden to the respective local jurisdictions.
92. No statistics exist that document the number of deaf defendants appearing in civil trials. It may be presumed, however, that the number of deaf defendants is small because the population of deaf persons in the U.S. is .87% (1,936,000) of the total United States population. Interview with Michael Karchmer, Director of the Office of Demographic Stud-
appearing as civil defendants will result in governmental burdens that differ from those presented by some non-English speaking populations, and the *Mathews* due process analysis is correspondingly different. Based upon the experience of the New York City Supreme Court, which operates the largest court interpreter program in the United States, only .058% of the annual budget is spent for interpreters, and only .012% of the budget is spent for interpreters for the deaf. On the federal level, estimates of the Administrative Office of the U.S. Courts reveal that the annual cost of implementing the Federal Court Interpreter's Act will be $1.8 million, only a fraction of which is expected to be expended for sign language interpreters. This figure is itself dwarfed by the total 1979-80 appropriation to federal courts of $503 million. Moreover, in Montreal, Canada, preliminary studies of the state-financed court interpreter program indicate that interpreter services may be actually cost effective in that they alleviate confusion, delay, and the administrative burdens presented by foreign language speaking people.

Likewise, the administrative burdens of court appointment of interpreters probably would be incremental. When it comes to the court's attention that a defendant is deaf, the clerk of the court need merely contact a state or local registry of interpreters for the deaf. Additionally, there are numerous community organizations for the deaf that offer interpreter services.

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94. Interview with Don Gossicki, Budget Officer for the New York Supreme Court, in New York City (Jan. 10, 1980). These figures apply to the First Department of the New York Supreme Court, which is composed of Manhattan and the Bronx.


97. Interview with Richard Dirst, Public Relations Director, National Registry of Interpreters for the Deaf (NRID), Silver Spring, Maryland (April 18, 1980).
Arguably, no additional judicial burden will result from a constitutional requirement of interpretation. A judge's duty to supervise the appointment of an interpreter under a constitutional standard would be no greater than his duty to determine the necessity and competence of an interpreter under the common law standard. In either case, the judge must ascertain the need of a defendant for language assistance and supervise the professional conduct of the interpreter as an officer of the court.

In addition to the above interests, the government has three important countervailing interests favoring mandatory interpretation. First, the government has an interest in fostering the "dignity and well-being of all persons within its borders." Second, the government, on both state and federal levels, has adopted a national policy of accommodating the handicapped population in the mainstream of society. Third, the government has an interest in preserving the integrity of the judicial system. These countervailing interests arguably offset the government's legitimate but insubstantial interest in conserving small amounts of financial and administrative resources. Even if these countervailing interests are not perceived as completely offsetting the government's interest in conserving its financial and administrative resources, the remaining government interest in minimizing administrative burdens is outweighed by the deaf defendant's important private interests in securing interpretation, the high risk of error presented by the lack of interpretation, and the substantial value of interpretive language assistance as a means of reducing the risk of error.

IV. Conclusion

Deaf persons are drawn into the adversary system daily to defend their liberty or property. In the absence of interpretive language assistance, the deaf defendant's ability to participate meaningfully in his trial is impaired to the extent that he is functionally excluded from the proceeding. Yet state and federal statutes do not mandate interpretation for deaf defendants in a large number of civil proceedings, and the rule of discretionary appointment remains in effect in a large number of state and federal proceedings. Independent of constitutional theory, the judiciary has a duty to

located by reference to the REGIONAL DIRECTORY OF SERVICES FOR DEAF PERSONS (1980), which catalogs the state registries of sign language interpreters and local organizations that maintain interpreter referral services. (The REGIONAL RESOURCE DIRECTORY is available at the NRID, 814 Thayer Ave., Silver Spring, Md. 20910.) Only three states, Vermont, North Dakota, and Wyoming, do not have a state registry of interpreters for the deaf.

99. See notes 59-60 supra.
100. See note 89 supra.
prevent the occurrence of functional exclusion based upon its responsibili-
ity to recognize the dignity of every person who comes before it and to
preserve the integrity of the fact-finding process. On a constitutional level,
the judicial system, as an official arm of both the state and federal govern-
ments, may not permit functional exclusion since it has a duty to allow all
defendants — including deaf defendants—an opportunity to be heard in
connection with deprivations of property or liberty.

Interpretive language assistance appears to be the most feasible and ef-
fective means of obviating the functional exclusion of a deaf civil defend-
ant. Through interpretation, a deaf defendant can participate directly and
meaningfully in his trial. He can understand the testimony, take notice of
the statements by counsel and the judge, confer with his attorney and gen-
erally participate actively in his own defense. If indeed interpretation is a
necessary incident of the deaf defendant's right to be heard, then the rule
of discretionary appointment must fall. As a due process right, the right to
interpretation is personal to the deaf defendant and, absent extraordinary
circumstances, only he may waive the right. Thus, any civil adjudication
of a deaf defendant’s interests in property or liberty made in the absence of
an appropriate form of interpretive language assistance is constitutionally
void.

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