

# USING INTERPRETERS TO ASSIST JURORS: A PLEA FOR CONSISTENCY

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## INTRODUCTION: A DEFENDANT HAS THE RIGHT TO A JURY THAT UNDERSTANDS THE PROCEEDINGS.

A murder trial at Manitoba in February 1978 was well advanced, when one juror revealed that he was completely deaf and did not have the remotest clue what was happening. The judge, Mr. Justice Solomon, asked him if he had heard any of the evidence at all, and when there was no reply, dismissed him. The excitement which this caused was only equaled when a second juror revealed that he spoke not a word of English. A fluent French speaker, he exhibited great surprise when told, after two days, that he was hearing a murder trial. The trial was abandoned when a third juror said that he suffered from both conditions, being simultaneously unversed in the English language and nearly as deaf as the first juror. The judge ordered a retrial.<sup>1</sup>

This passage, entitled "The Worst Jury," forms part of a humorous compilation of anecdotes recorded in *The Incomplete Book of Failures*.<sup>2</sup> The events described in "The Worst Jury," took place in a Canadian courtroom, but they provide a useful springboard for a discussion of the issues presented in that proceeding as they apply in American courts: the presence of deaf and non-English speaking people on jury panels, and the extent to which each should be allowed to participate in the justice system.

Mr. Justice Solomon presumably declared a mistrial because three of the jurors present were unable to understand the proceedings, thereby depriving the defendant of a fair trial. The issues for both sets of jurors, the deaf and the non-English speaking, are identical: first, can people who are deaf and non-

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1. STEPHEN PILE, *THE INCOMPLETE BOOK OF FAILURES* 65 (1979).
2. *See id.*

English speakers effectively participate on juries with the aid of an interpreter or other accommodation? Second, in resolving this issue, should both groups be treated equally, or is there a rational basis for a disparate analysis?

This paper will argue that courts and Congress should employ the same analysis in determining whether to provide interpreters for both deaf and non-English speaking jurors. Part I will explore recent statutory and Constitutional developments that protect the rights of deaf people to serve on juries. Part II will briefly address the lengthy history of Spanish speaking jurors in American courts. Part III will contrast inconsistent treatment of deaf and Spanish speaking individuals as potential jurors. Part IV will address court decisions that allow prosecutors to prevent bilingual jurors from serving because they might listen to the original testimony, not the English translation. Finally, Part V will assess the costs and benefits to society associated with the enactment of provisions to protect the rights of deaf and non-English speaking people to serve on juries, discuss possible reforms to the system, and argue that a Constitutional equal protection analysis should yield identical results for all jurors requiring an interpreter.

## I. STATUTORY AND CONSTITUTIONAL PROTECTIONS HAVE DEVELOPED WHICH ALLOW DEAF PEOPLE TO SERVE ON JURIES.

Historically, courts excluded deaf people from serving on juries because the hearing world embraced the conventional wisdom that "deaf people lacked, at the very least, the language skills and ability to evaluate credibility that are essential to a juror's function and required by the sixth amendment to guarantee a criminal defendant a fair jury at her trial."<sup>3</sup> In the late 1970's, courts began to reject the conventional wisdom and to allow deaf jurors.<sup>4</sup> One court even upheld a guilty verdict in a federal criminal jury trial when a deaf woman served as the jury's foreperson.<sup>5</sup>

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3. Randy Lee, *Equal Protection and a Deaf Person's Right to Serve as a Juror*, 17 N.Y.U. REV. L. & SOC. CHANGE 81, 82 (1989-1990) (citing *Eckstein v. Kirby*, 452 F. Supp 1235, 1242-43 (E.D. Ark. 1978)).

4. See *U.S. v Dempsey*, 830 F.2d 1084 (10th Cir. 1987); *State v. Lee*, 1997 WL 311593 (Ohio Ct. App. 1997) (affirming defendant's conviction for felonious assault and finding that the trial court did not err in empanelling a deaf juror or allowing an interpreter in the jury room during deliberations); *State v. Marcham*, 770 P.2d 356, 356, 358 (Ariz. Ct. App. 1988) (upholding Marcham's felony conviction for aggravated assault and finding that the trial court did not err in empanelling a deaf juror where it was "obvious that an interpreter would have to be in the jury room to interpret the discussion for the deaf juror" and no objections to the interpreter being in the jury room were made at any time at the trial level).

5. *Lee*, *supra* note 3, at 82-83 n.11 (discussing *U.S. v Dempsey*, 830 F.2d 1084 (10th Cir. 1987)).

Now, both the Rehabilitation Act of 1973<sup>6</sup> and the Americans with Disabilities Act ("ADA")<sup>7</sup> protect deaf jurors' right to serve.<sup>8</sup>

In a recent case, the Court of Appeals of Ohio upheld a trial judge's exclusion of a deaf juror because an interpreter was unavailable.<sup>9</sup> The appellate court noted that the trial judge:

expressed concerns regarding the litany of *potential* difficulties which could arise as a result of the following: the juror's ability to read lips, the juror's inability to assess the demeanor of witnesses, the necessity of having an interpreter conveying the testimony to him and related interruptions during trial, the juror's problem participating in group discussions, and complications stemming from an interpreter's participation in the deliberation process.<sup>10</sup>

The appellate court rejected the appellant's argument that the trial court abused its discretion. The appellate court firmly stated that it was "not prepared to sanction" the trial court's concerns "as legitimate challenges for cause."<sup>11</sup> However, the appellate court did not find that the trial court abused its discretion by excusing the juror because the decision "was ultimately based on the unavailability of an interpreter to assist the juror."<sup>12</sup> The Ohio Court of Appeals framed the trial court's action within the law, avoiding a reversal of a civil verdict. Thus, recently courts have allowed deaf jurors to serve on trials when possible and actively rejected the "conventional wisdom" common before the 1970's concerning the inability of deaf jurors to serve.

A. *Federal Statutes Prohibit the Exclusion of Deaf People from Juries Even Though They Will Not Understand the Testimony Without an Interpreter.*

Both the Rehabilitation Act and the ADA prohibit the exclusion of deaf jurors on the basis of their deafness. The Rehabilitation Act states that "[n]o otherwise qualified individual with a disability. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity re-

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6. 29 U.S.C. § 790 et seq. (1998).

7. 42 U.S.C. § 12101 et seq. (1998).

8. Galloway v. Superior Court of the District of Columbia, 816 F. Supp. 12, 20 (D.D.C. 1993) ("The Rehabilitation Act and ADA were enacted to prevent old-fashioned and uninformed prejudices against disabled persons from interfering with those individuals' rights to enjoy the same privileges and duties afforded to all United States citizens.").

9. See *Burke v. Schaffner*, 683 N.E.2d 861, 865 (Ohio Ct. App. 1996).

10. *Id.* at 864-865.

11. *Id.* at 865.

12. *Id.*

ceiving Federal financial assistance. . . ."<sup>13</sup> The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>14</sup>

In *DeLong v. Brumbaugh*, A Pennsylvania district court found that Blair County received federal funds and part of those funds defrayed the cost of the court system, making jury service in the county an activity "receiving federal financial assistance."<sup>15</sup> The court also concluded that DeLong was a disabled individual, "otherwise qualified" within the meaning of the Rehabilitation Act, and excluded from the array "solely because she [was] deaf."<sup>16</sup> Thus, the court held that the state court violated the Rehabilitation Act when it disqualified DeLong from the jury array.<sup>17</sup> The court declared that "[t]he clear weight of the credible evidence compels the conclusion that the presence of a deaf person, with the skills of [ ] DeLong, and an interpreter, would neither disrupt nor delay the judicial process in any respect."<sup>18</sup>

In another case, a federal district court used a similar analysis to reject a challenge that blind persons were not "otherwise qualified" under the ADA and the Rehabilitation Act.<sup>19</sup> In that case, the court noted that "the Superior Court admits persons who are deaf to jury panels and has never suggested that simply because they cannot hear, they cannot serve. In fact, the Superior Court accommodates those individuals by providing sign language interpreters."<sup>20</sup> The court thus mandated the expansion of the jury pool by holding that the exclusion of blind persons from jury service violated both the ADA and the Rehabilitation Act.<sup>21</sup> The district court applauded the superior court's policy toward deaf jurors, stating that it "evidences a lack of prejudice towards those with hearing impairments and demonstrates [the court's] ability to look behind archaic stereotypes thrust upon disabled persons."<sup>22</sup>

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13. 29 U.S.C. § 794(a) (1998).

14. 42 U.S.C. § 12132 (1998).

15. *DeLong v. Brumbaugh*, 703 F. Supp. 399, 402, 404-05 (W.D. Pa. 1989).

16. *Id.* at 405, 408.

17. *Id.* at 408.

18. *Id.* at 404.

19. *See Galloway v. Superior Court of the District of Columbia*, 816 F. Supp. 12, 16-17 (D.D.C. 1993).

20. *Id.* at 17 (footnote omitted).

21. *Id.* at 20.

22. *Id.* at 17.

B. *Under an Evolving Equal Protection Analysis, at Least One Court Has Held that Deaf People Have a Constitutional Right to Serve as Jurors.*

One court has applied a *Batson* equal protection analysis<sup>23</sup> to prevent a peremptory challenge of a deaf juror solely based on her inability to hear.<sup>24</sup> In *People v. Green*, a New York trial court ruled that a prosecutor's use of a peremptory challenge to strike a deaf juror because of her disability "was not rational and violated the juror's right to equal protection under New York State's Constitution."<sup>25</sup> The court in *Green* decided the case under an equal protection analysis, and noted that the recently enacted ADA would also prohibit exclusion of deaf jurors once it became effective.<sup>26</sup>

II. JURORS WHO SPOKE ONLY SPANISH SERVED ON JURIES IN AMERICAN COURTS DURING THE 1800s.

The presence of Spanish speaking jurors is not unprecedented in American legal history. In 1879, the Supreme Court of Colorado directly addressed the question "[i]s the inability on the part of persons called as jurors, to speak the English language, and to understand it when spoken, necessarily a disqualifying fact?"<sup>27</sup> In *The Town of Trinidad v. Thompson*, the court examined a statute providing that

all male inhabitants of the State of the age of twenty-one years, who are citizens of the United States, or have declared their intention to become such citizens, and who have not been convicted of felony [sic], shall be competent to serve as grand and petit jurors in all courts and judicial proceedings in this state.<sup>28</sup>

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23. In the seminal case of *Batson v. Kentucky*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor to challenge potential jurors solely on account of their race. See 476 U.S. 79, 79 (1986). The U.S. Supreme Court applied the same analysis to forbid discrimination against individuals on the basis of gender, *J.E.B. v. Alabama*, 511 U.S. 127, 127 (1995). The United States Supreme Court further explained, "[d]iscrimination on the basis of race or gender causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from the judicial process." *J.E.B.*, 511 U.S. at 127.

24. See *People v. Green*, 561 N.Y.S.2d 130, 131 (Westchester Co.Ct. 1990).

25. *Id.* at 132. Section 11 of Article I of the N.Y State Constitution declares that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. CONST. art. I, §11.

26. *Green*, 561 N.Y.S. at 133.

27. *The Town of Trinidad v. Thompson*, 5 Colo. 65 (1879).

28. *Id.* at 66.

The Colorado State Code also listed seven legitimate grounds for a peremptory challenge and "inability to speak or understand the English language [was] not enumerated as a ground of challenge."<sup>29</sup> The court in *Trinidad* reasoned that an individual who does not understand English lacks only a knowledge of English, not mental abilities. In fact, the court reasoned that a non-English speaker may have "the highest intellectual attainments and the greatest aptitude for the duties of a juror."<sup>30</sup> The court also noted that if the county were to adopt such an English only rule, the majority of the jury duty would fall on "a very limited number."<sup>31</sup> Thus, the Colorado Supreme Court held that it was "fully within the power of the court to appoint an interpreter, under the sanction of an oath, to interpret the testimony of witnesses and the arguments of counsel."<sup>32</sup>

In *Trinidad*, the Colorado Supreme Court's reasoning hinged in part on the fact that the country was acquired by treaty with the Republic of Mexico and the "inhabitants thereof were largely, if not exclusively, a Spanish speaking people."<sup>33</sup> Thus, the Colorado Supreme Court's decision in *Trinidad* was neither isolated, nor anomalous, and was followed by other courts of the time.<sup>34</sup> The New Mexico Supreme Court considered the same issue, and concluded that "[w]e cannot shut our eyes to the peculiar circumstances of this territory, taken from the Republic of Mexico in 1846 [and] [e]ven at the present time the preponderance of Spanish speaking citizens is very large; and in certain counties the English Speaking citizens can be counted by tens instead of hundreds."<sup>35</sup> The court thus held that "[w]e do not think that there is anything in the law which makes the fact of not understanding the English language a disqualification for a juror in this territory, or which gives to any defendant the right to be tried by jurors of any particular nationality or language."<sup>36</sup>

Ten years after *Trinidad*, the Colorado Supreme Court revisited the issue of Spanish interpreters for jurors in the context of an application for a writ of habeas corpus following a conviction

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29. *Id.*

30. *Id.* at 67.

31. *Id.* at 68.

32. *Id.*

33. *Id.* at 67-68.

34. *Territory of New Mexico v. Romaine*, 2 N.M. 114 (N.M. 1881); *In re Allison*, 22 P. 820, 820 (Colo. 1889).

35. *Romaine*, 2 N.M. at 123.

36. *Id.* at 124. This is not to suggest that the courts of the time had a modern view of racial or ethnic equality. The act that established the qualifications for jurors in New Mexico was passed in 1859 and limited jury service to "all white persons" who had the proper age and citizenship requirements. Language was not enumerated as a qualification. *See id.* at 122.

for highway robbery.<sup>37</sup> Charles Allison's appeal involved a procedural due process challenge to his conviction, on the ground that some of the grand and petit jurors who heard his case did not speak English.<sup>38</sup> The Colorado Supreme Court upheld its prior decision in *The Town of Trinidad v. Thompson*, stating "a Mexican elector, unable to speak or understand any other language than the [sic] Spanish, may, nevertheless, possess all the qualifications for jury duty required by the constitution and statute; and with the aid of an interpreter, he may perform the duties of juror far better than many English-speaking citizens."<sup>39</sup>

### III. NON-ENGLISH SPEAKING PERSONS DO NOT HAVE THE SAME STATUTORY OR CONSTITUTIONAL RIGHT TO INTERPRETERS TO ALLOW THEM TO PERFORM JURY SERVICE.

Though people who spoke Spanish exclusively were allowed to serve on juries with the assistance of interpreters in the western states in the 1800's and into the early 1900's, this practice has been rejected in recent court decisions.<sup>40</sup> In one Texas case, a defendant challenged his conviction for aggravated kidnapping on the ground that the trial court improperly dismissed two members of the jury venire because they were not fluent in English.<sup>41</sup> Comparing the practical utility of interpreters, the defendant contended "that because deaf jurors are statutorily entitled to an interpreter, Mr. Mansilla and Mr. Tamez [the dismissed veniremen who spoke only Spanish] should, in the same fashion, have been appointed an interpreter to translate the proceedings into Spanish."<sup>42</sup> The court rejected this contention, stating that the trial court did not abuse its discretion in determining that the two men could not effectively serve on the jury because they were not fluent in English.<sup>43</sup>

In *State v. Gibbs*, a Connecticut court rejected an equal protection challenge to a jury array that excluded non-English speaking Latinos.<sup>44</sup> The court found that "the ability to under-

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37. See *In re Allison*, 22 P. 820, 820 (Colo. 1889).

38. See *id.* at 822.

39. *Id.*

40. See, e.g., *State v. Gomez-Zapata*, No. 97-689077, 1998 WL 733495 (Tex. Crim. App. Oct. 22, 1998); *State v. Gibbs*, 1998 WL 351903 (Conn. Super. Ct. 1998); *Dilorenzo v. State*, 711 So. 2d 1362 (Fla. Dist. Ct. App. 1998); *United States v. McDade*, 929 F. Supp. 815 (E.D. Pa. 1996).

41. See *Gomez-Zapata*, 1998 WL 733495.

42. *Id.* at \*2.

43. See *id.* at \*3.

44. *State v. Gibbs*, 1998 WL 351903 at \*8, 21 (Conn. Super. Ct. 1998). David Gibbs was charged with two counts of murder and sentenced to life in prison without possibility of release. *Id.* at \*1.

stand English is a necessary and appropriate requirement [for jurors] under both the state and federal constitutions.” The court flatly rejected Gibbs’ comparison of providing interpreters to translate for deaf and Spanish speaking jurors, holding simply that “providing interpreters for a disability such as hearing impairment but not for non-English speakers does not violate equal protection.”<sup>45</sup>

Applying and extending this type of analysis, an appellate court in Florida recently reversed a defendant’s conviction solely on the ground that one of the jurors in his trial spoke Spanish and had had an interpreter appointed to translate the evidence, the arguments, and the deliberations.<sup>46</sup> The appellate court noted that interpreters have been permitted by Florida statute to translate for deaf jurors since 1993, and held that since no such statute existed for Spanish speaking jurors, none were allowed.<sup>47</sup> The court did not decide the case on equal protection grounds, but chose to “offer the passing comment” that “we would disabuse the notion that anyone has the right to serve as a juror. What one does have, as recognized by the United States Supreme Court, is the constitutional right not to be excluded from jury service on the bases of racial, gender or ethnic discrimination.”<sup>48</sup> The court noted that “removing Mr. Gutierrez [the juror] because of his inability to understand English does not begin to approach the proscription of [race or gender based discrimination].”<sup>49</sup>

Additionally, a federal statute, upheld in federal court, explicitly mandates that a federal judge shall deem any person qualified to serve on juries in the district courts unless the juror is unable to read, write, understand, or speak the English language.<sup>50</sup> A federal court applying the statute reasoned that “it is important that each juror be able to communicate verbally with the other jurors during deliberations . . . . To have one or more of

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45. *Id.* at \*25.

46. *See* *Dilorenzo v. State*, 711 So. 2d 1362, 1362-63 (Fla. Dist. Ct. App. 1998). The juror, Mr. Gutierrez, was questioned in English at the *voir dire*. He was born in Puerto Rico and had lived in the continental United States for seventeen years. He spoke fluent Spanish, but had some difficulty with English. *See id.* at 1362.

47. *See id.* at 1363; *see also* *Morales v. Florida*, 768 So. 2d 475 (Fla. Dist. Ct. App. 2000).

48. *Dilorenzo*, 711 So. 2d at 1363 (citation omitted).

49. *Id.*

50. *See* 28 U.S.C. §1865 (b)(2) and (3) (2000) (discussing qualifications for jury service); *United States v. McDade*, 929 F. Supp. 815, 817 (E.D. Pa. 1996) (allowing the *voir dire* question “[d]o you have any difficulty reading or understanding the English language?”); *but see* *DeLong v. Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989) (holding that a Pennsylvania statute, which had a restriction similar to 28 U.S.C. § 1865 (b)(2), did not exclude deaf persons who speak and understand sign language.).

them linguistically cordoned off from the debate would tend to cause some unacceptable attrition in the right to trial by jury . . . .”<sup>51</sup>

Currently, however, the rights of non-English speaking jurors to serve on juries are not protected as strongly as those of deaf jurors, who receive additional protection against exclusion in the ADA and the Rehabilitation Act. In fact, the federal statute defining juror qualifications explicitly prohibits non-English speakers from serving as jurors in federal court.<sup>52</sup> Additionally, although there have been glimmers of hope for protection for non-English speakers under the Equal Protection Clause, the analysis has not fully evolved to mandate courts to provide interpreters for non-English speakers.

#### IV. LAWYERS MAY LEGITIMATELY EXCLUDE BILINGUAL JURORS BECAUSE THEY MIGHT LISTEN TO NON-ENGLISH TESTIMONY, NOT THE COURT'S OFFICIAL TESTIMONY IN ENGLISH.

Paradoxically, even if a non-English speaker learns English, he can still be excluded from the jury with a peremptory challenge.<sup>53</sup> In *Hernandez v. New York*, the United States Supreme Court rejected a defendant's Equal Protection challenge to the prosecutor's use of peremptory challenges to exclude bilingual Spanish and English language speakers from the jury.<sup>54</sup> The prosecutor volunteered that he struck two potential jurors who were bilingual in Spanish and English because he was uncertain they would listen to and follow the English interpreter during testimony in Spanish.<sup>55</sup>

*Hernandez* is not a unique case. The Court of Appeals of Texas refused to overturn the conviction of Alexis Romero Chavarria where the prosecutor explained striking all the veniremen who spoke Spanish stating, “[b]ased on my past experience in trying cases where there are interpreters involved, [the jurors] will not follow the official version of the interpreter.”<sup>56</sup> However, in part because the prosecutor also struck two Caucasians who spoke Spanish, the court rejected defense counsel's objection under *Batson* and found the prosecutor's actions to be race-neutral. Despite defense counsel's *Batson* objection, this was de-

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51. *McDade*, 929 F. Supp. 815 at 817.

52. See 28 U.S.C. § 1865(b)(2) and (3) (1998).

53. See *Hernandez v. New York*, 500 U.S. 352, 372 (1991).

54. See *id.*

55. See *id.* at 357.

56. *Chavarria v. Texas*, 2000 Tex. App. LEXIS 3003 at \*6 (Tex. Ct. App. May 9, 2000).

terminated to be a race-neutral reason, in part because the prosecutor also struck two Caucasians who spoke Spanish.<sup>57</sup>

Striking from a jury people who are more likely to understand the witnesses' original testimony may undermine the system's ultimate goal, justice. One commentator noted "in situations where the translation is disputed, the bilingual juror can help correct errors and distortions . . . . Disqualifying from jury service individuals who can call attention to such inaccuracies defeats the truth-seeking function of a jury trial."<sup>58</sup> Furthermore, a policy that prohibits empanelling non-English speaking jurors because an interpreter might undermine the integrity of the judicial process seems to contradict a demand that bilingual jurors must listen only to the English interpreter during testimony they comprehend in their native language.

In 1875, the Supreme Court of Wisconsin considered this issue and reached the opposite conclusion when some of the witnesses were Germans and some of the jurors understood German.<sup>59</sup> Much of the testimony was in German and translated for the jury by an interpreter. During his charge to the jury, the judge stated "[m]any of you understand the language in which the testimony was given; the jury will have no difficulty in calling to mind what the testimony is in regard to it; and . . . you are better prepared to understand the evidence, both on the part of the plaintiff and the defendant, than I am."<sup>60</sup> When the defendant railroad appealed the judgment, the Supreme Court of Wisconsin considered the circuit judge's comments and found them to be "mere casual remarks, which, besides being perfectly harmless, were entirely true."<sup>61</sup>

Most courts have concluded that language classifications do not require heightened scrutiny. Thus, under the Equal Protection Clause, attorneys may strike bilingual persons from juries.<sup>62</sup> This results in what one commentator has termed a "harsh paradox" which has been "reluctantly acknowledged" by the Supreme Court: "one may become proficient enough in English to participate in a trial only to encounter disqualification because

57. See *id.* at \*6, 15.

58. Alfredo Mirande, "Now That I Speak English, No Me Dejan Hablar [I'm Not Allowed to Speak]": The Implications of *Hernandez v. New York*, 18 CHICANO-LATINO L. REV. 115, 148 (1996) (citation omitted).

59. See *Grasse v. Milwaukee, Lake Shore & W. R.R. Co.*, 36 Wis. 582, 586 (Wis. 1875).

60. *Id.*

61. *Id.* at 586-87.

62. For a thorough equal protection analysis of the use of language as a pretext for ethnicity see generally Andrew P. Averbach, *Language Classifications and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?* 74 B.U. L. REV. 481 (May 1994).

[the juror] knows a second language as well.”<sup>63</sup> The paradox is that language spoken does not fall within the protections of a Constitutional equal protection analysis, which may permissibly lead to racial discrimination. “Historically, Latinos have been excluded from juries because they did not know English. After *Hernandez*, they can be excluded because they do.”<sup>64</sup>

#### V. A COMPARATIVE ANALYSIS OF THE DISPARATE TREATMENT OF DEAF AND NON-ENGLISH SPEAKING POTENTIAL JURORS.

There is Constitutional tension in the judicial system between the sixth amendment rights<sup>65</sup> of a criminal defendant and the equal protection rights<sup>66</sup> of potential jurors. The overarching goal of the justice system is to provide a fair trial to a defendant in a criminal case.<sup>67</sup> Thus, to avoid violating a defendant’s sixth and seventh amendment rights, the burden is on the juror under both an equal protection claim and a claim under the Rehabilitation Act to prove his or her competence.<sup>68</sup> Given that premise, why are deaf people treated differently from non-English speakers in terms of competence to serve on juries?

Neither an analysis of the goals of the system nor an assessment of the costs and benefits of having interpreters available for both groups discloses a satisfactory answer. It seems immaterial whether an interpreter is provided to translate orally in English or Spanish, or into sign language, or both, as long as the juror is able to understand the proceedings, and participate in the deliberations. This analysis is reinforced if one subscribes to the viewpoint that the deaf are not handicapped, but instead are a “linguistic minority.”<sup>69</sup> An interpreter is an interpreter, and it is

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63. *Mirande*, *supra* note 58, at 148 (citations omitted).

64. *Id.*

65. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .” U.S. CONST. AMEND. VI.

66. “No State shall make or enforce any law which . . . shall deny to any person within its jurisdiction the equal protection of the laws” U.S. CONST. AMEND. XIV.

67. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984).

68. *See Lee*, *supra* note 3, at 90 (stating that “[u]nder both an equal protection action and a section 504 action, a deaf juror would have to prove that she was capable of serving on a jury; otherwise, her presence on the jury would violate the sixth amendment right of the defendant in a criminal case or the seventh amendment rights of parties in a federal civil case.”).

69. *See Amy Elizabeth Brusky, Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather than a Disability*, 1995 WIS. L. REV. 235, 235 (noting that, unlike people who are blind or physically handicapped, many deaf people consider themselves a linguistic and cultural minority with their own visual language, social organization, history and mores); *see also Jo Anne Simon, The Use of Interpreters for the Deaf and the Legal Community’s Obligation to comply with the A.D.A.*, 8 J.L. & HEALTH 155,

hard to imagine that there could be a rational basis for a policy which favors one language over another.

Opponents of providing interpreters argue their cause from two standpoints: first, that an interpreter cannot effectively and efficiently translate all that the juror needs to know, thereby undermining the integrity of the process; and second, that the financial costs to the system are both too high and unnecessary.<sup>70</sup> Each of these arguments has some merit, and both require analysis.

A. *Safeguards Must Be Put in Place to Maintain the Integrity of Proceedings Conducted Through an Interpreter.*

The strongest argument against the widespread use of interpreters for jurors is that so much would be lost in the translation that the juror would not be able to follow the proceedings. Both the interpreter and the juror would have to be extensively examined during *voir dire* to preserve the integrity of the trial and to protect the defendant's rights in a criminal case.<sup>71</sup>

In fact, the presence of bilingual jurors may highlight a deeply troubling aspect of the criminal justice system – the potential for errors by official court interpreters who mistranslate testimony. In one federal criminal case, a dispute arose between a juror and the interpreter as to the meaning of a Spanish word which had a significant impact on the credibility of the defense's theory of the case.<sup>72</sup> The following exchange occurred:

[Juror]: Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word LaVado [sic]. You say that it is a bar.

The Court: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me—

[Juror]: I understood it to be a restroom. I could better believe that they would meet in a restroom rather than in a public bar if he is undercover.

The Court: These are matters for you to consider. If you had any misunderstanding of what the witness testified to, tell the court now what you didn't understand and we'll place the—

[Juror]: I understand the word LaVado [sic]—I thought it meant restroom. She translates it as bar.

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160 (1993/1994) (citations omitted) (stating “[t]hat the deaf community is a distinct subculture cannot be disputed. Deaf people do not see themselves as disabled, they see themselves as a linguistic minority.”).

70. See *State v. Gibbs*, 1998 WL 351903 at \*24 (Conn. Super. Ct. 1998).

71. See *State v. Chyo Chiagk*, 92 Mo. 395, 411 (Mo. 1887) (holding that “like opportunity ought to have been afforded [the defendant] to show that the interpreter was incompetent, and that he was not impartial . . . [F]or otherwise an interpreter might do the defendant incalculable mischief . . .”).

72. See *United States v. Perez*, 658 F.2d 654, 654 (9th Cir 1981).

[Interpreter]: In the first place, the jurors are not to listen to the Spanish but the English. I am a certified court interpreter.

[Juror]: You're an idiot.<sup>73</sup>

In that case, rather than explore whether or not the interpreter mistranslated what was to be a critical piece of testimony, the judge dismissed the juror from the panel, on the grounds that that juror would have undue influence over the other jurors.<sup>74</sup> The dismissal of this juror might very well have made the difference in the outcome of this case.

Courts have long recognized that the main issue when considering whether to employ an interpreter to assist a juror or jurors is whether or not this practice will degrade the integrity of the proceedings. There are dramatically different viewpoints on this. In 1881, the Supreme Court of New Mexico noted that,

In all counties where the jury contains members representing each language, or where persons speaking each are before the court, all the proceedings are translated by a sworn interpreter, who is a court officer, into the other language from that in which they originally take place. Thus, every one interested is as fully as possible informed of every proceeding, and no injustice is done.<sup>75</sup>

Interestingly, the Supreme Court of Texas articulated the opposite view seven years earlier in a case overturning a murder conviction where nine of twelve empanelled jurors spoke only Spanish.<sup>76</sup> In reversing the conviction, the Supreme Court of Texas stated “[i]t would seem, therefore, a necessity that the jurors should have a reasonable knowledge of the language in which the proceedings are conducted, to enable them to perform their duties. This necessity becomes of the greatest importance in trials for capital felonies.”<sup>77</sup>

The Supreme Court of California in 1867 described the practice of having interpreters assist jurors as “a great obstruction to the proceedings of the court, [which would] open the door to errors and misunderstandings innumerable.”<sup>78</sup> The court further noted that that “[i]t would be difficult, if not impossible, to properly conduct trials with a jury [consisting of members of different

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73. *Id.* Webster's New World Spanish Dictionary translates “Lavado” as “wash or laundry” and “lavabo” as restroom — highlighting the necessity for bilingual court reporters, or other methods of providing for an accurate trial record. See WEBSTER'S NEW WORLD SPANISH DICTIONARY (7th ed. 1985) 284.

74. Perez, 658 F.2d at 663.

75. Territory of New Mexico v. Romine, 2 N.M. 114, 123-24 (N.M. 1881)

76. See Lyles v. State, 41 Tex. 172, 172 (Tex. 1874).

77. *Id.* at 176-77.

78. See People v. Jose Maria Arceo, 32 Cal. 40, 44 (Cal. 1867).

languages.]" and finally stated that the legislature had not intended such "absurd consequences."<sup>79</sup>

Law schools have conducted mock trials as a means of testing the effectiveness of deaf jurors with interpreters.<sup>80</sup> In one experimental trial held at the University of Pittsburgh, the deaf juror, a Ms. Courtemanche, was the only juror to note that two photographs, allegedly taken at the same time by the plaintiff, could not have been taken with the same roll of film, as one photograph was taken with black and white film while the other was in color.<sup>81</sup> After the trial, the other jurors stated that the presence of the deaf woman and her interpreter made the deliberations more orderly and courteous than they otherwise would have been.<sup>82</sup>

Pennsylvania has used both "oral" and sign language interpreters for deaf jurors in criminal trials since 1987.<sup>83</sup> The interpreter for deaf jurors in one case was described by the deaf juror's fellow jurors as "a court fixture" that did not detract from the proceedings at all.<sup>84</sup>

Courts have consistently rejected the argument that the presence of a sign language interpreter for a deaf juror violates a defendant's Sixth Amendment right to a fair trial.<sup>85</sup> In *People v. Guzman*, the Court of Appeals of New York flatly rejected the defendant's challenge to his conviction on this basis, stating "[t]here is certainly no question that deaf persons are as capable as anyone else of understanding legal jargon or any other technical jargon used by expert witnesses. The deaf are found in many highly technical professions, including medicine, engineering, and the law."<sup>86</sup>

The Court of Appeals of New York's position on deaf jurors and interpreters in 1984 was strikingly similar to the Supreme Court of Colorado's position on Spanish speaking jurors and interpreters in 1889. In 1889, the Colorado Supreme Court rejected a challenge to a conviction on the grounds that "some" of the jurors who spoke only Spanish participated in his trial

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79. *Id.*

80. See Lee, *supra* note 3, at 85 (describing mock trials with deaf jurors at the University of Pittsburgh and the McGeorge School of Law.)

81. See *id.* (describing a seven hour mock trial of a civil lawsuit involving six witnesses, medical testimony and physical exhibits. The photographs were of a rusted railing.)

82. See *id.* at 87.

83. See Lee, *supra* note 3, at 87. An oral interpreter mouths testimony to the deaf juror, who reads lips. *Id.* For an explanation and discussion of "speechreading" see HENRY KISOR, WHAT'S THAT PIG OUTDOORS, 1990.

84. Lee, *supra* note 3, at 88.

85. See *People v. Guzman*, 478 N.Y.S.2d. 455 (N.Y. Sup. Ct. 1984).

86. *Id.* at 460.

through the aid of interpreters.<sup>87</sup> The Colorado Supreme Court stated, "with the aid of an interpreter, [the Spanish speaking juror] may perform the duties of juror far better than many English-speaking citizens."<sup>88</sup>

The Supreme Court of Colorado was not passing judgment on a new phenomenon in jury composition. Spanish speakers, and their interpreters, had been sitting as jurors for *at least* the preceding ten years in Colorado since the Colorado Supreme Court rejected an identical challenge to a conviction in 1879 in *The Town of Trinidad v. Thompson*.<sup>89</sup> In that case, the Colorado Supreme Court alluded to a similar practice of allowing interpreters in California, and noted that Spanish speaking people were "in all respects citizens" and "[i]n the early history of the territory it would have been perhaps impossible . . . to obtain an English speaking jury."<sup>90</sup>

It is incongruous that courts currently differentiate between interpreters for the deaf and for non-English speakers, when the two interpreters perform an identical function. Moreover, this is not a new comparison. In 1879 the Supreme Court of Colorado made the following analogy,

[i]t is [the juror's] duty to listen to the evidence of the witnesses, the arguments of counsel, and the instructions of the court. Ignorance of the language, as a matter of fact, is as conspicuously a disqualifying circumstance as though he were deaf, unless the court may aid him in the discharge of his duties through the instrumentality of an interpreter.<sup>91</sup>

Therefore, courts should recognize that, on a functional level, there is no difference between providing an interpreter for a deaf juror or a foreign language speaker. Assuming that the interpreter is competent, and that there are effective procedural safeguards in place to insure that the proceeding is effectively translated, the presence of the interpreter is unlikely to undermine the integrity of the proceedings.<sup>92</sup>

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87. See *In re Allison*, 22 P. 820, 822 (Colo. 1889).

88. *Id.*

89. 5 Colo. 65 (1879).

90. *Id.* at 68.

91. *Id.* at 67.

92. Procedural safeguards to insure the competence of interpreters already exist, as interpreters are present in courtrooms to interpret for defendants and witnesses. Interpreters must be certified and are sworn in to translate. For a description of typical interpreter certification requirements which have been promulgated by the Delaware Supreme Court see Delaware Supreme Court Administrative Directive No. 107, April 4, 1996. For a discussion of interpreter competence, see generally Michele-Lee Berko, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 DICK. L. REV. 101 (1992).

B. *The Financial Cost of Providing More Interpreters is Not a Reason to Discriminate on the Basis of the Language to Be Interpreted.*

Having an interpreter present in the courtroom for a witness, defendant, lawyer, or juror is not a costless proposition from either a fiscal or an efficiency standpoint. In 1889, the Colorado Supreme Court acknowledged that “[t]he employment of an interpreter renders court proceedings more tedious and expensive.”<sup>93</sup> However, courts have used cost as a basis for a justification of a policy which distinguishes between providing interpreters for deaf jurors and for Spanish speaking ones. The Connecticut Superior Court rejected a defendant’s equal protection comparison of the exclusion of Spanish speakers from his jury to a hypothetical exclusion of deaf jurors on this basis. The court stated,

The legislature has made a public policy decision to provide, by statute, interpreters for hearing impaired jurors. This decision was likely influenced by the insignificant number of jurors who use these interpreters and the nature of the disability. By contrast, here the provision of interpreters for non-English speaking jurors would involve larger numbers of people and constitute a significant financial burden on the state.<sup>94</sup>

The court noted that the Connecticut chief court interpreter, “conservatively estimated the annual cost of interpreters for Hispanic jurors at \$2,513,986 and for all non-English speaking jurors at \$7,500,000.”<sup>95</sup> The Connecticut court thus rejected an equal protection claim at least partially on the basis of financial considerations.<sup>96</sup>

Courts have long recognized that interpreters for jurors would be expensive.<sup>97</sup> However, the U.S. Supreme Court has stated that “[d]iscrimination in jury selection, whether based on race or gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.”<sup>98</sup> It is logical, then, to include language with race and gender under an equal protection analysis in the context of jury service, especially as knowledge of the Spanish language among Latinos in the United States is pervasive.<sup>99</sup>

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93. *In re Allison*, 22 P. 820, 822 (Colo. 1889).

94. *State v. Gibbs*, 1998 WL 351903 at \*25 (Conn. Super. Ct. 1998).

95. *Id.*

96. *See id.*

97. *See In re Allison*, 22 P. at 822.

98. *See J.E.B. v. Alabama*, 511 U.S. 127, 139-40 (1995).

99. *See Mirande*, *supra* note 58, at 146 (noting that 97 percent of all bilingual Spanish speakers in the United States are Latino, and most Latinos claim some knowledge of Spanish).

## VI. CONCLUSION

If failing to provide an interpreter for a deaf juror violates his or her constitutional right to equal protection under the law, it seems logical that providing an interpreter for a Spanish speaker would also be required, especially if one views deaf culture as a linguistic minority rather than a handicap. Given that interpreters are already allowed in some instances, any equal protection analysis which precludes the exclusion of one type of citizen dependent upon an interpreter, but permits the exclusion of another citizen who requires a different interpreter is neither equal nor protective.

Additionally, there is an irreconcilable disparity between the federal statute forbidding non-English speakers from participating in jury service, and the ADA and the Rehabilitation Act, which require providing an interpreter for a deaf juror.

If the goal of the system is to provide a fair trial to the defendant, then perhaps society should more closely examine the way jurors are selected in the first instance.<sup>100</sup> It is odd that an intelligent, educated citizen who speaks only a foreign language would be prohibited from jury service, whereas there are no other mental or intellectual criteria for citizens who are able to serve, as long as an English speaker's lack of intelligence does not amount to a "mental infirmity."<sup>101</sup>

However, in order to further the truth-seeking goal of the system, all jurors throughout courts in the United States should be evaluated on stronger criteria than minimum age and sanity, and less stringently on their knowledge of English, assuming that a qualified interpreter is available. This would allow society to be more inclusive, while enhancing the integrity of the judicial system.

To properly implement an effective program to provide interpreters for individual jurors, efforts would have to be made to minimize the interpreter's influence on the rest of the panel. Technologies providing real-time translation currently exist and could be employed in court proceedings. For example, the United Nations routinely conducts business using a system where an interpreter translates into a microphone which transmits to the unobtrusive earpiece of the listener. Real-time closed cap-

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100. The Military has taken the most progressive steps with respect to jury selection criteria. Jurors in military courts martial are military members, who are of the accused's rank or higher, and shall be "those persons who in the opinion of the 'convening authority' are best qualified for duty by reason of their age, education, training, experience, length of service and judicial temperament. See R.C.M. 502(a). Military courts are federal courts under Article I of the United States Constitution, and a conviction at a court martial is a federal conviction.

101. See 28 U.S.C. § 1865(b)(4) (1998).

tioning would be another possibility — perhaps connected to the court reporter's terminal. As technology increases, the language barrier will assuredly decrease — one can easily imagine a voice-recognition/translation program being developed, if it does not currently exist.

The dismissed jury in the murder trial in Manitoba in 1978 may well have been a qualified, impartial, and intelligent panel, very well capable of determining accurately the defendant's innocence or guilt. Had that court had a system of providing interpreters for the deaf and the French speakers, Mr. Justice Solomon would not have had to declare a mistrial. Therefore, Stephen Pile could more accurately have titled his piece "The Worst Criteria for Selecting a Jury" or "The Worst System for Limiting Jury Panels," as the failure clearly lay in the exclusionary system of jury composition and not in the jury panel itself.