Comments

"CITADO A COMPARECER": LANGUAGE BARRIERS AND DUE PROCESS—IS MAILED NOTICE IN ENGLISH CONSTITUTIONALLY SUFFICIENT?*

California and many other states require that official notice of many legal proceedings be printed in English only.[1] For those who do not understand written English this practice can create an insuperable barrier to the exercise of many important rights.[2] This Comment considers whether the Constitution permits mailing notice in English to a person known to the serving party[3] not to be English-speaking, when such factors as the size of the language group and availability of translation services make notice in the recipient's language feasible.[4] First, an attempt is made to determine the scope of the

---

* Cited to appear.

1. For a state-by-state listing of English language requirements for official notice, as well as for legal proceedings, voting, holding office, education, and business regulation, see Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7, 51-67 (1969) [hereinafter cited as Leibowitz].

2. For examples of specific problems faced by Spanish-speaking persons see UNITED STATES COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 70-71, 73-74 (1970) [hereinafter cited as MEXICAN AMERICANS]. One example cited by the Commission was that of Spanish-American farmers in New Mexico who lose water and land rights by forfeiture when they fail to act upon English language notice affecting those rights. *Id.* at 71.

3. As used in this Comment, the term "serving party" refers to one who (1) plans to act upon another's interests, (2) clothes those intended acts with governmental authority, and (3) seeks to inform the person whose rights are at stake of the impending action. In the case of notice sent by a governmental agency, the serving party and the state will be one and the same; when a summons is issued pursuant to a suit brought by a private citizen the serving party has both a private and a public aspect. Obviously, in a private civil suit, it is the plaintiff and not the court who is likely to be aware of the defendant's language abilities. The plaintiff's knowledge is cognizable under the Constitution because he himself is a participant in governmental action as the user of court authority and as the initiator of governmental acts directed at the defendant. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Thus, whether one describes the court or the plaintiff as the serving party, the knowledge of either regarding the defendant is relevant to appraising the adequacy of the notice served. As between them, if the plaintiff knows of a language barrier and the court does not, a reasonable allocation of the translation burden would dictate that the court maintain a stock of summons forms in common languages and that, in a particular case, the plaintiff pay the incidental expense for the translated form.

For a discussion of the unique considerations pertaining to service of summons by mail in California, see note 105, *infra*.

4. This Comment will not address the question of whether notice is owed in a

problem by examining the size and composition of various non-English-speaking minorities and identifying the extent to which English-only practices are used in official communications to them. Then, the constitutional standards relating to effective service of process are outlined and used to evaluate several recent decisions involving sufficiency of notice not in the recipient's language.[5] The extent to which current legislation indicates a governmental policy towards meeting the needs of the non-English-speaking is also considered. The Comment concludes that due process is not satisfied by mailing an official notice in English to a non-English-speaking recipient where the serving party knows of his language handicap and where translation is economically feasible.

I

STATUTORY BASIS FOR ENGLISH-ONLY NOTICE

Although neither the United States nor the California Constitution declares English to be the official state language,[6] various statutes require that certain activities be conducted in English alone. For example, in California, English must be used when preparing a notice, report, or other official writing under the codes of Civil Procedure,[7] Agriculture,[8] Corporations,[9] Finance,[10] Fish and Game,[11] Labor,[12]

---

particular situation. Rather, focus will be on those situations where the need to notify has been established. Moreover, attention will be confined to mailed notice. The physical means of informing (*e.g.* mail, publication, or personal service) are distinct from the form of the notice (*e.g.* printed legibly in a specified language) but both must be considered when evaluating informative worth. When a notice is personally served, that step imparts a warning going beyond the mere form of the notice. Conversely, when notice is attempted via publication, it is unlikely to warn the recipient at all since he will probably never see it. When the notice is transmitted by mail, however, it is expected to come into the intended recipient's possession and to warn him by its form as well as its content. It is then that a language barrier is of the greatest relevance in determining informative adequacy.

5. Since the only reported cases on the sufficiency of English language notice have been California decisions, the focus of the Comment will be on this state.

6. Prior to 1966, the California Constitution required that all official writings, laws, legislative, executive, and judicial proceedings be published and preserved in English only. CAL. CONST. art. IV, § 24 (1879). This provision was deleted in 1966 as part of a general revision of the constitution undertaken by the state legislature.

The earliest state constitution required publication of all laws, decrees, regulations and provisions in Spanish as well as English. CAL. CONST. art. XI, § 21 (1849). Similiar provisions in the constitutions of Colorado [COLO. CONST. art. XVIII, § 8 (1876)] and New Mexico [N.M. CONST. art. XX, § 12 (1911)] were accepted by Congress in granting statehood. Both these sections are still on the books, although, due to their terms, they are primarily of historical importance today. The Colorado section provides for publication in Spanish and German only until the year 1900, while the New Mexico provision requires Spanish publication during the first twenty years of the constitution's life (enacted 1911) with discretion vested in the legislature to provide such publication thereafter.

7. CAL. CODE OF CIV. PRO. § 185 (West 1954).

8. CAL. AGRIC. CODE § 11 (West 1968).

Public Resources,[13] Revenue and Taxation,[14] Streets and Highways,[15] Unemployment Insurance,[16] Vehicles,[17] and Welfare and Institutions.[18] Other codes require that English be used generally, but permit use of other languages where expressly provided.[19] These codes include Business and Professions,[20] Education,[21] Elections,[22] Government,[23] Harbors and Navigation,[24] Health and Safety,[25] Insurance,[26] Military and Veterans,[27] Public Utilities,[28] and Water.[29] The Code of Civil Procedure requires that English be used in all court proceedings.[30] Other statutes provide that licensing examinations for applicants from non-English-speaking countries may include a test of English proficiency,[31] and knowledge of English is a prerequisite for jury duty.[32]

California is not unique in its emphasis on the use of English.[33]

---

9. CAL. CORP. CODE § 8 (West Supp. 1973).
10. CAL. FIN. CODE § 8 (West 1968).
11. CAL. FISH & GAME CODE § 7 (West 1958).
12. CAL. LABOR CODE § 8 (West 1971).
13. CAL. PUB. RES. CODE § 8 (West 1972).
14. CAL. REV. & TAX. CODE § 8 (West 1970).
15. CAL. STS. & H'WAYS CODE § 8 (West 1969).
16. CAL. UNEMP. INS. CODE § 8 (West 1972).
17. CAL. VEHICLE CODE § 9 (West 1971).
18. CAL. WELF. & INST'NS CODE § 8 (West 1972).
19. In 1970, the California Assembly considered a bill requiring all forms and form letters circulated by state departments to the general public to be printed in English, Spanish, and Chinese. Originally drafted as applicable to all departments, it was subsequently amended to cover only certain specified agencies. Following that, it was amended a second time to cover only the Department of Human Resources Development. As amended, it was reported out without action taken by the Committee on Government Administration. AB 554, 1970 sess. (introduced Feb. 4, 1970—reported from committee without action Sept. 21, 1970).
20. CAL. BUS. & PROF. CODE § 11 (West 1962).
21. CAL. EDUC. CODE § 31 (West 1969).
22. CAL. ELEC. CODE § 8 (West 1961).
23. CAL. GOV'T CODE § 8 (West 1966).
24. CAL. HARB. & NAV. CODE § 8 (West 1955).
25. CAL. HEALTH & SAFETY CODE § 8 (West 1970).
26. CAL. INS. CODE § 8 (West 1972).
27. CAL. MIL. & VET. CODE § 8 (West 1955).
28. CAL. PUB. UTIL. CODE § 8 (West Supp. 1973).
29. CAL. WATER CODE § 8 (West 1971).
30. *See* note 7 *supra.*
31. *Compare* CAL. BUS. & PROF. CODE § 8023.5 (West Supp. 1973) (exam to certify shorthand reporter must be in English) *with* CAL. BUS. & PROF. CODE § 2282 (West 1962) (physicians' licensing exam must be in English but examinee may employ an interpreter either during or after the test to translate questions and answers).
32. In California, knowledge of English is required for both grand jury [CAL. PEN. CODE § 893 (West Supp. 1973)] and petit jury duty [CAL. CODE CIV. PRO. § 198 (West Supp. 1973)]. The same is required for federal jury duty. 28 U.S.C. §§ 1865(b)(2)-(3) (1970).
33. For a comprehensive list of the various state statutes see Leibowitz, *supra* note 1, at 51-67.

Ten other states require that English be used in all court proceedings,[34] while twelve states and territories insist on the exclusive use of that language in all official records.[35] Eleven states prescribe that English alone be used in certain forms of official notice,[36] and other states require that official notices be printed only in English-language newspapers.[37] Some states require English as the language of instruction in schools.[38] Others condition the right to vote or hold office on English literacy.[39]

The prevalence of English-only statutes places those who are not fluent in English at a great disadvantage. While their language disability is not in every circumstance critical to their well-being, when ability to comprehend legal notice is at issue the disadvantage of some becomes acute and can result in loss of important personal or property rights. Thus, although one may deplore all legislatively imposed handicaps on the non-English-speaking, one need not attack the entire English-only system to appreciate the need for remedial measures in procedures used to give official notice.

II

THE SIZE OF THE CLASS DISADVANTAGED BY AN ENGLISH-ONLY REQUIREMENT

While the decennial census does not report figures reflecting current language skills, it does identify the "mother tongue" of individ-

34. ARK. STAT. ANN. § 22-108 (1962); COLO. REV. STAT. ANN. § 37-1-22 (1963); IDAHO CODE ANN. § 1-1620 (1947); MO. ANN. STAT. § 476.050 (1952); MONT. REV. CODES ANN. § 93-1104 (1964); NEB. CONST. art. 1, § 27; NEV. REV. STAT. § 1.040 (1971); UTAH CODE ANN. § 78-7-22 (1953); VT. STAT. ANN. tit. 4, § 731 (1972); WIS. STAT. ANN. § 256.18 (1971).

35. ARK. STAT. ANN. § 22-108 (1962); C.Z. CODE tit. 3, § 278 (1963); GUAM CODE CIV. PRO. § 185 (1953); IDAHO CODE ANN. § 1-1620 (1947); KY. REV. STAT. ANN. § 446.060 (1973); MO. ANN. STAT. § 476.050 (1952); MONT. REV. CODES ANN. § 93-1104 (1964); NEB. CONST. art. 1, § 27; N.J. STAT. ANN. § 52:36-4 (1955); UTAH CODE ANN. § 78-7-22 (1953); VT. STAT. ANN. tit. 4, § 731 (1972); WIS. STAT. ANN. § 256.18 (1971).

36. ARIZ. REV. STAT. ANN. § 39-204 (1956); IND. ANN. STAT. § 2-4706 (1968); IOWA CODE ANN. § 618.1 (1950); KY. REV. STAT. ANN. § 446.060 (1973); LA. REV. STAT. §§ 1.52 (1951), 43:202 (Supp. 1973); ME. REV. STAT. ANN. tit. 1, §§ 353 (1964), 601 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 200A, § 8(b) (Supp. 1973); N.J. STAT. ANN. § 35:1-2.1 (1968); OHIO REV. CODE ANN. § 3905.11 (1971); REV. CODE WASH. ANN. § 65.16.020 (1966); WIS. STAT. ANN. §§ 985.06-.065 (Supp. 1973).

37. *E.g.*, MINN. STAT. ANN. § 331.02 (Supp. 1973).

38. *See, e.g.*, ARIZ. CONST. art. XX, § 7; ARIZ. REV. STAT. ANN. § 15-202 (Supp. 1973) (limited bilingual instruction available in the first three primary grades); COLO. REV. STAT. ANN. § 123-21-3 (1964); MINN. STAT. ANN. §§ 120.10, 126.07 (1960).

39. *See, e.g.*, ARIZ. CONST. art. XX, § 8; CONN. GEN. STAT. ANN. § 9-12 (Supp. 1973); IND. ANN. STAT. § 29-3201 (Supp. 1973).

uals.[40] Since it is reasonable to assume that English language capability is lowest among first and second generation immigrants, a useful index of language ability is the number of persons reporting a native language other than English who were foreign born or native born of foreign and mixed parentage. In 1970, 22.1 million persons fit this description.[41]

Not all such persons, of course, suffer from inability to understand written English. Many who are immigrants or whose parents are immigrants learn to speak English quickly and well. Large numbers of other immigrants, however, have congregated in Chinatowns, barrios, and other big-city neighborhoods where the use of English is

40. The Census uses the term "mother tongue" to denote the language spoken in a person's home during childhood. It does not measure the present language fluency of mature persons surveyed. UNITED STATES DEPARTMENT OF COMMERCE, SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, UNITED STATES SUMMARY, DETAILED CHARACTERISTICS, PC(1)-D1, at App. 5-6, 37, 1970 *Census of Population* [hereinafter cited as UNITED STATES SUMMARY]. For purposes of this Comment, the term will be replaced by "first language."

41. The figure is the sum of those claiming a non-English first language who were foreign born (7.9 million persons) or native born of foreign or mixed parentage (14.2 million persons). *See Mother Tongue of the Population by Nativity, Parentage, and Race: 1970*, in UNITED STATES SUMMARY, *supra* note 40, PC(1)-D1 at 599, Table 193.

Persons of Puerto Rican birth are categorized as native by the census takers. *See* UNITED STATES SUMMARY, *supra* note 40, PC(1)-D1, at App. 4. Thus, the above first language figures do not include residents from Puerto Rico. Nevertheless, given the prevalence of Spanish in Puerto Rico, it is useful to know how many United States residents claim Puerto Rico as their birthplace or that of their parents. In 1970, 1.38 million persons were so identified. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *Persons by Selected Birthplace and Birthplace of Parents for Regions, Divisions, and States: 1970*, in SUPPLEMENTARY REPORT, PERSONS OF SPANISH ANCESTRY, PC(S1)-30, at 17, Table 5), 1970 *Census of Population* [hereinafter cited as PERSONS OF SPANISH ANCESTRY].

The only linguistically identifiable minority closely surveyed by the 1970 Census is the class of persons reporting a Spanish language background. Within that group, 9.6 million persons were identified as either having Spanish as their first language or belonging to families in which the head or wife reported Spanish as his or her first language. *Persons of Spanish Language by Regions, Divisions, and States: 1970* in PERSONS OF SPANISH ANCESTRY, *supra*, PC(S1)-30, at 9, Table 3. In California, Spanish-Americans constitute nearly 14 percent of the state's population, the largest proportion of any ethnic minority in any state. (Included in California's total population of 19,953,134 are 2,738,513 persons of Spanish language background. *Id. But see* MEXICAN-AMERICAN POPULATION COMM'N, MEXICAN-AMERICAN POPULATION IN CALIFORNIA (1973) which argues that the true figure is [much] higher.)

Besides the efforts of the Census Bureau, a number of linguists have attempted to measure the size of the non-English-speaking population in the United States. Employing various indices, estimates have ranged from 18.4 million ("most plausible" estimate for three generations of non-English mother tongue claimants, 1960) to 26 million persons (estimate of native speakers of foreign languages, 1964). T. ANDERSSON & M. BOYER, 2 BILINGUAL SCHOOLING IN THE UNITED STATES, 22-25, App. C, Table 1 (1970) (data compiled as part of a study performed by the Southwest Educational Development Laboratory).

not emphasized. This phenomenon often slows the acquisition of English language skills.[42] It has been suggested that an immigrant's language acquisition is a function of his progress into new activities and areas of the dominant culture. Initially the immigrant will need English only at work or for official contacts. As he enters the social sphere, he will find an increasing need to learn and employ English. But if—as is often the case in urban areas—official agencies and his employer deal with him in his native language and his immediate community provides a social life where English is unnecessary, the immigrant will feel little incentive to progress to other domains dominated by English.[43]

It is evident, then, that our nation includes many persons whose mastery of English is less than complete.[44] Whether the presence of such persons must be taken into account when considering the adequacy of mailed notice in English rests on a balancing of the competing interests and social costs as required by due process.[45]

---

42. Interaction and involvement with institutions of the host society are important steps toward assimilation and acculturation. To the extent that the receiving ethnic community provides new members with a prepared institutional structure, furnishing both protection and isolation, a significant opportunity for assimilation becomes relatively weak or ineffective. . . . [A]bsorption is less likely to occur when communication with the surrounding host community is restricted.

L. GREBLER, J. MOORE & R. GUZMAN, THE MEXICAN AMERICAN PEOPLE 84 (1970) [hereinafter cited as GREBLER ET AL.]. *See also* S.N. EISENSTADT, THE ABSORPTION OF IMMIGRANTS 6-10 (1954); VICTOR G. & BRETT DE BARY NEE, LONGTIME CALIFORN': A DOCUMENTARY STUDY OF AN AMERICAN CHINATOWN (1972).

According to a recent study, continued use of the native language and delay in learning English are a function of neighborhood ethnicity and income. GREBLER ET AL. at 424-25. Thus, substantial or complete inability to communicate in English is most common among Mexican-American poor persons in census tracts with large proportions of Mexican-Americans. *Id.* In 1966, 51 percent of such persons surveyed in Los Angeles and 64 percent of those questioned in San Antonio spoke little or no English. *Id.* at Table 18-1.

Besides these urban phenomena, rural life may slow acquisition of English capability. "Language islands," such as those created by the Spanish-speaking villages of northern New Mexico, blunt the importance of English, and the willingness of agents of the dominant language to adapt reinforces the exclusive use of Spanish. *See* GREBLER ET AL., *supra*, at 426-27; Kloss, *German-American Language Maintenance Efforts*, in J. FISHMAN ET AL., LANGUAGE LOYALTY IN THE UNITED STATES 206-09 (1966). See also note 2 *supra*. Mobile "language islands," such as those shared by Spanish-speaking migrant workers, also inhibit the assimilative process. Migratory work patterns interfere with such assimilative opportunities as those provided by schools [GREBLER ET AL., *supra*, at 94] and otherwise isolate such laborers from the social mainstream. GREBLER ET AL., *supra*, at 87-90.

43. GREBLER ET AL., *supra* note 42, at 426.

44. See note 41 *supra*.

45. Traditionally, questions concerning the right to notice and an opportunity to be heard have been regarded as problems of due process. *See* Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1064-65 (1968). Indeed, the issue of meaningful procedural protection is at the core of that constitutional concept. *See,*

III

THE REQUIREMENTS OF DUE PROCESS IN SERVICE OF NOTICE

In *Mullane v. Central Hanover Bank and Trust Co.*,[46] the Supreme Court considered the constitutional standard of adequate notice. *Mullane* held that, wherever feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely af-

---

e.g., Grannis v. Ordean, 234 U.S. 385, 394 (1914); Armstrong v. Manzo, 38 U.S. 545, 552 (1965). So fundamental is the right to meaningful notice that the courts will not automatically defer to a state's characterization of the adequacy of a particular procedure. Instead, in order to determine whether the state's interest is sufficiently strong to justify notice which is deficient in some respect, the courts will balance the potential recipient's interest in being informed against that of the state in avoiding the burden of providing more effective notice. See text accompanying notes 46-50 *infra*.

Given the due process safeguards that surround the right to "adequate" notice, it is not surprising that courts have made short shrift of arguments of unconstitutionality based on the equal protection clause. See text accompanying notes 61 & 67 *infra*. To assert that the state has discriminated against a particular class of notice recipients by its failure to afford them effective notice seems, on its face, simply an assertion that as to them notice was "inadequate" for the purposes of due process. When the question presented is that of the constitutional sufficiency of mailing English-language notice to the non-English-speaking, however, at least one interest of the affected class is involved which may not be adequately protected by traditional due process analysis. Members of the class are saddled with the risks of incomprehension, the expense and effort of translation, and the possible humiliation of being forced to reveal private matters to a translator; these burdens are imposed on the basis of an ethnic trait (language) which is intimately linked with national origins and alienage. Their interest in receiving official notice in a language they can understand is, therefore, not limited to their due process interest in effective access to the decision-making process, whether judicial or administrative. It includes as well an interest—uniquely the province of equal protection—in not having a distinction drawn between themselves and other notice recipients on the basis of a "suspect" or "invidious" classification. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948). *See also*, Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124 (1969). When this element of "suspectness" is combined with the "fundamental" constitutional interest in effective access, a sound argument can be made that the due process standard for adequacy of notice should be elevated to reflect the change in the interest being weighed. *Cf.* Cox, *The Supreme Court, 1965 Term, Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966). Since the classification scheme rests on suspect grounds and the individual's interest is of constitutional dimension, the state might be required to demonstrate that the differential treatment is necessary to the attainment of a "compelling" state interest. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Under such a test the present scheme would fail since (1) the first interest, cost, is not compelling as to *all* language groups and types of notice and (2) the differential treatment is not necessary to the attainment of the second interest, maintenance of English as the common tongue.

Thus, although adequacy of notice is properly a due process issue, when language barriers are involved, analysis should proceed with an awareness of the equal protection aspects of the question.

46. 339 U.S. 306 (1950).

fect their legally protected interests.[47] This test requires two distinct inquiries. The first considers whether the notice is likely to inform the interested party. It is incorrect to inquire abstractly whether the notice would inform an interested party; rather, the evaluation must center on a particular party in a particular set of circumstances.[48] If the contents of the notice and the means of service meet this test, due process is satisfied and no further inquiry is needed. If, however, the notice fails to meet this standard a second inquiry becomes necessary. The recipient's need and the interests of the state and serving party must be weighed to see whether it is feasible to require such notice as would be likely to inform. If supplying effective notice would entail inordinate costs in money and effort, it will not be required, and the intended recipient will be expected to bear the risks of the existing procedure.[49] But, should the costs of providing adequate notice appear manageable, the serving party will be required to bear the burden of providing such service.[50] Like the determination of effectiveness, this process focuses on the particular facts of a case; it is not an abstract inquiry.

A. Factors That Determine the Effectiveness of Official Communications

The effectiveness of legal notice depends not only on its content and mode of delivery, but on certain characteristics of the recipient. As courts have recognized, due process is an individual matter; what may be sufficient notice for one person may be inadequate for another. Some personal characteristics may be so widely shared by intended recipients as to discredit a particular means of service or manner of composition. Notices published in small print on the back pages of newspapers, for example, lie outside the scope of the average person's reading, and for that reason have been recognized as unlikely to inform *any* recipient.[51] On the other hand, a given notice procedure

47. *Id.* at 314-15; *accord,* Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956).

48. The state's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in the light of the values of a free society, can be characterized as due.

Boddie v. Connecticut, 401 U.S. 371, 379-80 (1971).

49. *See* 339 U.S. at 317-18 (approving publication notice of an accounting as to beneficiaries whose interest or whereabouts could not be ascertained with due diligence).

50. *See id.* at 318-19 (at a minimum, ordinary mail must be employed by the trustee in attempting to notify known present beneficiaries whose place of residence is known).

51. *See* 339 U.S. at 315. Sometimes, of course, notice by publication is an acceptable means of disseminating general information. Notice by publication in a for-

may be considered generally reliable but still be unacceptable with respect to a particular recipient. Service by mail, usually considered effective,[52] becomes a "mere gesture" when the recipient is mentally incompetent; both the means employed and the content (written warning) are deficient in such circumstances.[53] For similar reasons, mailed notice in English may fail to inform a person who is literate only in another language, unless translation is available.

1. Translation—Who Should Bear the Burden?

That translation is essential in order to inform some individuals does not by itself answer who should perform that task. Assuming the serving party knows of the recipient's language handicap, there are a number of possible views on who should translate official communications, the sender or the recipient. One view is that non-English-speaking persons can reasonably be expected to understand the need to translate official communications and to have access to a person capable of performing translation. Under this view, English-language notice by mail is reasonably calculated to inform, which is all that due process requires. A second view concedes that notice in English to such persons is an unreliable means of informing but asserts that to require the serving party to provide translation would be unduly burdensome. Thus, due process will not compel the serving party to assume that task. A third position is that English-language notice by mail is not reasonably calculated to inform and

---

eign language newspaper is discussed in Note, La Opinion *Serves Notice to the Spanish Speaking Community?*, 3 SOUTHWESTERN U.L. REV. 143 (1971), which argues that if a Spanish-language newspaper can be designated as a paper of general circulation entitled to carry legal notices, such notices should be printed in Spanish when intended for a Spanish-speaking person. The central case discussed, *In re* La Opinion, 10 Cal. App. 3d 1012, 89 Cal. Rptr. 404 (2d Dist. 1970) held that publication in a foreign language does not disqualify an otherwise qualified newspaper from obtaining a "general circulation" designation. *Id.* at 1015-16, 89 Cal. Rptr. at 406. The importance of *La Opinion* goes well beyond the issue of serving constructive notice since a general circulation designation allows publication of other forms of legal notice, including some which *are* expected to inform the public at large, *e.g.*, advertisements for bids on public works exceeding $10,000. CAL. GOV'T CODE §§ 14290-91 (West Supp. 1973). Under current law bid ads must be printed in English [CAL. GOV'T CODE § 8 (West 1966)]. In light of *La Opinion* this produces the anomaly of allowing publication but blunting its worth in informing the paper's readership. It is the responsibility of the state to seek a wide selection of bids and obtain the most for the public's money. Publication in English in a foreign-langnage paper runs contrary to this duty on its face. Yet Spanish-speaking contractors, for example, may be capable of providing the required services at the lowest cost. The legislature should consider whether this potential benefit would justify the cost of publishing ads in Spanish and, if so, should provide for ads to be bilingual regardless of the language of the newspaper in which they appear.

52. *See* 339 U.S. at 319.

53. *See* Covey v. Town of Somers, 351 U.S. 141, 146-47 (1956).

that translation by the serving party is in most cases a reasonable requirement.

Each of the above views has been considered recently in both federal and state courts in California. In *Julen v. Larson*,[54] for example, the plaintiff sought California state court enforcement of a money judgment rendered by a Swiss court. Prior to entry of the Swiss judgment, the defendant had received two certified letters containing documents written in German, a language which he did not understand.[55] The court found that in these circumstances the notice given was not reasonably calculated to inform.[56] The court went on to consider what kind of notice was reasonable in this setting. With an eye to the international aspects of the case, the court stated that while adequate notice requires no great formality, the defendant was entitled, at a minimum, to notice in the language of the jurisdiction in which he was served.[57]

One might read *Julen* as implying that notice in the dominant language of a jurisdiction is always sufficient. Such an interpretation, however, adopts *Julen*'s result without fully appreciating its reasoning. Because the case arose in an international context, the court's analysis of feasibility in *Julen* was subject to a number of constraints—the possible difficulties a foreign court might have in ascertaining the language ability of the recipient, a reviewing court's uncertainty over the translation capacity of a foreign serving party, and the court's limited power under the doctrine of comity to compel a result. Despite these constraints a major concession—translation into the language of the jurisdiction of the recipient—was required. In a wholly domestic case, the above limitations would be less pressing. Thus, a court that agreed with *Julen*'s conclusion that notice in a language unfamiliar to the recipient was not calculated to inform might well conclude that due process requires that notice be translated into the recipient's native language.

In two recent cases, however, California courts have rejected arguments that the burden of translation should be placed on the state. Either English-language notice was viewed as sufficiently informative or the burden of translation was considered unreasonable and excessive. The Ninth Circuit in *Carmona v. Sheffield*[58] rejected a broad

54. 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (2d Dist. 1972).

55. *Id.* at 327, 101 Cal. Rptr. at 797-98.

56. *Id.* at 328, 101 Cal. Rptr. at 798.

57. *Id.*, citing CAL. CODE CIV. PRO. § 185 (West 1954) which requires judicial proceedings to be conducted in English. *But cf.* Shoei Kako Co. v. Superior Court, — Cal. App. 3d —, —, 109 Cal. Rptr. 402, 412-13 (1st Dist. 1973) (approving mailed notice in English served on a Japanese corporation in Tokyo; distinguished *Julen* on the grounds the corporation regularly dealt in English and therefore understood the notice).

58. 475 F.2d 738 (9th Cir. 1973) (per curiam).

argument calling for translated notice and other services for Spanish-speaking claimants of unemployment benefits. The plaintiffs urged that the failure of the state to provide them with Spanish-speaking interpreters, descriptive materials, and notices in Spanish violated due process and equal protection.[59] While notice in English of state unemployment rights might be adequate for those who spoke that language, such notice, plaintiffs argued, amounted to no notice at all as to them.[60] The court rejected plaintiffs' claim, justifying the practice of supplying notice only in English on the grounds that no economically feasible alternative was available and that any classifications involved had a reasonable basis.[61] Thus, the existing approach was "reasonable" under due process standards and complied with the requirements of equal protection.

The California Supreme Court has been equally unreceptive to requests that state agencies provide notice in foreign languages. In *Guerrero v. Carleson,*[62] plaintiffs were Spanish-speaking welfare recipients whose inability to comprehend English was conspicuously noted in their files. They had suffered loss of welfare benefits for failure to respond to the welfare department's notice of an impending change in their status. The notice had been sent in English despite the department's knowledge that plaintiffs spoke no English and despite the ready availability of translation services.[63] Citing the agency's administrative capacity to provide translated notice in these circumstances, the plaintiffs requested a preliminary injunction prohibiting the directors of state and county welfare agencies from reducing or terminating payments to welfare recipients known to be literate only in Spanish unless they first had been notified in that language.[64]

The court rejected the plaintiffs' claim, asserting it was reasonable to assume that recipients of untranslated notice would be motivated to obtain a translation.[65] To hold otherwise, the court

59. The state unemployment agency employs some interpreters and provides a few Spanish-language forms. *See* Brief for defendant at 3 & Appendix A, Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973). These services are discretionary, but the agency must print all standard information pamphlets concerning unemployment and disability insurance programs either separately or bilingually in Spanish and English. CAL. UNEMP. INS. CODE § 316 (West 1972).

60. 475 F.2d at 739.

61. *Id.*

62. 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973).

63. *Id.* at 810, 816-17, 512 P.2d at 834, 838-39, 109 Cal. Rptr. at 202, 206-7.

64. *Id.* at 809, 512 P.2d at 833, 109 Cal. Rptr. at 201.

65. *Id.* at 813, 512 P.2d at 836, 109 Cal. Rptr. at 204. In support, the court noted that one of the co-plaintiffs, Mrs. Varela, had at least three teenage children in her household who spoke and read English and, in addition, plaintiff Varela had taken her notice of reduction in benefits to the State Service Center in Los Angeles where a

felt, would impose an impossible burden on the state since there would be no way to distinguish among language groups or types of notice. As a result, every official communication would need to be translated into a multitude of foreign languages.[66] Finally, the demands of equal protection were found to have been satisfied since the notice used was "due and proper," thus plaintiffs' claim of discrimination against "a class of recipients who are . . . denied aid without being duly and properly informed" was rejected.[67]

In a strong dissent, Justice Tobriner attacked the majority's "self-informing" assumption as unrealistic and insufficient to meet the constitutional standard of a means reasonably calculated to inform.[68] Weighing the agency's knowledge of the language barrier and its translation capacity against plaintiffs' motivation and ability to obtain translation, he concluded that the burden of translation was properly the state's.[69] In addition, he rejected the majority's "floodgates" argument observing that ordering translations on these facts in no way compelled the same conclusion in other types of situations or with respect to other languages. The feasibility of translation in each case would depend on the particular facts presented.[70] Thus the state could be required to provide termination notices in Spanish but not Basque or Chippewa.

The opinions of Justice Tobriner, the court in *Julen,* the Ninth Circuit in *Carmona,* and the *Guerrero* majority all rest on the twin due process concepts of practicality and sufficiency. Yet, in fairly similar fact situations the conclusions reached were widely divergent. The court in *Julen* and Justice Tobriner dissenting in *Guerrero* adjudged notice in a language which the recipient did not understand as unlikely to inform. The *Guerrero* majority, on the other hand, held that it was likely to inform, while *Carmona* simply called the procedure "reasonable." *Julen* and Justice Tobriner asserted that translation by the serving party was practicable; *Carmona* and the *Guerrero* majority, however, viewed the requirement of translation as excessively burdensome.

Evaluation of these conflicting conclusions is best accomplished by applying the two-step analytical approach used by each of these opinions. First, it must be determined whether English-language notice is reasonably calculated to inform a non-English-speaking recipient. Second, if it appears that such notice is insufficiently informa-

---

law student explained its meaning in Spanish and helped her prepare papers requesting a hearing. *Id.* at 813 nn. 6 & 8.

66. 9 Cal. 3d at 815-16, 512 P.2d at 837-38, 109 Cal. Rptr. at 205-06.

67. *Id.* at 814, 512 P.2d at 837, 109 Cal. Rptr. at 205.

68. *Id.* at 821, 512 P.2d at 842, 109 Cal. Rptr. at 210.

69. *Id.* at 822, 512 P.2d at 843, 109 Cal. Rptr. at 211.

70. *Id.* at 822-23, 512 P.2d at 842-43, 109 Cal. Rptr. at 210-11.

tive, the feasibility of requiring translation by the serving party must be assessed.

2. *The "Self-Informing" Hypothesis*

In holding notice in English adequate, the *Guerrero* majority assumed it was reasonable to believe that a recipient of mailed notice would be able to obtain a translation where one was needed. The dissent felt that the steps involved in obtaining a translation often would not be taken. Determining which of these conclusions is more accurate requires analysis of the two distinct lines of argumentation that can be advanced in support of the self-informing hypothesis. The first could be described as the normative view, the second the pragmatic view.

a. The Normative View

That a person ought to be satisfied with communication in English derives support from state and federal law as well as social custom. Since English is this country's dominant language, it could be argued that an alien or other non-English-speaking person "should" learn English. Though the *Guerrero* majority never states this proposition explicitly, it underlies much of their discussion of the value of a common tongue and the existence of social pressures and incentives favoring the use of English.[71] When examined, this position reveals serious defects. First, the value judgment itself is not persuasive as to all non-English-speakers, since a recipient of legal notice may be attempting to comply with the social goal of learning English but still be unable to comprehend the legal notice when he receives it.[72] The in-

---

71. The majority cites the pervasiveness of English in California and the nation, and the desirability of a common tongue. 9 Cal. 3d at 812-13, 512 P.2d at 835-36, 109 Cal. Rptr. at 203-04. The court also cites section 8 of the California Welfare and Institutions Code which requires notices ordered by that code to be in English. *Id.* Such support is of questionable worth since it was the constitutionality of that very practice which was at issue.

72. Even if the establishment of English as the common language is an acceptable social policy, the extent to which notice restrictions further that goal seems slight, particularly compared to the informational needs of the recipient and the risk he bears in failing to respond to notice. Less onerous methods are available to encourage fluency in English, such as remedial language programs in the schools [see note 120 *infra*] and social pressure.

More fundamentally, however, the goal itself may be questioned, particularly in light of current social trends. The growth of ethnic feeling among non-English-speaking subcultures, the development of bilingual education, and the expanding awareness by legislators and courts of unnecessary disadvantages occasioned by English-only practices all argue against a policy of enforced monolingualism. *See also* Leibowitz, *supra* note 1, at 11, wherein the author questions the efficacy of legal sanctions in promoting English, as they have only a marginal effect when compared to the practical

ability to understand what is written may spur the recipient to learn English in the future, but his present inability may result in the immediate loss of important rights whether or not the notice motivates him to learn English. Second, as a constitutional matter, that English happens to be the language most widely used does not, in itself, settle the question whether its exclusive use in legal communications is constitutionally permissible.

It is true that under various federal and state laws, English is made the exclusive mode of communication and individuals unable to comply are denied the exercise of certain prerogatives as a result. For example, under both California and federal law, one must understand English to qualify for jury duty.[73] The propriety of such conditioning, however, depends on the constitutional significance of the right affected (as well as the strength of the state's interest in administrative savings). Unlike jury duty or naturalization, notice and an opportunity to be heard are at the core of due process. The non-English-speaking, including aliens, are entitled to these protections whenever their liberty, person, or property is threatened by the government.[74] Such rights are not made contingent on citizenship, naturalization, or the ability to read and write English. To say that one *ought* to know English denies relevancy to a language barrier as one of the considerations in allocating risks and burdens even though such a handicap is clearly among the characteristics affecting an intended recipient's ability to comprehend. If translation is adjudged to be properly the recipient's burden, that conclusion must rest, not on a

needs of the individual who is handicapped by inability to speak the dominant language.

Finally, it can be questioned whether, historically, the driving force behind English-only restrictions has been the goal of uniting the citizenry. In the era from the Civil War through the 1920's, both California and the nation were seized with fear and hatred of "foreigners." Immigrants were widely viewed as unwanted interlopers seeking citizens' jobs. Discriminatory legislation was passed, ranging from outright exclusion in the case of Chinese women and laborers [*see generally*, VICTOR G. & BRETT DE BARY NEE, LONGTIME CALIFORN': A DOCUMENTARY STUDY OF AN AMERICAN CHINATOWN 30-59 (1972)] to literacy requirements for voting designed to keep the electorate racially and culturally pure [*cf.* Castro v. California, 2 Cal. 3d 223, 228-31, 466 P.2d 244, 247-49, 85 Cal. Rptr. 20, 23-25 (1969)]. For a discussion of discriminatory motivation in requiring English as a condition to business licensing and voting see generally Leibowitz, *supra* note 1, at 25-41.

73. See note 32 *supra*.

74. The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . .

Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *accord*, Graham v. Richardson, 403 U.S. 365, 371 (1972); Purdy v. Fitzpatrick, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 79 Cal. Rptr. 77, 85 (1969).

subjective view of the desirability of his knowing English, but on pragmatic considerations of the likelihood of "self-informing," the interest of the recipient in exercising his legal rights, and the economic and administrative cost to the serving party of providing a translation.

b. Pragmatic Considerations: Economic Costs and the Efficacy of Incentives

Evaluation of the practical efficacy and desirability of a self-informing requirement is, as the *Guerrero* dissent recognized, a two-step procedure. First, it must be determined whether the recipient will normally perceive the necessity of promptly translating a particular communication. Since recognition of a letter's official nature presupposes some familiarity with the language in which it is written, the recipient may not have sufficient warning of the need for immediate interpretation. Unable to read its contents, the recipient must rely on the letter's form to determine its significance. The *Guerrero* majority cite certain formal features of the welfare notice as evidence of its official nature:[75] it was personally addressed on letterhead stationery, dated and sigued, with boxes checked and filled in by hand. Whether such features will motivate prompt translation, however, is certainly debatable. Many forms used in political, charitable, or business solicitations have a similar format. Indeed, unscrupulous credit agencies and confidence men have been known to use official-looking forms in order to bilk the ignorant and the unwary. A non-English-speaking person who has previously incurred inconvenience and expense in translating mail mistakenly thought to be official will not be anxious to repeat this process for a communication similar in appearance.

Even where the recipient perceives the need for a prompt and accurate rendering, a second step must be taken before effective communication can occur: a translator must be found. The *Guerrero* majority felt it reasonable to assume that translators are available to all Spanish-speaking persons who need them. In support of this view, the court cited a similar assumption appearing in a recent voting rights case, *Castro v. California*,[76] and argued that various incentives served to make procurement of a private translator likely. At issue in *Castro* was the constitutionality of English literacy as a prerequisite to registering to vote. The court treated voting as a conditional right, with the state retaining the power, within constitutional limits, to determine how and by whom the franchise could be exercised.[77] The state's interest in having an informed electorate could not, however,

75. 9 Cal. 3d at 813, 512 P.2d at 836, 109 Cal. Rptr. at 204.
76. 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).
77. *Id.* at 232, 466 P.2d at 250, 85 Cal. Rptr. at 26.

bar voting by those literate in another language where the voters were able to demonstrate the availability of political information in their own language sufficient to enable them to form intelligent electoral opinions. The court declared Spanish literates to be such a class, citing the wide availability of Spanish-language television and radio broadcasts, newspapers, and periodicals.[78] It was left open to speakers of other languages to qualify upon satisfying the tests of literacy and availability of adequate information.[79]

Although *Castro* requires that voter registration be open to Spanish-speaking persons, the decision did not order the state to print ballots or election materials in Spanish.[80] Such materials were dismissed as "not necessary either to the formation of intelligent opinions on election issues or to the implementation of those opinions through the mechanics of balloting."[81] Media sources were seen as adequate to inform Spanish-speaking voters of the issues, and it was considered reasonable to assume that such voters could prepare themselves for the ballot-marking process by study of sample ballots with the assistance of others who were bilingual.[82]

Even assuming that these premises are credible, they differ in rationale and strength from the "self-informing" suggestion of *Guerrero*. The prospective voter initially has at his or her disposal sources of relevant information in his own language, whose accessibility and adequacy have been established. Relying on this information, the prospective voter learns he must register prior to voting. Informed of the election in advance, the non-English-speaking voter will only need bilingual assistance in the final step of a process made known to him in his own tongue. In contrast, the recipient of untranslated notice cannot rely on these readily available sources to forewarn him of the

78. *Id.* at 238-39, 242-43, 466 P.2d at 255, 258, 85 Cal. Rptr. at 30, 34.

79. *Id.* at 242, 466 P.2d at 258, 85 Cal. Rptr. at 34.

80. *Id.* at 242-43, 466 P.2d at 258, 85 Cal. Rptr. at 34.

81. *Id.* at 242, 466 P.2d at 258, 85 Cal. Rptr. at 34.

82. Subsequent to the *Castro* decision, the California legislature ordered that Spanish language facsimile ballots be posted conspicuously in polling stations and made available to anyone who desired to use them for reference while voting. In addition, facsimile ballots are provided in other languages where the county clerk finds a siguificant need. CAL. ELEC. CODE §§ 14201.5 & 14201.6 (West Supp. 1973).

The legislature was also skeptical of the adequacy of pre-election information sources. Accordingly, they provided that any candidate for elective office in any local agency, city, county, or district who desires publication in Spanish of his statement of qualifications can obtain it upon request. CAL. ELEC. CODE § 10012.5 (West Supp. 1973). (A written statement of each candidate's qualifications appears in the voter's pamphlet which is sent to each voter together with a sample ballot).

It should also be noted that the 1973 legislature passed a bill requiring bilingual deputy registrars for precincts where three per cent or more of the voters speak a language other than English. AB 790, 1973 sess. (introduced March 15, 1973).

nature and meaning of an individualized communication.[83] Lacking any sense of urgency about the letter's contents he may not feel *Guerrero*'s "incentive" to obtain a translation.

A further distinction lies in the nature of the right at stake. Failure to "self-inform" in *Castro* produced only a remote and intangible loss stemming from failure to cast an informed vote. In contrast, failure to obtain translation when the communication is a termination-of-benefits notice will result in immediate deprivation of a significant personal interest. Prudently, therefore, the *Guerrero* majority did not rest their argument for the efficacy of self-informing on *Castro* alone. They also argued that because the non-English-speaking are routinely compelled to resort to privately obtained translators when dealing with government agencies, it is reasonable to expect that they will continue to do so in a given case. As evidence, they cite naturalization proceedings, application for driving permits, social security, income tax, and unemployment transactions, and application for business licenses as typical occasions calling for English-language capacity.[84] Upon examination, however, the role of these contacts in encouraging reliance on privately obtained translators is questionable, particularly for the Spanish-speaking. In California, Spanish literates may qualify for a driver's license through tests in their own language.[85] Federal income tax instructions are available in Spanish as well as other foreign languages, and California's tax agency employs interpreters.[86] Similarly, the Social Security Administration prints

83. Newspapers and radio or television broadcasts can not be depended upon to provide an informational foundation for official notice comparable to that provided for voting. An election is a public matter; its processes and forms are universal. By comparison, the variety in form and effect of official notices is tied to the particular facts and circumstances underlying each communication. The media may be a potential interpretive source for the recipient of notice who has perceived the need for a prompt translation but they can not be expected to forewarn the recipient of the "official" nature and meaning of each individual notice.

84. 9 Cal. 3d at 813, 512 P.2d at 836, 109 Cal. Rptr. at 204.

85. The state must publish Spanish-language rule books [CAL. VEH. CODE § 1656 (b) (West 1971)] and, when the licensing test is administered to a Spanish-speaking examinee, the written test is in Spanish. *See* Cal. Motor Vehicle Dep't Driver's Licensing examination Form DL-5D. The only English language skill required is the "ability to read and understand simple English used in highway traffic and directional signals . . . ." CAL. VEH. CODE § 12804 (West 1971). This ability is tested by means of flashcards bearing facsimiles of English language road sigus on one side and, on the other, the Spanish translation.

86. *See, e.g.*, DEP'T OF THE TREASURY, IRS, PUBLICATION No. 806 (11-72) (Spanish langnage instructions for completion of Form 1040).

Preparation of forms, directions, or instructions pertaining to the collection of the federal income tax is the responsibility of the Secretary of the Treasury or his delegate. INT. REV. CODE OF 1954 § 7805(c). Preparation of non-English language informational materials falls within the scope of the power to prescribe "all needful rules and regulations for the enforcement of [the Code]." *Id.* at § 7805(a).

information and forms in languages other than English and employs interpreters on a permanent basis to assist in communicating with applicants.[87] In addition, California's unemployment insurance agency provides some translated materials and interpreting services for the Spanish-speaking.[88] Finally, the English-language requirement for business licensing and for naturalization will teach the need for translation to only those residents who open a business or become citizens.[89] Thus, contrary to the court's assertion, the contacts listed do not clearly provide strong and repeated incentives either to learn English or to obtain private assistance in translating English messages into one's native language. Indeed, the exact opposite may well be true: frequent provision of translated materials may encourage reliance on the state's apparent policy of making available advice and materials on a bilingual basis wherever important interests are at stake.[90]

In California, the forms and official communications of the Franchise Tax Board are in English, but as a matter of policy the agency employs many bilingual persons who assist the non-English-speaking in their contacts with the agency. A catalogue of languages within the Board's overall capability is maintained for use by local agencies when faced with a language whose translation is beyond the capacity of their particular office. Interview with Donald Perata, Audit Supervisor, Oakland Office of the California Franchise Tax Board, in Berkeley, California, Oct. 4, 1973. (It is interesting that government should be so responsive to language barriers when providing for its own coffers, yet so reluctant to assist when the property and personal rights of private citizens are at issue.)

87. It is the policy of the Social Security Administration to have available in district and branch offices personnel who are designated as official translators of foreign documents and interpreters of foreign languages. Obviously, not all foreign languages can be translated in every local office, but to the extent possible, languages of foreign countries are represented throughout the Administration. Interview with Virginia Donnell, Social Security Representative, Social Security Administration, in Berkeley, California, Oct. 1, 1973. The Administration's internal guidelines govern certification of official translators and the procedures to be followed when translating non-English-language documents. SOCIAL SECURITY ADMINISTRATION, CLAIMS MANUAL, DISTRICT OFFICE SUPPLEMENT §§ 9600-9700 (1972).

88. See note 59 *supra*.

89. Even in these cases, the force of English-only requirements is diluted. Naturalization requirements and related general information are provided in non-English languages. *See, e.g.*, Immigration and Naturalization Service, U.S. Dep't of Justice, Publication No. N-17 (Spanish). In addition, in California, certain examinations, (such as the physician's licensing examination) while printed in English, permit the examinee to employ an interpreter either during the test or thereafter to interpret questions or translate his answers. CAL. BUS. & PROF. CODE § 2282 (West 1962).

90. Certain state agencies have adopted a policy of providing translation services for various languages whenever a non-English-speaking recipient indicates he has not understood written notice. For example, the California Human Resources Development Department includes in its job categories, positions for Spanish and Cantonese translators. If a Spanish- or Cantonese-speaking person receives an H.R.D. communication which he can not comprehend, agency personnel will translate it for him upon request. Interview with Duncan Buchanan, Chief of Administrative Services, Region II, California Human Resources Development Department, in Richmond, California,

The assumption of an adequate incentive to obtain translation services suffers from an even more fundamental defect, however. While due process does not require certainty when giving notice, it does require that the means chosen be reasonably calculated to advise the recipient of the impending change in his status.[91] *Mullane* defines reasonable notice as that which a person might reasonably give when he is intent on actually informing the recipient.[92] When the serving party knows the recipient cannot read English, it is evident that mailed notice in English will not inform, absent translation. Whether a particular recipient will seek prompt interpretation rests on such uncertain factors as whether the notice will strike him as "official" in appearance and on the presence or absence of other intangible incentives.

This uncertainty is easily remedied. Assuming the serving party has available translation services, he can readily provide notice calculated to inform whenever he is aware of the existence of a language problem.[93] Whether he *will* provide such notice then becomes a function of his desire to effectively communicate his message. Surely, reliance on speculative psychological incentives would not satisfy a businessman desirous of actually informing a potential customer.[94] Neither can it generally be sufficient to satisfy the requirements of due process.

B. Feasibility of Providing Translated Notice

1. Economic Costs and the Balancing of Interests

An essential determinant of whether a certain mode of notice can be required is the serving party's knowledge of the recipient's circumstances. In *Guerrero*, for example, plaintiff emphasized the

---

Oct. 3, 1973. A similar policy governs the Franchise Tax Board. See note 86 *supra*. To the extent that this occurs, a major justification for self-informing—allocation of translation costs to the recipient and not the state—is defeated. Such individualized after-the-fact translations are almost certainly more expensive than providing translated notice in the first place, especially when notice forms can be prepared in quantity and sent routinely when the agency communicates with a recipient of known language handicap.

91. 339 U.S. at 314-15.

92. *Id.*

93. Due process is an individualized obligation [see note 48 *supra* and accompanying text]. As the serving party learns more about the recipient, facts relevant to the recipient's comprehension shape the form and content of the notice that will be required, making reliance on generalizations increasingly inappropriate. See text accompanying notes 48-53 *supra*.

94. Certainly it is instructive, in determining the reasonableness of the [means employed], to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to . . . persons whose name and addresses are in his files.

339 U.S. at 320.

agency's awareness of his language handicap. Where knowledge of the recipient's special requirements is extremely difficult to obtain, however, notice tailored to meet his needs may be infeasible and therefore not constitutionally required.[95] In *Mullane* the Court permitted notice by publication for beneficiaries whose interests or whereabouts could not be ascertained with due diligence.[96] Publication was rejected, however, for beneficiaries whose names and addresses appeared in the serving party's books.[97]

Knowledge possessed by the serving party was also essential to the decision in *Covey v. Somers*.[98] At issue was the adequacy of notice to a mentally incompetent property owner. Pursuant to statute, town officials served notice by mail, by posting the property, and by publication in two local newspapers.[99] When the defendant failed to respond, default was entered and the property was sold. On review, the Supreme Court focused on appellant's allegation that town officials knew this property owner was an unprotected incompetent.[100] Expressly rejecting the contention that due process requires only measures that would be sufficient to inform the ordinary citizen, the Court declared the procedure used inadequate.[101] Recognizing that even mail was not reasonably calculated to inform a person who cannot comprehend the written word, the Court followed *Mullane* in using serving party knowledge as the key to requiring more effective means of communication (here, appointment of and service upon a guardian).[102]

Subsequent decisions have followed *Covey* and *Mullane* in assigning pivotal importance to certain facts known to or easily ascer-

95. The burden of search can be viewed as inversely correlated to the uniqueness of a recipient's relevant characteristics. If a communication-affecting trait is widely shared (*e.g.*, having a mailing address), that fact alone dictates that a serving party should seek such information as it relates to the recipient. But if the trait is unusual (*e.g.*, mental incompetency), it is reasonable for the serving party to assume the norm, absent other information, and proceed without further inquiry. Because a language barrier is relatively uncommon, whether the serving party "should have known" will depend on the facts in his possession at the time of serving. A Chinese or Spanish surname should not, by itself, compel investigation since such information is ambiguous—most people with such surnames are bilingual. A prior course of dealing with the recipient seems essential to establishing the requisite knowledge. In dealings with a state agency such a showing would often be possible. See text accompanying notes 62-63 *supra*.

96. 339 U.S. at 317.

97. *Id.* at 318.

98. 351 U.S. 141 (1956).

99. *Id.* at 144.

100. *Id.* at 145-47.

101. *Id.* For a discussion of the due process requirement of individualized notice, see note 48 *supra*.

102. 351 U.S. at 146-47.

tainable by the serving party.[103] The recipient's name, permanent address, physical whereabouts, and mental capacity are among the factors that have been considered relevant by the Court in determining the ability of the intended recipient to receive, understand, and act upon pertinent information. A language barrier is similarly crucial when considering a person's capacity to respond to official notice. In *Guerrero,* the recipient's language handicap was known; in addition, the agency possessed adequate Spanish-language resources. As *Mullane* and *Covey* suggest, due process does not require exhaustive and expensive investigation into an intended recipient's language skills. But where that information is at hand, the only practical objection remaining is the feasibility of responding to his handicap.[104] When the notice involved is only a form document and the transmitting agency has translation capacity in the recipient's language, the appropriate question seems to be, "Why wasn't it translated?" rather than, "Can it

103. Name and address were emphasized in *Mullane* and subsequently in Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962) and Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956). Mental capacity was key in *Covey,* and the intended recipient's actual whereabouts was central to the recent case of Robinson v. Hanrahan, 409 U.S. 38, 40 (1972) (state mailed notice concerning automobile forfeiture proceedings to accused's home address despite state's knowledge that defendant was then in jail).

104. The argument of the *Guerrero* majority that mandating the translation requested by plaintiffs would compel translations of all notices into every language is specious. That translating may be difficult or impossible in some situations does not justify a blanket rule against providing it in others. "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Mullane,* 339 U.S. at 318. Thus, the balance of interests might permit notice in English even when a language barrier is known, if translation of the language involved is beyond reasonable serving party capacity. Where the language is one for which translators are not readily available, the burden of serving notice in that language ordinarily will outweigh the recipient's need for more effective notice. Similarly, even when translation *can* be performed it will not be necessary to translate each and every piece of correspondence. If an official notice is accompanied by docnments, for example, they need not be translated so long as the notice itself provides the defendant with the critical information in a language which he comprehends.

Another criticism that has been levelled at proponents of notice tailored to the recipient's language capabilities is that such a rule would also require special treatment for English-speaking persons known to be illiterate. Initially, upon receipt of the notice, the positions of the English-speaking illiterate and the non-English-speaker are similar: neither can understand the notice. But their opportunities to learn the contents of the communication differ greatly, as do the methods by which the serving party can remedy the deficiency. English-speaking illiterates are more likely to live in close association with English literates who can assist them in understanding the notice. Moreover, effective communication with English-speaking illiterates would require a person-to-person oral explanation. While this may be desirable, it is a great deal to ask of the serving party. Mailed notice, however, *will* inform a non-English-speaking recipient if translated into his language. Thus, in the case of the English-speaking illiterate, an improved scheme is both less needed and more difficult to administer.

be done?"[105] In these circumstances refusal to mail notice in the recipient's language is expediency, not due process.

2. *Social Costs and Public Policy Considerations*

A requirement that the state or serving party assume responsibility for adequate (i.e., foreign-language) notice is consistent with national trends and with the spirit of recent legislation.[106] California, for example, has shown increasing concern to adapt state action to meet the special needs of the non-English-speaking.[107] Many Cali-

105. The considerations pertaining to translation of summonses in California differ in some respects from those relating to other forms of notice. The form and content of the summons to be served by mail are dictated by statute [CAL. CODE CIV. PRO. § 415.30(b) (West 1973)]. Such documents can be and are stockpiled for general use; in a particular case, it is necessary only to complete the blanks on the printed form designating the parties, cause, and title of the court.

Since courts possess translation capacity by virtue of their interpreter staffs it would be feasible to print summonses in many languages. What translations should be provided would depend upon the capacities of the staff of interpreters as well as the presence of sizable minority language groups in the area served by the court. When a plaintiff knows the defendant is non-English-speaking, he should be required to inform the clerk. A summons in the defendant's language should then issue if that language is among those frequently before the court and if translated forms are available. If they are not available, notice in English is the defendant's due since the plaintiff and state have done all that can be reasonably expected.

It should be noted, however, that under the present statutory scheme, failure to respond to a mailed summons does not result in immediate default. Instead, the plaintiff must attempt to serve defendant by another method, preferably personal service [CAL. CODE CIV. PRO. § 415.30(d) (West 1973)]. Except on a showing of good cause, the plaintiff will be permitted to recover reasonable expenses in attempting post-mail service. Inability to read a summons in English might constitute "good cause."

106. Legislative response to language barriers in New York has included provision for certain judicial notices in Spanish. See note 107 *infra*.

For discussion of case law developments nationally in respect to various language barrier issues see notes 118-122 *infra* and accompanying text.

107. Even early in its history, California demonstrated a concern for the needs of its Spanish-speaking citizens. Besides authorization of the use of Spanish for the publications cited in note 6 *supra*, California once permitted giving notice of a judicial action in either Spanish or English, in four counties. CAL. CODE CIV. PRO. § 185 (1872).

Other states with sizable numbers of non-English-speaking residents also recognized their needs to some degree during the nineteenth century. The states of Indiana, Ohio, Pennsylvania, Louisiana, New Mexico, and Colorado, as well as California, have all at some time authorized publication of their laws in certain foreign languages. *See* Fedynskyj, *State Session Laws in Non-English Languages: A Chapter of American Legal History*, 46 IND. L.J. 463 (1971).

A revival of concern in recent years has prompted states other than California to depart from an English-only regimen. The legislature of New York acted in 1970 to provide Spanish-speaking residents of New York City with more adequate notice. The new law [N.Y. CITY CIV. CT. ACT § 401 (d) (McKinney Supp. 1972)] requires that all summonses issued in the city for consumer credit transaction cases be printed in Spanish as well as English. In addition, 72-hour notices of eviction in New York City are required to contain a statement printed in Spanish and English as to the

fornia agencies now employ permanent interpreters and are authorized to publish informational materials in languages other than English.[108] Recently-enacted statutes provide that vehicle code summaries,[109] facsimile ballots,[110] and electoral candidates' statements of qualifications[111] be provided in Spanish. California schools are now authorized to provide bilingual instruction,[112] and employers of agricultural workers must post wage rates in Spanish as well as English.[113] In criminal trials, California judges are authorized to appoint interpreters,[114] and the legislature has provided for interpreters in adminis-

---

availability of legal assistance for persons who are unable to afford counsel. Legislative memoranda, Session Laws of New York, pp. 2901-2 (McKinney 1970).

In certain New York City criminal courts, clerks prepare the complaints. In such courts, there must be conspicuously posted in the clerk's office a notice legible in English, Spanish, Yiddish, Italian and such other language as the court shall provide, informing complainants of the right to appeal to the judge in person if the clerk refuses to make or verify a complaint. N.Y. CITY CRIM. CT. ACT § 50 (McKinney 1963).

Of longer standing is the New Mexico provision, originally enacted in 1912, authorizing publication of official notices in the Spanish language where 75 percent of the county's residents are Spanish-speaking. N.M. STAT. ANN. § 10-2-11 (1953).

108. The State Department of Social Welfare, for example, is empowered to publish its informational pamphlets and related materials in Spanish as well as English [CAL. WELF. & INST. CODE § 10607 (West 1972)], while the Department of Human Resources Development must print all standard employee information pamphlets concerning unemployment and disability insurance programs either separately or bilingually in Spanish and English [CAL. UNEMP. INS. CODE § 316 (West 1972)].

109. CAL. VEH. CODE § 1656(b) (West 1971).

110. CAL. ELEC. CODE §§ 14201.5-.6 (West Supp. 1973).

111. *Id.* § 10012.5 (West Supp. 1973).

112. The Bilingual Education Act of 1972 [CAL. EDUC. CODE §§ 5761-64.5 (West Supp. 1973)] establishes guidelines for school districts in developing bilingual programs. While the Act does not make such programs mandatory, it strongly endorses their development. In the statement of legislative findings it is recognized that

> [T]here are large numbers of children in this state who come from families where the primary language is other than English. . . . The inability to speak, read and comprehend English presents a formidable obstacle to classroom learning and participation which can be removed only by instruction and training in the pupil's dominant language.

Id. at § 5761.

In a related development, the San Francisco school board has modified entrance requirements to Lowell High School, a school for the academically gifted, in the case of students whose native language is other than English. The board has ruled that these students are entitled to be tested in their own language. The results of these tests can then be used in applying for admission to Lowell, which enrolls the top junior high school scholars throughout the city. The decision was made in response to a suit brought on behalf of six "straight-A" students of Mexican-American descent who sought a Spanish-language exam. San Francisco Chronicle, Aug. 31, 1973, at 4, col. 3.

113. CAL. LABOR CODE § 1695(7) (West Supp. 1973).

114. CAL. EVID. CODE § 752 (West 1966) provides for the appointment of an interpreter when needed to translate the testimony of a witness. As such it is designed more for the benefit of the court and jury than for the defendant. The statute is not, however, the exclusive basis for the appointment of an interpreter since courts of general jurisdiction have inherent power to do so whenever it is necessary in the administration of justice. People v. Holtzclaw, 243 P. 894, 896, 76 Cal. App. 168,

trative hearings[115] as well as in programs of rehabilitation of the handicapped.[116] Finally, the 1973 California legislature passed a bill requiring certain state and local agencies to employ bilingual and bicultural persons in public-contact positions.[117]

Courts also have manifested a growing awareness of and sensitivity to problems of language. Recent cases have upheld the right to an interpreter at trial,[118] to non-English *Miranda* warnings,[119] and

---

171 (2d Dist. 1926); People v. Walker, 231 P. 572, 577, 69 Cal. App. 475, 486-87 (2d Dist. 1924). A recent decision declared, "a defendant who is not able to communicate in the English language is entitled to an interpreter at his trial." People v. Annett, 251 Cal. App. 2d 858, 861, 59 Cal. Rptr. 888, 890 (2d Dist. 1967), *cert. denied*, 390 U.S. 1029 (1968).

In counties having a population in excess of 900,000 the county clerk may employ as many foreign language interpreters as may be needed to interpret in criminal cases and juvenile court and to translate documents. CAL. GOV'T CODE § 26806 (West 1968). Provision is also made for interpreting in grand jury proceedings. CAL. PEN. CODE § 937 (West Supp. 1973).

115. The Office of Administrative Hearings may compile and publish a list of interpreters from which parties may choose and, if the hearing officer so directs, the agency having jurisdiction must pay the cost of the interpreter. CAL. GOV'T CODE § 11513 (West Supp. 1973). Express provision is made for interpreters in hearings under the Workmen's Compensation laws. 8 CAL. ADMIN. CODE § 10315 (1973).

116. In performing any rehabilitative services or in contracting with other public or private agencies for rehabilitative services, the Department of Rehabilitation must provide special language assistance to non-English-speaking handicapped persons participating in such programs. CAL. WELF. & INST. CODE § 19013.5 (West 1972).

117. *See* SB 61, 1973 sess.; AB 86, 1973 sess. (introduced Jan. 16, 1973); signed by the Governor Oct. 2, 1973).

The legislature also sent to the Governor a bill requiring specified sales, service, and secured loan contracts to be in Spanish when the vendor has advertised his product or services in Spanish but Governor Reagan vetoed the measure. A.B. 212, 1973 sess. (introduced Jan. 31, 1973; vetoed Oct. 2, 1973).

118. United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970); People v. Annett, 251 Cal. App. 2d 858, 859, 59 Cal. Rptr. 888, 890 (2d Dist. 1967), *cert. denied*, 390 U.S. 1029 (1968). *See also* State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942). Relying on the Sixth Amendment right of a defendant to be present at his trial, the Second Circuit in *Negron, supra*, held that the failure to provide a needed translator for a non-English-speaking defendant violates the Constitution:

> When a court is put on notice of a severe language difficulty, it must make it unmistakeably clear to the non-English speaking defendant that he has the right to a competent translator, at state expense if need be, throughout trial. . . . Otherwise, the adjudication loses its character as a reasoned interaction . . . and becomes an *invective against an insensible object.*

Id. at 389. (Emphasis added.)

There is a strong analogy between such a criminal defendant and a recipient of notice in a court or administrative proceeding. If the recipient of notice fails to respond and thereby loses important rights, that deprivation is as much the product of an "invective against an insensible object" as proceeding to trial in the absence of a needed translator.

For useful commentaries on the basic issues pertaining to criminal trial interpreters see, Comment, *Constitutional Law: Translators: Mandatory for Due Process*, 2 CONN. L. REV. 163 (1969); Note, *The Right to an Interpreter*, 25 RUTGERS L. REV. 145 (1970).

to equal access to education[120] and the electoral process.[121] Job testing is a new area that is ripe for examination.[122] While these cases

---

In Perovich v. United States, 205 U.S. 86, 91 (1907), the only Supreme Court ruling on the question of interpreters, it was held that appointment of an interpreter to translate when the defendant is *testifying* is a matter within the sound discretion of the trial court.

119. The intention of the Court in *Miranda* was to insulate the defendant from the coercive atmosphere of custodial interrogation. 384 U.S. 436, 444 (1966). Obviously, if the accused does not speak English and the arresting officers speak only that language, questioning can not begin nor can the defendant be understood unless and until the police procure a bilingual interrogator. When one *is* available, though, the accused must be informed of his rights in the language he understands prior to any interrogation. For an example of constitutionally adequate warnings in the case of a Spanish-speaking arrestee *see* United States v. Trabucco, 424 F.2d 1311, 1316-17 (5th Cir. 1970).

120. Imparting knowledge, obviously, requires communication between student and teacher. Thus it is not surprising that a number of non-English-speaking plaintiffs have argued that the Constitution requires provision of bilingual instruction sufficient to guarantee that schooling consists of more than bare presence in the classroom. To date the federal courts are divided on this issue, but certiorari has been granted in a case denying such a claim made by Chinese-speaking plaintiffs, Lau v. Nichols, — F.2d — (9th Cir. 1973), *cert. granted*, 93 S. Ct. 2786 (1973). *Compare* United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972) *and* Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972) (both ordering Spanish language instruction) *with* Morales v. Shannon, 41 U.S.L.W. 2451 (W.D. Tex., Feb. 13, 1973).

121. In Puerto Rican Organization for Political Action v. Kusper, 350 F. Supp. 606 (N.D. Ill. 1972), Spanish-speaking plaintiffs already had the right to vote but were contesting the lack of Spanish-language voting materials. The court found this deficiency violative of equal protection and ordered provision of Spanish-language ballots and voting instructions. *See also* Cardona v. Power, 384 U.S. 672, 677 (1966) (Douglas, J., dissenting); Garza v. Smith, 320 F. Supp. 131 (W.D. Tex. 1970).

As noted earlier, the California Supreme Court extended the franchise to Spanish literates but did not order translations, feeling that self-help would effectuate the right. See text accompanying notes 70-82 *supra*. The legislature subsequently ordered the provision of bilingual materials comparable to that ordered in *Puerto Rican Organization for Political Action, supra*. See note 82 *supra* and accompanying text.

Two recent United States Supreme Court cases, Cardona v. Power, 384 U.S. 672 (1966) and Katzenbach v. Morgan, 384 U.S. 641 (1966), involved the issue of English-language literacy tests as applied to Spanish literates, but the Court did not rule on the constitutionality of such tests in either case, deciding them on the basis of section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e)(2) (1970) (suspends English literacy requirements as applied to persons who have "successfully completed the sixth primary grade in a public school in, or private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.")

122. Griggs v. Duke Power Co., 401 U.S. 424 (1971), established the guidelines for job testing by employers subject to § 703(h) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(h) (1970). At the time of *Griggs*, an employer was defined as "a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ." Civil Rights Act of 1964, Title VII, § 701 (b), 78 Stat. 253(b) (1964), *as amended* 42 U.S.C. § 2000e(b) (Supp. II 1973). The section was amended in 1972 substituting "fifteen or more" for "twenty-five or more" employees and extending coverage to state and local governments. Civil Rights

supply no direct authority for requiring non-English notice, they indicate the efforts courts feel the state should be willing to undertake in dealing with language-barrier issues. The requirements of due process in notice cases depend on a weighing of the interest of the individual in receiving effective information against the cost to the state or serving party in providing such information. Because the costs to the state in areas where relief has been ordercd—voting rights, education, provision of court interpreters—have been substantial in comparison to the relatively low cost of maintaining a stockpile of translated notice forms, the judiciary's failure to require foreign-language notice remains a constitutional anomaly.

CONCLUSION

The right to receive effective notice is a prerequisite to access to the judicial system and as such has been zealously guarded by the courts. *Mullane* and the cases that followed provide for notice designed actually to inform whenever feasible. This burden has traditionally fallen on the serving party. For the non-English-speaking person, however, this procedure is reversed: the responsibility for ensur-

---

Act of 1964, § 701(b), 42 U.S.C. § 2000e(b) (Supp. II 1973), formerly § 701(b), 78 Stat. 253(b) (1964). Such employers are permitted to

> give and to act upon the results of a professionally developed test provided that such test, its administratiou or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin . . .

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970). In *Griggs*, the Court interpreted this standard to require that the skills tested must be job-related. 401 U.S. at 431. A subsequent case, Carter v. Gallagher, 3 CCH EMP. PRAC. GUIDE ¶ 8205 at 6665 (D. Minn. 1971), *rev'd in part on other grounds*, 452 F.2d 315 (8th Cir. 1972), applied *Griggs* in condemning the formal vocabulary of a fireman's test. Such language skills were not job-related and penalized minority applicants accustomed to more casual language. *Id.* at 6669. Similarly, where English-language capability is not job-related, non-English-speaking applicants would be disqualified on an irrelevant ground, violating the rule of *Gallagher* and *Griggs*.

See also Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926), where the Court invalidated a Phillipine law making it a crime to keep account books in any language other than English, Spanish, or a local dialect. Interpreting the law as absolutely prohibiting Chinese merchants from keeping accounts in their own language, the Court declared,

> In view of the history of the Islands and of the conditions there prevailing, we think the Law to be invalid, because it deprives Chinese persons—situated as they are, with their extensive and important business long established—of their liberty and property without due process of Law, and denies them the equal protection of the Laws.
>
> . . . We are clearly of the opinion that it is not within the police power . . . because it would be oppressive and arbitrary, to prohibit all Chinese merchants from maintaining a set of books in the Chinese language, and in the Chinese characters, and thus prevent them from keeping advised of the status of their business and directing its conduct.

271 U.S. at 524-25.

ing effective notice is placed in large part on him, since he is expected to provide his own translation. As has been seen, this reversal finds little support in law or policy. When the serving party is aware that English-language notice will not be understood, and when translation services are readily available at low cost, there exists no convincing reason why provision of foreign-language notice should not be a duty of the serving party.

Charles F. Adams