COMMENTARY

The Argument for a Constitutional Right to Communication and Language

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The need for and right to communication and language is fundamental to the human condition. Without communication, an individual cannot become an effective and productive adult or an informed citizen in our democracy. The importance of communication and language for deaf and hard-of-hearing children is so basic as to be beyond debate. Given the historic difficulties deaf and hard-of-hearing children face, their compromised communication and language skills and the educational, social, cognitive, and psychological consequences, this note contends that a constitutional right to communication is both necessary and legally sound. The right to assemble and to vote, the right to equal protection under the law must be extended to the right of deaf and hard-of-hearing children to full communication development and access. If the Constitution venerates the right to speech, the right to communication and language is of equal or greater value.

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"Language is so tightly woven into human experience that it is scarcely possible to imagine life without it."

Steven Pinker, *The Language Instinct*

"What we have here is a failure to communicate."

Strother Martin, *Cool Hand Luke*

In a world of hyperbole, it is frequently said that one thing or another is so "fundamental" as to be "beyond debate," and thus, in the repetition of it, what is meritorious becomes less so. But the development of communication—the "defining characteristic of human cognition and . . . human society"—is so fundamental as to be beyond debate (Corina, p. 35). Indisputably so. Accordingly, the right to communication and language, particularly as it affects deaf and hard-of-hearing children, must be afforded the highest possible legal protection. In short, deaf and hard-of-hearing children must have a Constitutional right to communication and language. Our Constitution has embraced the most important of human needs, while our courts have, through penurious examination and pruning, afforded only a handful of rights the greatest legal protection.

Freedom of speech. Freedom of religion. Freedom to assemble. The right to vote, the right to privacy. Protection from all but the most compelling and urgent governmental action based on race, religion, or nationality.

We protect speech because we must convey our thoughts. We protect our right to vote because we insist on being free. We protect the right to prayer because we abhor interference with what is spiritual in our nature. Is the need for, and right to, communication any less important? To weigh its value against the others is a futile exercise; to exclude it, indefensible.

For deaf and hard-of-hearing children, the absence of communication and language has a crushing effect on the development of basic educational and life skills. That deaf and hard-of-hearing children continue to leave school with no more than third grade reading ability—a statistic so often repeated that these children and their parents must grow weary of it—and the high rates of under- and unemployment among deaf and hard-of-hearing adults, reveals the pragmatic

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consequences of what Oliver Sacks calls the ''languageless'' environment (1989, p. 9).

There are several arguments for a right to communication, each sufficient on its own, their totality a clamor for acknowledging that our Constitution has both the genius and flexibility to recognize the importance of communication for deaf and hard-of-hearing children.

To communicate completely and freely is to be included in the decision-making process of our democracy, to be a member of the commonweal. There is not a hearing child in this nation who must think, even for a second, that each day and year she goes to school, she must secure anew her right and need to communicate.[1] Deaf and hard-of-hearing children are entitled to the same happy ignorance.

Denial of communication is ultimately, for our democracy, a forfeiture of the vision, talent, and involvement of deaf and hard-of-hearing children, for the ''peculiar evil'' of ''silencing'' expression is that

> it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. (Mill, 1859, chapter 2)

What Is Meant by Freedom of Speech?

Freedom of speech may be the most venerated of our constitutional rights, but if speech means the ''speaking or expressing of things,'' is the right to communicate a less important freedom?

Webster's 9th New Collegiate Dictionary (1998) defines communication as a ''process by which information is exchanged between individuals through a common system of symbols, signs, or behavior'' (p. 266). ''Speech'' is defined as the ''communication or expression of thoughts in spoken words'' (p. 1133). Speech, the constitutionally protected right, is subsumed under the broader notion of communication, which is not so safeguarded.[2] The right to free communication cannot be separated from free speech and indeed should be the overarching privilege.

But whether it has been a question of bilingual education, the provision of multilingual voting documents, the availability of non-English newspapers and correspondence for prisoners, or the recognition of a nonstandard or dialectical form of English, the debate has focused on the differences between spoken languages and not, more intrinsically, on communication modes.

What does the freedom encompass? Article I of the United States Constitution provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Its nobility is reflected in an informed and self-governing citizen, but it is not merely the right to verbally express, but to receive and convey knowledge:

> The First Amendment is not, in the first instance, concerned with the ''right'' of the speaker to this or that. It is concerned with the authority of the hearers [sic] to meet together, to discuss, and to hear [sic] discussion by speakers. (Meiklejohn, 1965, p. 119)

The importance of access to speech cannot be gainsaid for ''intellectual freedom is the necessary bulwark of the public safety. . . . [a] declaration that admits of no exceptions . . . [for] if by suppression, we attempt to avoid lesser evils, we create greater evils'' (Meiklejohn, 1965, p. 59). It is this freedom to question—what Alexander Meiklejohn calls the ''demand for education''—that loses no radiance for its repetition (p. 86). It is at the core of the Constitution because ''the primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counter belief, no relevant information may be kept from them'' (Meiklejohn, 1965, p. 75).

The right to ''speech,'' which is the right to express, is subsumed within the broader world of communication, a place for both the conveyance and reception of information. The right to ''speech'' is rendered half a value without the right to communicate.

Judicial Interpretation of the Freedom of Speech: The Undervalued Role of Receiving Communication

Our courts have been no less vigorous than Professor Meiklejohn in finding that the First Amendment protects communication to its source and recipients both.

If as the U.S. Supreme Court has said, the free flow of commercial information is ''indispensable'' to an ''intelligent and well informed'' populace, which in turn serves the broad public interest, then providing the ''free flow'' of social, cultural, political, and creative information in our educational institutions is a tripled value by comparison. If the First Amendment protects the right to sell diet sodas, a child's right to communication must be worthy of at least comparable safeguarding.

In *Virginia Pharmacy Board v. Virginia Consumer Council,* the United States Supreme Court considered a Virginia law that banned the advertising of prescription drug prices, raising the question of whether ''commercial'' speech is outside the protection of the First Amendment. The court first reiterated the First Amendment right to communication to the ''source *and* . . . its recipients both,'' noting the factual dispute involved nothing more than a Virginia pharmacist ''wish[ing] to communicate'' that she will sell ''X drug at the Y price.'' The mere fact that this was a commercial transaction did not so remove it from the ''exposition of ideas'' and from the ''truth, science, morality, and arts'' in the ''diffusion of liberal sentiments on the administration of Government,'' to be beyond Constitutional protection (*Virginia Pharmacy,* 1976, pp. 761, 762).

Advertising, ''however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason and for what price'' (*Virginia Pharmacy*), p. 765).

To argue whether a particular expression, political or commercial, carries a greater or lesser constitutional imprimatur is, as the court stressed, a ''highly paternalistic'' one (*Virginia Pharmacy,* p. 770). Ultimately the court recognized that the people will perceive their own best interests if only they are well enough informed, and that the best

means to that end is to *open the channels of communication* rather than close them (*Virginia Pharmacy,* p. 770, emphasis added).

The lack of a free and open flow of communication and therefore ideas is no more starkly illuminated than by the failure to provide deaf and hard-of-hearing children with teachers who can communicate directly and proficiently with them and effective interpreters when the classroom teacher possesses insufficient or no skills. As the U.S. Supreme Court said in *Virginia Pharmacy Board:* ''We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners [sic] could come by his message by some other means'' (*Virginia Pharmacy,* p. 757, fn. 15).

Although the ''First Amendment [is] *primarily* an instrument to enlighten public decision-making in a democracy'' (*Virginia Pharmacy,* p. 765, emphasis added), for too long deaf and hard-of-hearing children have, to their detriment, come by the free flow of information via handwritten notes and the half-communication of educators.

Other judicial decisions illuminate the importance of access to communication. Ernest Mandel, a Belgian journalist and self-proclaimed ''revolutionary Marxist,'' was prohibited from coming to the United States for several speaking engagements, because §212 (a) (28) (D) of the Immigration and Nationality Act of 1952 denied a visa to any ''aliens'' who ''advocate the economic, international and governmental doctrines of world communism.'' Mr. Mandel addressed one of the conferences by transatlantic telephone, after which he and his six sponsors filed suit claiming the statute was unconstitutional because it restricted the right to hear his views and engage him in a free and open academic exchange (*Kleindienst v. Mandel,* 1972).

While Mandel ''had no constitutional right of entry to the country,'' the First Amendment clearly protects the right to ''hear, speak, and debate with Mandel in person'' because the Constitution ''protects the right to receive information and ideas'' as well as suitable ''*access* to social, political, aesthetic, moral, and other ideas and experiences.'' In rejecting the government's claim that plaintiffs could exchange ideas with Mandel over the telephone, the court noted the importance of those ''particular qualities inherent in sustained, face-to-face debate, discussion and questioning'' (*Kleindienst,* pp. 762,

763). The constitutional right to access information is ''no more vital'' than in our schools and universities (*Kleindienst,* p. 763).

If one has the right to ''face-to-face'' exchange with an individual deemed, at least by statute, to be dangerous to the well being of the nation, then what of the right of a deaf or hard-of-hearing child to have ''face-to-face'' exchange with a teacher in a classroom and friends on the playground?

If our Constitution safeguards the right of dissident voices to be heard in our schools and universities and to receive information of all kinds, then the contrast between the right to access minority points of view and the right to access any information/communication is startling. The student who is denied the right to receive information from a revolutionary Marxist is denied much; the student who cannot access any information, whether at that night's basketball game or a debate about Nazis marching in Skokie, is denied everything.

The country's future ''depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues'' (*United States v. Association Press,* 1943, p. 372). Deaf and hard-of-hearing children are a vital part of that ''multitude.'' Our Constitution must recognize that children, all children, have unfettered, direct, and appropriate access to classroom communication.

Deaf and Hard-of-Hearing Children Who Are Denied Communication Access Are a Suspect Class for Purposes of 14th Amendment Protections

The 14th Amendment of the U.S. Constitution provides that no state ''shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States . . . [or] deprive any person of life, liberty, or property without due process of law, [or] deny to any person within its jurisdiction the *equal protection under the laws*'' (emphasis added).

The Fourteenth Amendment protects citizens against any law that treats a particular group of people unequally *and* any law or policy

that affects an individual's fundamental rights to free speech, assembly, privacy.

If the law or state practice discriminates based on race, color, or national origin (sometimes called ''immutable'' characteristics), a ''suspect class'' is created and a reviewing court will ''strictly scrutinize'' the questionable law or policy. The ''strict scrutiny'' rule places a heavy burden on the entity charged with applying/enforcing the law or practice and represents the highest Constitutional protection.

If the law or practice does not involve race, color, or national origin, then the court applies a ''rational basis'' test to determine whether the law or practice is reasonably related to its purpose. Laws involving gender, sexual preference, and age generally come under this lower standard; however, the U.S. Supreme Court has created a hybrid classification between strict scrutiny and rational basis for gender issues.

The Denial of Equal Access to Communication and Equal Protection Case Law

Although the U.S. Supreme Court has not yet recognized a ''suspect class'' based on national language or communication mode, the subject of ''linguistic discrimination'' is not new. The Fourteenth Amendment extends to the protection of any groups identified by ethnic, national origin, or *linguistic characteristics* (*United States v. Uvalde,* 1980). To a person who speaks ''only one tongue or has difficulty using another language than the one spoken in his own home, language might well he an *immutable* characteristic like skin color, sex or place of birth'' (*Garcia v. Gloor,* 1980, p. 270, emphasis added).

In *Olagues v. Russoniello,* bilingual ballots were denied to Chinese- and Spanish-speaking immigrants. In analyzing the ''traditional indicia of a suspect classification,'' the court asked whether the class is ''saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'' (*Olagues,* 1994, p. 1520).

The court found that ''Congress had explicitly recognized that pervasive discrimination exists against linguistic minorities and a ''language-based'' classification might be the same as ''national

origin'' classification, particularly when there was a clear distinction between a ''general classification'' of English and non-English-speaking groups and more narrowly-defined groups such as Spanish-speaking and Chinese-speaking immigrants (*Olagues,* p. 1520).

If the plaintiffs in *Olagues* constituted a sufficiently well-defined sublanguage group to support a ''suspect'' classification with the attendant constitutional protections, then deaf and hard-of-hearing children (and deaf and hard-of-hearing adults) constitute an even more narrowly drawn group, who, unlike non-English speaking immigrants, have an entirely different communication mode.

In *Sandoval v. Hagan* the United States 11th Circuit Court of Appeals ruled that Alabama's policy of an English-only driver's test was unconstitutional and discriminatory based on language/national origin. The policy prevented 13,000 Alabamians who could not speak or read English from obtaining a driver's license. As a result, they lost economic opportunities, social services, and other ''quality of life pursuits'' (*Sandoval*, 1999, p. 508).

In its appeal the state of Alabama asserted that ''language never has been held to be a proxy for national origin''; thus, non-English speaking Alabamians were not a ''suspect class'' and not protected by the ''strict scrutiny'' standard. The Court of Appeals rejected the argument.

The Supreme Court has not ruled that language may serve as a proxy for national origin for equal protection analysis. However, in the context of jury selection, the court surmised that ''it may be, for certain ethnic groups *and in some communities, that proficiency in a particular language,* like skin color, *should be treated as a surrogate for race* [emphasis added] under an equal protection analysis. . . . [T]he Constitution protects . . . [the Japanese] as well as those who speak another tongue. . . . [S]ince language is a close and meaningful proxy for national origin, restrictions on the *use of languages* [emphasis added] may mask discrimination [while] employment termination because of foreign accent constitute[s] national origin discrimination'' *(Sandoval,* p. 509, fn. 26).

While the decision in *Sandoval* was reversed by the U.S. Supreme Court in April 2001, the five-justice majority did not rule on the language issue, but rather reversed based only on their determination

that the applicable law did not provide the plaintiffs with a ''private right of action.'' The Supreme Court focused entirely on this threshold issue and did not negate the lower court's evaluation of the language issue and did not change previous decisions, including its own, in which the door was opened for establishing a communication/language ''suspect'' class. If language is like ''skin color'' for purposes of equal protection, then what of language in which the individual has both a different language and communication mode? The Spanish (or Russian or Indian or Korean or Newari) ''speaker'' has a different spoken language, but has the capacity to learn another spoken ''tongue.'' The deaf or hard-of-hearing child has an immutable characteristic—hearing loss—that removes him or her, partially or fully, from the universal language community in which all members have an equal capacity to learn spoken language.

If there is agreement as to the importance of communication, there is a fundamental Fourteenth Amendment violation. Education is compulsory, for there is ''no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of public education'' *(Wisconsin v. Yoder,* 1972, p. 215). California Education Code §48200, as one example, requires that all individuals between the ages of 6 and 18 are ''subject to compulsory full-time education . . . and shall attend . . . school.''

Any state that ''imposes'' a requirement to attend school, but does not provide that which makes the experience possible, violates the Fourteenth Amendment of the United States Constitution. Is there any doubt that if a state mandated school attendance, but did not provide reading development for a specific group of students or no electricity for another, or only half the curriculum for a third, such state action would not only be incomprehensible but illegal? It certainly was deemed so by the United States Supreme Court in the 1954 *Brown v. Board of Education* case.

Is effective communication—both development of and access to—any less fundamental under an equal protection analysis? It is difficult to imagine therefore that state law mandating school attendance does not violate the Fourteenth Amendment rights of deaf and hard-of-hearing children.

Any law, policy, or program that denies deaf and hard-of-hearing children equal access to communication should meet the ''strict scrutiny'' test and show the most remarkable exigencies to justify the discrimination they may foster.

Statutory Protection of a Right to Communication

A right can be established by the passage of a law, which then becomes an enforceable statute. And while the statute must pass muster with the Constitution, it is an entirely separate and valid process for protecting certain individual rights.

The right to communicate in the classroom is protected by federal law. Section 1703(f) of Title 20 of the United States Codes provides that:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, or national origin, by—(f) the failure of an educational agency to take appropriate action to *overcome language barriers that impeded equal participation by its students in its instructional programs.* (emphasis added)

While I am not aware of any cases brought under §1703 on behalf of deaf or hard-of-hearing children, its mandate to ''overcome'' ''language barriers'' that ''impede'' education is directly applicable.

Moreover, while §1703 (f) does refer to a denial based on ''race, color, or national origin'' (paralleling the suspect class component of ''equal protection'' law), ''in some communities . . . proficiency in a particular language, like skin color, should be treated as a surrogate for race'' as noted under an equal protection analysis (*Hernandez v. New York,* 1991, p. 371).

In *Martin Luther King Jr. v. Ann Arbor Sch. Dist.,* certain African American children spoke ''black English,'' a black vernacular or dialect. They sued the school district under §1703 (f) to force it to ''take appropriate action to teach'' the children ''to read in the standard English of the school, the commercial world, the arts, science and professions'' (*Martin Luther King,*1979, p. 1373).

The court ruled that the school district had to develop a plan to overcome the language barriers facing these children, including training school staff to understand, identify, and assist these children to develop standard English skills. The school district was required to

make use of the child's unique communication, for the ''language of 'black English' has been shown to be a distinct, definable version of English [but] different from the general world of communications [and] is not used by the mainstream of society—black or white'' (*Martin Luther King,* p. 1378, emphasis added).

In its ruling the court could not have more clearly recognized the central importance of communication and language:

> A major goal of American education . . . is to train voting people to communicate. . . . The art of communication among the people of the country in all aspects of people's lives is a basic building block in the development of each individual.
>
> Children need to learn to speak and understand and to read and write the language used by society to carry on its business, to develop its science, arts and culture, and to carry on its professions and governmental functions.
>
> [A] major goal of a school system is to teach reading, writing, speaking and understanding standard English. *(Martin Luther King,* p. 1372)

The court called the children's legal action a ''cry for judicial help in opening the doors to the establishment . . . and [necessary to prevent another generation from becoming functionally illiterate,'' a sentiment so close to the concerns of the deaf and hard-of-hearing communities as to be, if not startling, in some odd way reassuring that there are others denied the fundamental right of communication.

In passing the Equal Educational Opportunities Act of 1974, Congress intended to ''set standards for all school districts throughout the Nation, as the basic requirements for carrying out, in the field of public education, the Constitutional guarantee that each shall have *equal protection of the laws and the obligation of the school system . . . to take appropriate action to overcome the language barrier*'' (*Martin Luther King,* p. 1381, emphasis added).

Even though the educational system and teachers in this case were ''well intentioned,'' the children's language barrier could not be overcome unless the educators ''[took] into account the home language system'' and ''use[d] that knowledge as a way of helping the children to learn to read standard English'' and help them learn ''code switching skills in connection with reading standard English.''

The *Martin Luther King* case provides a powerful rationale and analogue of significant dimensions for deaf and hard-of-hearing children.

In *Lau v. Nichols,* 2,856 non-English-speaking Chinese students sued the San Francisco Unified School District for appropriate language services. The court required no proof that the language discrimination was ''purposeful'' and ordered that where ''inability to speak and understand the English language excludes national origin minority group children'' from an education, ''the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students'' (*Lau,* 1973, p. 568).

The court's call for ''affirmative steps to rectify'' matters in order to ''open'' educational doors is profoundly relevant for deaf and hard-of-hearing children, the more so because theirs is not a deficiency but a modality difference.

The court, in sending the case back for further action, noted that the students could be taught English and/or instructed in Chinese because

> [b]asic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful. (*Lau,* p. 566)

It requires little imagination to substitute deaf and hard-of-hearing children for the African American and Chinese-American students in *Martin Luther King* and *Lau.* There is a clearly identified group of children in this country who, because they cannot understand English, are being deprived of any meaningful educational experiences. And to the extent that deaf and hard-of-hearing children are not a ''race'' or ''nationality,'' as noted, there are important cases in which a ''language'' minority was, for purposes of constitutional rights, tantamount to a race or nationality. That the plaintiffs in *Martin Luther King* and *Lau* had the full capacity to develop ''spoken'' English illuminates to a greater degree the ''deprivation'' experienced by deaf and hard-of-hearing children and the importance of a legal and educational remedy.[4]

That one might argue that the children in *Lau* and *Martin Luther King* are entitled, under §1703 (f), to protection of their communication/language needs because they are a ''race'' and deaf and hard-of-hearing children are not is a distinction without merit, educationally insupportable, and morally suspect.

The Practical Implications of Creating a Constitutional Right to Communication

If the right to communication and language for deaf and hard-of-hearing children were legally recognized—either under the Constitution or an existing or new statute—what specifically would the right encompass? Clearly the law and judicial decisions referred to suggest the need for communication access under the First Amendment cases and communication development under the Fourteenth Amendment and §1703 (f) cases.

Determining what constitutes a communicationally-appropriate education requires much discussion and a full understanding of what deaf and hard-of-hearing children need. For purposes of the broader argument proposed here, the right should include the *right to communication/language access,* including educational staff proficient, at an adult level, in the child's communication mode and specific language, an educational program in which each child has available an appropriate community of age and communication/language peers, and access to recreational, social, extracurricular, vocational, and other educational programs available to all children. Moreover, it should include the *right to communication development,* including age-appropriate communication mode and language skills. As discussed in the *Martin Luther King* case, our schools (and other institutions) must have programs in place to specifically bridge the gap between a deaf and hard-of-hearing child's age *and* communication skills. The students in *Lau* were, more or less, proficient in Chinese, but lacked age-appropriate English skills, if they had any at all. The students in *King* were capable in their home language, but not so in standard English. The development of communication skills for Chinese-American, African American, *and* deaf and hard-of-hearing children is the foundation upon which literacy is built.

And if such rights should exist, what of the cost? Cost and administrative issues are highly relevant, but legislators and policy makers will determine whether the right is important enough to warrant fiscal support.

Moreover, the question stops the analysis before it begins. We raise here a constitutional question, not a political or fiscal one, for as the effectively political John Kennedy said in discussing the justification for civil rights legislation, we face a dilemma as ''old as the Scriptures and as clear as the American Constitution'' (Kenneth, 1963).

Conclusions

Education is compulsory in this nation and yet for deaf and hard-of-hearing children that which is central to human and educational growth—communication and language—is a discretionary matter. These children are required to go to school to enhance our democracy, strengthen our way of life, and promote individual and economic viability, but have no claim on the very thing they need to take their places as fully involved citizens.

Even as our laws have required that non-English-speaking children develop reading and writing skills in English, even as our courts have recognized the importance of different languages and even dialects or jargons, even as our Constitution has accepted that one's language is so important as to be tantamount to cultural or national origin, there is no recognition of the truly unique language and communication needs of deaf and hard-of-hearing children.

The United States has always been ''home to speakers of many languages'' and attempts, for example, to prohibit teaching in a language other than English have been rejected out of hand as unconstitutional (''Official English: Federal limits on efforts to curtail bilingual services in the states,'' 1987, p. 1348).

Not surprisingly, legal scholars have concluded that since there is a ''close connection between language and religious/cultural freedoms'' it is well past time to ''recognize a human right to language in this country'' (''Official English,'' p. 1348, fn. 16).

Anna-Miria Muhlke, writing in the Winter 2000 issue of the *Virginia Journal of International Law,* argued that the International Bill of

Rights creates both a clear entitlement to language for deaf and hard-of-hearing children and a concomitant governmental obligation to ''ensure the fullest possible linguistic development'' for them (pp. 729–730).

A Constitutional right is a rare and valuable thing and so it should be. We speak so often of needs and rights that the two become interchangeable, the latter devalued by the former. But some rights are so fundamentally clear, logical, fair, and honorable that it is hard to conceive of an argument to the contrary. The right to communication, particularly for deaf and hard-of-hearing children is such a right, for the ''purpose of language is communication in much the same sense that the purpose of the heart is to pump blood'' (Chomsky, 1975, p. 55).

> ''There is no pleasure to me without communication. There is not so much as a sprightly thought comes into my mind that it does not grieve me to have produced alone, and that I have no one to tell it to.'' Montaigne

Notes

1. What of the right to ''language'' rather than communication? Language is defined, formally and pragmatically, as those words and combination of words understood by a considerable community. Communication is the mode by which language is conveyed; language is the particular agreed-to convention in which specific words have specific meanings and convey understanding. English or Russian or Chinese or Spanish are languages; sign language and spoken language are communication modes.

2. Under IDEA, the IEP team must ''consider'' the communication needs of a deaf or hard-of-hearing child. By comparison, a child with disabilities must be ''provided'' a free appropriate public education. The legal difference between a ''consideration'' and a mandate is far-reaching, the former discretionary, the latter required. With limited budgets, a declining teacher pool, and other pressures on public education, communication is rendered an expendable educational option. 20 U.S.C. §1401 (8), §1413 (d)(3)(B).

3. The court, not unlike the U.S. Supreme Court in *Brown v. Board of Education,* 347 U.S. 483 (1954), based its decision more on sociology than legal precedent, including language development research: ''Black English has been used at some time by 80% of the black people of this country. . . . [I]t still flourishes in areas where there are concentrations of black people. . . . [E]fforts to instruct the children in standard English by teachers who

failed to appreciate that the children speak a dialect which is acceptable in the home and peer community can result in the children becoming ashamed of their language, and thus impede the learning process" (*Martin Luther King,* pp. 1375–1377).

4. The applicability of §1703 (f) is no more apparent than in the findings of the National Association of State Directors of Special Education [NASDSE]:

> Most hearing children enter school with the ability to process and integrate verbal information. They have a basic command of the language and an extensive vocabulary. School systems establish programs and services and develop curricula based on the assumption that all children enter school with basic language skills. The schools then proceed to teach children to read, write, and develop computational skills. . . . [C]hildren with hearing loss seldom bring to their educational experience the same extensive language background or the same breadth of language skills as do hearing children. Children who are deaf who are not exposed to early language input are likely to have severe deficits that will have an impact on future learning and will require extensive intervention to facilitate language development. (pp. 2, 9)

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