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CONTACT SHEET  
RIGHTS OF DEAF, BLIND & DISABLED

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Wain  
5/3/85

Original sponsors: Duncan, Collins  
and Gruenberg

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IN THE HOUSE BY THE JUDICIARY COMMITTEE  
SENATE CS FOR CS FOR HOUSE BILL NO. 172 (Judiciary)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the rights of physically and  
mentally disabled persons."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

\* Section 1. AS 09.20.010 is amended by adding new subsections to read:

(b) A person is not disqualified to act as a juror solely  
because of the loss of hearing or sight in any degree or a disability  
that substantially impairs or interferes with the person's mobility.

(c) The court shall provide, and pay the cost of services of, an  
interpreter or reader when necessary to enable a person with impaired  
hearing or sight to act as a juror.

\* Sec. 2. AS 18.06.020 is amended to read:

Sec. 18.06.020. RIGHTS. (a) The [BLIND, THE VISUALLY HANDI-  
CAPPED, AND THE OTHERWISE] physically or mentally disabled have the  
same right as the able-bodied to the full and free pedestrian use of  
the streets, highways, sidewalks, walkways, public buildings, public  
facilities, and other public places.

(b) The [BLIND, THE VISUALLY HANDICAPPED, AND THE OTHERWISE]  
physically or mentally disabled are entitled to full and equal accom-  
modations, advantages, facilities, and privileges of all common  
carriers, airplanes, motor vehicles, railroad trains, motor buses,  
street cars, boats or any other public conveyances or modes of trans-  
portation, hotels, lodging places, places of public accommodation,  
amusement or resort, and other places to which the general public is  
invited, subject only to the conditions and limitations established by

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2 law and applicable alike to all persons.

3 (c) Persons who are physically or mentally disabled [TOTALLY OR  
4 PARTIALLY BLIND PERSONS] have the right to be accompanied or assisted  
5 by a service animal that is certified by a training facility for  
6 service animals as being able to function in a public setting [GUIDE  
7 DOG, ESPECIALLY TRAINED FOR THE PURPOSE], in any of the places listed  
8 in (b) of this section without being required to pay an extra charge  
9 for the service animal [GUIDE DOG]; however, the person with the  
10 animal [GUIDE DOG] is liable for any damage done to the premises or  
11 facilities by the animal [DOG].

12 \* Sec. 3. AS 18.06.030 is amended to read:

13 Sec. 18.06.030. RIGHTS AS PEDESTRIANS. The driver of a motor  
14 vehicle approaching a physically or mentally disabled [TOTALLY OR  
15 PARTIALLY BLIND] pedestrian who is carrying a cane predominantly white  
16 or metallic in color, with or without a red tip, using special equip-  
17 ment for mobility, or using a service animal [GUIDE DOG] shall take  
18 all necessary precautions to avoid injury to the pedestrian, and a  
19 driver who fails to take all necessary precautions and causes injury  
20 to the pedestrian is liable in damages for the injury caused. A  
21 physically or mentally disabled [TOTALLY BLIND OR PARTIALLY BLIND]  
22 pedestrian not carrying a cane as described in this section or using a  
23 service animal [GUIDE DOG] in any of the places, accommodations or  
24 conveyances set out under AS 18.06.020 has all of the rights and  
25 privileges conferred by law upon other persons, and the failure of a  
26 physically or mentally disabled [TOTALLY OR PARTIALLY BLIND] pedestri-  
27 an to carry a cane as described in this section or to use a service  
28 animal [GUIDE DOG] is not by itself evidence of [CONTRIBUTORY] negli-  
29 gence.

\* Sec. 4. AS 18.06.040 is amended to read:

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Sec. 18.06.040. PENALTY FOR DENYING RIGHTS. A person who denies or interferes with admittance to or enjoyment of the public facilities set out in AS 18.06.020 or otherwise interferes with the rights of a physically or mentally [TOTALLY OR PARTIALLY BLIND OR OTHERWISE] disabled person is guilty of a class B misdemeanor [AND UPON CONVICTION IS PUNISHABLE BY A FINE OF NOT MORE THAN \$1,000, OR BY IMPRISONMENT FOR NOT MORE THAN 60 DAYS, OR BY BOTH].

\* Sec. 5. AS 18.06.040 is amended to read:

Sec. 18.06.040. ENFORCEMENT AND PENALTY [FOR DENYING RIGHTS]. Enforcement of this chapter shall be by the state Human Rights Commission under AS 18.80.010 - 18.80.145. A person who denies or interferes with admittance to or enjoyment of the public facilities set out in AS 18.06.020 or otherwise interferes with the rights of a physically or mentally [TOTALLY OR PARTIALLY BLIND OR OTHERWISE] disabled person is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$1,000, or by imprisonment for not more than 60 days, or by both.

\* Sec. 6. AS 18.06.050 is amended to read:

Sec. 18.06.050. DEFINITIONS. In this chapter "physically or mentally disabled" has the meaning given in AS 18.80.300 [TOTALLY BLIND" OR "PARTIALLY BLIND" MEANS A PERSON WHOSE VISUAL ACUITY DOES NOT EXCEED 20/200 IN THE BETTER EYE WITH CORRECTING LENSES OR WHOSE WIDEST DIAMETER OF VISUAL FIELD SUBTENDS AN ANGLE NO GREATER THAN 20 DEGREES].

\* Sec. 7. AS 18.80.060(a) is amended to read:

(a) In addition to the other powers and duties prescribed by this chapter the commission shall

- (1) appoint an executive director approved by the governor;
- (2) hire other administrative staff as may be necessary to

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2 the commission's function;

3 (3) exercise general supervision and direct the activities  
4 of the executive director and other administrative staff;

5 (4) accept complaints under AS 18.80.100;

6 (5) study the problems of discrimination in all or specific  
7 fields of human relationships, and foster through community effort or  
8 goodwill, cooperation and conciliation among the groups and elements  
9 of the population of the state, and publish results of investigations  
10 and research as in its judgment will tend to eliminate discrimination  
11 because of race, religion, color, national ancestry, physical or  
12 mental disability [HANDICAP], age, sex, marital status, changes in  
13 marital status, pregnancy or parenthood;

14 (6) make an overall assessment, at least once every three  
15 years, of the progress made toward equal employment opportunity by  
16 every department of state government; results of the assessment shall  
17 be included in the annual report made under AS 18.80.150;

18 (7) enforce AS 18.06.

19 \* Sec. 8. AS 18.80.200 is amended to read:

20 Sec. 18.80.200. PURPOSE. (a) It is determined and declared as  
21 a matter of legislative finding that discrimination against an inhabitant  
22 of the state because of race, religion, color, national origin,  
23 age, sex, physical or mental disability, marital status, changes in  
24 marital status, pregnancy or parenthood is a matter of public concern  
25 and that such discrimination not only threatens the rights and privileges  
26 of the inhabitants of the state but also menaces the institutions  
27 of the state and threatens peace, order, health, safety and  
28 general welfare of the state and its inhabitants.

29 (b) Therefore, it is the policy of the state and the purpose of  
this chapter to eliminate and prevent discrimination in employment, in

1 credit and financing practices, in places of public accommodation, in  
2 the sale, lease, or rental of real property because of race, religion,  
3 color, national origin, sex, age, physical or mental disability,  
4 marital status, changes in marital status, pregnancy or parenthood.  
5 It is not the purpose of this chapter to supersede laws pertaining to  
6 child labor, the age of majority or other age restrictions or require-  
7 ments.

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9 \* Sec. 9. AS 18.80.210 is amended to read:

10 Sec. 18.80.210. CIVIL RIGHTS. The opportunity to obtain em-  
11 ployment, credit and financing, public accommodations, housing accom-  
12 modations and other property without discrimination because of sex,  
13 physical or mental disability, marital status, changes in marital  
14 status, pregnancy, parenthood, race, religion, color or national  
15 origin is a civil right.

16 \* Sec. 10. AS 18.80.220(a) is amended to read:

17 (a) It is unlawful for

18 (1) an employer to refuse employment to a person, or to bar  
19 the person [HIM] from employment, or to discriminate against the  
20 person [HIM] in compensation or in a term, condition, or privilege of  
21 employment because of [HIS] race, religion, color or national origin,  
22 or because of [HIS] age, physical or mental disability [HANDICAP],  
23 sex, marital status, changes in marital status, pregnancy or paren-  
24 hood when the reasonable demands of the position do not require dis-  
25 tinction on the basis of age, physical or mental disability [HANDI-  
26 CAP], sex, marital status, changes in marital status, pregnancy or  
27 parenthood;

28 (2) a labor organization, because of a person's sex, mari-  
29 tal status, changes in marital status, pregnancy, parenthood, age,  
race, religion, physical or mental disability, color or national

1 origin, to exclude or to expel the person [HIM] from its membership,  
2 or to discriminate in any way against one of its members or an  
3 employer or an employee;

4 (3) an employer or employment agency to print or circulate  
5 or cause to be printed or circulated a statement, advertisement, or  
6 publication, or to use a form of application for employment or to make  
7 an inquiry in connection with prospective employment, which expresses,  
8 directly or indirectly, a limitation, specification or discrimination  
9 as to sex, physical or mental disability, marital status, changes in  
10 marital status, pregnancy, parenthood, age, race, creed, color or  
11 national origin, or an intent to make the limitation, unless based  
12 upon a bona fide occupational qualification;

13 (4) an employer, labor organization or employment agency to  
14 discharge, expel or otherwise discriminate against a person because  
15 the person [HE] has opposed any practices forbidden under AS 18.80.  
16 200 - 18.80.280 or because the person [HE] has filed a complaint,  
17 testified or assisted in a proceeding under this chapter;

18 (5) an employer to discriminate in the payment of wages as  
19 between the sexes, or to employ a female in an occupation in this  
20 state at a salary or wage rate less than that paid to a male employee  
21 for work of comparable character or work in the same operation, busi-  
22 ness or type of work in the same locality; or

23 (6) a person to print, publish, broadcast or otherwise  
24 circulate a statement, inquiry or advertisement in connection with  
25 prospective employment which expresses directly, a limitation, speci-  
26 fication or discrimination as to sex, physical or mental disability,  
27 marital status, changes in marital status, pregnancy, parenthood, age,  
28 race, religion, color or national origin, unless based upon a bona  
29 fide occupational qualification.

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2 \* Sec. 11. AS 18.80.230 is amended to read:

3 Sec. 18.80.230. UNLAWFUL PRACTICES IN PLACES OF PUBLIC ACCOMMO-  
4 DATION. It is unlawful for the owner, lessee, manager, agent or  
5 employee of a public accommodation

6 (1) to refuse, withhold from or deny to a person any of its  
7 services, goods, facilities, advantages or privileges because of sex,  
8 physical or mental disability, marital status, changes in marital  
9 status, pregnancy, parenthood, race, religion, color or national  
10 origin;

11 (2) to publish, circulate, issue, display, post or mail a  
12 written or printed communication, notice or advertisement that [WHICH]  
13 states or implies

14 (A) that any of the services, goods, facilities,  
15 advantages or privileges of the public accommodation will be  
16 refused, withheld from or denied to a person of a certain race,  
17 religion, sex, physical or mental disability, marital status,  
18 color or national origin or because of pregnancy, parenthood, or  
19 a change in marital status, or

20 (B) that the patronage of a person belonging to a  
21 particular race, creed, sex, marital status, color or national  
22 origin or who, because of pregnancy, parenthood, physical or  
23 mental disability, or a change in marital status, is unwelcome,  
24 not desired or solicited.

25 \* Sec. 12. AS 18.80.240 is amended to read:

26 Sec. 18.80.240. UNLAWFUL PRACTICES IN THE SALE OR RENTAL OF REAL  
27 PROPERTY. It is unlawful for the owner, lessee, manager or other  
28 person having the right to sell, lease or rent real property

29 (1) to refuse to sell, lease or rent the real property to a  
person because of sex, marital status, changes in marital status,

1 pregnancy, race, religion, physical or mental disability, color or  
2 national origin; however, nothing in this paragraph prohibits the  
3 sale, lease or rental of classes of real property commonly known as  
4 housing for "singles" or "married couples" only;

5 (2) to discriminate against a person because of sex, mari-  
6 tal status, changes in marital status, pregnancy, race, religion,  
7 physical or mental disability, color or national origin in a term,  
8 condition or privilege relating to the use, sale, lease or rental of  
9 real property; however, nothing in this paragraph prohibits the sale,  
10 lease or rental of classes of real property commonly known as housing  
11 for "singles" or "married couples" only;

12 (3) to make a written or oral inquiry or record of the sex,  
13 marital status, changes in marital status, race, religion, physical or  
14 mental disability, color or national origin of a person seeking to  
15 buy, lease or rent real property;

16 (4) to offer, solicit, accept, use or retain a listing of  
17 real property with the understanding that a person may be  
18 discriminated against in a real estate transaction or in the furnish-  
19 ing of facilities or sources in connection therewith because of a  
20 person's sex, marital status, changes in marital status, pregnancy,  
21 race, religion, physical or mental disability, color, national origin  
22 or age;

23 (5) to represent to a person that real property is not  
24 available for inspection, sale, rental, or lease when in fact it is so  
25 available, or to refuse a person to inspect real property because of  
26 the race, religion, physical or mental disability, color, national  
27 origin, age, sex, marital status, change in marital status or preg-  
28 nancy of that person or of any person associated with that person;

29 (6) to engage in blockbusting;

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2 (7) to make, print or publish, or cause to be made, printed  
3 or published, any notice, statement or advertisement, with respect to  
4 the sale or rental of real property that indicates any preference,  
5 limitation, or discrimination based on race, color, religion, physical  
6 or mental disability, sex, or national origin, or an intention to make  
7 the preference, limitation or discrimination.

8 \* Sec. 13. AS 18.80.250(a) is amended to read:

9 (a) It is unlawful for a financial institution or other commer-  
10 cial institution extending secured or unsecured credit, upon receiving  
11 an application for financial assistance or credit for the acquisition,  
12 construction, rehabilitation, repair or maintenance of a housing  
13 accommodation or other property or services, or the acquisition or  
14 improvement of unimproved property, or upon receiving an application  
15 for any sort of loan of money, to permit one of its officials or  
16 employees during the execution of the official's or the employee's  
17 [HIS] duties

18 (1) to discriminate against the applicant because of sex,  
19 physical or mental disability, marital status, changes in marital  
20 status, pregnancy, parenthood, race, religion, color or national  
21 origin in a term, condition or privilege relating to the obtainment or  
22 use of the institution's financial assistance or credit, except to the  
23 extent of a federal statute or regulation applicable to a transaction  
24 of the same character;

25 (2) to make or cause to be made a written or oral inquiry  
26 or record of the sex, physical or mental disability, marital status,  
27 changes in marital status, pregnancy, parenthood, race, religion,  
28 color or national origin of a person seeking the institution's finan-  
29 cial assistance or credit, unless the inquiry is for the purpose of  
ascertaining the creditor's rights and remedies applicable to the

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2 particular extension of credit and is not made or used in order to  
3 discriminate in a determination of creditworthiness;

4 (3) to refuse to extend credit, issue a credit card or make  
5 a loan to a married person, who is otherwise creditworthy, if so  
6 requested by the person;

7 (4) to refuse to issue a credit card to a married person in  
8 that person's name, if so requested by the person, provided, however,  
9 that the person so requesting a card may be required to open an ac-  
10 count in that name.

11 \* Sec. 14. AS 18.80.255 is amended to read:

12 Sec. 18.80.255. UNLAWFUL PRACTICES BY THE STATE OR ITS POLITICAL  
13 SUBDIVISIONS. It is unlawful for the state or any of its political  
14 subdivisions

15 (1) to refuse, withhold from or deny to a person any local,  
16 state or federal funds, services, goods, facilities, advantages or  
17 privileges because of race, religion, sex, color or national origin;

18 (2) to publish, circulate, issue, display, post or mail a  
19 written or printed communication, notice or advertisement which states  
20 or implies that any local, state or federal funds, services, goods,  
21 facilities, advantages or privileges of the office or agency will be  
22 refused, withheld from or denied to a physically or mentally disabled  
23 person or a person of a certain race, religion, sex, color or national  
24 origin or that the patronage of a physically or mentally disabled  
25 person or a person belonging to a particular race, creed, sex, color  
26 or national origin is unwelcome, not desired or solicited; it is not  
27 unlawful to post notice that facilities to accommodate the physically  
28 or mentally disabled are not available;

29 (3) to refuse or deny to a person any local, state, or  
federal funds, services, goods, facilities, advantages or privileges

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2 because of physical or mental disability; however, this paragraph may  
3 not be construed to require alteration or remodeling of buildings or  
4 facilities owned or operated by the state or its political subdivi-  
5 sions to any extent not required by other law.

6 \* Sec. 15. AS 18.80.300 is amended by adding new paragraphs to read:

7 (15) "major life activities" means functions such as caring  
8 for one's self, performing manual tasks, walking, seeing, hearing,  
9 speaking, breathing, learning, and working;

10 (16) "physical or mental disability" means

11 (A) a physical or mental impairment that substantially  
12 limits one or more major life activities,

13 (B) a history of, or a misclassification as having, a  
14 mental or physical impairment that substantially limits one or  
15 more major life activities; or

16 (C) having

17 (i) a physical or mental impairment that does not  
18 substantially limit a person's major life activities but  
19 that is treated by the person as constituting such a limita-  
20 tion;

21 (ii) a physical or mental impairment that sub-  
22 stantially limits a person's major life activities only as a  
23 result of the attitudes of others toward the impairment; or

24 (iii) none of the impairments defined in this  
25 paragraph but being treated by others as having such an  
26 impairment;

27 (D) a condition that may require the use of a prosthe-  
28 sis, special equipment for mobility or service animal;

29 (17) "physical or mental impairment" means

(A) physiological disorder or condition, cosmetic

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disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(B) mental or psychological disorder, including mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

\* Sec. 16. AS 18.80.300(13) is repealed.



Alaska Court System  
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

STEPHANIE J. COLE  
Deputy Administrative Director

303 K STREET  
ANCHORAGE, ALASKA 99501

October 24, 1985

The Honorable M. Rodey  
Chairman  
Senate Judiciary Committee  
Pouch Y  
Juneau, AK 99811

Dear Senator Rodey:

Attached is the amendment to SB 168 which was proposed by Administrative Director Arthur Snowden at the Senate Judiciary Committee hearing on October 22, 1985.

This proposed language, in part, conforms SB 168 to CSHB 393. (I did not change the proposed "a deaf, blind, or disabled person or" language in section (2) of SB 168, although this change may be necessary to conform the terms of SB 168 to the terms used in the proposed additional provisions.)

Please contact me if you have any questions.

Very truly yours,

Handwritten signature of Stephanie J. Cole in cursive script.

Stephanie J. Cole  
Deputy Administrative Director

cc: Arthur H. Snowden, II

Attachment  
SJC:lae

\* Sec. 10. AS 18.80.255(2) shall be changed to read as follows:

(2) to publish, circulate, issue, display, post or mail a written or printed communication, notice or advertisement which states or implies that any local, state or federal funds, services, goods, facilities, advantages or privileges of the office or agency will be refused, withheld from or denied to a deaf, blind, or disabled person or a person of a certain race, religion, sex, color or national origin or that the patronage of a deaf, blind, or disabled person or a person belonging to a particular race, creed, sex, color or national origin is unwelcome, not desired or solicited[.]; it is not unlawful to post notice that facilities to accommodate the physically or mentally disabled are not available;

\* Sec. 10. AS 18.80.255(3) shall be added to read as follows:

(3) to refuse or deny to a person any local, state, or federal funds, services, goods, facilities, advantages or privileges because of physical or mental disability; however, this paragraph may not be construed to require alteration or remodeling of buildings or facilities owned or operated by the state or its political subdivisions to any extent not required by other law.

# Louise Rude Center for Blind and Deaf Adults

CENTER FOR BLIND ADULTS  
3903 Talt Drive  
Anchorage, Alaska 99503  
(907) 248-7770

JAMES H. OMVIG, Director

CENTER FOR DEAF ADULTS  
1020 E. 4th Avenue  
Anchorage, Alaska 99501  
(907) 276-3456

November 8, 1985

Mr. Arthur Snowden  
Administrative Director of the Courts  
Alaska Court System  
303 "K" Street  
Anchorage, AK 99501

Dear Mr. Snowden:

As you know, I wrote you under date of July 23, 1985, requesting clarification of the Court's policies concerning the payment of two-hour minimums for sign language interpreters who are providing services in Court proceedings for persons who are deaf, and I sent copies to State Representative Max Gruenberg and the Alaska Association of the Deaf. You responded to me under date of September 20, 1985, indicating that the requested minimums could not be paid but that members of your staff would perform a "study" in order to find a satisfactory solution to this problem. (Copies of both letters are attached for ready reference.)

It is now November 8, and we have had no indication that the problem has been or will be resolved. This situation is becoming a severe one for us, and the time has come when it must be resolved to everyone's satisfaction.

Our problem is this: Since July, there have been a good number of Court requests. The interpreters simply will not work for less than the minimum. Therefore, each time we receive a request, we must consider it carefully since we have no funds to carry either the Court or any other service user. We have very limited funding which is intended to support only the referral service itself. If we pay a qualified interpreter the usual two-hour minimum but receive only partial reimbursement for the amount which we have paid out, this Program will be bankrupt within a very short time and, in fact, we will be in violation of our grant agreements with both the State and the Municipality of Anchorage.

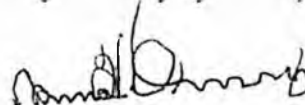
Mr. Arthur Snowden  
November 8, 1985  
Page 2

Accordingly, until this issue is resolved, the Court should make no further requests to us unless it is known in advance that the proceeding involved will last for two hours or more. We are reluctant to take this position, since we have no wish to deprive persons who are deaf of their civil rights, but we have no alternative.

Finally, I would like to point out again that there is a profound difference between a professional, certified interpreter for the deaf and a foreign language translator. The interpreter goes through several years of intensive, professional training prior to testing for certification. On the other hand, the foreign language translator is typically an individual who simply happens to be fluent in English and the particular foreign language involved. To the best of my knowledge, such an individual is not a "professional" and experiences neither training nor certification.

As you would suspect, I am writing this letter with great reluctance, but I am sure that you can appreciate our dilemma. I hope that a way can be found to resolve this situation soon.

Very truly yours,



James H. Omvig  
Director

JHO:el

cc: State Senator Pat Rodey  
Ms. Ann D.I. Route, IRL Coordinator  
Mr. Clyde Vincent, Program Supervisor,  
Center for Deaf Adults  
Mr. Alan Cartwright, President,  
Alaska Association of the Deaf  
Mrs. Judy Ann Farris, President,  
Registry of Interpreters for the Deaf  
Mr. John Katcher, PADD  
Ms. Goldeen Goodfellow  
Mr. Bob Fisher

# Louise Rude Center for Blind and Deaf Adults

(907) 272-7223 Program for the Blind  
272-7112 Program for the Deaf

James H. Omgvig, Director

July 23, 1985

Mr. Arthur Snowden  
Administrative Director of the Courts  
Alaska Court System  
303 K Street  
Anchorage, AK 99501

Dear Mr. Snowden:

As we discussed by phone, we are experiencing some confusion in the manner and amount of reimbursement we receive for service we provide to the Alaska Court System through our Interpreter Referral Line. Before addressing the specific situation, let me provide you with some general background information.

Section 504 of the Rehabilitation Act of 1973, as amended, requires that programs receiving federal funds must be accessible to and usable by persons with disabilities. For people who are deaf, accessibility generally means full and open communication through the use of interpreters. Since a state receives federal funds, its programs must be accessible to and usable by persons with disabilities and, of course, this includes the court system.

In order to facilitate the providing of interpreters, many states and cities have established interpreter coordinating services so that both deaf and hearing persons may make arrangements for needed interpreters by contacting one centralized coordinating program. Our Anchorage Interpreter Referral Line was established in 1980 at the request of the Alaska Association of the Deaf. Since that time, we have served as the central coordinating agency in this area. When requests are made, we identify an interpreter who is qualified to handle the particular situation, and we then send the individual on assignment. The interpreter bills us for the work, we bill the entity using the service, and we pay the interpreter.

Interpreting has come to be quite a profession (only a few years ago, it was quite casual and in many areas of the country deaf individuals' needs were virtually unmet). As the need for interpreters increased, more and more people have gone through

the lengthy and rigorous training which is involved to become a qualified professional in this field.

Today, many professional interpreters support themselves through this form of employment. In the circumstances, it is not surprising that professional interpreters have begun to require "minimums" for interpreting assignments. If a particular interpreting assignment should last for as little as 15 minutes in a morning, the reality is that the interpreter would be hard pressed to accept another assignment that same morning. As a result, the professional interpreter could not really make a living unless some satisfactory solution to this problem could be found.

Throughout the nation, the solution in recent years has been that, for short assignments, qualified interpreters would be paid at least a two-hour minimum (some programs and agencies have four-hour minimums). Our Agency adopted this policy several years ago and it has generally worked to everyone's satisfaction. The alternative is bleak for deaf persons in need of interpreting services--interpreters simply turn down the short assignments in favor of longer ones, and the needs of deaf individuals go unmet.

Here in Alaska, our problem is compounded by the fact that we have a limited number of highly qualified professionals. Since the demand for these individuals is high (we made more than 1,200 referrals during the last fiscal year), it is easy for interpreters to select the more lucrative employment opportunities and to turn down the undesirable ones. We are working to increase the number of certified interpreters in this State but, for the present, we must do the very best that we can with the limited number of professionals available to us.

Now, let me turn to the specific problem at hand. Until a few months ago, we had always followed our usual and customary practice and had billed the Alaska Court System for two-hour minimums for short assignments. The interpreters billed us, we paid them and we were routinely reimbursed. We are currently billing at the rate of \$28.00 per hour. As a Director new to Alaska, I was quite surprised by this amount since, in many states, legal interpreting often runs as high as \$60.00 per hour.

In the Spring of this year, two questions arose over our two-hour minimum under Rule 6 (a) (1 & 2) of the Court's Administrative Rules concerning fees of interpreters and translators. The first problem is that under a strict interpretation of these rules, two-hour minimums cannot be paid because of the "actual performance" language. Secondly, if a deaf individual is waiting in the courtroom for his or her case to be called, and if the interpreter is interpreting the proceedings as he or she is required to do under the Interpreters Code of Ethics, is such time "actual performance," "standby


time," or time simply donated by the interpreter at no cost to the Court?

We hope that these questions may be resolved satisfactorily and with a minimum of delay since current billings are pending. First, the two-hour minimum is reasonable, is standard practice throughout the country and will give us the best possible opportunity to make certain that full and accurate communication occurs in legal proceedings since a simple error in communication could be devastating to the deaf individual who is in court. Secondly, if a deaf individual must appear in court with an interpreter, and if other cases are heard before the deaf individual is called, the Code of Ethics requires the professional to interpret everything which is going on. Even if the Code had no such requirement, common sense and morality would dictate that this be done. It would be virtually cruel and unusual punishment to let the deaf individual sit in isolation and bewilderment wondering what is going on as well as what is likely to happen to him or her.

It is my earnest hope that you can resolve these issues with a simple memo of clarification or interpretation. We have been told that it could take several months to finalize a revised Court Rule. We hope that the existing Rule can be interpreted to allow for two-hour minimums and that the time an interpreter spends in court with a deaf individual can be regarded as "actual performance."

If you have questions, please contact me at any time. I will be happy to discuss these or other issues with you to make certain that deaf Alaskans have full and accurate communication in all Court proceedings.

Very truly yours,



James H. Omvig, Director  
LOUISE RUDE CENTER  
FOR BLIND & DEAF ADULTS

JHO:el

cc: State Representative Max Gruenberg  
Alaska Association of the Deaf

P.S. For your information, I am enclosing a copy of Rules I prepared for the Social Security Administration before I came to Alaska. The only change after I wrote them is that someone substituted "hearing impaired" for "deaf" before they were published.

**B. Compensation**

1. Reasonable, hourly compensation will be based upon prevailing local rates. An SSA employee may contact organizations of interpreters, agencies for the hearing-impaired or organizations of the hearing-impaired in order to establish prevailing rates in the local office area.

2. Reasonable travel expenses may be paid to the interpreter at the discretion of the approving official.

3. Payment for a minimum number of hours can be approved at the discretion of the approving official.

4. In the event prior arrangements have been made to purchase interpreter service, the authorizing official has the discretion to pay a reasonable minimum if the hearing-impaired individual fails to appear for the interview or hearing.

5. In the event a hearing-impaired individual comes to an office without prior arrangement with an interpreter who expects payment, the authorizing official has the discretion to pay reasonable fees even though a check has not been made for free service, in order to expedite the necessary action.

**19.05.07 Definitions****A. Interpreter**

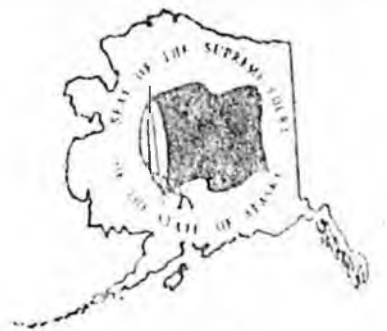
Any person who is capable of sending signs to a hearing-impaired person and understanding signs from a hearing-impaired person accurately and simultaneously.

**B. Certified Interpreter**

Any person certified by the National Registry of Interpreters or by any State Registry of Interpreters or named on a list of interpreters compiled by the National Association of the Deaf and/or any State Association of the Deaf.

**C. Qualified Interpreter**

For SSA purposes, a "qualified interpreter" is any person certified as described in 19.05.07 B above, or any person who is acceptable both to the hearing-impaired individual and the approving official. (SSA recognizes that "certified interpreters" are not available in all SSA service areas and that individuals who can meet the interpreter's need must be utilized.)



Alaska Court System

State of Alaska

301 "K" STREET  
ANCHORAGE, ALASKA  
99501

ARTHUR H. SNOWDEN II  
ADMINISTRATIVE DIRECTOR

(907) 274-8611

September 20, 1985

Mr. James H. Omvig  
Director  
Louise Rude Center for  
Blind and Deaf Adults  
3710 East 20th Avenue  
Anchorage, AK 99508

Dear Mr. Omvig:

I have given careful consideration to your letter of July 23, 1985, discussing problems relating to the payment of a two-hour minimum for interpreter services.

As you are aware, Administrative Rule 6 of the Alaska Rules of Court sets specific limitations on the payment of fees to interpreters and translators. In addition, the Rules of Court cover other categories of professional services -- legal, medical, mental health, etc. The Rules do not establish minimums for any of these professions.

Setting minimums for only one category of professionals would not be equitable. However, extending minimums to all professionals would be quite costly. Without a special appropriation, the court would be unable to bear this cost. Because of the current reduction in state revenue, it is unlikely that the court would be able to get approval to fund this additional expense.

Under current policy, interpreters actually fare better than other professionals. Medical professionals are compensated at approximately 70 percent of their normal billing rate. Prior to the creation of the Office of Public Advocacy, the court paid attorneys at about 45 percent of the market rate. In contrast, interpreters are paid their full rate of pay.

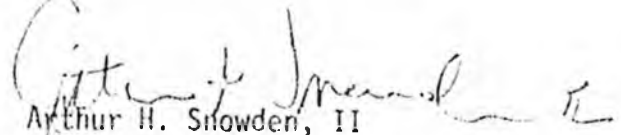
Although I cannot approve payment of a two-hour minimum, I do think the court can reconsider policies which determine the categories of time which are compensable. I have requested that several members of my staff perform a study of this matter and make recommendations to me for a

Mr. James H. Omvig  
September 20d, 1985  
Page Two

standard policy to cover payment for in-court time, standby time, and transit time.

If you have further questions or if you would like to check on the progress of the committee studying compensable time, please contact Jeneane Moore at 264-8236.

Very truly yours,

  
Arthur H. Snowden, II  
Administrative Director

AHS, II:lae

MEMORANDUM

TO: PAT  
FROM: ANN  
RE: SB168/HB393

Some questions which need to be answered regarding this legislation:

- 1) SB168, Section 2, would require state and local governments, and the University, to provide interpreters for deaf individuals. PADD states, "the fiscal impact of this would not be overwhelming." However, in reviewing Roger Lewis' work on this bill last session, I find no evidence that this fiscal impact has been addressed at all. If the state is required, for example, to provide interpreters for all deaf individuals who take classes at UAA, it would seem to me that the fiscal note could be significant. Also, what about members of the deaf community in the bush (if any). Will they be able to demand an interpreter when visiting a state office in Kotzebue? Perhaps PADD could respond to this.
- 2) SB168, Section 3, adds deaf and disabled to Chapter 18.06 "Rights of Blind and Otherwise Physically Disabled Persons." The corresponding section of HB393 (Section 2) adds the language physically or mentally. It would seem that we must change either the title of the chapter, or the language in HB393 to be consistent.
- 3) Proposed changes to the Human Rights Commission statute are worded as "physically or mentally disabled" in HB393, and as the "deaf, blind or disabled" in SB168. PADD prefers the more general HB393 language. As they state, "While we can understand the desire of some deaf and blind people to receive special mention, this is as inappropriate as having the statute read, 'race and Black', 'religion and Catholic'", etc. Makes sense to me ....

However, if the committee decides to go with the language "physically and mentally", they should look closely at the definitions relating to mental impairment (attached to HB393 sectional analysis).

Work copy - AP

Introduced: 2/20/85  
Referred: Health, Education and  
Social Services and  
Judiciary

1 IN THE SENATE

BY RODEY, V. FISCHER,  
JOSEPHSON AND KERTTULA

2

SENATE BILL NO. 168

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to rights of deaf, blind, and  
7 disabled persons."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 09.20.010 is amended by adding new subsections to read:

10 (b) A person is not unqualified to act as a juror solely because  
11 of the loss of hearing or sight in any degree or a disability that  
12 substantially impairs or interferes with the person's mobility.

13 (c) The court shall provide, and pay the cost of services of, an  
14 interpreter when necessary to enable a person with impaired hearing to  
15 act as a juror.

16 \* Sec. 2. AS 18.06 is amended by adding a new section to read:

17 Sec. 18.06.015. INTERPRETERS FOR DEAF PERSONS. A department,  
18 office, agency, or other organizational unit of the state government,  
19 or a political subdivision of the state, including the University of  
20 Alaska, from which a deaf person seeks access to funds, services,  
21 goods, facilities, advantages, or privileges shall pay the costs of  
22 and provide an interpreter for the person.

23 \* Sec. 3. AS 18.06.040 is amended to read:

24 Sec. 18.06.040. PENALTY FOR DENYING RIGHTS. A person who  
25 denies or interferes with admittance to or enjoyment of the public  
26 facilities set out in AS 18.06.020 or otherwise interferes with the  
27 rights of a totally or partially blind or deaf or otherwise physically  
28 disabled person is guilty of a misdemeanor and upon conviction is  
29 punishable by a fine of not more than \$1,000, or by imprisonment for

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& mentally  
disabled  
fit?

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but not  
mandatory

18.06 "Rights of Blind and  
Otherwise Physically  
Disabled Persons"

1 not more than 60 days, or by both.

2 \* Sec. 4. AS 18.80.200 is amended to read:

3 Sec. 18.80.200. PURPOSE. (a) It is determined and declared as  
4 a matter of legislative finding that discrimination against an inhabi-  
5 tant of the state because of race, religion, color, national origin,  
6 age, sex, deafness, blindness, disability, marital status, changes in  
7 marital status, pregnancy or parenthood is a matter of public concern  
8 and that such discrimination not only threatens the rights and  
9 privileges of the inhabitants of the state but also menaces the  
10 institutions of the state and threatens peace, order, health, safety  
11 and general welfare of the state and its inhabitants.

12 (b) Therefore, it is the policy of the state and the purpose of  
13 this chapter to eliminate and prevent discrimination in employment, in  
14 credit and financing practices, in places of public accommodation, in  
15 the sale, lease, or rental of real property because of race, religion,  
16 color, national origin, sex, age, deafness, blindness, disability,  
17 marital status, changes in marital status, pregnancy or parenthood.  
18 It is not the purpose of this chapter to supersede laws pertaining to  
19 child labor, the age of majority or other age restrictions or  
20 requirements.

21 \* Sec. 5. AS 18.80.210 is amended to read:

22 Sec. 18.80.210. CIVIL RIGHTS. The opportunity to obtain em-  
23 ployment, credit and financing, public accommodations, housing accom-  
24 modations and other property without discrimination because of sex,  
25 deafness, blindness, disability, marital status, changes in marital  
26 status, pregnancy, parenthood, race, religion, color or national  
27 origin is a civil right.

28 \* Sec. 6. AS 18.80.220(a) is amended to read:

29 (a) It is unlawful for

1           (1) an employer to refuse employment to a person, or to bar  
2 a person [HIM] from employment, or to discriminate against a person  
3 [HIM] in compensation or in a term, condition, or privilege of employ-  
4 ment because of [HIS] race, religion, color or national origin, or  
5 because of [HIS] age, [PHYSICAL HANDICAP,] sex, deafness, blindness,  
6 disability, marital status, changes in marital status, pregnancy or  
7 parenthood when the reasonable demands of the position do not require  
8 distinction on the basis of age, [PHYSICAL HANDICAP,] sex, deafness,  
9 blindness, disability, marital status, changes in marital status,  
10 pregnancy or parenthood;

11           (2) a labor organization, because of a person's sex,  
12 deafness, blindness, disability, marital status, changes in marital  
13 status, pregnancy, parenthood, age, race, religion, color or national  
14 origin, to exclude or to expel the person [HIM] from its membership,  
15 or to discriminate in any way against one of its members or an  
16 employer or an employee;

17           (3) an employer or employment agency to print or circulate  
18 or cause to be printed or circulated a statement, advertisement, or  
19 publication, or to use a form of application for employment or to make  
20 an inquiry in connection with prospective employment, that [WHICH]  
21 expresses, directly or indirectly, a limitation, specification or  
22 discrimination as to sex, deafness, blindness, disability, marital  
23 status, changes in marital status, pregnancy, parenthood, age, race,  
24 creed, color or national origin, or an intent to make the limitation,  
25 unless based upon a bona fide occupational qualification;

26           (4) an employer, labor organization or employment agency to  
27 discharge, expel or otherwise discriminate against a person because  
28 the person [HE] has opposed any practices forbidden under AS 18.80.200  
29 - 18.80.280 or because the person [HE] has filed a complaint,

1 testified or assisted in a proceeding under this chapter;

2 (5) an employer to discriminate in the payment of wages as  
3 between the sexes, or to employ a female in an occupation in this  
4 state at a salary or wage rate less than that paid to a male employee  
5 for work of comparable character or work in the same operation, busi-  
6 ness or type of work in the same locality; or

7 (6) a person to print, publish, broadcast or otherwise  
8 circulate a statement, inquiry or advertisement in connection with  
9 prospective employment that [WHICH] expresses directly, a limitation,  
10 specification or discrimination as to sex, deafness, blindness,  
11 disability, marital status, changes in marital status, pregnancy,  
12 parenthood, age, race, religion, color or national origin, unless  
13 based upon a bona fide occupational qualification.

14 \* Sec. AS 18.80.230 is amended to read:

15 Sec. 18.80.230. UNLAWFUL PRACTICES IN PLACES OF PUBLIC ACCOMMO-  
16 DATION. It is unlawful for the owner, lessee, manager, agent or  
17 employee of a public accommodation

18 (1) to refuse, withhold from or deny to a person any of its  
19 services, goods, facilities, advantages or privileges because of sex,  
20 deafness, blindness, disability, marital status, changes in marital  
21 status, pregnancy, parenthood, race, religion, color or national  
22 origin;

23 (2) to publish, circulate, issue, display, post or mail a  
24 written or printed communication, notice or advertisement that [WHICH]  
25 states or implies

26 (A) that any of the services, goods, facilities,  
27 advantages or privileges of the public accommodation will be  
28 refused, withheld from or denied to a person of a certain race,  
29 religion, sex, deafness, blindness, disability, marital status,

1 color or national origin or because of pregnancy, parenthood, or  
2 a change in marital status, or

3 (B) that the patronage of a person belonging to a  
4 particular race, creed, sex, marital status, color or national  
5 origin or who, because of pregnancy, parenthood, deafness,  
6 blindness, disability, or a change in marital status, is  
7 unwelcome, not desired or solicited.

8 \* Sec. 8. AS 18.80.240 is amended to read:

9 Sec. 18.80.240. UNLAWFUL PRACTICES IN THE SALE OR RENTAL OF  
10 REAL PROPERTY. It is unlawful for the owner, lessee, manager or other  
11 person having the right to sell, lease or rent real property

12 (1) to refuse to sell, lease or rent the real property to a  
13 person because of sex, deafness, blindness, disability, marital  
14 status, changes in marital status, pregnancy, race, religion, color or  
15 national origin; however, nothing in this paragraph prohibits the  
16 sale, lease or rental of classes of real property commonly known as  
17 housing for "singles" or "married couples" only;

18 (2) to discriminate against a person because of sex,  
19 deafness, blindness, disability, marital status, changes in marital  
20 status, pregnancy, race, religion, color or national origin in a term,  
21 condition or privilege relating to the use, sale, lease or rental of  
22 real property; however, nothing in this paragraph prohibits the sale,  
23 lease or rental of classes of real property commonly known as housing  
24 for "singles" or "married couples" only;

25 (3) to make a written or oral inquiry or record of the sex,  
26 deafness, blindness, disability, marital status, changes in marital  
27 status, race, religion, color or national origin of a person seeking  
28 to buy, lease or rent real property;

29 (4) to offer, solicit, accept, use or retain a listing of

1 real property with the understanding that a person may be discriminat-  
2 ed against in a real estate transaction or in the furnishing of facil-  
3 ities or sources in connection therewith because of a person's sex,  
4 deafness, blindness, disability, marital status, changes in marital  
5 status, pregnancy, race, religion, color, national origin or age;

6 (5) to represent to a person that real property is not  
7 available for inspection, sale, rental, or lease when in fact it is so  
8 available, or to refuse to allow a person to inspect real property  
9 because of the race, religion, color, national origin, age, sex,  
10 deafness, blindness, disability, marital status, change in marital  
11 status or pregnancy of that person or of any person associated with  
12 that person;

13 (6) to engage in blockbusting;

14 (7) to make, print or publish, or cause to be made, printed  
15 or published, any notice, statement or advertisement, with respect to  
16 the sale or rental of real property that indicates any preference,  
17 limitation, or discrimination based on race, color, religion, sex,  
18 deafness, blindness, disability or national origin, or an intention to  
19 make the preference, limitation or discrimination.

20 \* Sec. 9. AS 18.80.250(a) is amended to read:

21 (a) It is unlawful for a financial institution or other commer-  
22 cial institution extending secured or unsecured credit, upon receiving  
23 an application for financial assistance or credit for the acquisition,  
24 construction, rehabilitation, repair or maintenance of a housing  
25 accommodation or other property or services, or the acquisition or  
26 improvement of unimproved property, or upon receiving an application  
27 for any sort of loan of money, to permit one of its officials or  
28 employees during the execution of the official's or the employee's  
29 [HIS] duties

1                   (1) to discriminate against the applicant because of sex,  
2                   deafness, blindness, disability, marital status, changes in marital  
3                   status, pregnancy, parenthood, race, religion, color or national  
4                   origin in a term, condition or privilege relating to the obtainment or  
5                   use of the institution's financial assistance or credit, except to the  
6                   extent of a federal statute or regulation applicable to a transaction  
7                   of the same character;

8                   (2) to make or cause to be made a written or oral inquiry  
9                   or record of the sex, deafness, blindness, disability, marital status,  
10                  changes in marital status, pregnancy, parenthood, race, religion,  
11                  color or national origin of a person seeking the institution's  
12                  financial assistance or credit, unless the inquiry is for the purpose  
13                  of ascertaining the creditor's rights and remedies applicable to the  
14                  particular extension of credit and is not made or used in order to  
15                  discriminate in a determination of creditworthiness;

16                  (3) to refuse to extend credit, issue a credit card or make  
17                  a loan to a married person, who is otherwise creditworthy, if so  
18                  requested by the person;

19                  (4) to refuse to issue a credit card to a married person in  
20                  that person's name, if so requested by the person, provided, however,  
21                  that the person so requesting a card may be required to open an ac-  
22                  count in that name.

23                  \* Sec. 10. AS 18.80.255 is amended to read:

24                  Sec. 18.80.255.   UNLAWFUL PRACTICES BY THE STATE OR ITS POLITI-  
25                  CAL SUBDIVISIONS. It is unlawful for the state or any of its politi-  
26                  cal subdivisions

27                  (1) to refuse, withhold from or deny to a person any local,  
28                  state or federal funds, services, goods, facilities, advantages or  
29                  privileges because of race, religion, sex, deafness, blindness,

1 disability, color or national origin;

2 (2) to publish, circulate, issue, display, post or mail a  
3 written or printed communication, notice or advertisement which states  
4 or implies that any local, state or federal funds, services, goods,  
5 facilities, advantages or privileges of the office or agency will be  
6 refused, withheld from or denied to a deaf, blind, or disabled person  
7 or a person of a certain race, religion, sex, color or national origin  
8 or that the patronage of a deaf, blind, or disabled person or a person  
9 belonging to a particular race, creed, sex, color or national origin  
10 is unwelcome, not desired or solicited.

11 \* Sec. 11. AS 18.80.300 is amended by adding new paragraphs to read:

12 (15) "disability" means

13 (A) a physical or mental impairment that substantially  
14 limits one or more major life activities,

15 (B) a history of, or a misclassification as having, a  
16 mental or physical impairment that substantially limits one or  
17 more major life activities; or

18 (C) having

19 (i) a physical or mental impairment that does not  
20 substantially limit a person's major life activities but  
21 that is treated by the person as constituting such a limita-  
22 tion;

23 (ii) a physical or mental impairment that sub-  
24 stantially limits a person's major life activities only as a  
25 result of the attitudes of others toward the impairment; or

26 (iii) none of the impairments defined in this  
27 paragraph but being treated by others as having such an  
28 impairment;

29 (16) "major life activities" means functions such as caring

*Commissioner supports*

1 for one's self, performing manual tasks, walking, seeing, hearing,  
2 speaking, breathing, learning, and working;

3 (17) "physical or mental impairment" means

4 (A) physiological disorder or condition, cosmetic  
5 disfigurement, or anatomical loss affecting one or more of the  
6 following body systems: neurological, musculoskeletal, special  
7 sense organs, respiratory including speech organs, cardiovascu-  
8 lar, reproductive, digestive, genito-urinary, hemic and  
9 lymphatic, skin, and endocrine; or

10 (B) mental or psychological disorder, including mental  
11 retardation, organic brain syndrome, emotional or mental illness,  
12 and specific learning disabilities.

13 \* Sec. 12. AS 18.80.300(13) is repealed.

## SECTIONAL ANALYSIS

### SB 168 - AN ACT RELATING TO RIGHTS OF DEAF, BLIND AND DISABLED PERSONS

- SECTION 1 Provides that hearing and sight impaired persons may serve on juries, and that the court shall provide interpreters and readers to assist these people.
- SECTION 2 Requires state and local governments to provide an interpreter whenever a deaf person seeks funds, services, goods, facilities, advantages or privileges from that government.
- SECTION 3 Amends the statute providing penalties for interfering with admittance to or enjoyment of public facilities by clarifying that disabled means physically disabled in that statute and adding deaf to that statute.
- SECTION 4 -  
SECTION 10 Amends the Human Rights Commission statute. Current statute prohibits discrimination in employment, public accommodations, housing, credit and financing on the basis of race, religion, color, national origin, sex, age, marital status, changes in marital status, pregnancy or parenthood. This bill adds deafness, blindness and disability to this list of inappropriate discriminatory criteria.
- SECTION 11 Definitions
- SECTION 12 Repeals current definition of "physical handicap."

STATE OF ALASKA 1985 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: 10/21/85

REQUEST

Bill/Resolution No.: SB168/HB 343  
 Title: An Act Relating To Rights of Deaf, Blind, Disabled Persons  
 Sponsor: Senate Judiciary  
 Requestor: \_\_\_\_\_  
 Date of Request: 10/21/85

FISCAL DETAIL

Agency Affected: ALASKA COURT SYSTEM  
 Program Category Affected: \_\_\_\_\_  
Due Process  
 BRU, Program or Subprogram(s) Affected: Trial Courts

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
<b>OPERATING</b>						
100 PERSONAL SERVICES						
200 TRAVEL		5.1	5.4	5.7	6.0	6.4
300 CONTRACTUAL		9.5	10.1	10.7	11.3	12.0
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
900 MISCELLANEOUS						
<b>TOTAL OPERATING</b>		14.6	15.5	16.4	17.3	18.4

<b>CAPITAL</b>						
----------------	--	--	--	--	--	--

<b>REVENUE</b>						
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FUNDING: (Thousands of Dollars)

GENERAL FUND		14.6	15.5	16.4	17.3	18.4
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		14.6	15.5	16.4	17.3	18.4

POSITIONS: NONE

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Robert G. Fisher  
 Division: Fiscal Officer

Phone: 264-8215  
 Date: 10/21/85

Approved by Commissioner: *Arthur W. ...*  
 Agency: ALASKA COURT SYSTEM

Date: 10/21/85

Distribution (by Agency preparing fiscal note):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

7/1/84

ALASKA COURT SYSTEM  
SB 168 - RIGHTS OF DEAF, BLIND, AND DISABLED PERSONS  
FISCAL IMPACT

This legislation allows deaf, blind, and disabled individuals to serve on juries. Additionally, interpreters are provided for deaf persons while on jury duty. Providing interpreters for deaf persons will impact the Court's travel and contractual budget categories. The other aspects of the legislation should not impact the Court.

Historically, seven to eight percent of all eligible persons are required to perform jury duty. Jury service typically averages slightly more than one and one-half days in length. The Division of Vocational Rehabilitation has estimated that 250 deaf persons would be eligible for jury duty. Based on past experience, it is estimated that approximately 17 deaf individuals could be called for service in a year. Each deaf juror would require an interpreter for all activities in the court.

The geographical distribution of the adult deaf population is not known. To estimate the cost of providing interpreters, the court used 1984 jury statistics to estimate the probability of serving in each of the court locations statewide. These probabilities were applied to the estimated costs of providing an interpreter for the average length of jury service in each location. For locations other than Anchorage, one day of travel time was added to the average length of service. It was assumed that all interpreters are based in Anchorage. The summation of the costs for each court provided an estimate of the total cost of providing interpreters.

Interpreter fees are calculated to cost \$9,500 per year. Interpreter travel is estimated to cost \$5,100.

Cost estimates for subsequent fiscal years reflect inflation at the rate of six percent.

STATE OF ALASKA 1985 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: 10/15/85

**REQUEST**

Bill/Resolution No.: SB 168  
 Title: Rights of Deaf, Blind and Disabled Persons / Josephson  
 Sponsor: Rodey, V. Fischer, Kerttulainen  
 Requestor: Fahrenkamp  
 Date of Request: \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected: Due Process  
 Program Category Affected: \_\_\_\_\_  
 Human Rights Commission  
 RU, Program or Subprogram(s) Affected: \_\_\_\_\_

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
<b>OPERATING</b>			49.1			
100 PERSONAL SERVICES			7.5			
200 TRAVEL						
300 CONTRACTUAL			.5			
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
<b>TOTAL OPERATING</b>			57.1			
<b>CAPITAL</b>			-0-			
<b>REVENUE</b>			-0-			

**FUNDING: (Thousands of Dollars)**

GENERAL FUND			57.1			
FEDERAL FUNDS			-0-			
OTHER			-0-			
<b>TOTAL</b>			57.1			

**POSITIONS:**

FULL-TIME			1.0			
PART-TIME						
TEMPORARY						

**ANALYSIS:** Attach a separate page if necessary

Prepared By: Michael A. Nizich, Director  
 Division: Administrative Services

Phone: 465-3616  
 Date: 10/15/85

Approved by Commissioner: Laura J. Herman  
 Agency: Office of the Governor

Date: 10-16-85

**Distribution (by Agency preparing fiscal note):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

BILL SHEFFIELD, GOVERNOR

## HUMAN RIGHTS COMMISSION

October 15, 1985

The Honorable Patrick Rodey  
2335 Lord Baranof  
Anchorage, Alaska 99503

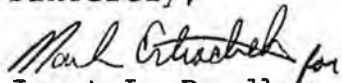
Dear Senator Rodey:

The Human Rights Commissioners have voted to support passage of Senate Bill 168, as reflected in my April 11, 1985 letter to Senator Fahrenkamp (copy attached). The Commissioners have considered the various bills which propose expanding the protections for the disabled and which affect our enabling legislation. The Commissioners expressed a preference for the comprehensiveness of HB 172. However, after reviewing the latest version of this legislation CSHB 172 (Jud) AM at their meeting in Valdez on July 26, 1985, the Commissioners went on record withdrawing their support for any legislation which increased the programmatic responsibilities of the ASCHR without providing additional funding for the agency.

The Commissioners also expressed concern about those portions of CSHB 172 (Jud) AM which would amend Sections 18.06.030 and 040 to give the Commission responsibility to enforce the rights of disabled pedestrians. The bill provides criminal penalties for those convicted of violating these sections. We believe that this responsibility would be incompatible with our present enforcement activities. Our current programs focus on civil rights enforcement proceedings comparable to those of such agencies as the U.S. Equal Employment Opportunity Commission, U.S. Department of HUD, and state and local civil rights agencies. I would like to note in passing that CSHB 393 (Jud) has a similar provision. Although the Commissioners have not yet reviewed HB 393, I believe it is likely they will not support this section.

The Commissioners will meet on November 14 - 15 at which time they plan to discuss the pending "physical handicap" legislation. I will let you know if they modify their position on these bills.

Sincerely,

  
Janet L. Bradley  
Executive Director

JLB/db

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SB 168

BILL SHEEFIELD, GOVERNOR

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## HUMAN RIGHTS COMMISSION

April 11, 1985

The Honorable Bettye M. Fahrenkamp  
Chair  
Senate Health, Education & Social  
Services Committee  
Room 125 Capitol  
Juneau, AK 99811

Dear Senator Fahrenkamp:

At their annual meeting in Juneau on March 1, 1985, the Human Rights Commissioners considered SB 168 "An Act relating to rights of deaf, blind, and disabled persons" and passed the following resolution:

To support that part of the legislation which applies to our agency and the state law and express our concern that the portion which deals with jury duty be permissive but not mandatory.

The Commissioners are aware of the need for broader protection from the unfair discrimination suffered by the deaf, blind and disabled in Alaska. Although the Commission's current jurisdiction on the basis of physical handicap is limited to the employment section of our statute, the Commission has been active in the enforcement of this limited protection. Most recently, the Commissioners took a strong advocacy position in the Williams v Union Chemical decision after a public hearing on the matter, holding that an applicant capable of performing all the required duties of a job could not be denied employment on the grounds that his prior medical history made him an industry risk without evidence establishing a likelihood of injury.

With respect to SB 168, the Commission supports the proposed definition of disability found at Section 11 AS 18.80.300 because of its broader coverage affording greater protections than under our present definition, repealed at Section 12 AS 18.80.300(13). Furthermore, the harmonizing of state law with the federal protections for the disabled provides a consistency beneficial to both complainants and respondents who must comply with state and federal law.

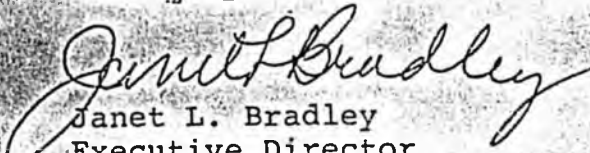
The Commissioners' concern about Section 1 amending AS 09.20.210 reflects their hesitation to compel a blind, deaf or disabled

Fahrenkamp  
Page 2  
April 11, 1985

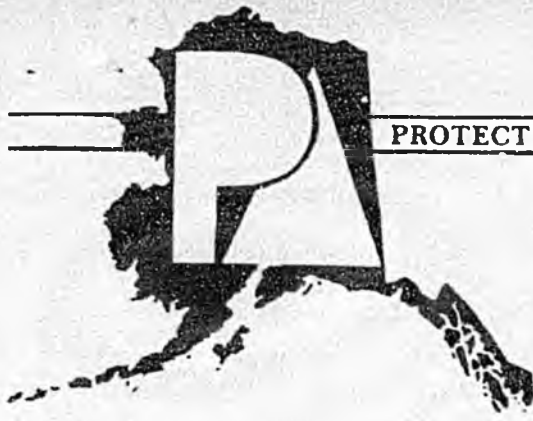
person to act as a juror. The Commission supports this section so long as it is interpreted as a permissive but not mandatory responsibility.

If you or the Committee desire further information about the Commission's position on this bill, please do not hesitate to call me.

Sincerely,

  
Janet L. Bradley  
Executive Director

JLB/b



**PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED**

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**SOUTHEAST  
REGIONAL OFFICE**  
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Juneau, AK 99801  
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**NORTHERN  
REGIONAL OFFICE**  
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Fairbanks, AK 99701  
(907) 456-1070

October 14, 1985

Senator Patrick Rodey  
2335 Lord Baranof  
Anchorage, Alaska 99503

RE: SB 168 and HB 393

Dear Senator Rodey:

On October 22, the Senate Judiciary Committee will hold hearings on these two bills which relate to the rights of disabled persons. I am writing to provide you some background information to assist you in understanding the bills.

SB 168 addresses four areas:

- 1) Jury service by the deaf, blind and mobility impaired;
- 2) Interpreters for deaf persons seeking access to their governments;
- 3) Penalties for denying a physically impaired person's access to public facilities; and
- 4) The State Human Rights Commission HB 393 deals with several of these same areas in almost exactly the same way. The reason there are two bills is because of action taken by the House on related legislation.

HB 393 was originally part of CS HB 172 (HESS). The House Judiciary Committee deleted HB 393's provisions from CS HB 172 (HESS) and placed them into a separate bill - HB 393. This was done in order to segregate HB 393's provisions, which will require a small fiscal note, from CS HB 172 (JUD), which will not. Both bills passed the house. CS HB 172 (JUD) is now in the Senate HESS Committee.

SB 168 has four conceptual parts. The first part addresses the rights of disabled persons to serve on state jury panels. The second part requires state and local governments to provide an interpreter whenever a deaf person seeks funds, services, goods, facilities, advantages, or privileges from that government. The third section amends the statute providing penalties for interfering with admittance to or enjoyment of public facilities by clarifying

that disabled means physically disabled in that statute and adding deaf to that statute. The fourth section amends the Human Rights Commission statute. At present the Human Rights Commission statute prohibits discrimination in employment, credit and financing, public accommodations, and housing on the basis of race, religion, color, national origin, sex, age, marital status, changes in marital status, pregnancy, or parenthood. The bill adds disability to this list of classes which shall not be discriminated against inappropriately.

HB 393 covers all but the penalty for interfering with admittance to public facilities.

1) Jury Service. At present, deaf, blind and mobility impaired persons are not legally qualified to serve on state jury panels. This disqualification has nothing to do with whether the disabled person is actually capable of hearing the case and rendering a rational judgment based upon the facts presented. Rather, it appears to be based upon the archaic presumption that persons who are not in possession of their "natural facilities" are unable to reach a fair and impartial verdict. Nothing in the literature or experience supports this conclusion. The bill is an attempt to eradicate this unjustified denial of a basic civil right to disabled persons.

To date the Alaska Association for the Deaf has documented the denial of jury service to at least four deaf persons merely because they are deaf. At least one member of the Governor's Council for the Handicapped and Gifted would be disqualified from serving on a state jury because of his deafness. Another member of the Governor's Council had been denied the opportunity to serve on the state jury because of her disability even though this disability does not interfere with her powers of judgment.

Similar laws prohibiting discrimination against disabled jurors are in effect in a number of states including California, Colorado, Oklahoma, Washington, and Texas.

A recent law review article has addressed the issue of deaf persons serving on juries. Jury Selection: The Courts, The Constitution, and the Deaf, 11 Pacific Law Journal 967 (1980), effectively refutes all the arguments against deaf jurors. Of particular significance is Part B. Fairness in the Consideration of the Case, found at pp 975-982. Its well reasoned analysis convincingly demonstrates that deaf people are perfectly capable of fairly considering a case and that the assistance of an interpreter would in no way interfere with the deliberative process or its secrecy. Furthermore, the article goes on to demonstrate that jury service is a constitutional right, the denial of which to persons on the basis of their disability is highly inappropriate. We have enclosed a copy of the law review article for your consideration.

Providing interpreters for deaf people to serve on juries should not be prohibitively expensive. Qualified interpreters are already serving in the Alaska Court System for purposes of testimony. They could just as readily interpret for purposes of a juror. There will be some expenses associated with rendering jury boxes accessible to the mobility impaired. However, this should be minimal and it does not justify the denial of the right to jury service for these persons. Finally, there is absolutely no justification for denying jury service to blind persons.

2) Interpreters for deaf persons seeking access to governments. This section would require all state and local governmental units, including the University of Alaska, to provide an interpreter whenever a deaf person seeks access to funds, services, facilities, advantages, or privileges. The merits of this provision are apparent on its face. In order for deaf people to meaningfully participate in a society where the overwhelming majority of its civil servants are unable to communicate with the deaf, it is incumbent upon the government to provide a means by which the deaf can make use of the government which their taxes go to support. The deaf are unique vis-a-vis other non-English speaking peoples. In almost all non-English speaking communities, there is always someone who can interpret for a citizen who is attempting to communicate with the government. With the deaf, very few people are able to interpret. Therefore, the responsibility should shift to the governments to assure the right of access for deaf people.

It should be noted that the fiscal impact of this section should not be overwhelming. In Alaska deaf people are concentrated in the urban centers of Fairbanks, Juneau, and Anchorage. Interpreter services exist to some extent in all those communities. This section will merely require upgrading of those interpreter services.

3) Penalties for denying access to public facilities. This amendment supplements and clarifies the statute providing penalties for persons who deny or interfere with admittance to or enjoyment of a public facility. The amendment would make clear that it is inappropriate to deny admittance to a deaf person to public facilities. It also clarifies that this penalty provision is meant to only apply to physically disabled persons. This clarification is justified because the statutory chapter is entitled "Rights of Blind and Otherwise Physically Disabled Persons," and was, therefore, never intended to apply to mental disabilities.

4) Human Rights Commission. The Alaska Human Rights Commission, which is under the Governor's office, is vested with the power to investigate and prescribe remedies to eliminate inappropriate discriminations against all Alaskan citizens. The Commission deals with complaints on a case by case basis. If the Commission finds the complaint to be justified, it has the power to fashion remedies which will prevent the discriminatory practice from continuing. At present, the Commission's mandate is limited to discrimination against Alaskan's on the basis of race, religion, color, origin, age, sex, marital status, changes of marital status, pregnancy or parenthood, or in the case of employment, physical handicap.

The bills would amend the human rights statute by adding disability to the list of classes which shall not be discriminated against inappropriately. If a disabled person is being discriminated against by any person, entity, or government, in the areas of civil rights, employment, housing, or financial practices, the Commission would have the power to address the situation. The disabled person could also elect to take their case to Superior Court instead.

There would be a two-fold benefit to adding disability to the human rights statute. First, it would give all disabled persons additional forums through which to remedy the plethora of abuses which these persons have been subjected to. Second, by codifying the illegality of discriminating against disabled

persons, we would be enhancing the dignity, self-perception, and status of these otherwise devalued persons. The effect would be felt not only within the disabled community, but also in the community at large, as society as a whole is forced to recognize that disabled persons are entitled to the same rights and privileges of all other persons.

The bill's definition of "Disability" closely tracks the Federal Department of Health and Human Services Non-Discrimination on the Basis of Handicap regulations which were promulgated pursuant to Section 504 of the Rehabilitation Act of 1973. This is intended to tie into the large body of federal case law that has addressed the issue.

There is one difference between SB 168 and HB 393. HB 393 labels the class to be protected as the "physically or mentally disabled." SB 168 labels the protected class as the "deaf, blind or disabled." We at P.A.D.D. prefer HB 393's more general label. The deaf and the blind are clearly covered and protected by the definition of "physical or mental disability" found in HB 393 or "disability" found in SB 168.

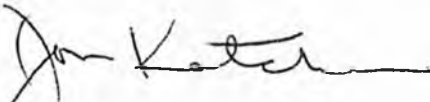
While we can understand the desire of some deaf and blind people to receive special mention, this is as inappropriate as having the statute read "race and Black", "religion and Catholic", or "national origin and Chinese."

HB 393's label of "physical or mental disability" is preferable to SB 168's "disability" because it puts the citizenry on notice that all disabled persons are protected, including the mentally disabled.

Thank you for your kind attention to my comments. I look forward to the hearing on October 22. We at P.A.D.D. sincerely hope you will assist in the shaping and passage of this important legislation.

Sincerely,

lr



Senathon A. Katcher  
Supervising Attorney

JAK:bk

## Jury Selection: The Courts, The Constitution, and the Deaf

Traditionally, handicapped persons have been almost universally excluded from jury service regardless of qualifications that might offset their particular disabilities.<sup>1</sup> California, followed by several other states, has recently amended its Code of Civil Procedure to allow blind and wheelchair-bound persons to be jurors,<sup>2</sup> but deaf persons are apparently still excluded.<sup>3</sup> Recent developments suggest that the prohibition against deaf jurors may have little remaining vitality. Legislation recently introduced in the California Assembly would allow deaf per-

1. Typical modern jury selection statutes require that the prospective juror be "in possession of his or her natural faculties." See, e.g., CAL. CIV. PROC. CODE §198(2); N.Y. JUD. LAW §510 (Consol.). In construing this language in the predecessor of Section 510 in the New York statute, the New York courts held that a blind man who was a professor at a state university was not "in possession of his natural faculties," and was thus incompetent to be a juror. *Lewinson v. Crews*, 25 App. Div. 2d 111, 282 N.Y.S.2d 83 (1967), *aff'd mem.*, 21 N.Y.2d 898, 236 N.E.2d 853 (1968), *remititur amended*, 21 N.Y.2d 1004, 238 N.E.2d 326, *appeal dismissed*, 393 U.S. 13 (1968).

2. California Code of Civil Procedure Section 198(2) provides "that no person shall be deemed incompetent [for jury service] solely because of the loss of sight in any degree or other disability which substantially impairs or interferes with the person's mobility. . . ." The Oregon statute is perhaps a bit broader, prohibiting exclusion "on the basis of blindness or *physical handicap* alone" (emphasis added). ORE. REV. STAT. §10.030. See also WASH. REV. CODE §2.36.070 (exclusion based on blindness prohibited). Some statutes are entirely silent on the matter of a juror's physical capabilities and conceivably, otherwise qualified deaf persons and blind persons could be considered under such statutes. See, e.g., FLA. STAT. ANN. §40.07; VA. CODE §8.01-335.

3. In a suit brought by a deaf woman who had been dismissed from a jury panel in Los Angeles, the superior court sustained the demurrer of the jury commissioner, finding, *inter alia*, that Code of Civil Procedure Section 198 disqualifies deaf persons from jury service. *Meyer v. Zolin*, No. C 302883 (L.A. Super Ct., Dec. 20, 1979) (copies of Complaint, Demurrer, and Ruling on Demurrer on file at the *Pacific Law Journal*). The case has been appealed to the Second District Court of Appeal.

While the prohibition against deaf jurors is not explicit in the terms of Section 198, the legislative history of SB 1525 (1977-78 Reg. Sess.) makes it clear that the legislature was not willing to abrogate the traditional prohibition. SB 1525 amended Section 198 to allow wheelchair-bound persons to serve as jurors. See CAL. STATS. 1978, c. 301, §2. As originally introduced, the bill "provide[d] that a person shall not be excluded from jury duty because of *any* physical handicap." SB 1525, Legislative Counsel's Digest, *as introduced*, February 13, 1978 (emphasis added). The term "physical handicap" was interpreted to include deafness. See Bill Digest on SB 1525 prepared by Senate Committee on Judiciary (copy on file at the *Pacific Law Journal*). An amendment introduced in the Assembly on May 25, 1978, changed "any physical handicap" to "disability which substantially impairs or interferes with the person's mobility." See JOURNAL OF THE CALIFORNIA ASSEMBLY 14843 (1977-78 Reg. Sess.) This version was enacted. CAL. STATS. 1978, c. 301, §2. Also enacted as part of the Assembly amendment was the following caveat:

The Legislature hereby declares that failure to include any specific category of disabled persons within the proviso in subdivision 2 of Section 198 of the Code of Civil Procedure . . . shall not be interpreted as legislative intent to either qualify or disqualify such persons from jury service.

CAL. STATS. 1978, c. 301, §4. The net result of of the legislature's evasive action was to leave intact the common law prohibition against deaf jurors.

sons to be considered for jury service.<sup>4</sup> Deaf persons have actually been seated as jurors in two recent criminal cases<sup>5</sup> and there has been litigation in California and elsewhere on the issue of whether deaf persons have a right to sit on juries.<sup>6</sup>

Case law and statutes excluding deaf persons from jury service have generally done so on the ground that a deaf juror's presence would infringe a litigant's right to a fair trial.<sup>7</sup> Courts have held that deafness is a physical disability that substantially interferes with the performance of the tasks of a juror, thereby depriving litigants of the right to a fair trial.<sup>8</sup> That right, however, is arguably threatened more by the exclusion of deaf persons from the jury selection process than by the potential effects of a juror's deafness during a trial. This comment will contend that the sixth amendment guarantees a trial by a jury chosen from a pool that includes deaf persons. Certainly, the practical impact of a deaf juror on the trial process cannot be dismissed as unimportant, but as will be demonstrated, no aspect of this impact is so insurmountable that a total exclusion of deaf persons, without regard to individual capabilities, is required. Furthermore, to subject deaf persons to a blanket exclusion from jury service while other groups with similar perceptive disabilities are statutorily guaranteed the opportunity to serve, raises equal protection problems. The initial concern, however, must center around the rights of the litigants whose interests in the outcome of the trial are at stake.

#### DEAF JURORS AND THE RIGHT TO A FAIR TRIAL

The nexus between deaf jurors and the right to a fair trial has two

4. AB 3285, 1979-80 Regular Session, as introduced, March 12, 1980.

5. John O'Brien was seated as a juror in a criminal case in Seattle, Washington. *State v. Robert J. Scalise*, Crim. Cause No. 90771 (King Cty. Super. Ct., August 14-16, 1979). The defendant was acquitted. Charles Peck was seated as juror in a criminal case in Oakland, California in October, 1979. Because the defendant was acquitted of violating California Penal Code Section 647(b) in a case that attracted widespread media attention, it is not deemed appropriate to use his name. This case will hereinafter be cited as Oakland Deaf Juror Case. See Letter from Thomas Deal, Alameda County Deputy District Attorney, to Harold Craig Manson, March 11, 1980 [hereinafter cited as Letter on Oakland Deaf Juror] (copy on file at the *Pacific Law Journal*).

6. *Eckstein v. Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978); *Meyer v. Zolin*, No. C 302853 (L.A. Super. Ct., Dec. 20, 1979).

7. See, e.g., 452 F. Supp. 1235; *Commonwealth v. Brown*, 332 A.2d 828 (Pa. Super. 1974); No. C 302853 (L.A. Super. Ct., Dec. 20, 1979).

8. 332 A.2d at 831. There is no "legal" definition of deafness. The term "deaf" in this comment refers to persons "totally deaf," that is, "[t]hose in whom the sense of hearing is non-functional for the ordinary purposes of life." R. BENDER, *THE CONQUEST OF DEAFNESS* 11 (1970). A considerable body of case law purporting to treat the issue of "deaf" jurors deals with persons who are "hard of hearing," i.e., "those in whom the sense of hearing, although defective, is functional, with or without a hearing aid." *Id.*; see 47 AM. JUR. 2D *Jury* §109; 31 AM. JUR. *Jury* §130, 15 A.L.R. 2d 534. Nearly 14 million Americans have some hearing impairment; of these, nearly two million are deaf as defined above. J. SCHEIN & M. DELK, *THE DEAF POPULATION OF THE UNITED STATES* 4 (1974).

aspects. First, the litigant is entitled to a fair trial. Second, the litigant is entitled to a jury selected from a cross-section of the community. These are two separate issues raised by these two

#### A. Fairness in the Jury Selection Process

A "fair trial" in California requires a "cross-section" of the community to be seated on the jury. This is a principle developed over several years of litigation. The principle is per se applied to the jury selection process.<sup>11</sup> California courts have applied this principle to the jury selection process.<sup>12</sup> California courts have applied this principle to the jury selection process.<sup>13</sup>

Recently, the United States Supreme Court has set forth a three part test to establish the cross-section principle. First, the party claiming a distinctive group in the community must show that the group is a distinctive group from which juries are selected. Second, the number of such persons in the community must be established that the group's exclusion is a systematic exclusion of the group from the jury selection process.

With respect to the exclusion of deaf persons, dwell at length over the second part of the test. Since deaf persons are not represented in the jury selection process, no mathematical analysis of the jury selection process is not fairly or accurately representative of the community. The fact that the

9. *Taylor v. Louisiana*, 419 U.S. 579, 584 (1975); *United States v. Lane*, 429 U.S. 109 (1976); *United States v. Lane*, 315 U.S. 60 (1942); *Smith v. Maryland*, 371 U.S. 172 (1962).

10. *Mullaney v. Wilbur*, 421 U.S. 688, 692 (1975); *Murchison*, 349 U.S. 133 (1965).

11. See generally *People v. Wheeler*, 43 Cal. 2d 31, 278 P.2d 9 (1954).

12. See *id.*; *People v. Carter*, 56 Cal. 2d 309, 363 P.2d 9 (1962).

13. *Cross-sectionalism in Jury Selection* (1975) [hereinafter cited as *Daughtrey*].

14. *Taylor v. Louisiana*, 419 U.S. 579, 584 (1975); *United States v. Lane*, 315 U.S. 60 (1942); *Smith v. Maryland*, 371 U.S. 172 (1962).

15. 439 U.S. 357 (1979). See *Comment*, *WASHBURN L.J.* 160 (1979).

16. 439 U.S. at 364.

17. *Id.*

aspects. First, the litigant is entitled to a *fair jury selection process*.<sup>9</sup> Second, the litigant is entitled to a *fair consideration of the case*.<sup>10</sup> The separate issues raised by these two aspects merit individual treatment.

#### A. Fairness in the Jury Selection Process

A "fair trial" in California is a trial before a jury representing a "cross-section" of the community, from which no "cognizable" class or group within the community has been excluded in the jury selection process.<sup>11</sup> California courts have generally followed the analysis of this principle developed over several decades in the federal courts.<sup>12</sup> Violation of this principle is *per se* a denial of a litigant's right to a fair trial.<sup>13</sup>

Recently, the United States Supreme Court in *Duren v. Missouri*<sup>14</sup> set forth a three part test to establish a *prima facie* violation of the cross-section principle. First, the existence of an excluded "cognizable" or distinctive group in the community must be shown.<sup>15</sup> Second, the complainant must show that the representation of this group in the pool from which juries are selected is not fair and reasonable in relation to the number of such persons in the community.<sup>16</sup> Finally, it must be established that the group's underrepresentation is caused by systematic exclusion of the group from the jury selection process.<sup>17</sup>

With respect to the exclusion of deaf persons, it is not necessary to dwell at length over the second and third elements of the *Duren* test. Since deaf persons are not represented *at all* in the jury selection process, no mathematical analysis is required to conclude that their current representation is not fairly or reasonably related to their numbers in the community. The fact that the exclusion is the result of a legislative act

9. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972); *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946); *Glasser v. United States*, 315 U.S. 60 (1942); *Smith v. Texas*, 311 U.S. 128 (1940).

10. *Mullaney v. Wilbur*, 421 U.S. 654 (1975); *Taylor v. Hayes*, 418 U.S. 488 (1974); *In re Murchison*, 349 U.S. 133 (1965).

11. *See generally* *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

12. *See id.*; *People v. Carter*, 56 Cal. 2d 549, 364 P.2d 477, 15 Cal. Rptr. 645 (1961); *People v. White*, 43 Cal. 2d 740, 278 P.2d 9 (1954). For an overview of the federal history of the principle of cross-sectionalism, see J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* (1977) [hereinafter cited as *JURY SELECTION*]; Daughtrey, *Cross-sectionalism in Jury Selection Procedures after Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975) [hereinafter cited as *Daughtrey*].

13. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972); *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946); *Glasser v. United States*, 315 U.S. 60 (1942); *Smith v. Texas*, 311 U.S. 128 (1940).

14. 439 U.S. 357 (1979). *See* Comment, *Systematic Exclusion in the Jury Selection Process*, 19 WASHBURN L.J. 160 (1979).

15. 439 U.S. at 364.

16. *Id.*

17. *Id.*

clearly qualifies the exclusion as "systematic."<sup>15</sup> Thus, in order to show that the exclusion of deaf persons from the jury selection process deprives litigants of a fair trial, only the first element of the *Duren* test need be analyzed. This requires a showing that deaf persons are a distinctively cognizable group in the community whose exclusion deprives juries of a representative cross-section of the community. Before specifically addressing that issue, it is appropriate to discuss the development of the cross-section principle in order to comprehend its full import to the right to a fair trial.

### 1. Development of the Cross-section Principle

The germ of the cross-section principle is in the sixth amendment guarantee of criminal trials "by an impartial jury of the State and district wherein the crime shall have been committed. . . ."<sup>19</sup> The principles developed under the sixth amendment are logically applicable to civil trials.<sup>20</sup> In 1940, the United States Supreme Court, in *Smith v. Texas*,<sup>21</sup> interpreted "impartial jury" to mean one drawn from a cross-section of the community. In an oft-quoted passage now regarded as "seminal,"<sup>22</sup> the Court declared:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. . . . [T]he exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government.<sup>23</sup>

The decision in *Smith* was placed upon equal protection grounds since the sixth amendment did not then apply to the States.<sup>24</sup> The Supreme Court in its supervisory role then gradually extended the

18. *Meyer v. Zolin*, No. C 302583 (L.A. Super. Ct., Dec. 20, 1979) (ruling on Demurrer, at 2) (copy on file at the *Pacific Law Journal*).

19. U.S. CONST., amend. VI.

20. The sixth amendment did not apply to the states, and states were not required to have jury trials in criminal prosecutions prior to the decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Duncan* applied the sixth amendment to the states through the due process clause of the fourteenth amendment. The seventh amendment right to jury trial in civil cases has not been incorporated into the fourteenth amendment and theoretically states need not have juries in civil cases. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 11 (1916). *But see CAL. CONST.*, art. I, §16 (jury trial "inviolable right" in both civil and criminal actions).

In the pre-*Duncan* era, however, and today with respect to civil trials, the theory was and is that if a state chooses to provide jury trials, it must do so on terms that comport with notions of due process and equal protection. *See Peters v. Kiff*, 407 U.S. 493, 501 (1972) (plurality opinion per Marshall, J.).

21. 311 U.S. 128 (1940).

22. *People v. Wheeler*, 22 Cal. 3d 258, 267, 583 P.2d 748, 755, 148 Cal. Rptr. 890, 896 (1978).

23. 311 U.S. at 130. Some evidence suggests that the cross-sectional jury dates to the thirteenth century. *See JURY SELECTION*, *supra* note 12, at 12.

24. *See* note 20 *supra*.

cross-section requirement to federal jury selection was finally read into the Constitution in the meantime. However, the California Supreme Court, in *People v. Wheeler*,<sup>22</sup> interpreted the cross-section requirement, say

The American system requires a representative cross-section of the entire community. . . . The fact that eligible jurors are not deaf is not a fact. . . . Later, in *People v. Wheeler*,<sup>29</sup> the California Supreme Court held that the cross-section requirement is a requirement under the California Constitution.<sup>30</sup>

An observation about the principle is in order. Cross-sectionalism requires that every group in the community be represented. As the California Supreme Court has held, the cross-section requirement is that there be no identifiable group or groups of citizens excluded. . . . Other than cross-sectionalism leaves no room for accommodations as long as the pool of jurors is representative of the community.<sup>33</sup> A litigant is not entitled to a jury from a particular community.<sup>34</sup>

Given the foregoing, it might be argued that the exclusion of deaf persons is condemnable. The argument would be that the exclusion of deaf persons from the community and should therefore be prohibited. It would not distinguish deaf persons. Not just any "group"

25. *See* 407 U.S. at 500 n.9.

26. *Williams v. Florida*, 399 U.S. 79, 84 (1971). The court asserts that the Fifth Circuit Court of Appeals' decision is binding on the states as early as 1936. 365 F.2d 698 (5th Cir. 1966).

27. 43 Cal. 2d 740, 278 P.2d 9.

28. *Id.* at 754, 278 P.2d at 18.

29. Cal. Rptr. 890 (1978); *People v. Carter*, 43 Cal. 2d 740, 278 P.2d 9 (1955). The court's language in *White* was a precedent. 328 U.S. 217, 220 (1946).

30. 22 Cal. 3d 258, 583 P.2d 748.

31. *Id.* at 272, 583 P.2d at 758.

32. *Taylor v. Louisiana*, 419 U.S. 579 (1975).

33. *United States v. C*, 419 U.S. 579 (1975).

34. *United States v. DiTomasso*, 406 F.2d 1000 (9th Cir. 1969).

35. *Simmons v. United States*, 406 F.2d 1000 (9th Cir. 1969).

36. 43 Cal. 2d at 749, 178 P.2d 9.

37. 419 U.S. at 538; *Carter v. United States*, 419 U.S. 579 (1975).

38. 419 U.S. at 538, citing *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978).

39. 406 U.S. 404 (1972). *See also* 22 Cal. 3d at 749, 178 P.2d 9.

40. *See* text accompanying n. 35.

cross-section requirement to federal criminal and civil actions.<sup>25</sup> Cross-sectionalism was finally read into the sixth amendment in 1970.<sup>26</sup> In the meantime, however, the California Supreme Court had adopted the cross-section requirement, saying in *People v. White*:<sup>27</sup>

The American system requires an impartial jury drawn from a cross-section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society.<sup>28</sup>

Later, in *People v. Wheeler*,<sup>29</sup> the court explained that cross-sectionalism is a requirement under the state constitution as well as the federal constitution.<sup>30</sup>

An observation about the practical meaning of the cross-section principle is in order. Cross-sectionalism does not require representation of every group in the community on every or any jury actually chosen.<sup>31</sup> As the California Supreme Court aptly noted in *White*, "The principal requirement is that there be no systematic or intentional exclusion of any group or groups of citizens from the prospective jury lists."<sup>32</sup> Further, cross-sectionalism leaves the states free to prescribe juror qualifications as long as the pool of qualified persons is representative of the community.<sup>33</sup> A litigant is not entitled to a jury of any specific composition.<sup>34</sup>

Given the foregoing, it might seem sufficient to say that the exclusion of deaf persons is condemned by the cross-section requirement alone. The argument would be that deaf persons are a group within the community and should therefore be included.<sup>35</sup> This approach, however, would not distinguish deaf persons from any other collection of persons. Not just any "group" is entitled to equal consideration in the jury

25. See 407 U.S. at 500 n.9.

26. *Williams v. Florida*, 399 U.S. 78, 100 (1970). Actually, the effect of the requirement on the states is much more apparent in *Taylor v. Louisiana*, 419 U.S. 522 (1975). Professor Daughtrey asserts that the Fifth Circuit Court of Appeals had constitutionalized cross-sectionalism and made it binding on the states as early as 1956. Daughtrey, *supra* note 12, at 29-30; see *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966).

27. 43 Cal. 2d 740, 278 P.2d 9 (1954).

28. *Id.* at 754, 278 P.2d at 18. See also *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *People v. Carter*, 56 Cal. 2d 549, 364 P.2d 477, 15 Cal. Rptr. 645 (1961). The court's language in *White* was a paraphrase of two sentences found in *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946).

29. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

30. *Id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899.

31. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); see *United States v. Potter*, 552 F.2d 901 (9th Cir. 1977); *United States v. Gast*, 457 F.2d 141 (7th Cir. 1972), *cert. denied*, 406 U.S. 969 (1972); *United States v. DiTomasso*, 405 F.2d 385 (4th Cir. 1969), *cert. denied*, 394 U.S. 934 (1969); *Simmons v. United States*, 406 F.2d 456 (5th Cir. 1969).

32. 43 Cal. 2d at 749, 178 P.2d at 15; see 419 U.S. at 538.

33. 419 U.S. at 538; *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970).

34. 419 U.S. at 538, citing *Fay v. New York*, 332 U.S. 261 (1947) and *Apodaca v. Oregon*, 406 U.S. 404 (1972). See also 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

35. See text accompanying note 23 *supra*.

selection process. A group must be constitutionally "cognizable" for this purpose.

## 2. The Cognizability Factor

The principle of "cognizability" in the jury selection process is universally said to have had its genesis in *Hernandez v. Texas*,<sup>36</sup> wherein the United States Supreme Court stated:

When the existence of a distinct class is demonstrated, and it is further shown that the laws as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.<sup>37</sup>

The task of defining cognizability was left to the lower federal courts.<sup>38</sup> Not surprisingly, the results have varied.<sup>39</sup> The Court of Appeals for the Ninth Circuit observed that "[a] precise definition of what constitutes a cognizable group is lacking in the decided cases . . . [C]ognizability will necessarily vary with local conditions."<sup>40</sup>

The case that has been praised as the "most thoughtful analysis"<sup>41</sup> of cognizability is *United States v. Guzman*.<sup>42</sup> In deciding that 18 to 21 year-olds do not constitute a cognizable group, the District Court for the Southern District of New York set out three factors defining such a group. First, the group must have a definite and unshifting membership.<sup>43</sup> This requires some characteristic that limits the group.<sup>44</sup> Second, there must be a "common thread" of ideas, attitudes, or

experiences that gives the group share a community of interest that other groups or individuals in the factors, courts have sometimes thought of as distinct and identifiable.

The California Supreme Court cognizability in *Adams v. Superior* persons resident in the state for less nizable class. The court did not cognizability; rather, the opinion quirement of *Guzman* without dissenting, believed the mere fa proved the cognizability of the tion was unnecessary.<sup>50</sup>

For nearly five years, cogniz man-Adams "common thread." braced the philosophy he had majority opinion in *Rubio v. S* ex-felons and resident aliens a own interpretation of the "com man requirement that the gr sented by other members of tl

The "common thread" Mo arising from . . . life experie possessors a common social events."<sup>53</sup> The explanation fc

36. 347 U.S. 475 (1954).

37. *Id.* at 478. See also *United States v. Potter*, 552 F.2d 901, 905 (9th Cir. 1977); Daughtrey, *supra* note 12, at 13; JURY SELECTION, *supra* note 12, at 48. Of particular interest also is Gewin, *An Analysis of Jury Selection Decisions* (appended to the opinion in *Foster v. Sparks*, 506 F.2d 895, 811 (5th Cir. 1975)). Judge Gewin's report was originally prepared for the Committee on the Operation of the Jury System, Judicial Conference of the United States. Judge Gewin observes that the language in the text quoted from *Hernandez* "could be deemed the precursor of the suspect classification terminology," which he says the Court introduced only a short time later in *Bolling v. Sharpe*, 347 U.S. 497 (1954), 506 F.2d at 820 n.41. (It appears that the "suspect" class terminology actually originated in *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). Nonetheless, "cognizability" and "suspect classification" are not identical. A class may be "cognizable" for sixth amendment purposes, yet not "suspect" for fourteenth amendment purposes. Some groups are both "cognizable" and "suspect" e.g., racial groups. Women are clearly a cognizable group, see *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); yet classifications based on sex have not been anointed "suspect" by a majority of the Court, see *Stanton v. Stanton*, 421 U.S. 7 (1975). But see *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality of four Justices held sex to be a "suspect" classification).

38. In fact, the Supreme Court has rarely, if ever, used the term "cognizability" to describe the principle announced in *Hernandez*. The term most likely originated with a lower court, although which court, and when and where do not appear in the relevant literature.

39. For a summary of the cognizability decisions to 1975, see Daughtrey, *supra* note 12, at 14-15 n.49.

40. *United States v. Potter*, 552 F.2d 901, 903 (9th Cir. 1977).

41. Daughtrey, *supra* note 12, at 13-14 n.49.

42. 337 F. Supp. 140 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973).

43. *Id.* at 143.

44. *Id.*

45. *Id.* This element is not to be r socioeconomic group has a rigorous ideo 69. Additionally, as Professor Van Dyk pears to conflict with Justice Marshall's [i]t is not necessary to assume that t order to conclude, as we do, that t human events that may have unsus 407 U.S. 493, 504 (1972). On the other t he viewed as demanding that the gro thread may be seen as referring to "a fl were excluded. See *Ballard v. United* 46. 337 F. Supp. at 143-44.

47. See *United States v. Potter*, 55 Court, 403 F. Supp. 486 (N.D. Cal. 19 48. 12 Cal. 3d 55, 524 P.2d 373, 1 in California appears to have been in 523, 529 (1971).

49. 12 Cal. 3d at 60, 524 P.2d at 50. *Id.* at 66, 524 P.2d at 383, 11 51. 24 Cal. 3d 93, 593 P.2d 595, 52. *Id.* at 98, 593 P.2d at 598, 15 53. *Id.*

experiences that gives the group cohesion.<sup>45</sup> Finally, the group must share a community of interest that cannot be adequately represented by other groups or individuals in the population.<sup>46</sup> In addition to these factors, courts have sometimes required that the particular class be thought of as distinct and identifiable by the larger community.<sup>47</sup>

The California Supreme Court first articulated the concept of cognizability in *Adams v. Superior Court*,<sup>48</sup> where it was held that persons resident in the state for less than one year do not constitute a cognizable class. The court did not attempt an independent definition of cognizability; rather, the opinion adopted the "common thread" requirement of *Guzman* without comment or citation.<sup>49</sup> Justice Mosk, dissenting, believed the mere fact that a "group" was being discussed proved the cognizability of the group, and that any further determination was unnecessary.<sup>50</sup>

For nearly five years, cognizability in California hung by the *Guzman-Adams* "common thread." In 1979, however, Justice Mosk embraced the philosophy he had eschewed in *Adams* and authored the majority opinion in *Rubio v. Superior Court*.<sup>51</sup> Rejecting a claim that ex-felons and resident aliens are cognizable groups, Mosk laid out his own interpretation of the "common thread" and adopted the third *Guzman* requirement that the group's interests not be adequately represented by other members of the community.<sup>52</sup>

The "common thread" Mosk described as "a common perspective arising from . . . life experience in the group" that "impart[s] to its possessors a common social or psychological outlook on human events."<sup>53</sup> The explanation for adoption of the third *Guzman* require-

45. *Id.* This element is not to be narrowly construed since obviously "no racial, ethnic or socioeconomic group has a rigorous ideological cohesiveness." JURY SELECTION, *supra* note 12, at 69. Additionally, as Professor Van Dyke points out, *id.*, this "common thread" requirement appears to conflict with Justice Marshall's observation in *Peters v. Kiff* that

[i]t is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

407 U.S. 493, 504 (1972). On the other hand, the *Guzman* "common thread" requirement need not be viewed as demanding that the group have a predictable decisional outlook. The common thread may be seen as referring to "a flavor, a distinct quality" which would be lost if the group were excluded. See *Ballard v. United States*, 329 U.S. 187, 193-94 (per Douglas, J.)

46. 337 F. Supp. at 143-44.

47. See *United States v. Potter*, 552 F.2d 901, 905 (9th Cir. 1977), citing *Quadra v. Superior Court*, 403 F. Supp. 486 (N.D. Cal. 1975).

48. 12 Cal. 3d 55, 524 P.2d 375, 115 Cal. Rptr. 247 (1974). Actually, the first use of the term in California appears to have been in *People v. Holland*, 22 Cal. App. 3d 530, 540, 99 Cal. Rptr. 523, 529 (1971).

49. 12 Cal. 3d at 60, 524 P.2d at 378, 115 Cal. Rptr. at 250.

50. *Id.* at 66, 524 P.2d at 383, 115 Cal. Rptr. at 255.

51. 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

52. *Id.* at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737.

53. *Id.*

ment was that the cross-section principle was designed to broaden the representation of *attitudes*, not *groups* as such.<sup>54</sup>

Applying the *Rubio* definition, it is apparent that deaf persons are a cognizable group. Deafness is the characteristic that gives the group a definite composition. There can be no doubt that deafness<sup>55</sup> supplies a "common thread" to the group that it afflicts. In the terms of *Rubio*, deaf persons share a common perspective on human events arising from their common life experience. Because deaf persons have, as a group, a life experience vastly different from the majority of citizens, it is unlikely that the interests shared by deaf persons could be adequately represented by any other group in the community. Deaf persons represent the same sort of "discrete and insular minority"<sup>56</sup> as

54. *Id.* In a bitter but persuasive dissent, Justice Tobriner, who had joined Mosk's dissent in *Adams*, attacks what he calls the "vicarious representation analysis." *Id.* at 106, 593 P.2d at 603, 154 Cal. Rptr. at 743 (Tobriner, J., dissenting). From Tobriner's precise analysis of prior United States Supreme Court decisions, it is obvious that the cross-section rule was not fashioned merely to provide representation of attitudes wherever they might be found, but also to compel the inclusion of groups. For example, the plurality opinion in *Peters v. Kiff* pointed out:

[T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. . . . When any large and identifiable segment of the population is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

497 U.S. 493, 503-04 (1972) (emphasis added). See also note 45 *supra*.  
The effect of the "vicarious representation" element is to exclude groups based on presumptions about group attitudes, presumptions which "[fl]y squarely in the face of the cross-section rule." 24 Cal. 3d at 112, 593 P.2d at 608, 154 Cal. Rptr. at 747 (Tobriner, J., dissenting). As Judge Gewin points out, judicial sanctions can be imposed against jury discrimination without regard to whether or not a technical "cross-section" has been achieved for the reason that "state fostered or imposed discrimination is simply inimical to the Constitution." Gewin, *An Analysis of Jury Selection Decisions*, 566 F.2d 811, 520 (1975).

The "vicarious representation" element considers perhaps the interests of the judicial system and litigants, but ignores the interests of a group excluded for the sole reason that its views are shared by another group. Also, as between two groups whose interests could somehow be divined as similar, the decision that one but not the other should represent these interests could only be made on arbitrary grounds unrelated to the ability of individual group members to perform as jurors.

Exclusion of qualified groups from jury service is essentially an equal protection issue with respect to the excluded groups, no matter what labels or standards of review may be applied. Justice Mosk had earlier recognized that in his *Adams* dissent. See 12 Cal. 3d at 67, 524 P.2d at 383, 115 Cal. Rptr. at 255. No other equal protection issue turns on whether or not the victims of discrimination have their interests adequately represented by other members of society.

Justice Tobriner's dissent in *Rubio* thus clearly states the correct view. Ironically, Justice Mosk's now-repudiated dissent in *Adams* remains an outstanding essay on the law in jury discrimination cases. In light of both opinions, the "vicarious representation" element of *Rubio* and *Guzman* is unquestionably erroneous. It would appear then that cognizability, an historical accident and largely a creation of the lower federal courts, has evolved far past its usefulness. The concept was essential in 1954, but is troublesome in 1980. The ends of the sixth amendment would be better served by discarding cognizability entirely. In challenges to a jury selection system brought by members of the excluded group, the more usual modern equal protection analysis should apply. In challenges brought by allegedly wronged litigants, the litigants should be allowed to assert the equal protection rights of the excluded group. See *Peters v. Kiff*, 407 U.S. 493 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953).

55. See note 8 *supra*.

56. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Although this phrase arose in the context of substantive due process and has particular significance in discus-

other groups declared "cognizably, the entire social history of educational segregation<sup>58</sup> reveals that deaf persons have a greater community.<sup>60</sup> The result is meaningless, however, if the consideration of the cases t

### B. Fairness in the Consideration of Deaf Jurors

The United States Supreme Court has held that "A fair trial in a fair tribunal is a fair trial." The terms "fair trial" and "fair tribunal" are used in the consideration of the cases referred to the position that the evidence precludes a fair and adequate due process.<sup>63</sup>

In *Eckstein v. Kirby*,<sup>64</sup> a

discussion of equal protection, it is the message that is anywhere.

57. See the cases cited in Daugherty, *DEAF JURORS AND THE CONCEPTS OF DEAFNESS* 66 (R. Hardy, ed., 1977).

58. See note 60 *infra*.  
59. In early history, deaf persons were often considered as "mutes" or "deaf-mutes." False notions about deafness today. One popular notion is that deaf persons lack language skills, and the deaf are "incapable" of learning. Sciences has revealed that deaf persons refer to deaf persons as "deaf" or "deafness" any more than "nigger" or "negro" is used to refer to a person of African descent.

At one time, the deaf were persons of color. *See* *Southwestern Community College v. Federal Law*, 36, 115 N.W. 251 (1908). Modern federal law has only recently been applied to deaf persons. *See* *United States v. Kirby*, 1277 (7th Cir. 1977); *Kampmeier v. Federal Law*, 558 F.2d 413 (8th Cir. 1977); *Southwestern Community College v. Federal Law*, 1047 (M.D.N.C. 1977). The same result was achieved when a nursing degree program. A state thus effectively terminating his program. *See* *United States v. Kirby*, 1047 (M.D.N.C. 1977). The same result was achieved when a nursing degree program. A state thus effectively terminating his program. *See* *United States v. Kirby*, 1047 (M.D.N.C. 1977).

Despite the lack of extensive federal law has only recently been applied to deaf persons. *See* *United States v. Kirby*, 1047 (M.D.N.C. 1977); *Stewart, A Truly Silent Asylum for Deaf Persons* 1 (1977).

60. 349 U.S. 133 (1965).

61. *Id.* at 136.

62. See text accompanying note 61.

63. 452 F. Supp. 1235 (E.D. Ark. 1978). Plaintiff, a deaf woman who had been denied admission to the Arkansas jury selection:

other groups declared "cognizable" for jury selection purposes.<sup>57</sup> Finally, the entire social history of the treatment of deaf persons, from educational segregation<sup>58</sup> to the imposition of legal disabilities,<sup>59</sup> reveals that deaf persons have been thought of as a distinct class by the greater community.<sup>60</sup> The status of deaf persons as a cognizable group is meaningless, however, if their presence on juries interferes with a fair consideration of the cases before them.

### B. Fairness in the Consideration of the Case

The United States Supreme Court pointed out in *In re Murchison*:<sup>61</sup> "A fair trial in a fair tribunal is a basic requirement of due process."<sup>62</sup> The terms "fair trial" and "due process" are synonymous with "fairness in the consideration of the case." As previously noted, courts have adhered to the position that the inability of a deaf juror to perceive the evidence precludes a fair consideration of a case and thus denies a litigant due process.<sup>63</sup>

In *Eckstein v. Kirby*,<sup>64</sup> a federal district court sitting in Arkansas sus-

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sions of equal protection, it is the most accurate description of the cognizability factor to be found anywhere.

57. See the cases cited in Daughtrey, *supra* note 12, at 14-15, n.49.

58. See generally Glass, *Deafness and Its Effects*, EDUCATIONAL AND PSYCHOSOCIAL ASPECTS OF DEAFNESS 66 (R. Hardy & J. Culls, eds. 1974) [hereinafter cited as Glass].

59. See note 60 *infra*.

60. In early history, deaf persons were thought to be possessed by evil spirits. See *Mark* 9:17-26. False notions about deafness continue to result in social discrimination against the deaf to this day. One popular notion is that deaf persons are "intellectually slower than hearing persons." See Glass, *supra* note 58. This idea arose from the common tendency to equate intelligence with language skills, and the deaf are admittedly lacking in language skills. See note 69 *infra* and accompanying text. Science has repudiated the idea that deaf persons lack the intellectual capacity of hearing persons, see Glass, *supra* note 58; yet even the most educated and seemingly enlightened persons refer to deaf persons as "deaf and dumb." This offensive phrase is not "just an expression" any more than "nigger" is "just an expression."

At one time, the deaf were *personae non standi iudicio*. See generally *Alex v. Matke*, 151 Mich. 36, 115 N.W. 251 (1908). Modern case law dealing with discrimination against deaf persons is sparse. One reason for the paucity of litigation is that a private right of action under relevant federal law has only recently been recognized. See *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977). A few cases have attracted national attention. In *Southeastern Community College v. Davis*, 439 U.S. 1065 (1979), the Supreme Court held that no federal law was violated when a college refused to admit a deaf licensed practical nurse to its nursing degree program. A state university denied a deaf graduate student interpreter services, thus effectively terminating his program, in *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). The same issue arose in *Fines v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977).

Despite the lack of extensive litigation, it is apparent that social, economic, and employment discrimination against deaf persons is common. See R. BENDER, *THE CONQUEST OF DEAFNESS* (1970); Stewart, *A Truly Silent Minority*, 2 PROFESSIONAL REHABILITATION WORKERS WITH THE ADULT DEAF, DEAFNESS 1 (1972).

61. 349 U.S. 133 (1965).

62. *Id.* at 136.

63. See text accompanying note 8 *supra*.

64. 452 F. Supp. 1235 (E.D. Ark. 1978). In a suit of first impression in American courts, plaintiff, a deaf woman who had been dismissed from a jury panel, sought a declaratory judgment that the Arkansas jury selection statute violated the fourteenth amendment in excluding deaf per-

ained the exclusion of a deaf person from a state court jury panel on the basis of fairness to litigants, among other reasons.<sup>65</sup> Finding that the deaf person "might not be able to give a litigant a fair trial,"<sup>66</sup> the court outlined several potential obstacles to a fair consideration of a case by a deaf juror.

First, it was urged in *Eckstein* that deaf persons necessarily have limited vocabularies and therefore verbatim translations of court proceedings would be impossible even with the aid of a skilled interpreter.<sup>67</sup> The court suggested that complex medical testimony or other evidence of a highly technical nature could not be satisfactorily conveyed to a deaf juror without significant delay.<sup>68</sup> There is no dispute that the expressive and receptive language skills of deaf persons are, *on the average*, quite deficient compared to the language skills of hearing persons.<sup>69</sup> But contrary to former belief, language proficiency is not a measure of intelligence,<sup>70</sup> and it is intelligence that is the critical factor in a juror's ability to evaluate evidence and draw the necessary conclusions. Beyond this fact, it is documented that deaf persons participate in a number of professions with highly specialized jargon, including medicine, education, engineering, and law.<sup>71</sup> It may be in fact much more difficult to convey highly technical information to a hearing person of limited intelligence or education than it would be to convey the same information to a deaf person of average or above average intelligence.

Another potential obstacle to a fair consideration of a case by a deaf juror raised in *Eckstein* was the apparent inability of a deaf juror to perceive the "more subtle nuances of verbal communication" in assessing the credibility of a witness.<sup>72</sup> There are some "subtle nuances of verbal communication" such as hesitancy that would be visually obvious to a deaf person. Likewise, other clues perceptible to a deaf person, such as visible discomfort, wringing hands, sweating, and so forth,

sons. Jurisdiction was granted pursuant to Title 42, United States Code, Section 1983. The challenged provision declared:

The following are disqualified to act as grand or petit jurors:

(c) Persons who are unable to speak or understand the English language.

(f) Persons whose senses of hearing or seeing are substantially impaired.

ARK. STAT. ANN. §39-102 (1977).

65. 452 F. Supp. at 1242. The court also decided that the plaintiff had no fundamental right to sit on a jury. *Id.* at 1241. See notes 125-139 and accompanying text *infra*.

66. 452 F. Supp. at 1242.

67. *Id.* at 1237.

68. *Id.* at 1242.

69. See generally H. FURTH, THINKING WITHOUT LANGUAGE (1966).

70. Glass, *supra* note 58, at 66-67.

71. P. CRAMMATTE, DEAF PERSONS IN PROFESSIONAL EMPLOYMENT 72-87 (1968).

72. 452 F. Supp. at 1237.

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73. See Letter on Oakland Deaf Jurors compensate for hearing loss without merit. B. BOLTON, PSYCH (1976). The visual clues referred to perceive. Also false is the idea that reading. See *id.*

74. H. KALVEN & H. ZIESEL,

75. 452 F. Supp. at 1242. Deaf method is through the use of American Sign Language and Communication in P. 22 (B. Bolton, ed. 1976). Sign is not needed, just as with any foreign language English-speaker. It should be point of communication, and there are Sign. *Id.* But each mode requires ess.

76. This procedure was used Juror, *supra* note 5, at 2. California note 102 *infra*, requires that an interpreter is "spatially situated to involved."

77. 452 F. Supp. at 1242.

78. See Letter on Oakland Deaf

might reveal a witness' apparent confusion or misrepresentation.<sup>73</sup> Furthermore, a hearing juror may fail to grasp the significance of some "subtle nuances" of voice inflection, and this fact will rarely be known to the parties. Finally, there is no conclusive authority that perception of voice inflection or any other "nuance" of verbal communication leads juries to "truer" or "more just" findings. In fact, authority suggests that juries base their credibility judgments more on their *visual* perception of a witness than on voice inflection, or even the substantive content of testimony.<sup>74</sup> Thus the excluded deaf person may be a "better" juror than the blind person now permitted to serve on California juries.

The *Eckstein* court also asserted that a deaf juror would have to keep his or her eyes constantly on the interpreter and would not be able to watch the facial expressions of witnesses as they testified.<sup>75</sup> This problem is easily resolved by placing the interpreter next to or behind the witness.<sup>76</sup> Nonetheless, this hardly seems a valid reason to exclude deaf persons as a group since blind persons who are allowed to be jurors cannot see the facial expressions of the witnesses at all. Regardless of whether an interpreter could be strategically located, the deaf juror would at least be able to see the witness before and immediately after anything was said.

Of all the potential obstacles to a fair consideration of a case identified by the court in *Eckstein*, the most serious was that a deaf juror's participation in deliberations would be impeded or delayed by having "each remark made by each juror" relayed by the interpreter.<sup>77</sup> This observation has not been borne out by actual trial experience with a deaf juror.<sup>78</sup> A hearing juror, being able to comprehend only one con-

73. See Letter on Oakland Deaf Juror, *supra* note 5. The "appealing notion" that deaf persons compensate for hearing loss with heightened sensitivity to nonverbal conduct is apparently without merit. B. BOLTON, *PSYCHOLOGY OF DEAFNESS FOR REHABILITATION COUNSELORS* 4 (1976). The visual clues referred to in the text are those that hearing persons would just as readily perceive. Also false is the idea that deaf persons, as a group, are extremely proficient at lip-reading. See *id.*

74. H. KALVEN & H. ZIESEL, *THE AMERICAN JURY* 352-53 (1966).

75. 452 F. Supp. at 1242. Deaf persons communicate in a variety of ways, but the preferred method is through the use of American Sign Language or "Sign." Bornstein, Woodward, & Tully, *Language and Communication in PSYCHOLOGY OF DEAFNESS FOR REHABILITATION COUNSELORS* 22 (B. Bolton, ed. 1976). Sign is not English nor is it based on English. *Id.* Thus an interpreter is needed, just as with any foreign language, when a user of Sign wishes to communicate with an English-speaker. It should be pointed out that not all deaf persons identify with Sign as a means of communication, and there are Sign-English hybrid languages and other modes of deaf communication. *Id.* But each mode requires a qualified interpreter to complete the communication process.

76. This procedure was used in the Oakland Deaf Juror Case. See Letter on Oakland Deaf Juror, *supra* note 5, at 2. California Evidence Code Section 754, considered more thoroughly at note 102 *infra*, requires that an action involving a deaf party or witness not proceed until the interpreter is "spatially situated to assure proper communication with the deaf person or persons involved."

77. 452 F. Supp. at 1242.

78. See Letter on Oakland Deaf Juror, *supra* note 5.

versation at a time, cannot always hear "each remark made by each juror."<sup>79</sup> The solution to this problem, if it is a problem, lies in the voluntary cooperation of the other jurors. If they seem unwilling to cooperate, and this appears unlikely,<sup>80</sup> the judge could impose rules for the conduct of deliberations in order to insure a fair consideration of the case. That a jury has a duty to include each juror in discussions is clear.<sup>81</sup> A verdict rendered without the participation of one juror is not the verdict of each juror to which a litigant is entitled.<sup>82</sup> Such a verdict could be impeached on the ground that a "fair and due consideration of the case has been prevented."<sup>83</sup> Furthermore, the common law right to a jury of twelve individuals is guaranteed by the California constitution<sup>84</sup> and exclusion of one juror from deliberations would violate that right.<sup>85</sup>

Another vital aspect of the right to a fair trial deserves particular mention. The court in *Eckstein* observed that the presence of a thirteenth person in the jury room during deliberations "violates the secrecy of the jury room and thereby deprives an accused person of their [sic] right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution . . . ."<sup>86</sup>

There is no doubt that an interpreter would be necessary to assist a deaf juror in deliberations. The presence of an outsider during deliberations, it is said, however, prevents a fair consideration of the case by chilling free discussion of the issues.<sup>87</sup> An outsider might interfere with

the decisionmaking process the jury alone based upon nonjuror is orally mute, he c the jurors by intentional or t vasive is the reverence for i *Eckstein* noted, the prohibi been extended even to alteri way.<sup>89</sup> Close scrutiny reve principle"<sup>90</sup> of jury secrecy

The rule precluding addi marily in cases dealing wi counsel.<sup>91</sup> The presence of than the presence of a di tempted to, or be asked to dence; a bailiff may by me reasonable apprehension ported; counsel may expre cided. An interpreter, not cloaked in judicial authori coerce a jury as might a j

The California Suprem tenth juror problem in *Pe* tinction between the prese of an alternate juror who receiving with the other j behavior.<sup>93</sup> The court ad which hold there is no err the jury room absent a sl tionale applies logically t ternate juror, an interp

79. On *voir dire* in the Oakland Deaf Juror Case. Prosecutor Deal queried deaf juror Peck on the problem of multiple conversations. Through the interpreter, Peck replied, "How many people can you listen to and understand at one time?" Letter on Oakland Deaf Juror, *supra* note 5, at 2.

80. At the conclusion of the trial in the Oakland Deaf Juror Case, the other jurors "gave the deaf man a standing ovation and were generally extremely pleased to have sat on the jury with him. They apparently encountered no problems while deliberating. They all made a conscientious effort not to speak when another person spoke and to make sure the deaf man was able to express his views." Letter on Oakland Deaf Juror, *supra* note 5, at 3.

81. CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) No. 15.30 directs in part: "Each of you must decide the case for yourself but you should do so only after a consideration of the case with the other jurors." See also NEW YORK PATTERN JURY INSTRUCTIONS, No. 1:25; *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98 (1961). Instructions of this nature were tacitly approved in *Philbrick v. Weinberger*, 228 Cal. App. 2d 681, 39 Cal. Rptr. 617 (1964) and *Hutton v. Brookside Hospital*, 213 Cal. App. 2d 350, 25 Cal. Rptr. 774 (1963).

82. See *People v. McKee*, 80 Cal. App. 200, 251 P. 675 (1926) (held, error to refuse instruction that both defendant and People entitled to individual opinion of each juror). See also CALIFORNIA JURY INSTRUCTIONS—CRIMINAL (CALJIC) No. 17.40.

83. California Penal Code Section 1181 permits a new trial to be granted on this ground.

84. *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 231 P.2d 832 (1951).

85. See *People v. Ames*, 52 Cal. App. 3d 389, 124 Cal. Rptr. 894 (1975).

86. 452 F. Supp. at 1244. See also *United States v. Beasley*, 464 F.2d 468 (10th Cir. 1972); *People v. Knapp*, 42 Mich. 267, 3 N.W. 927 (1879); *Birgman v. State*, 350 P.2d 321 (Okla. Crim 1960); *Acosta v. State*, 126 Tex. Crim 618, 72 S.W.2d 1074 (1934). The *Knapp* case seems to be the seminal American decision on the matter.

87. *People v. Valles*, 24 Cal. 3d 121, 131, 593 P.2d 240, 245-46, 154 Cal. Rptr. 543, 548 (1979) (Mosk, J., dissenting). See also *United States v. Virginia Erection Co.*, 335 F.2d 868 (4th Cir. 1974).

88. 24 Cal. at 131, 593 P.2d at

89. 452 F. Supp. at 1244. See

*v. Britton*, 4 Cal. 2d 622, 52 P.2d 2

462 (1973); *People v. Bruneman*,

90. 335 F.2d at 572.

91. See, e.g., *Bowman v. State*

Pa. 224, 153 A. 335 (1931) (Judge

92. 24 Cal. 3d 121, 593 P.2d

93. *Id.* at 127, 593 P.2d at 24;

625 (Ind. 1977).

94. *Id.* at 128, 593 P.2d at 24

3d 402, 411, 111 Cal. Rptr. 462.

Orchard, 17 Cal. App. 3d 565, 95

70 Cal. Rptr. 918 (1968). To the

App. 1974), *Jardine Estate v. De*

*Cullahan v. Hester*, 181 S.W.2d

the decisionmaking process so that the verdict is not one rendered by the jury alone based upon evidence presented in court. Even if the nonjuror is orally mute, he or she might convey attitudes or opinions to the jurors by intentional or unintentional nonverbal conduct.<sup>88</sup> So pervasive is the reverence for inviolate deliberations that, as the court in *Eckstein* noted, the prohibition against outsiders in the jury room has been extended even to alternate jurors who are not allowed to vote anyway.<sup>89</sup> Close scrutiny reveals, however, that the so-called "cardinal principle"<sup>90</sup> of jury secrecy is not as immutable as it seems.

The rule precluding additional persons in the jury room is found primarily in cases dealing with the presence of the judge, a bailiff, or counsel.<sup>91</sup> The presence of these persons is a matter entirely different than the presence of a disinterested interpreter. A judge might be tempted to, or be asked to, reinstruct the jury or comment on the evidence; a bailiff may by mere presence coerce a hasty verdict or raise a reasonable apprehension that the content of discussions will be reported; counsel may express an opinion or reargue the case being decided. An interpreter, not being an officer of the court as such, is not cloaked in judicial authority and would not by mere presence inhibit or coerce a jury as might a judge, counsel, or bailiff.

The California Supreme Court most recently considered the thirteenth juror problem in *People v. Valles*.<sup>92</sup> The court approved the distinction between the presence of an officer of the court and the presence of an alternate juror who had been with the jury throughout the trial, receiving with the other jurors the admonitions of the judge as to jury behavior.<sup>93</sup> The court adopted the theory of the better reasoned cases which hold there is no error in the mere presence of a nonparticipant in the jury room absent a showing of actual prejudice.<sup>94</sup> The *Valles* rationale applies logically to an interpreter for a deaf juror. Like an alternate juror, an interpreter would be treated identically to the

88. 24 Cal. at 131, 593 P.2d at 245-46, 154 Cal. Rptr. at 543.

89. 452 F. Supp. at 1244. See *United States v. Beasley*, 464 F.2d 468 (10th Cir. 1972); *People v. Britton*, 4 Cal. 2d 622, 52 P.2d 217 (1935); *People v. Adame*, 36 Cal. App. 3d 402, 111 Cal. Rptr. 462 (1973); *People v. Bruneman*, 4 Cal. App. 2d 75, 40 P.2d 891 (1935).

90. 335 F.2d at 872.

91. See, e.g., *Bowman v. State*, 192 N.E. 755 (Ind. 1934) (bailiff); *Hunsicker v. Waidelich*, 302 Pa. 224, 153 A. 335 (1931) (judge).

92. 24 Cal. 3d 121, 593 P.2d 240, 154 Cal. Rptr. 543 (1979).

93. *Id.* at 127, 593 P.2d at 243, 154 Cal. Rptr. at 546, citing *Johnson v. State*, 369 N.E.2d 623, 625 (Ind. 1977).

94. *Id.* at 128, 593 P.2d at 243, 154 Cal. Rptr. at 546-47; see *People v. Adame*, 36 Cal. App. 3d 402, 411, 111 Cal. Rptr. 462, 467 (1973) (Brown (G.A.), P.J., concurring in result); *People v. Orchard*, 17 Cal. App. 3d 568, 95 Cal. Rptr. 66 (1971); *People v. Martinez*, 264 Cal. App. 2d 906, 70 Cal. Rptr. 918 (1968). To the same effect are *Weston v. State*, 506 S.W.2d 648 (Tenn. Crim. App. 1974), *Jardine Estates v. Donna Brook Corp.*, 42 N.J. Super. 332, 126 A.2d 372 (1956), and *Cullahan v. Hester*, 181 S.W.2d 294 (Tex. Civ. App. 1944).

participating jurors and would not affect the outcome of the deliberations by mere presence.

But even if the *Va.* rule is limited to the factual situation of an alternate juror, the strict traditional rule against outsiders in the jury room has been set aside for reasons far less compelling than the necessity of an interpreter for a deaf juror.<sup>95</sup>

To the extent that the presence of an interpreter in the jury room threatens the integrity of the deliberative process, several remedial measures are available. The interpreter would be under the same obligation as a juror not to disclose the progress or nature of deliberations. Presumably, the court could require the interpreter to take an oath to this effect. Misconduct by the interpreter in the jury room could be proved, on motion for new trial<sup>96</sup> or vacation of judgment, in a juror's affidavit.<sup>97</sup> Furthermore, an interpreter who misbehaves in the jury room could be punished under existing provisions of the Penal Code.<sup>98</sup> Interpreter misconduct, however, is highly unlikely since courtroom interpreters for the deaf adhere to a stringent code of ethics.<sup>99</sup>

95. In *People v. Weston*, 32 Cal. App. 571, 163 P. 691 (1917), the court of appeal found no error in allowing a doctor to attend a juror who had a stomachache in the course of deliberations, even though the doctor had been a principal prosecution witness. The Texas courts thought it perfectly proper in *Newton v. State*, 2 S.W.2d 233 (Tex. Crim. App. 1930), that a "negro" was allowed to be present in the jury room to serve food to hungry jurors during deliberations. Minnesota's highest court had no problem, absent a showing of actual prejudice, in allowing the trial judge in the jury room during deliberations in *Heimbrecht v. Heimbrecht*, 31 Minn. 504, 18 N.W. 449 (1884). Of the utmost curiosity is the New York case of *People v. Flack*, 57 Hun. 83, 10 N.Y.S. 475 (Sup. Ct. Gen. Term 1890), *revid. on other grounds*, 125 N.Y. 324 (1891), wherein the court was not the least concerned by the presence of a newspaper reporter in the jury room!

96. In civil cases, a new trial may be had for "irregularity in the proceedings of the court, jury or adverse party" or for "misconduct of the jury." CAL. CIV. PROC. CODE §557. For a similar rule in criminal cases, see note 83 and accompanying text *supra*.

97. In California, a juror's affidavit may be used to show any "misconduct on the part of either jurors or third parties that should be exposed, misconduct upon which no verdict should be based." *People v. Hutchinson*, 71 Cal. 2d 342, 350, 455 P.2d 132, 137, 78 Cal. Rptr. 196, 201 (1969) (emphasis added). Such an affidavit is limited to proof of objective facts, that is, "overt conduct, conditions, events and statements" or other "improper influences" perceived by "sight, hearing, and the other senses." 71 Cal. 2d at 349-50, 455 P.2d at 137, 78 Cal. Rptr. at 201; see CAL. EVID. CODE §1150. No evidence is admissible to show the effect of such misconduct on the minds of the jurors. CAL. EVID. CODE §1150(a). By its own terms, Section 1150 allows proof of misconduct "within or without the jury room, of such a character as is likely to have influenced the verdict improperly." *Id.* This provision, as interpreted in *Hutchinson*, would appear to cover almost any conceivable misconduct on the part of an interpreter allowed in the jury room. The *Hutchinson* case dealt with improper remarks by a bailiff to the jury in the course of its deliberations.

98. California Penal Code Section 95 provides:

Every person who corruptly attempts to influence a juror or any person summoned or drawn as a juror . . . in respect to his verdict in, or decision of any cause, or proceeding, pending, or about to be brought before him . . . is punishable by fine not exceeding five thousand dollars or by imprisonment in the state prison.

99. The code referred to is that of the National Registry of Interpreters for the Deaf. A copy is on file at the *Pacific Law Journal* or may be had from the National Association of the Deaf, 814 Thayer Ave., Silver Spring, Maryland 20910. Courtroom interpreters for the deaf in California are required to subscribe to this or an equivalent set of standards. See CAL. EVID. CODE §754 (discussed at note 102 *infra*).

Finally, it should be noted problems apparently arose in the which deaf persons were jurors. individuals into the jury rooms a breaches of the juries' confidence should serve to substantially a presence during deliberations.<sup>100</sup>

In assessing all of the potential case posed by a deaf juror, it is experience with deaf jurors respect rights to a fair trial.<sup>103</sup> Further not the total exclusion of deaf incapable of rendering a fair co be challenged for cause.<sup>104</sup> A

100. See generally Letter on Oakland  
101. See *id.* In California, it is a crime deliberations or a jury's voting without the interpreter is needed to assist a deaf juror obtain the jury's consent in order for the tions. Understandably, there has been li hence, it is not clear whether "consent of consent of a majority of the jury would Kawachi required the consent of each jur defendant himself. Additionally, the inter utterances except to translate to the other jur Juror, *supra* note . . . at 2.

102. There are, however, several other selecting an interpreter, the criteria to g interpreter. A convenient framework for sion of California Evidence Code Section PAC. L.J., REVIEW OF SELECTED 1977 CA that the court appoint an interpreter in a deaf person is a party or witness and r appointed interpreter must be certified b any other agency with equivalent stand included on a list of recommended inter sions should govern the appointment of seated as a juror.

Interpreters appointed under Section 7 interpreters. *Id.* §754(e). This should be No significant burden would result on th fairly rare occurrence. It appears that fa not all, of the cost. The federal Rehab establish interpreter services and interpr deaf persons and any public or private the deaf. See 29 U.S.C. §§774(d)(1), 77 taxed as a cost to the parties.

103. See generally Letter on Oakland

104. See McLaughlin, *Civil Practice* (1967). See also *Lewinson v. Crews*, 28 the same time of the amendment allow tion 602 was changed to allow a challenge functions of the body." CAL. STATS. R SELECTED 1977 CALIFORNIA LEGISLATION permits a challenge for cause for any incapacity which satisfies the

Finally, it should be noted that none of the "thirteenth juror" problems apparently arose in the two cases previously mentioned in which deaf persons were jurors.<sup>100</sup> Interpreters accompanied these individuals into the jury rooms and as far as is known, there were no breaches of the juries' confidentiality.<sup>101</sup> This actual trial experience should serve to substantially abate concerns about the interpreter's presence during deliberations.<sup>102</sup>

In assessing all of the potential obstacles to the fair consideration of a case posed by a deaf juror, it is essential to point out that actual trial experience with deaf jurors resulted in no diminution of the litigants' rights to a fair trial.<sup>103</sup> Furthermore, the solution in any given case is not the total exclusion of deaf jurors. Rather, a deaf potential juror incapable of rendering a fair consideration in any given litigation could be challenged for cause.<sup>104</sup> As one judge has pointed out, "In each

100. See generally Letter on Oakland Deaf Juror, *supra* note 5.

101. See *id.* In California, it is a crime for a nonjuror to record, observe or listen to a jury's deliberations or a jury's voting without the jury's consent. CAL. PENAL CODE §167. Where an interpreter is needed to assist a deaf juror, it would be necessary, absent a statutory change, to obtain the jury's consent in order for the interpreter to accompany the deaf juror into deliberations. Understandably, there has been little judicial interpretation of Penal Code Section 167; hence, it is not clear whether "consent of the jury" requires the consent of each juror or whether consent of a majority of the jury would be sufficient. In the Oakland Deaf Juror Case, Judge Kawachi required the consent of each juror, as well as that of the attorneys on both sides, and the defendant himself. Additionally, the interpreter swore that he would "offer no opinions or other utterances except to translate to the other jurors what the deaf man said." Letter on Oakland Deaf Juror, *supra* note 5, at 2.

102. There are, however, several other issues relating to interpreters, including the manner of selecting an interpreter, the criteria to govern an interpreter's competency, and the cost of an interpreter. A convenient framework for resolving these issues currently exists in the recent revision of California Evidence Code Section 754. CAL. EVID. CODE §754, CAL. STATS. 1977, c. 1182, §1, at 3873-74; 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIF. LEGISLATION 485 (1978). This statute requires that the court appoint an interpreter in any criminal action and certain other proceedings where a deaf person is a party or witness and required to be present. CAL. EVID. CODE §754(b). The appointed interpreter must be certified by the National Registry of Interpreters for the Deaf or any other agency with equivalent standards. *Id.* §754(c). Additionally, the interpreter must be included on a list of recommended interpreters maintained by the court. *Id.* These same provisions should govern the appointment of interpreters in all actions where a deaf person has been seated as a juror.

Interpreters appointed under Section 754 are paid by the city or county at the rate paid to other interpreters. *Id.* §754(d). This should be the rule when a deaf person is a juror in a criminal case. No significant burden would result on the public fisc since the seating of a deaf juror would be a fairly rare occurrence. It appears that federal funds may be available to the state to bear part, if not all, of the cost. The federal Rehabilitation Act of 1973 permits federal grants to states to establish interpreter services and interpreter training programs, which shall be made available to deaf persons and any public or private nonprofit organization providing assistance or services to the deaf. See 29 U.S.C. §§774(d)(1), 777e (1976). In a civil case, the interpreter's fee should be taxed as a cost to the parties.

103. See generally Letter on Oakland Deaf Juror, *supra* note 5.

104. See McLaughlin, *Civil Practice, 1967 Survey of N.Y. Law*, 19 SYRACUSE L. REV. 501, 529 (1967). See also *Lewinson v. Crews*, 282 N.Y.S.2d 83, 88-89 (1967) (Hopkins, J., dissenting). At the same time of the amendment allowing blind jurors, California Code of Civil Procedure Section 602 was changed to allow a challenge for cause based on "a defect in the visual or auditory functions of the body." CAL. STATS. 1977, c. 591, §3, at 1957. See 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 392 (1978). The most recent amendment to Section 602 permits a challenge for cause for

any incapacity which satisfies the court that the challenged person is incapable of per-

case, the acceptance of the juror hangs on the assessment of his qualities to serve in the *particular* litigation."<sup>105</sup>

Given that there is not necessarily prejudice to a fair consideration of a case and that inclusion is mandated by the principle of cross-sectionality, the statutory exclusion of deaf jurors appears to deny litigants a fair trial. The rights of deaf persons with respect to jury service must also be considered in analyzing the exclusion.

### EQUAL PROTECTION FOR DEAF PERSONS IN JURY SELECTION

#### A. *The Equal Protection Concept*

The fourteenth amendment guarantee of "equal protection of the laws"<sup>106</sup> essentially means that persons similarly situated must be treated similarly by the government.<sup>107</sup> Under the traditional equal protection analysis, however, laws that treat similar persons differently are presumptively valid if they bear some rational relationship to a legitimate state objective.<sup>108</sup> No presumption of validity attaches to legislation that in purpose or effect classifies persons according to criteria regarded as inherently "suspect" by the courts.<sup>109</sup> Such "suspect classification" legislation can withstand an equal protection challenge only if the classification is necessary to further a compelling state interest<sup>110</sup> that cannot be achieved by less drastic or less restrictive means.<sup>111</sup> This strict standard of judicial scrutiny also applies to legislation that impinges upon a "fundamental" right.<sup>112</sup> Between the polar standards of "rational relationship" and "compelling state interest," legislation that treats persons differently meets the requirements of equal protection if it is substantially related to the achievement of important govern-

forming the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

CAL. CIV. PROC. CODE §602(2), as amended by CAL. STATS. 1978, c. 301, §3. (emphasis added); see 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 369 (1979). The availability of the challenge for cause in this situation gives the litigant the best of both worlds, so to speak. This litigant has the benefit of a cross-sectionally representative panel from which to select jurors, as well as a device to protect the litigant's interest in a fair consideration of the case.

105. *Lewinson v. Crews*, 282 N.Y.S.2d 83, 89 (1967) (Hopkins, J., dissenting).

106. U.S. CONST., amend. XIV, §1.

107. *Reynolds v. Sims*, 377 U.S. 533 (1964); see *New York City Transit Auth. v. Beazer*, 440 U.S. 565, 587 (1979); *Tussman & tenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

108. *Parham v. Hughes*, 441 U.S. 347, 351 (1977); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 60-61 (1973) (Stewart, J., concurring).

109. 441 U.S. at 351; see 427 U.S. at 312; 411 U.S. at 60-61 (Stewart, J., concurring).

110. 411 U.S. at 17; see 427 U.S. at 312.

111. *Shelton v. Tucker*, 364 U.S. 479 (1960); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); see *Kahn v. Shevin*, 416 U.S. 351, 357-58 (1974) (Brennan, J., dissenting).

112. 411 U.S. at 17; *Hawkins v. Superior Court*, 22 Cal. 3d 584, 592, 586 P.2d 916, 921, 150 Cal. Rptr. 435, 440 (1979).

mental objectives.<sup>113</sup> Legislation in "fundamental," or "classifications" judged by this intermediate standard.

The California Supreme Court States Supreme Court in equal protection has found "fundamental" rights a federal high Court would not.<sup>116</sup>

If the jury selection statute fails persons similarly situated, it is subject to analysis. Since the legislative goal is capable of rendering a fair consideration of similarly situated for jury selection, it has been illustrated, are capable of rendering a fair case.<sup>117</sup> With the aid of an interpreter, relevant spoken proceedings of the trial does not diminish the deaf juror's ability to participate. The interpreter can be strategic in the courtroom.<sup>120</sup> Several measures exist to influence jury deliberations.<sup>121</sup> The credibility of witnesses just as of jurors has shown deaf jurors in terms of rendering a fair trial.

Since the basic objection to being a juror is inability to perceive evidence, it is not surprising that deaf persons with receptive disabilities are similarly affected. The fact that blind persons are a

113. *Craig v. Boren*, 429 U.S. 190, 197 (1977) (that equal protection can be isolated at two points). See L. TRIBE, *AMERICAN CONSTITUTION: 1916 Term—Foreword: Equal Citizenship*, 23 (1977). The courts, however, continue to struggle. See *Hawkins v. Superior Court*, 22 Cal. 3d (concurring).

114. 22 Cal. 3d at 601, 586 P.2d at 927.

115. *Id.* at 600, 586 P.2d at 926-27, 150 Cal. Rptr. 435, 440.

116. *Id.* See, e.g., *Serrano v. Priest*, 12 Cal. 3d 680, 687 (1973) (education a fundamental right); *Saillet v. Irujo* (1971) (sex a "suspect" classification). Cf.: "suspect" classification treatment; San Antonio School Dist. v. Rodriguez (education not a fundamental right).

117. See text accompanying notes 61-65.

118. See text accompanying notes 67-71.

119. See text accompanying notes 67-71.

120. See text accompanying notes 75-79.

121. See text accompanying notes 85-89.

122. See text accompanying notes 72-74.

123. See Letter on Oakland Deaf Jurors.

124. See note 2 *supra*.

mental objectives.<sup>113</sup> Legislation involving "rights important—but not 'fundamental,'" or "classifications sensitive—but not 'suspect'" may be judged by this intermediate standard.<sup>114</sup>

The California Supreme Court has generally followed the United States Supreme Court in equal protection analysis,<sup>115</sup> but occasionally has found "fundamental" rights and "suspect" classifications where the federal high Court would not.<sup>116</sup>

If the jury selection statute fails to accord similar treatment to persons similarly situated, it is subject to review under equal protection analysis. Since the legislative goal is a fair trial for litigants, persons capable of rendering a fair consideration of a case must be regarded as similarly situated for jury selection purposes. Deaf persons, as has been illustrated, are capable of rendering a fair consideration of a case.<sup>117</sup> With the aid of an interpreter, a deaf juror can perceive the relevant spoken proceedings of the trial.<sup>118</sup> The use of an interpreter does not diminish the deaf juror's ability to fairly consider the case.<sup>119</sup> The interpreter can be strategically, but unobtrusively, placed in the courtroom.<sup>120</sup> Several measures exist to prevent an interpreter from influencing jury deliberations.<sup>121</sup> The deaf juror can visually evaluate the credibility of witnesses just as other jurors do.<sup>122</sup> Finally, actual trial experience has shown deaf jurors to be essentially similar to hearing jurors in terms of rendering a fair consideration of a case.<sup>123</sup>

Since the basic objection to both blind and deaf jurors is the alleged inability to perceive evidence, it would appear that persons with perceptive disabilities are similarly situated for jury selection purposes. The fact that blind persons are allowed to sit on juries<sup>124</sup> in California

113. *Craig v. Boren*, 429 U.S. 190, 197 (1976). It has been observed that it is presently unlikely that equal protection can be isolated at two polar positions or even at three distinct centers of review. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1089 (1975); Karsi, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 23 (1977). The courts, however, continue to apply a definitely stratified equal protection analysis. See *Hawkins v. Superior Court*, 22 Cal. 3d at 601, 586 P.2d at 927, 150 Cal. Rptr. at 446 (Mosk, J., concurring).

114. 22 Cal. 3d at 601, 586 P.2d at 927, 150 Cal. Rptr. at 446 (Mosk, J., concurring).

115. *Id.* at 600, 586 P.2d at 926-27, 150 Cal. Rptr. at 445.

116. *Id.* See, e.g., *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (education a fundamental right); *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (sex a "suspect" classification). Cf. *Stanton v. Stanton*, 421 U.S. 7 (1975) (sex not accorded "suspect" classification treatment); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education not a fundamental right).

117. See text accompanying notes 61-105 *supra*.

118. See text accompanying notes 67-71, 77-85 *supra*.

119. See text accompanying notes 67-85 *supra*.

120. See text accompanying notes 75 & 76 *supra*.

121. See text accompanying notes 86-102 *supra*.

122. See text accompanying notes 72-76 *supra*.

123. See Letter to Oakland Deaf Juror, *supra* note 5.

124. See note 2 *supra*.

while deaf persons are excluded is another indication that the jury selection statute fails to treat similar citizens in a similar manner. The statute is thus subject to equal protection scrutiny.

### B. The Compelling State Interest Test

In order to examine the exclusion of deaf persons from jury service under the compelling state interest test, it is necessary to show that citizens have a fundamental right to serve on a jury or that deafness is a suspect classification with respect to jury service. If either is shown, the exclusion is unconstitutional unless it can be justified by a compelling state interest.

#### 1. Jury Service as a Fundamental Right

In *Adams v. Superior Court*,<sup>125</sup> Justice Clark, writing for the majority, asserted:

While trial by jury is constitutionally implanted in our system of justice, an individual's interest in serving on a jury cannot be held a fundamental right. The guarantee of the Sixth Amendment is primarily for the benefit of the litigant—not persons seeking service on the jury.<sup>126</sup>

The federal district court in *Eckstein* found this a "thoughtful" and "cogent" observation and quoted this passage in support of its conclusion that a deaf woman had no fundamental right to serve as a juror.<sup>127</sup>

The United States Supreme Court has defined a "fundamental" right as one explicitly or implicitly guaranteed by the Constitution.<sup>128</sup> The idea that jury service is a fundamental right has been implicit in recent jury selection decisions of the Court. In *Carter v. Jury Commission of Greene County*,<sup>129</sup> the Court unanimously upheld the right of members of an excluded group, rather than a litigant, to challenge a jury selection system.<sup>130</sup> The Court thereby recognized the right of equal opportunity to serve on a jury. Justice Stewart declared on behalf of the Court that a state can no more discriminate with respect to jury service than it can with respect to the elective franchise.<sup>131</sup>

The comparison in *Carter* of jury service and the right to vote, which

is a fundamental right,<sup>132</sup> clearly ascribed to jury service. Relying on the precedent served in *Bradley v. Judges of Los*

It is well established that action by a person of the opportunity to serve is secured by the U.S. constitution.

Jury service, then, falls within that which is considered a fundamental right under the state constitution. Even absent such a determination, the California Supreme Court might find a right under the state constitution. For greater protection of individual interests in state courts, the California Supreme Court has declared as fundamental "those individual interests at the core of our free and representative government does not require an explicit federal definition.

Justice Clark's declaration in *Adams* that jury service is not a fundamental right was based on then-existing federal constitutional rights,<sup>137</sup> especially as set forth in *Rodriguez*.<sup>138</sup> Thus *Adams*, insofar as it concerns fundamental rights, may bear reassessment by the Court subsequently in *Serrano* and *United States Supreme Court* has held that jury service is a fundamental right. But whether or not jury service is either the federal or state constitutional right, it may still violate equal protection if it is treated as a "suspect" classification.

#### 2. Deaf Persons As a "Suspect" Classification

The concepts of suspect classification

Rptr. at 255 (Mosk. J., dissenting); *Fundamental Rights*, supra note 12, at 74.

132. *Harper v. Virginia Bd. of Elections*, 383 U.S. 618, 658 (1966), regarded as a more important right than voting in the processes of government than does it temporarily and spatially immediate. See *Id.*, at 255 (Mosk. J., dissenting). For an opposite view, see *Rubio v. Superior Court*, 24 Cal. 3d 93, 114 (1977).

133. 372 F. Supp. 26 (C.D. Cal. 1974), cert. denied, 413 (9th Cir. 1976).

134. *Id.* at 30.

135. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 2d 413 (1974).

136. *Id.* at 767-68, 557 P.2d at 952, 135 Cal. Rptr. 2d at 413.

137. See 12 Cal. 3d at 61, 524 P.2d at 383, 115 Cal. Rptr. 2d at 255.

138. See 411 U.S. at 33-39.

139. 18 Cal. 3d at 767-68, 557 P.2d at 929, 135 Cal. Rptr. 2d at 413.

125. 12 Cal. 3d 55, 524 P.2d 375, 115 Cal. Rptr. 247 (1974).

126. *Id.* at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251. See also *JURY SELECTION*, supra note 12, at 72-77; Van Dyke, *Jury Service is a Fundamental Right*, 2 HASTINGS CONST. L.Q. 27 (1975) [hereinafter cited as *Fundamental Right*].

127. *Eckstein v. Kirby*, 452 F. Supp. 1235, 1241 (1978).

128. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973); *Karsi, The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 3 (1977).

129. 396 U.S. 320 (1970).

130. 396 U.S. at 329-30; see *JURY SELECTION*, supra note 12, at 58.

131. 396 U.S. at 330. See *Adams v. Superior Court*, 12 Cal. 3d at 67, 524 P.2d at 383, 115 Cal. Rptr. 2d at 255.

is a fundamental right,<sup>132</sup> clearly indicates the status the Court has ascribed to jury service. Relying on *Carter*, a federal district court observed in *Bradley v. Judges of Los Angeles Superior Court*:<sup>133</sup>

It is well established that action by a state in arbitrarily depriving a person of the opportunity to serve on a jury is a violation of a right secured by the U.S. constitution . . . .<sup>134</sup>

Jury service, then, falls within the *Rodriguez* definition and can be considered a fundamental right under the United States Constitution. Even absent such a determination under the federal constitution, the California Supreme Court might find jury service to be a fundamental right under the state constitution. Demonstrating a penchant for greater protection of individual interests than is afforded by the federal courts, the California Supreme Court in *Serrano v. Priest*<sup>135</sup> described as fundamental "those individual rights and liberties which lie at the core of our free and representative form of government."<sup>136</sup> This definition does not require an explicit or implicit textual guarantee as does the federal definition.

Justice Clark's declaration in *Adams* that jury service is not a fundamental right was based on then existing *federal* notions about fundamental rights,<sup>137</sup> especially as set forth in *San Antonio School District v. Rodriguez*.<sup>138</sup> Thus *Adams*, insofar as it addresses the issue of fundamental rights, may bear reassessment since the California Supreme Court subsequently in *Serrano* found a fundamental right where the United States Supreme Court had not found such a right on similar facts.<sup>139</sup> But whether or not jury service is a fundamental right under either the federal or state constitution, the exclusion of deaf persons may still violate equal protection if the jury selection statute has created a "suspect" classification.

## 2. Deaf Persons As a "Suspect" Class

The concepts of suspect classification and cognizability are similar in

Rptr. at 255 (Mosk, J., dissenting); *Fundamental Right*, *supra* note 126, at 29; JURY SELECTION, *supra* note 12, at 74.

132. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Jury service may even be regarded as a more important right than voting since it affords a more direct form of participation in the processes of government than does the franchise and the effects of participation are more temporally and spatially immediate. See 12 Cal. 3d at 66-67, 524 P.2d at 383, 115 Cal. Rptr. at 255 (Mosk, J., dissenting). For an opposite view, see the dissenting opinion of Justice Tohnner in *Rubio v. Superior Court*, 24 Cal. 3d 93, 114-16, 593 P.2d 595, 609-10, 154 Cal. Rptr. 734, 748-49.

133. 372 F. Supp. 26 (C.D. Cal. 1974), *aff'd in part, appeal dismissed in part as moot*, 531 F.2d 413 (9th Cir. 1976).

134. *Id.* at 30.

135. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

136. *Id.* at 767-68, 557 P.2d at 952, 135 Cal. Rptr. at 368.

137. See 12 Cal. 3d at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251.

138. See 411 U.S. at 33-39.

139. 18 Cal. 3d at 767-68, 557 P.2d at 952, 135 Cal. Rptr. at 368.

some respects.<sup>140</sup> Many groups that are cognizable for jury selection purposes are also "suspect" for other purposes. Indeed the California Supreme Court seems to regard the elements of cognizability as somewhat necessary though insufficient conditions of suspectness.<sup>141</sup>

In *San Antonio School District v. Rodriguez*,<sup>142</sup> the United States Supreme Court outlined the "traditional indicia" of suspectness as

. . . such disabilities, or . . . such a history of purposeful unequal treatment, or . . . such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.<sup>143</sup>

These indicia clearly apply to deaf persons. Deafness is so obviously a "disability" in a social and economic sense as much as it is in a physical sense that elaboration is hardly necessary.<sup>144</sup> Educational segregation and the imposition of legal disabilities show the social history of the deaf to be one of "purposeful unequal treatment."<sup>145</sup> Finally, as one commentator, himself deaf, has pointed out, deaf persons are truly a "silent minority."<sup>146</sup> They have never marched; they have never rioted; they have nothing that might be symbolically burned; they have never occupied buildings or taken hostages; no presidential candidate has championed their cause. Thus, deaf persons stand in need of "extraordinary protection from the majoritarian political process" just as much, if not more than any minority.<sup>147</sup>

In *Eckstein v. Kirby*, the district court concluded that Arkansas' statutory exclusion of deaf persons from jury service did not create a suspect classification.<sup>148</sup> The court did not, however, examine the *Rodriguez* indicia of suspectness. Instead, the court based its conclusion on the fact that the statute excluded deaf persons "of all races, ethnical groups, sexes, religions and socio-economic backgrounds."<sup>149</sup> By such reasoning, a statute which excluded blacks could likewise be

140. See note 37 *supra*.

141. See 12 Cal. 3d at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251.

142. 411 U.S. 1 (1975).

143. *Id.* at 28.

144. See note 60 *supra*.

145. See note 60 *supra*.

146. Stewart, *A Truly Silent Minority in 2 PROFESSIONAL REHABILITATION WORKERS WITH THE ADULT DEAF, DEAFNESS* 1 (1972).

147. Judicial recognition of the handicapped as a class requiring extraordinary protection has been isolated. *But see In re G.H.*, 218 N.W.2d 441 (N.D. 1976). Applying the criteria of suspectness to handicapped persons has been the subject of strong, well-reasoned scholarly commentary. See, e.g., Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975); Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016 (1976); Comment, *The Right to a Meaningful Education in California: Should Dollars Make the Difference?*, 10 PAC. L.J. 991 (1979).

148. 452 F. Supp. 1235, 1240 (E.D. Ark. 1978).

149. *Id.*

said not to create a suspect classification for blacks of both sexes, and all religious grounds. The fact that a group's characteristics with respect to which they are classified include a finding of invidious discrimination characteristic of the group.

In *Sailer Inn, Inc. v. Kirby*,<sup>150</sup> the court's "suspect" treatment for the deaf on sex,<sup>151</sup> described suspect classifications, usually fortuitous circumstances, and an individual's ability to contribute to the court's determination of a suspect classification. "stigma of inferiority and second-class citizenship."<sup>153</sup>

Like the federal factors of suspect classifications clearly embraced in *San Antonio*, is "a status into which the class members are born."<sup>154</sup> The adventitiously deaf deafness through circumstances beyond the deaf person's control, deafness alone does not contribute as a juror.<sup>155</sup> Furthermore, the fact that deaf persons<sup>156</sup> is a second-class citizenship. Deaf persons are not a suspect class in California.

### 3. The State's Compelling Interest

It appears from the foregoing that the same level of scrutiny should apply to California's exclusion from jury service since either the exclusion or the infringement of a fundamental right under the federal or state constitution. Thus, if t

150. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 2d 151.

151. *Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. 2d 152.

152. *Id.*

153. *Id.* Most of this language, which seems to be derived from *San Antonio*, is taken from *Richardson*, 82 HARV. L. REV. 1065, 1173-1174 (1973). For this part of the federal indicia of suspectness. See *Handicapped Children: A Primer for the New Advocate*, majority of the Court did not join the *Frontier* among the federal criteria of suspectness.

154. 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. 2d 151.

155. See text accompanying notes 61-105 *supra*.

156. See note 60 *supra*.

said not to create a suspect classification as long as it applied equally to blacks of both sexes, and all religions and socioeconomic backgrounds. The fact that a group's members may possess certain characteristics with respect to which they are treated equally does not preclude a finding of invidious discrimination with respect to the primary characteristic of the group.

In *Sailer Inn, Inc. v. Kirby*,<sup>150</sup> the California Supreme Court, according "suspect" treatment for the first time to a classification based on sex.<sup>151</sup> described suspect classifications as those based on immutable traits, usually fortuitous circumstances of birth, that bear no relation to an individual's ability to contribute to society.<sup>152</sup> Another factor in the court's determination of a suspect classification was the historical "stigma of inferiority and second-class citizenship associated with" the classification.<sup>153</sup>

Like the federal factors of suspectness, the California definition of suspect classifications clearly embraces deafness. Congenital deafness is "a status into which the class members are locked by the accident of birth."<sup>154</sup> The adventitiously deaf are likewise condemned to that status through circumstances beyond their control. As has been previously noted, deafness alone does not bear on an individual's ability to contribute as a juror.<sup>155</sup> Furthermore, the unequal treatment historically accorded deaf persons<sup>156</sup> is a stigma of inferiority and a badge of second-class citizenship. Deaf persons, therefore, are properly considered a suspect class in California.

### 3. *The State's Compelling Interest*

It appears from the foregoing that the strict standard of equal protection scrutiny should apply to California's exclusion of deaf persons from jury service since either the existence of a suspect classification or the infringement of a fundamental right may be shown under the federal or state constitution. Thus, if the exclusion is to be constitutionally

150. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

151. *Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

152. *Id.*

153. *Id.* Most of this language, which seems to have originated in *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969), was used nearly verbatim in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). For this reason, these factors are considered by some to be part of the federal indicia of suspectness. See Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1038-39 (1976). Since a majority of the Court did not join the *Frontiero* opinion, these elements are not properly placed among the federal criteria of suspectness.

154. 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

155. See text accompanying notes 61-105 *supra*.

156. See note 60 *supra*.

valid, it must be necessary in the furtherance of some compelling state interest.

Clearly, the responsibility to secure a fair trial to litigants is a compelling state interest. But a total exclusion of deaf jurors is neither necessary, nor the least restrictive means, to achieve that goal. Not every potential deaf juror in every case raises the spectre of an unfair consideration of the case. As has been pointed out, jury service is a matter of individual capabilities in the context of a particular case.<sup>157</sup> Thus, a total ban on deaf jurors overreaches the state's interest. The least restrictive means to accomplish the goal of a fair trial for litigants is the availability of a challenge for cause against those individual jurors in those particular cases where it appears that a litigant's right to a fair trial may be in jeopardy.<sup>158</sup>

### C. The Lesser Standards of Review

The discussion of the compelling state interest test was premised upon finding jury service to be a fundamental right or deafness a suspect classification. Dismissing these rigorous requirements, however, it is apparent that jury service, if not fundamental, is an "important" right, and deafness, if not suspect, is a "sensitive" classification with respect to jury service. Thus, in *Meyer v. Zolin*,<sup>159</sup> the first equal protection challenge to California's exclusion of deaf persons from jury service, the plaintiffs urged, and the trial court found, the exclusion properly reviewable under the intermediate equal protection analysis.<sup>160</sup> This standard requires that the exclusion be substantially related to achievement of an important state objective.<sup>161</sup>

Since actual trial experience with deaf jurors has resulted in no apparent diminution of the right to a fair trial,<sup>162</sup> the total exclusion cannot be said to be substantially related to achievement of that objective. Likewise, applying the traditional equal protection analysis,<sup>163</sup> actual trial experience makes it doubtful that the exclusion is even rationally related to the goal of a fair trial in many instances.

### CONCLUSION

Experience in actual trial settings has shown that the right to have a case fairly considered is not necessarily infringed by the seating of a

deaf juror. While there exist the possibility of prejudice to a litigant by the seating of a deaf juror, these do not exist without regard to the circumstances. The seating of a deaf juror has no basis for infringing the right to a fair trial and is not to be considered for jury service as meretricious.

Likewise, the state has no basis for denying a deaf person a reasonable participatory opportunity in the judicial process. It is in the state's interest in guaranteeing that justice is done in the cases before them can be accomplished by the seating of deaf persons rather than denying all deaf persons the right to citizenship.

Action by the legislature and the courts to protect the rights of both litigants and deaf persons is required. Code of Civil Procedure Section 754 is amended so that no person shall be deemed incompetent to serve as a juror on the basis of loss of hearing in any degree. Code Section 754 is required to be amended to require the seating of an interpreter when a deaf person is seated on a jury to remove all bars to the presence of a deaf person on jury deliberations. At the same time, Code of Civil Procedure Section 1181 must be amended to require the seating of the part of an interpreter during jury deliberations.

In the judicial sphere, the decision to seat a deaf juror is a persons equal protection in jury service. The seating of deaf persons in jury courts must insure cooperation and communication during trial to minimize disruptions from the seating of a deaf juror is seated.

Such actions on the part of the legislature and the courts demonstrate the state's commitment to the right of citizenship on the "truly silent minority."

157. See text accompanying note 105 *supra*.

158. See note 104 and accompanying text *supra*.

159. No. C 302883 (L. A. Super. Ct., Dec. 20, 1979); see note 3 *supra*.

160. *Id.* (ruling on Demurrer, at 2) (copy on file at the *Pacific Law Journal*).

161. See text accompanying note 113 *supra*.

162. See Letter on Oakland Deaf Juror, *supra* note 5.

163. See text accompanying note 108 *supra*.

164. No. C 302883 (L.A. Super. Ct., 1979).

deaf juror. While there exist theoretical obstacles to a fair consideration by a deaf juror, these do not support a total ban on deaf jurors without regard to the circumstances of particular cases. The state thus has no basis for infringing the right of litigants to have deaf persons considered for jury service as members of the community.

Likewise, the state has no basis for stripping deaf persons of a valuable participatory opportunity in the form of jury service. The state's interest in guaranteeing that juries will render a fair consideration of the cases before them can be accomplished by a means less restrictive than denying all deaf persons the chance to exercise a prerogative of citizenship.

Action by the legislature and the courts is necessary to safeguard the rights of both litigants and deaf persons. The jury selection statute, Code of Civil Procedure Section 198, must be amended to provide that no person shall be deemed incompetent as a juror solely because of the loss of hearing in any degree. Additionally, extension of Evidence Code Section 754 is required to explicitly govern procedures for selecting an interpreter when a deaf person is a juror. The legislature must remove all bars to the presence of an interpreter in the jury room during deliberations. At the same time, however, the grounds for a new trial as stated in Code of Civil Procedure Section 657 and Penal Code Section 1181 must be amended to include instances of misconduct on the part of an interpreter during deliberations.

In the judicial sphere, the decision in *Meyer v. Zolin*,<sup>164</sup> denying deaf persons equal protection in jury selection, must be reversed. The trial courts must insure cooperation on the part of all persons involved in a trial to minimize disruptions from the normal routine when a deaf juror is seated.

Such actions on the part of the legislature and the courts will demonstrate the state's commitment to conferring the full privileges of citizenship on the "truly silent minority."

*Harold Craig Manson*

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164. No. C 302883 (L.A. Super. Ct., Dec. 20, 1979).



trial. In fact, the seating of Mr. Berke as a juror was decided only minutes before the trial commenced.

During the attorneys' opening statements, the interpreter stood next to and slightly behind the attorneys before the jury. During the testimony of witnesses, the interpreter was seated on a raised chair next to the witness. Thus, the deaf jurors were able to observe the facial expressions of the witnesses as well as the interpreter. The two interpreters took turns interpreting, usually switching during natural breaks in testimony or between witnesses. At one point, however, the interpreters switched during the testimony of a doctor called by the plaintiff. This was accomplished with no break in communications with the deaf jurors.

A considerable amount of medical testimony was put on by the plaintiff. In direct contradiction to the contention made in *Eckstein v. Kirby*, discussed in the comment, the deaf jurors had no difficulty understanding this testimony. This became apparent in discussions with the deaf jurors after the trial, but was also apparent in the jury's deliberations, which were taped by hidden cameras.

Problems during the presentation of evidence were virtually nonexistent. At one point, the interpreter indicated that she could not hear the rather soft-spoken trial judge. This observation benefitted several of the hearing jurors who were also having difficulty at times hearing the judge. It was necessary at another point for the interpreter to ask a nervous student attorney to speak a little slower. Finally, during the testimony of a defense witness, the interpreter received an emergency call on her electronic pager, requiring a change of interpreters.

Jury deliberations in this mock case were especially insightful. One interpreter accompanied the two deaf jurors into the jury room. Both deaf jurors and the interpreter sat at the end of the oblong jury table. The jury foreman sat across from the deaf men. The other jurors made an effort to speak one at a time. Occasionally, however, several conversations began at once. The interpreter kept up with as many as possible. The jury usually returned to order within moments. No critical information was lost to the deaf jurors.

The deaf jurors were valuable participants in the deliberations. In fact, the jury accepted two suggestions made by Mr. Caligiuri. There were two theories of liability against the corporate defendant. The jury had dismissed the first theory, *respondeat superior*, and was prepared to discount the other theory, negligent supervision, when Mr. Caligiuri pointed out a flaw in the defense on this point. Accepting his reasoning, the jury found for the plaintiff. On the issue of plaintiff's damages for lost future earnings, several jurors were prepared to accept the amount suggested by counsel. Mr. Caligiuri noted that the suggested figure was premised upon the plaintiff never working at *any* job *ever* again. The evidence, Mr. Caligiuri said, indicated that the plaintiff was not totally disabled and in fact was capable of working at a number of jobs. The jury then reduced the proposed award of lost future earnings by nearly fifty per cent.



**Sec. 18.05.060. Penalty for violation.** A person who violates a provision of this chapter or a regulation adopted under this chapter is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than \$500, or by imprisonment for not more than one year. Each day that a person continues a violation is a separate offense. (§ 40-1-6(c) ACLA 1949)

**Revisor's notes.** — The words "rule or" were deleted preceding "regulation" and the word "adopt" was substituted for "promulgated" following "regulation" by the revisor of statutes pursuant to AS 01.05.031.

**Sec. 18.05.070. Definitions generally.** In this chapter

(1) "department" means the Department of Health and Social Services;

(2) "commissioner" means the commissioner of health and social services. (§ 40-1-1 ACLA 1949; am § 2 ch 149 SLA 1968; am § 6 ch 104 SLA 1971)

**Revisor's notes.** — The text of a former subsection (b), defining "impairment" as used in AS 18.05.044 and 18.05.046, was relocated to those sections by the revisor of statutes under authority of AS 01.05.031.

**Legislative history reports.** — For report on ch. 149 SLA 168 (CSHB 358 am S), see 1968 House Journal, p. 475.

## Chapter 06. Rights of Blind and Otherwise Physically Disabled Persons.

**Section**

- 10. State policy
- 20. Rights
- 30. Rights as pedestrians

**Section**

- 40. Penalty for denying rights
- 50. Definitions

**Collateral references.** — 15 Am. Jur. 2d, Civil Rights, §§ 1-4.

14 C.J.S., Civil Rights Supplement, §§ 1-18.

Exclusion of person (for reason other than color or race) from place of public entertainment or amusement. 1 ALR2d 1165.

Businesses or establishments falling within state civil rights statute provisions prohibiting discrimination. 87 ALR2d 120.

Municipal corporation's power to enact civil rights ordinance. 93 ALR2d 1028.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 ALR3d 351.

Construction and effect of state legislation forbidding job discrimination on account of physical handicap. 90 ALR3d 393.

**Sec. 18.06.010. State policy.** It is the policy of this state to encourage and enable the blind, the visually handicapped, and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment. (§ 2 ch 19 SLA 1972)

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**Sec. 18.06.020. Rights.** (a) The blind, the visually handicapped, and the otherwise physically disabled have the same right as the able-bodied to the full and free pedestrian use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places.

(b) The blind, the visually handicapped, and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

(c) Totally or partially blind persons have the right to be accompanied by a guide dog, especially trained for the purpose, in any of the places listed in (b) of this section without being required to pay an extra charge for the guide dog; however, the person with the guide dog is liable for any damage done to the premises or facilities by the dog. (§ 2 ch 19 SLA 1972)

**Sec. 18.06.030. Rights as pedestrians.** The driver of a motor vehicle approaching a totally or partially blind pedestrian who is carrying a cane predominantly white or metallic in color, with or without a red tip, or using a guide dog shall take all necessary precautions to avoid injury to the pedestrian, and a driver who fails to take all necessary precautions and causes injury to the pedestrian is liable in damages for the injury caused. A totally blind or partially blind pedestrian not carrying a cane as described in this section or using a guide dog in any of the places, accommodations or conveyances set out under AS 18.06.020 has all of the rights and privileges conferred by law upon other persons, and the failure of a totally or partially blind pedestrian to carry a cane as described in this section or to use a guide dog is not by itself evidence of contributory negligence. (§ 2 ch 19 SLA 1972)

**Sec. 18.06.040. Penalty for denying rights.** A person who denies or interferes with admittance to or enjoyment of the public facilities set out in AS 18.06.020 or otherwise interferes with the rights of a totally or partially blind or otherwise disabled person is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$1,000, or by imprisonment for not more than 60 days, or by both. (§ 2 ch 19 SLA 1972)

**Sec. 09.20.010. Qualification of jurors.** A person is qualified to act as a juror if the person is

- (1) a citizen of the United States;
- (2) a resident of the state;
- (3) at least 18 years of age;
- (4) of sound mind;
- (5) in possession of the person's natural faculties; and
- (6) able to read or speak the English language. (§ 2.01 ch 101 SLA 1962; am § 3 ch 245 SLA 1970; am § 1 ch 66 SLA 1981)

**Effect of amendments.** — The 1981 amendment substituted "18" for "19" in paragraph (3).

#### NOTES TO DECISIONS

**Qualifications subject for legislation.** — To define the qualification of jurors and prescribe the mode of their selection is a rightful subject of legislation. *Tynan v. United States*, 297 F. 177 (9th Cir.), cert. denied, 266 U.S. 604, 45 S. Ct. 91, 69 L. Ed. 463 (1924).

**Exclusionary method of jury selection held invalid.** — Any method of jury selection which is in reality a subterfuge to exclude from juries systematically and in-

tentionally some cognizable group or class of citizens in the community must be held invalid. *Hampton v. State*, Sup. Ct. Op. No. 1487 (File No. 2741), 569 P.2d 138 (1977), cert. denied, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757, rehearing denied, 435 U.S. 981, 98 S. Ct. 1634, 56 L. Ed. 2d 75 (1978).

Quoted in *City of Kotzebue v. Ipalook*, Sup. Ct. Op. No. 588 (File No. 1033), 462 P.2d 75 (1969).

**Collateral references.** — Unfamiliarity with English as affecting competency of juror, 34 ALR 194.

Effect of exclusion of women from jury list, 52 ALR 922.

Intelligence or character test of qualifications of juror, 126 ALR 507.

Religious test of qualifications of juror, 126 ALR 526.

Loyalty test of qualifications of juror, 126 ALR 529.

Women as jurors, 157 ALR 561.

Deafness of juror as ground for impeaching verdict; waiver of objection thereto, 15 ALR2d 534, 537.

Validity of requirement of oath of allegiance, 18 ALR2d 294.

Proper procedure upon illness or other disability of civil case juror, 99 ALR2d 684.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of juror, 20 ALR3d 1420.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof, 78 ALR3d 1147.

Validity of requirement of practice of selecting prospective jurors exclusively from list of registered voters, 80 ALR3d 869.

**Sec. 09.20.020. Disqualification of jurors.** A person is disqualified to act as a juror if the person

- (1) has served as a juror in the state within one year of the time of examination for service;
- (2) has been convicted of a felony and the civil rights of the person have not been restored. (§ 2.02 ch 101 SLA 1962)

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Or go to court to find out if it was an old injury?

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Elementary School

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Captain Cook

Friday Oct. 25

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- all day -

**Rule 24. Trial Jurors.**

(a) **Examination.** The court may permit the defendant or his attorney and the prosecuting attorney to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the prosecuting attorney to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) **Alternate Jurors.** The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenge allowed by these rules may not be used against an alternate juror.

(c) **Challenges for Cause.** After the examination of prospective jurors is completed and before any juror is sworn, the parties may challenge any juror for cause. A juror challenged for cause may be directed to answer every question pertinent to the inquiry. Every challenge for cause shall be determined by the court. The following are grounds for challenges for cause:

- (1) That the person is not qualified by law to be a juror.

(5) That the person is biased for or against a party or attorney

(6) That the person shows a state of mind which will prevent him from rendering a just verdict, or has formed a positive opinion on the facts of the case or as to what the outcome should be, and cannot disregard such opinion and try the issue impartially.

(7) That the person has opinions or conscientious scruples which would improperly influence his verdict.

(8) That the person has been subpoenaed as a witness in the case.

(9) That the person has already sat upon a trial of the same issue.

(10) That the person has served as a petit juror in a civil case based on the same transaction.

(11) That the person was called as a juror and excused either for cause or peremptorily on a previous trial of the same action, or in another action by the same parties for the same cause of action.

(12) That the person is related within the fourth degree (civil law) of consanguinity or affinity to one of the parties or attorneys.

(13) That the person is the guardian, ward, landlord, tenant, employer, employee, partner, client, principal, agent, debtor, creditor, or a member of the family of the defendant, of the person alleged to be injured by the crime charged in the indictment, complaint, or information, of the person on whose complaint the prosecution was instituted, or of one of the attorneys.

(14) That the person within the previous two years:

(i) has been a party adverse to the challenging party or attorney in a civil action; or

(ii) has complained against or been accused by the challenging party or attorney in a criminal prosecution.

(15) That the person has a financial interest other than that of a taxpayer in the outcome of the case.

(16) That the person was a member of the grand jury returning an indictment in the cause.

(14) That the person is employed by an agency, department, division, commission, or other unit of the State of Alaska, including a municipal corporation, which is directly involved in the case to be tried.

(d) **Peremptory Challenges.** After all challenges for cause are completed, the parties shall make or waive their peremptory challenges. First the plaintiff and then the defendant may exercise one or more peremptory challenges alternately until each party successively waives further peremptory challenges or all such challenges have been exercised. A party who waives peremptory challenge as to the jurors in the box does not thereby lose the challenge but may exercise it as to new jurors who may be called. A juror peremptorily challenged is excused without cause. If the offense is punishable by imprisonment for more than one year, the state is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year, or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) **Replacement of Challenged Jurors.** After a challenge for cause is sustained or a peremptory challenge exercised, another juror shall be selected and examined before further challenges are made. Such jurors shall be subject to challenge as are other jurors.

(f) **Oath of Jurors.** The jury shall be sworn by the clerk substantially as follows:

"You and each of you do solemnly swear (or affirm) that you will well and truly try the issues in the matter now before the court solely on the evidence introduced and in accordance with the instructions of the Court; so help you God."

(Amended by Supreme Court Order 276 effective June 30, 1977; and by Supreme Court Order 428 effective September 1, 1980)

(a) **CROSS REFERENCE:** AS 12.45.010

9/12  
will testify

CONTACT SHEET  
RIGHTS OF DEAF, BLIND & DISABLED

x  
✓ Al Berke 563-4713  
AK Association for the Deaf  
P.O. Box 4-64  
Anchorage, AK 99509

+  
✓ David Maltman 274-3658 (Jonathan Katcher, Supervising Atty.)  
Protection and Advocacy for the Developmentally Disabled (PADD)  
325 East Jrd 2nd Floor  
Anchorage, AK 99501

x  
✓ James Omvig, Director 272-7223  
Sensory Impairment Center 248-7770  
3710 E. 20th Ave.  
Anchorage, AK 99508

Clyde Vincent  
Center for Deaf Adults  
1020 E 4th Ave  
Suite #2 99501

✓ Dorothy Truran, Director 479-6507  
Governor's Council for the Handicapped & Gifted  
600 University Ave., Suite C  
Fairbanks, AK 99701

Bob Franken  
331-3400

{ Michael Morgan, Director  
Division of Voc. Rehab.  
DOE  
Pouch F  
Juneau 99811

{ Stan Ridgeway 561-4466 message left 10/17  
State Coordinator for Deaf Services  
Division of Voc. Rehab. 10/10 may attend - will notify  
3600 Bragaw  
Anchorage, AK 99508

Janet Bradley, Executive Director 276-7474 left message  
Human Rights Commission  
431 W. 7th Ave., Suite 105  
Anchorage, AK 99501

x  
✓ Karla Forsythe, General Counsel 264-~~8234~~  
Alaska Court System 8234  
303 K Street  
Anchorage, AK 99501

Stephanie Cole  
264-8230  
Bob Fischer

MOA Community Support Services Program  
Disability Access Board  
Josef Reum, Manager  
Pouch 6-650  
Anchorage, AK 99502

Juneau:

Karen Donnelly  
6590 Glacier Hwy #215  
Juneau  
780-6088

Pam Guy, President  
Juneau Assn. for the Deaf  
(Vice-Pres. AK Assn. for the Deaf)  
780-4551

Access Alaska  
3710 Woodland Park Dr., Suite 900  
Anchorage 99517

X  
✓ 248-4777

Duane French  
Program Operations Supervisor

will attend

Interpreter Referral Service  
Anchorage 277-3323  
Annie

Interpreter: Terry Griswold  
\$20/hour.

Bob Gregovich  
DM + SS 465-~~3370~~  
3370



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau Alaska 99811

For Immediate Release:  
October 10, 1985

Further Information:  
Ann Plunkett 276-6731

#### SENATE TO STUDY RIGHTS OF DISABLED

The rights of physically and mentally disabled persons will be the topic when the Senate Judiciary Committee meets Tuesday, October 22, 1:00-4:00 in the Anchorage Legislative Information Office building. The committee, chaired by Senator Pat Rodey (D-Anchorage), will address SB168, "An Act relating to rights of deaf, blind and disabled persons," and HB393, "An Act relating to the rights of physically and mentally disabled persons."

Major issues within the legislation include allowing deaf and blind persons to serve on state juries, and amending the state human rights statute to prohibit discrimination on the basis of deafness, blindness or disability. Interpreters will be provided for those members of the deaf community wishing to testify.

According to Senator Rodey, "It is our job, as lawmakers, to make sure that deaf or blind individuals, along with other people with disabilities, enjoy full human rights protections. I believe this legislation represents an affirmative step in the quest for equal rights for all handicapped persons."



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99801

#### MEMORANDUM

TO: Senate Judiciary Committee

FROM: Senator Pat Rodey, Chairman

DATE: October 7, 1985

RE: Hearing on Rights of Disabled Persons  
October 22, 1985  
1:00-4:00  
Anchorage LIO

The Senate Judiciary Committee will be conducting a hearing on two bills currently in committee relating to the rights of disabled persons:

SB168 - "An Act relating to rights of deaf, blind, and disabled persons."

HR393 - "An Act relating to the rights of physically and mentally disabled persons."

We anticipate a good level of participation from individuals and agencies involved in meeting the needs of disabled persons. All committee members are urged to attend.

If you require any further information, contact Ann Plunkett at 276-6731.



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### MEMORANDUM

TO: File - SB168 & HB393

Conversation with Annie - Interpreter Referral Service  
9/18/85

Interpreter requested for October 22 hearing on SB 168 and HB 393

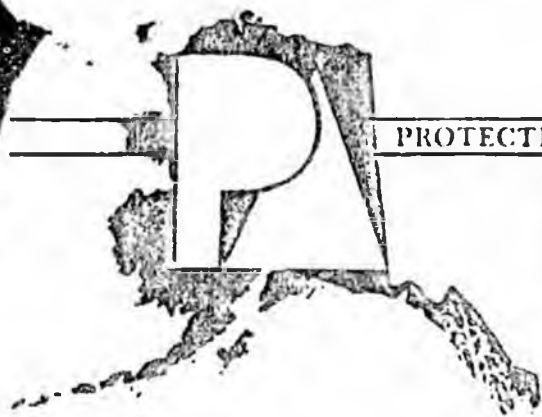
Asked her about levels of interpreter certification -

Standard for court interpreter is the highest level - Comprehensive Skills Certificate (CSC). They typically have two years of training to reach that level. CSC-L is CSC-Legal; they have special training in legal terminology, and are screened and tested by a board.

There are four CSC level interpreters in the state - three with legal experience. This would not be enough to cover needs if legislation is passed to allow deaf on juries.

CSC-L interpreters usually charge \$28/hour with a 2 hour minimum

Interpreter for hearing will charge approximately \$20/hour.



PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED

MAIN OFFICE  
325 East 3rd, 2nd Floor  
Anchorage, AK 99501  
(907) 274-3658

SOUTHEAST  
REGIONAL OFFICE  
127 S. Franklin, Suite 2  
Juneau, AK 99801  
(907) 588-1627

NORTHERN  
REGIONAL OFFICE  
763 7th Ave.  
Fairbanks, AK 99701  
(907) 456-1070

March 1, 1985

Ms. Dorothy Truran, Director  
Governor's Council for the  
Handicapped & Gifted  
600 University Avenue, Suite C  
Fairbanks, Alaska 99701

RE: SB168: An Act Relating to the Rights of Deaf, Blind, and Disabled  
Persons.

Dear Dot:

This position paper is offered to the Governor's Council with the hope that the Council will support SB168. The bill has four conceptual parts. The first part addresses the rights of disabled persons to serve on state jury panels. The second part requires state and local governments to provide an interpreter whenever a deaf person seeks funds, services, goods, facilities, advantages, or privileges from that government. The third section amends the statute providing penalties for interfering with admittance to or enjoyment of public facilities by clarifying that disabled means physically disabled in that statute and adding deaf to that statute. The fourth section amends the Human Rights Commission statute. At present the Human Rights Commission statute prohibits discrimination in employment, credit and financing, public accommodations, and housing on the basis of race, religion, color, national origin, sex, age, marital status, changes in marital status, pregnancy, or parenthood. The bill adds deafness, blindness, and disability to this list of inappropriate discriminatory criteria.

(1) Jury Service. At present, deaf, blind and mobility impaired persons are not legally qualified to serve on state jury panels. This disqualification has nothing to do with whether the disabled person is actually capable of hearing the case and rendering a rational judgment based upon the facts presented. Rather, it appears to be based upon the archaic presumption that persons who are not in possession of their "natural faculties" are unable to reach a fair and impartial verdict. Nothing in the literature or experience supports this conclusion. The bill is an attempt to eradicate this unjustified denial of a basic civil right to disabled persons.

To date the Alaska Association for the Deaf has documented the denial of jury service to at least four deaf persons merely because they are deaf. At least one member of the Governor's Council would be disqualified from serving on a state jury because of his deafness. Another member of the Governor's Council had been denied the opportunity to serve on the state jury because of her disability even though this disability does not interfere with her powers of judgment.

Similar laws prohibiting discrimination against disabled jurors are in effect in a number of states including California, Colorado, Oklahoma, Washington, and Texas.

A recent law review article has addressed the issue of deaf persons serving on juries. Jury Selection: The Courts, The Constitution, and The Deaf, 11 Pacific Law Journal 967 (1980), effectively refutes all the arguments against deaf jurors. Its well reasoned analysis convincingly demonstrates that deaf people are perfectly capable of fairly considering a case and that the assistance of an interpreter would in no way interfere with the deliberative process or its secrecy. Furthermore, the article goes on to demonstrate that jury service is a constitutional right, the denial of which to persons on the basis of their disability is highly inappropriate. We have enclosed a copy of the law review article for your consideration.

Providing interpreters for deaf people to serve on juries should not be prohibitively expensive. Qualified interpreters are already serving in the Alaska Court System for purposes of testimony. They could just as readily interpret for purposes of a juror. There will be some expenses associated with rendering jury boxes accessible to the mobility impaired. However, this should be minimal and it does not justify the denial of the right to jury service for these persons. Finally, there is absolutely no justification for denying jury service to blind persons.

(2) Interpreters for deaf persons seeking access to governments. This section would require all state and local governmental units, including the University of Alaska, to provide an interpreter whenever a deaf person seeks access to funds, services, facilities, advantages, or privileges. The merits of this provision are apparent on its face. In order for deaf people to meaningfully participate in a society where the overwhelming majority of its civil servants are unable to communicate with the deaf, it is incumbent upon the government to provide a means by which the deaf can make use of the government which their taxes go to support. The deaf are unique vis-a-vis other non-English speaking peoples. In almost all non-English speaking communities, there is always someone who can interpret for a citizen who is attempting to communicate with the government. With the deaf, very few people are able to interpret. Therefore, the responsibility should shift to the governments to assure the right of access for deaf people.

It should be noted that the fiscal impact of this section should not be overwhelming. In Alaska deaf people are concentrated in the urban centers of Fairbanks, Juneau, and Anchorage. Interpreter services exist to some extent in all those communities. This section will merely require upgrading of those interpreter services.

(3) Penalty for denying rights. This amendment supplements and clarifies the section providing penalties for persons who deny or interfere with admittance to or enjoyment of a public facility. The amendment would make clear that it is inappropriate to deny admittance to a deaf person to public facilities. It also clarifies that this penalty provision is meant to only apply to physically disabled persons. This clarification is justified because the statutory chapter is entitled "Rights of Blind and Otherwise Physically Disabled Persons," and was, therefore, never intended to apply to mental disabilities.

(4) Human Rights Commission. The Alaska Human Rights Commission, which is under the Governor's office, is vested with the power to investigate and prescribe remedies to eliminate inappropriate discriminations against all Alaskan citizens. The Commission deals with complaints on a case by case basis. If the Commission finds the complaint to be justified, it has the power to fashion remedies which will prevent the discriminatory practice from continuing. At present, the Commission's mandate is limited to discrimination against Alaskan's on the basis of race, religion, color, origin, age, sex, marital status, changes of marital status, pregnancy or parenthood, or in the case of employment, physical handicap.

The bill would amend the human rights statute by adding deafness, blindness, and disability to the list of inappropriate discriminatory criteria. If a deaf, blind or disabled person is being discriminated against by any person, entity, or government, in the areas of civil rights, employment, housing, or financial practices, the Commission would have the power to address the situation.

There would be a two-fold benefit to adding deafness, blindness, and disability to the human rights statute. First, it would give all deaf, blind, disabled persons another forum through which to remedy the plethora of abuses which these persons have been subjected to. Second, by codifying the illegality of discriminating against deaf, blind, and disabled persons, we would be enhancing the dignity, self-perception, and status of these otherwise devalued persons. The effect would be felt not only within the disabled community, but also in the community at large, as society as a whole is forced to recognize that disabled persons are entitled to the same rights and privileges of all other persons.

The bill's definition of "Disability" closely tracks the Federal department of Health and Human Services Non-Discrimination on the Basis of Handicap regulations which were promulgated pursuant to Section 504 of the Rehabilitation Act of 1973. This is intended to tie into the large body of federal case law that has addressed the issue.

We anticipate that this bill will be well received and vigorously supported by the Governor's Council. It represents an affirmative step in the quest for equal rights for all handicapped persons, regardless of their disability. If the Governor's Council is interested in more information about the bill, please feel free to contact either of the undersigned with your questions and comments.

Sincerely,

Jonathon A. Katcher  
Supervising Attorney  
P.A.D.D.

Albert Berke  
Director  
Alaska Association of the Deaf



**PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED**

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REGIONAL OFFICE**  
763 7th Ave.  
Fairbanks, AK 99701  
(907) 456-1070

April 19, 1985

Mr. Roger Lewis  
Office of Sen. Patrick M. Rodey  
Pouch V  
Juneau, Alaska 99811

RE: SB 168/HB 172

Dear Roger:

As you may already know, on April 15th the House Judiciary Committee passed out an amended version of CS HB 172. They deleted the sections which would cost money (jury service; government discrimination against the disabled) but kept the pedestrian rights and the human rights which would have no fiscal impact. They also reinserted "emotional or mental illness" into the definition of physical or mental disability. As for the deleted fiscal impact sections, the committee agreed to submit a separate bill which would include those sections.

It appears that the ball is in the Senate's court and we hope there will be some movement soon. A teleconference of some sort remains highly desirable.

Finally, the enclosed copy of AS 47.30.865 should alleviate your concerns about the inclusion of "emotional or mental illness."

Please keep me posted.

Sincerely,

Jonathon A. Katcher  
Supervising Attorney

JAK/jim

**A**laska  
**A**ssociation of the  
**D**eaf  
**D**

4241 B Street, Suite 201  
Anchorage, Alaska 99503  
907-563-4713 (V/TTY)

April 5, 1985

Representative Max Gruenberg  
Pouch V  
Juneau, AK 99811

RE: HB172/SB168

Dear Max:

This letter is in response to your letter dated March 15, 1985.

Thank you for this opportunity to comment on these very important pieces of legislation. I am very pleased that the House HESS Committee chose to consolidate these bills in order to expedite their passage. Both bills would afford handicapped people legal protections that have been long awaited.

However, in the process of combining these two bills, certain elements of SB168 which are very important to the deaf community have been watered down or deleted. I am disappointed that this has occurred and I hope that through my input you will be able to rectify the situation.

SB168 provided that whenever a deaf person seeks access to funds, services, goods, facilities, advantages or privileges from the state or local government, including the University of Alaska, that governmental entity must pay for and provide the deaf person with an interpreter. HB172 has eliminated this very important provision. You must try to understand what a terrible disadvantage we deaf people are at whenever we try to deal with the government. Without an interpreter any attempts on our part to receive the benefits of basic citizenship are completely frustrated. I feel it is the responsibility of the government to provide us with interpreters in order for us to have the same rights as all speaking and hearing persons. I recognize that this will end up costing the state some money. However, this expense does not justify denying deaf people access to their government. I hope you and the other members of the House will reconsider this deletion. We, in the deaf community, consider this section to be essential and we will be very disappointed if it does not become part of the law.

Both SB168 and HB172 deal with the Alaska Human Rights Commission. Both bills add the disabled to race, religion, etc. in the Human Rights Commission Statute. SB.68 protects the "deaf, blind, and disabled". HB172 protects the "physically and mentally disabled". I am unhappy with the deletion of deafness and blindness from the specific wording of HB172. I feel it is very important that the deaf and the blind be specifically mentioned in the Human Rights Commission Statute. I believe that the law should make it absolutely certain that these protections apply to the deaf and blind. I do not want to leave it up to some lawyer or judge down the road to determine that the statute does not apply to the deaf or the blind. Therefore, I disagree with HB172's elimination of the

words deafness and blindness.

Finally, I am dissatisfied with the exclusion of the emotionally and mentally ill from the protection of the Human Rights Commission Statute as found in HB172. SB168 includes the emotionally and mentally ill as persons who are protected under the Human Rights Commission. I believe that these laws should apply to all disabled people, including the emotionally and mentally ill.

I was very disappointed that I was not given the opportunity to give input to your committee at the time that it was deliberating over these bills. As you know I have been very actively involved in the drafting of SB168. As a primary advocate for the deaf community, I feel that I had the right to present my position to the committee at the time it was considering the action and not subsequent to that time. Therefore, I would greatly appreciate being notified of any subsequent hearings or actions by your committee or any other House Committee as it may relate to these bills.

Thank you again for this opportunity to comment. Please feel free to contact me if you have any questions.

Sincerely,



Albert Berke,  
Executive Secretary

AB:ss

# Sensory Impairment Center

(907) 272-7223

3710 E. 20th Ave. • Anchorage, Alaska 99508

March 8, 1985

The Honorable Patrick M. Rodey  
Alaska State Senate  
Pouch V (MS3100)  
Juneau, Alaska 99811

Re: Support for SB168 - "An Act relating to rights of persons with disabilities."; and proposed amendment.

Dear Senator Rodey:

On behalf of this Agency, I wish to lend our support to Senator Rodey's Bill concerning rights of persons with disabilities. As you know, our Agency is responsible for providing rehabilitation services for blind or deaf adults from throughout Alaska. Therefore, we have a keen interest in making sure that blind or deaf individuals, along with other people with disabilities, enjoy full civil rights protections.

I thought it would be helpful to provide some general information particularly about blind or deaf persons, since there was quite a discussion on an Anchorage T.V. newscast a few days ago concerning the right of these individuals to serve on juries. A statement was made that it would be extremely difficult and would present quite a problem for a blind person to serve on a jury, since it would not be possible for such an individual to "see" physical evidence. This is nonsense! No attorney in a trial situation simply holds up a piece of physical evidence, photograph, drawing, or other visual information and says, "Here, members of the jury, look at this." The attorney involved always describes the physical evidence in great detail. Therefore, a blind juror would learn about the evidence by listening to the verbal description. And, of course, there may also be situations where a piece of physical evidence will be passed among the members of the jury for closer examination.

Many states now have laws which permit blind individuals who are otherwise qualified to fulfill their civic responsibilities by serving on juries. Also, there are a

good number of blind attorneys and judges in this nation who perform quite competently in courtroom settings.

Several other states have laws which establish the right of deaf individuals to serve on juries through the use of interpreters. In the Anchorage T.V. story, a question arose concerning the cost to the State if interpreters had to be provided. Again, this issue should be kept in perspective. It is estimated that there are only 450 deaf adults throughout this entire State who use sign language. Therefore, it is clear that the number of deaf persons actually called to serve as jurors would be minimal.

In general, we are in support of SB168 in its entirety. However, in \* Section 6. AS 18.80.220(a), subsection (1), (3) and (6), we see a potential problem. While these sections make it clear that it is illegal to discriminate against persons with disabilities in employment, advertising by an employer or employment agency, or advertising by a person, each section permits "different" treatment of persons with disabilities if such differential in treatment is based upon the "reasonable demands of the position" or "a bona fide occupational qualification."

This legislative intent is clear. For example, an employer may refuse to hire a blind person as a truck driver since driving actually requires sight. Or an employer may refuse to hire a totally deaf person as a switchboard operator since telephone work requires at least some degree of hearing.

Here is where confusion may arise: Many employers mistakenly believe that sight or hearing are required for every position which they have. Therefore, even though they are mistaken, they may honestly believe that visual or hearing requirements are based upon "bona fide occupational qualifications."

Therefore, to prevent possible future problems, we recommend that the following language be added to subsections (1), (3) and (6), or as a new subsection:

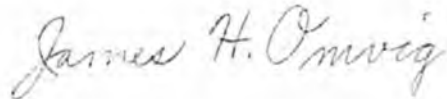
#### PROPOSED AMENDMENT

Where an employer, employment agency, or person believes that it is reasonable to treat a person with a disability differently from persons

without disabilities because of the reasonable demands of the position or due to a bona fide occupational qualification, the employer, employment agency, or person has the burden of proving that the differential in treatment was reasonable and not discriminatory.

I appreciate the opportunity to comment on this much-needed piece of civil rights legislation. I hope that you will consider the suggested amendment which I have proposed.

Respectfully,



James H. Omvig, Director  
Sensory Impairment Center

JHO/db

cc: The Honorable William J. Sheffield  
Mr. Mike Morgan, Director,  
Division of Vocational Rehabilitation

741 then file

APR 11 1985

BILL SHEFFIELD, GOVERNOR

### HUMAN RIGHTS COMMISSION

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April 11, 1985

The Honorable Bettye M. Fahrenkamp  
Chair  
Senate Health, Education & Social  
Services Committee  
Room 125 Capitol  
Juneau, AK 99811

Dear Senator Fahrenkamp:

At their annual meeting in Juneau on March 1, 1985, the Human Rights Commissioners considered SB 168 "An Act relating to rights of deaf, blind, and disabled persons" and passed the following resolution:

To support that part of the legislation which applies to our agency and the state law and express our concern that the portion which deals with jury duty be permissive but not mandatory.

The Commissioners are aware of the need for broader protection from the unfair discrimination suffered by the deaf, blind and disabled in Alaska. Although the Commission's current jurisdiction on the basis of physical handicap is limited to the employment section of our statute, the Commission has been active in the enforcement of this limited protection. Most recently, the Commissioners took a strong advocacy position in the Williams v Union Chemical decision after a public hearing on the matter, holding that an applicant capable of performing all the required duties of a job could not be denied employment on the grounds that his prior medical history made him an industry risk without evidence establishing a likelihood of injury.

With respect to SB 168, the Commission supports the proposed definition of disability found at Section 11 AS 18.80.300 because of its broader coverage affording greater protections than under our present definition, repealed at Section 12 AS 18.80.300(13). Furthermore, the harmonizing of state law with the federal protections for the disabled provides a consistency beneficial to both complainants and respondents who must comply with state and federal law.

The Commissioners' concern about Section 1 amending AS 09.20.210 reflects their hesitation to compel a blind, deaf or disabled

Fahrenkamp  
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person to act as a juror. The Commission supports this section so long as it is interpreted as a permissive but not mandatory responsibility.

If you or the Committee desire further information about the Commission's position on this bill, please do not hesitate to call me.

Sincerely,

*Janet A. Bradley, M.D.*

Janet A. Bradley  
Executive Director

JLB/b