



Legal Studies Research Paper Series Paper No. 1127

**UC Davis Journal of Juvenile Law and Policy**  
# 37 2011

**Breakdown in the Language Zone:  
The Prevalence of Language Impairments  
among Juvenile and Adult Offenders  
and Why It Matters**

**Michele LaVigne**

**UW Law School Remington Frank J. Remington Center**

**Gregory J. Rybroek**

**Mendota Mental Health Institute, Madison Wisconsin**

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# **Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile and Adult Offenders and Why It Matters**

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MICHELE LA VIGNE\*

GREGORY J. VAN RYBROEK\*\*

## **ABSTRACT**

*For over eighty years, social scientists have known that poor language skills are closely associated with the constellation of emotional and behavioral disturbances*

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\* Clinical Professor of Law, University of Wisconsin Law School, J.D. George Washington University Law School, Director Public Defender Project, University of Wisconsin Law School

Invaluable advice, editing, and research provided by Sara Kelton. Additional research provided by Paul Burant and Reference Librarians Cheryl O'Connor and Lilly Li. Technical advice and consulting provided by Michael Caldwell, PsyD., Rachel Fregien M.S. CCC-SLP, and Joanne Wolfe R.N., Mendota Juvenile Treatment Center; Jack Spear, Ph.D., Consulting Psychologist, Madison, Wis.; Jean Andrews Ph.D., Professor of Deaf Education, Lamar University; McCay Vernon, Ph.D. Professor Emeritus of Psychology, McDaniel College; Ben Gonring, Assistant State Public Defender, Madison, Wis.; Jon Sands, Federal Public Defender for Arizona; Herschella Conyers, Clinical Professor of Law, University of Chicago Law School; Rev. Jerry Hancock and members of the Prison Ministry Project, First Congregational United Church of Christ, Madison, Wis.; participants in the Fall 2009 Restorative Justice Group, Columbia Correctional Institution, Portage, Wis.; Meredith Ross, Director, Frank J. Remington Center, Keith Findley, Research Director, Frank J. Remington Center, Heinz Klug, Associate Dean for Faculty Development and Research; and Stewart Macaulay, Professor of Law Emeritus, University of Wisconsin Law School..

\*\*Director, Mendota Mental Health Institute/Mendota Juvenile Treatment Center. Ph.D., University of Wisconsin-Madison; J.D., University of Wisconsin Law School; Adjunct Professor in Law and Psychology, University of Wisconsin.

*routinely seen in juvenile and criminal court. These include conduct disorder, academic deficits, social incompetence, impulsivity, and even aggression. As we might expect, researchers have also found that language impairments are present at a high rate within juvenile and adult correctional institutions. So far however, the law has barely even acknowledged the existence of this body of social science, let alone its significance for the administration of justice, rehabilitation, and public safety. This article is an attempt to bring this phenomenon to light. It examines why widespread language deficits among so many juvenile and adult defendants should be a matter of great concern for the juvenile and criminal justice systems, and perhaps more importantly, what we can do about it.*

## Table of Contents

Introduction .....	41
A. An Overview of the Problem.....	42
I. How does this work? Understanding communication and language disorders.....	45
A. Language acquisition and language impairment .....	46
B. What can go wrong?.....	49
1. Disorders .....	49
2. The special case of environmental deprivation .....	51
a. Poverty .....	51
b. Maltreatment and abuse .....	53
c. When language acquisition fails: the cognitive, social, and behavioral implications .....	54
1. Pragmatic deficits.....	56
2. Cognitive and emotional effects of language impairment .....	59
3. Social development and self-regulation .....	61
4. Aggression .....	63
II. Why does this matter? The implications .....	65
A. Constitutional implications .....	66
1. Competency to stand trial .....	66
2. Ability to assist counsel .....	68
3. Waiver of rights: The example of the guilty plea .....	70
4. The reliability and admissibility of confessions .....	74
B. Language impairment and the question of compliance .....	77
C. Language impairment becomes a legal liability: the danger of subjective judgments of behavior, character, credibility, and remorse.....	81
1. Character, conduct, and rehabilitation .....	82
2. Credibility .....	85
3. Remorse .....	87
D. The human implications: language impairments within correctional institutions.....	90
1. The high rate of language impairments within correctional institutions.....	90
a. Adult prisoners .....	91
b. Juvenile offenders .....	94
2. Language impairment and life in correctional institutions.....	96

III. Now what?.....	100
A. The front line: attorneys .....	101
1. Recognizing language impairment .....	101
2. The way you talk: communicating with the language- impaired client .....	103
3. Where and how to raise the issue? .....	106
a. Competency to stand trial .....	106
b. Ensuring comprehension in court for the linguistically- impaired client .....	107
c. Suppression of statements .....	108
4. Language impairment as a defense, explanation, or mitigating factor .....	110
B. Make it readable: rewriting legal forms .....	113
C. Judges .....	116
D. Assessment and Treatment .....	118
IV. Conclusion: Why Don't We Know This? .....	102

## Introduction

### *Mendota Juvenile Treatment Center*

*Mendota Juvenile Treatment Center (MJTC) is a 29-bed mental health facility for adolescent males in the Wisconsin Juvenile Corrections system. MJTC is a hybrid facility; it is housed at the Mendota Mental Health Institute, a state mental health institution in Madison, Wisconsin, but is classified as a secured juvenile correctional facility.*

*All of the boys at MJTC have been adjudicated delinquent (convicted in juvenile court), sent to a Wisconsin juvenile correctional facility, and subsequently transferred to MJTC. Their average age is 16. The juveniles placed at MJTC have displayed substantial behavior problems at the juvenile corrections facility and typically have spent months in disciplinary segregation before being sent to MJTC.<sup>1</sup> MJTC is in essence “a last resort.”<sup>2</sup> In fact, it is a specialized facility specifically designed to assess and treat very violent juveniles transferred from the juvenile correctional system. Or, as one staff member bluntly put it, MJTC is for “kids who bomb out in corrections.”<sup>3</sup>*

*As part of its intake procedures, MJTC administers a complex battery of tests to about 25 percent of the juveniles to assess their ability to process, understand, and utilize spoken language.<sup>4</sup> The results of these assessments have been*

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<sup>1</sup> MJTC’s mission “is to provide psychological evaluations, specialized treatment, training, programs and supervision to delinquent youth whose behaviors present a serious problem to themselves or others.” Mendota Juvenile Treatment Center, <http://www.wi-doc.com/MJTC.htm> (last visited Jan. 6, 2010).

<sup>2</sup> Interview with Mendota Juvenile Treatment Center Staff, in Madison, Wis. (April 4, 2005).

<sup>3</sup> Interview with Mendota Juvenile Treatment Center Staff, in Madison, Wis. (April 4, 2005).

<sup>4</sup> The tests include: Peabody Picture Vocabulary Test, Expressive Vocabulary Test, and Clinical Evaluation of Language Fundamentals or Comprehensive Assessment of Language Fundamentals (this last test “evaluates the oral language systems needed for adolescents to become literate as well as to succeed in school and in the work environment.”)

*astonishing: the spoken language competency of the juveniles tested consistently falls in the **bottom one percent** of the population at large. As for the remaining 75% of the boys at MJTC, the staff doubts that any of them would score as high as the average range in language competency<sup>5</sup> and believes that all would be classified as having some degree of language impairment. The multi-disciplinary staff at MJTC also believes that “many of the behavioral difficulties [the youths at MJTC] struggle with can often be attributed to communication barriers of some sort.”<sup>6</sup>*

*The story of MJTC draws raised eyebrows whenever it is shared with judges, lawyers, or academics. And indeed, it is startling that in the twenty-first century, we have adolescents who -- despite the fact that they have normal hearing, are not classifiable as “retarded,”<sup>7</sup> were raised in English-speaking households, and were educated at least into high school -- cannot make effective use of spoken language, either receptively or expressively. Equally startling is the fact that these severely impaired youths had reached adolescence or even late adolescence without anyone recognizing their language deficits. Yet, the prevalence of language deficiency among a single group of institutionalized delinquent boys, while disturbing, is not unique, or even unusual. In fact, a high rate of language impairments among incarcerated individuals, **juvenile and adult**, is not the exception, but the rule.*

#### *A. An Overview of the Problem*

The juvenile and criminal justice systems operate on an implicit assumption that, barring a severe mental defect or

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Email from Rachel Fregein, MJTC Speech Pathologist to Gregory Van Rybroek, February 24, 2010, 7:44 a.m. CST (on file with authors)

<sup>5</sup> The communication deficits are not a matter of cultural or dialectical differences. Test instruments are able to control for these factors.

<sup>6</sup> Email communication from Rachel Fregein, MJTC Speech Pathologist to Gregory Van Rybroek, February 2, 2010, 3:06 p.m. CST (on file with authors)

<sup>7</sup> The mean IQ for the population of MJTC falls into the “low average” range.

other extraordinary obvious condition, most human beings understand most of what they are told<sup>8</sup> and are able (even if they are not willing) to use language as an effective tool for navigating through life. Research has consistently shown, however, that for a substantial number of juveniles and adults who have been charged, convicted, and incarcerated, that assumption is wrong.

Decades before MJTC ever opened for business, mental health professionals, speech and hearing professionals, and educators were studying the communication skills of individuals who fit into the category euphemistically known as “troubled.” This included incarcerated juveniles and adults, as well as children and young adults with identified clinical needs that have long been associated with later involvement in the juvenile or criminal justice system.<sup>9</sup> This extensive body of research has found that the very people overrepresented in the criminal and juvenile justice systems -- individuals with ADHD and learning disabilities; individuals who were labeled from early childhood as “behavior problems;” and especially, *individuals who grew up in extreme poverty* -- all exhibit an uncommonly high rate of communication and language

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<sup>8</sup> See, e.g., *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (Stating that once a defendant has been informed of the consequences of his pleas, the “voluntary and intelligent character” of a guilty plea by a defendant represented by counsel is presumed and may only be attacked based on a showing of actual prejudice (i.e., a different result))

<sup>9</sup> As far back as the 1920s researchers were connecting language deficits and behavior disorders. In his 1926 article “Defects in the Zone of Language (Word-Deafness and Word-Blindness) and Their Influence in Education and Behavior,” McCready observed that lack of fluency and skill with language was a likely source of emotional instability, anti-social conduct, innumerable school problems, and social difficulties. McCready went on to recommend “recognition...and partial correction of the defect” to assure “better educational progress and...better social adjustment.” *Id* at 277. These conclusions were reiterated in a number of studies including neurologist Samuel Torrey Orton’s classic piece on language deficits, *Reading, Writing and Speech Problems in Children* where he stated unequivocally that “any disorder in the normal acquisition of spoken or written language serves as a severe hindrance to academic advancement and often also lies at the root of serious emotional disturbances.” SAMUEL TORREY ORTON, *READING, WRITING AND SPEECH PROBLEMS IN CHILDREN* 12 (1937).

disorders or impairments. Moreover, research has also established a “strikingly high” connection between those communication and language disorders and myriad psychological, emotional, and behavioral problems.<sup>10</sup> Not surprisingly, studies of correctional institutions have revealed a high rate of communication and language impairments among inmates. In some instances, the rate of severe disorders within adult prisons has been estimated to be at least *four to five times* that of the general population.<sup>11</sup> Within juvenile prisons, the rate is even higher.<sup>12</sup>

The failure of the legal world to acknowledge - or even be aware of - this phenomenon is disconcerting. Widespread language and communication dysfunction among the individuals in our courts and in our correctional system presents urgent needs that are ignored at our peril. Impaired language skills impact defendants’ ability to understand the criminal or juvenile justice process, to communicate with counsel, to understand and comply with terms of bond or probation or parole, to complete programming successfully, and ultimately, to lead productive lives. Moreover, the language/behavior link provides much-needed insight into

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<sup>10</sup> Philip S. Dale, *Language and Emotion: A Developmental Perspective*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS 5 (Joseph H. Beitchman et al. eds., 1996).

<sup>11</sup> In 1981, the American Speech-Language-Hearing Association estimated that the rate of severe speech, hearing and language disorders within the general population of adults was three to five percent of the population. WILLIAM C. HEALEY ET AL., THE PREVALENCE OF COMMUNICATIVE DISORDERS: A REVIEW OF THE LITERATURE 67 (1981). Within adult prisons, approximately 10-15% (*a conservative estimate since some institutions showed even higher rates*) of the inmates “have speech, hearing, and/or language disorders severe enough to warrant specialized [audiology and/ or speech pathology] services.” *Id.* Less severe, though handicapping, language and language function deficits occur at a much higher rate.

<sup>12</sup> See Abbe D. Davis et al., *Language Skills of Delinquent and Nondelinquent Adolescent Males*, 24 J. COMM. DISORDERS 251, 252 (1991) (citing studies that show anywhere from 58%-84% of institutionalized delinquents had language or communication difficulties many of which would be classified as “severe.”). This is consistent with the findings on MJTC.

why some crimes are committed in the first place, and how we might prevent them.

This article is an attempt to begin the conversation. It is written by a lawyer/teacher and a psychologist/public mental health administrator who stumbled upon this phenomenon almost by accident,<sup>13</sup> and wondered, “Why don’t we (lawyers, judges, probation agents, social workers, forensic experts, correctional professionals) know about this?” The article is directed at the legal and practical issues that confront the legal and correctional practitioners who contend with the implications of impaired language and communication skills on a daily basis, but who do not have time to contemplate language theory in the abstract. The approach here is concrete and focuses on those developmental and functional aspects of language deficiency that have a direct impact on the work of the practitioner in the juvenile or criminal justice systems.<sup>14</sup> This article asks three questions about language impairment: “How does this work?” (the how and why of communication and language disorders); “Why does this matter?” (the constitutional, practical, and human implications); and perhaps most importantly, “Now what?” (what can practitioners do about it?). We hope to provide some answers.

### **I. How does this work? Understanding communication and language disorders**

In order to understand why language impairments matter, we must first understand how language acts as a

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<sup>13</sup> Co-author Michele LaVigne was originally following up on literature discussing a high rate of hearing loss among inmates. The MJTC experience and subsequent research revealed that hearing loss is just a small fragment of a very large communication and language dysfunction problem among juveniles and adults who have been, or will be, in the legal system.

<sup>14</sup> Juvenile and adult courts have different procedures and juveniles present their own special issues in terms of brain development. However, the legal issues presented by language deficit are similar for juveniles and adults. This includes not only the constitutional issues but the communication, behavioral and treatment issues. For this reason, this article addresses language impairment in the context of both juveniles (adolescents charged with delinquent acts) and adults.

critical tool of individual development, and how the failure to fully acquire language drastically affects the two human characteristics around which we have built our entire juvenile and criminal justice systems: communication and behavior. Therefore, we begin with a brief discussion of how humans acquire language and what language acquisition actually means. This is followed by an overview of the sources of language disorders, including environmental deprivation. We then address the impact of impaired language skills on those all-important questions of communication and behavior.

*A. Language acquisition and language impairment*

*Language is something that happens to you;  
it's not something you do.*<sup>15</sup>

*The development of language is a complex  
process. Language must be received either  
auditorily or visually, processed centrally...and  
then expressed with appropriate  
motor...skills.*<sup>16</sup>

All of us acquired our language in childhood through constant exposure and practice. We acquired and learned language by hearing it<sup>17</sup> and using it, first with family and caregivers, and later, to a lesser extent, with teachers and peers. Not only did we acquire the language itself, we acquired the ability to use it effectively in a wide variety of situations. It is this second aspect of language, the ability to use it, that is the real heart of the story and is the reason that linguistic competency plays such a vital role in determining how we function in the world. When language operates as it should, it is both an instrument of communication between humans and an instrument of individual development.<sup>18</sup> A

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<sup>15</sup> NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 173-74 (1988).

<sup>16</sup> Paula Tallal et al., *Familial Aggregation in Specific Language Impairment*, 54 J. SPEECH & HEARING DISORDERS, 167, 167 (1989).

<sup>17</sup> Or seeing it, in the case of deaf children of deaf parents.

<sup>18</sup> Throughout this article, we refer to language as an instrument or tool. This metaphor is considered particularly apt by experts in the field of

child who acquires language and the ability to use it effectively can carry on a conversation with a total stranger, make friends, tell a story, laugh at a joke, follow rules, figure out what makes other people tick, control his behavior, avoid offending conversational partners, and look forward to a lifetime of learning.

Language disorder or impairment<sup>19</sup> means that this marvelous instrument of communication and development is defective or missing essential parts.<sup>20</sup> Language disorder can be described simplistically as the failure to acquire

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language and development. “Just as a physical tool, such as a saw, requires an intelligent hand to guide it, language requires intelligence to put it to work effectively. This intelligence has its sources partly within the developing human being, *e.g.* the cognitive requirements for use of mental state words, and partly outside the individual, in the experience provided by other people, both parents and peers.” Dale, *supra* note 10, at 20.

<sup>19</sup> The terms language disorder, language impairment, and language deficit are used interchangeably within this article. We are using it in a generic sense that generally refers to “language difficulties” or deficiencies that present themselves in communicative and/or behavioral contexts. Within the professions that deal directly with language issues, language deficits are categorized as specific language impairments *or* speech and language difficulties. See Christine A. Dollaghan, *Taxometric Analyses of Specific Language Impairment in 3- and 4-Year-Old Children*, 47 J. SPEECH, LANGUAGE, & HEARING RES. 464, 464 (2004) (Specific language impairments are “deficits in language development in the absence of co-occurring cognitive, hearing, oral-motor, emotional, or environmental deficits”); Ginette Dionne, *Language Development and Aggressive Behavior*, in DEVELOPMENTAL ORIGINS OF AGGRESSION 330, 332 (Richard E. Tremblay et al. eds., 2005) (Speech and language difficulties are a “more general construct”). One branch of psycholinguistics - “functional linguistics” - takes a slightly different approach, analyzing language and language usage issues in context. Functional linguistics views language as “‘disordered’ when the language user regularly fails or is regularly compromised in some way in the negotiation of meaning in either social, academic or workplace environments. E. Armstrong, *Language disorder: A functional linguistic perspective*, 19 CLINICAL LINGUISTICS & PHONETICS 137, 138 (2005).

<sup>20</sup> Language disorders are diverse. Language skills can be affected in terms of production (speech), content (ability to use and decipher language and its meaning) and/or use (norms of how and when to use “socially efficient” language.) Dionne, *supra*, note 19 at 332-33

competency in language and language use; but the consequences are anything but simple:

A child with a language disorder may have difficulty with all or part of language including grammar, syntax, vocabulary, the social use of language, and using communication effectively. Children with language disorders often have difficulty sequencing ideas, describing events, following directions, understanding the speech of others, and socializing.<sup>21</sup>

Language deficiencies that are not treated by the age of five have a substantial likelihood of continuing in some form into adolescence and adulthood.<sup>22</sup> Even though most impaired adolescents and adults will probably master the basic language skills necessary to function on a day-to-day basis, the effects of untreated language deficiencies will persist.<sup>23</sup> In operation, language disorder or impairment can disrupt an individual's ability to develop, to learn, to control and adapt his behavior, and to engage other human beings meaningfully throughout

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<sup>21</sup> DENNIS C. TANNER, EXPLORING COMMUNICATION DISORDERS: A 21<sup>ST</sup> CENTURY INTRODUCTION THROUGH LITERATURE AND MEDIA 9 (2002).

<sup>22</sup> See, e.g., Joseph H. Beitchman & E.B. Brownlie, *Childhood Speech and Language Disorders*, in DO THEY GROW OUT OF IT? LONG-TERM OUTCOMES OF CHILDHOOD DISORDERS 225 (Lily Hechtman, 1996); Michael & Lynn Mawhood, *The Long-term Psychosocial Sequelae of Specific Development Disorders of Speech and Language*, in BIOLOGICAL RISK FACTORS FOR PSYCHOSOCIAL DISORDERS 233 (Michael Rutter & Paul Casaer eds., 1991); Susan E. Stothard et al., *Language-Impaired Preschoolers: A Follow-Up Into Adolescence*, 41 J. SPEECH, LANGUAGE, & HEARING RESEARCH 407 (1998); Joseph H. Beitchman et al., *Fourteen-Year Follow-up of Speech/Language-Impaired and Control Children: Psychiatric Outcome*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 75 (2001).; Joseph H. Beitchman et al, *Models and determinants of vocabulary growth from kindergarten to adulthood*, 49 J OF CHILD PSYCHOLOGY AND PSYCHIATRY 626 (2008); Carla J. Johnson, *Twenty-Year Follow-Up of Children With and Without Speech-language Impairments: Family, Educational, Occupational, and Quality of Life Outcomes*, 19 AM. J. OF SPEECH-LANGUAGE PATHOLOGY 51 (Feb. 2010)

<sup>23</sup>Beitchman et al, *supra* note 22 at 631, Johnson, *supra* note 22 at 60-62; Dionne, *supra* note 19 at 340

his life.<sup>24</sup> While language deficit is not the same as mental retardation,<sup>25</sup> it can be a serious, though often invisible, developmental disability.

### B. What can go wrong?

Language acquisition is disrupted when conditions interfere with the mechanisms through which language and language use skills are acquired. The condition may be an underlying communication disorder, a disorder commonly associated or co-occurring with language or communication impairment, or circumstances, such as poverty and abuse, that place a child at risk for language delay. These conditions can exist singly or in combination. Regardless of the source or sources, the result is impaired language ability and impaired social development.

#### 1. Disorders

Certain communication disorders (defined as an “impairment in the ability to express, understand, and/or process thoughts and information”<sup>26</sup>) have a direct, obvious, and readily acknowledged impact on language acquisition. The communication disorders that will likely be of interest to legal practitioners are: 1) congenital or early onset hearing deficit (not just deafness, but any hearing loss)<sup>27</sup> and 2)

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<sup>24</sup> Armstrong, *supra* note 19 at 138

<sup>25</sup> An individual can have a “normal” overall IQ and still have a language impairment, especially in the realms of pragmatic usage and ability to understand complex sentences. However, language impairment is often revealed, or at least signaled, by a lower verbal IQ score, Dionne, *supra* note 19 at 338-39

<sup>26</sup> TANNER, *supra* note 21, at 2. The term *communication disorder* covers a broad spectrum of conditions that “range from minor nuisances to ones that render a person completely unable to speak or understand the speech of others...[and] can result from strokes, mental deficiency, deafness, learning, anxiety and tension, muscular degeneration, tumors, and a host of other causes.” *Id.*

<sup>27</sup> For a discussion of the effects of congenital or early childhood hearing loss on language acquisition see Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 852-65 (2003); Mark T. Greenberg and Carol A. Kusché, *Preventive Intervention for School-Age Deaf Children: The PATHS*

auditory processing disorders (“hearing impairment(s) arising from pathology of the brain”<sup>28</sup>). The presence of these types of disorders creates a substantial likelihood of some kind of language deficit, especially among the poor and undereducated individuals frequently seen in the juvenile and criminal justice systems.<sup>29</sup>

There are also a number of disorders that, while not communicative disorders themselves, are closely associated with, or frequently co-occur with, impaired language. Learning disabilities and Attention Deficit/Hyperactive Disorder (ADHD) are two of the disorders commonly associated with language impairment. These warrant particular attention for practitioners because of their prevalence among offender populations.<sup>30</sup> Learning

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*Curriculum*, 3 J. DEAF STUD. & DEAF EDUC. 49 (1998). JEFFREY P. BRADEN, DEAFNESS, DEPRIVATION, AND IQ 56-57 (1994). This generally applies to deaf children born into a hearing family. The deaf child born to deaf parents will acquire language the same way that a hearing child acquires language from her hearing parents. However, fewer than 10% of deaf children are born to deaf parents.

<sup>28</sup> D-E Bamiou et al., *Aetiology and clinical presentations of auditory processing disorders - a review*, 85 ARCHIVES DISEASE CHILDHOOD 361, 361 (2001). For a discussion of the effects of auditory processing on language and language use, see *id.*

<sup>29</sup> See e.g. Sarah A. Landsberger & David R. Diaz, *Inpatient Psychiatric Treatment of Deaf Adults: Demographic and Diagnostic Comparison with Hearing Inpatients*, 61 PSYCHIATRIC SERVICES 196 (February 2010), (available at [ps.psychiatryonline.org](http://ps.psychiatryonline.org))“Experienced clinicians in the field of mental health and deafness found that two-thirds of their deaf inpatients were dysfluent in any language. *Id.* at 198; LaVigne & Vernon, *supra* note 27 at 867 (individuals with hearing loss who come into the juvenile and criminal justice systems are more likely to be poor and undereducated, both of which increase the likelihood of impaired language skills)

<sup>30</sup> Pervasive Developmental Disorders (such as spectrum disorder autism including Asperger’s) may emerge as another area of concern due to their increasing prevalence in society at large. Even among high functioning individuals with autism, language development tends to be delayed in areas that reflect emotional understanding and an ability to grasp the motivations, reactions, and social cues of others. TANNER, *supra* note 21, 129-30. See also MARCO IACOBONI, MIRRORING PEOPLE 172-76 (2008) (Deficits in mirror neuron functioning have been implicated in autism. Mirror neurons are also thought to play a central role in language

disabilities are notorious for creating “difficulty learning and using symbols,”<sup>31</sup> such as language. In fact, the most common type of learning disability is language disorder syndrome.<sup>32</sup> The connection between ADHD and language is murkier; however, studies suggest that language impairment and ADHD may co-occur at a rate as high as 90%.<sup>33</sup>

## 2. The special case of environmental deprivation

Environmental deprivation is neither a communication nor a language disorder. Because language acquisition is so delicately layered and complex, however, verbal abilities are particularly vulnerable to environmental deprivation, brought about by maltreatment, neglect, or abuse, and in many instances, poverty.

### a. Poverty

One mother agreed to tape-record her interactions with her children over a two-year period and to write notes about her activities with them...Within approximately 500 hours of tape and over 1,000 lines of notes, she initiated talk to one of her three pre-school children...in only 18 instances.<sup>34</sup>

It is probably impossible to summarize the poverty/language research without trivializing, oversimplifying, or distorting it. Nevertheless, the effects of poverty on language development are well-known among social scientists. While poverty affects functioning in a

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acquisition, which may account for the language development issues connected with autism.)

<sup>31</sup> TANNER, *supra* note 21, at 131.

<sup>32</sup> *Id.*

<sup>33</sup> Rosemary Tannock & Rusell Schachar, *Executive Dysfunction as an Underlying Mechanism of Behavior and Language Problems in Attention Deficit Hyperactivity Disorder*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS, *supra* note 10, at 128, 133.

<sup>34</sup> Shirley Brice Heath, *Oral and Literate Traditions Among Black Americans Living in Poverty*, 44 AM. PSYCHOLOGIST 367, 369 (1989).

number of realms, verbal skills seem to be particularly hard hit.<sup>35</sup> The connection between poverty and failure to develop linguistically has its roots in the paucity of linguistic input that is found in too many impoverished homes.

In a prominent study, child development specialists Betty Hart and Todd Risley observed families from a range of ethnicities and socioeconomic classes, and qualitatively and quantitatively assessed the communication parents had with their young children.<sup>36</sup> Parents in poorer households simply spoke less with, and around, their children. As a result, those children had fewer opportunities to observe adults effectively use language as a means of solving problems or negotiating relationships. While all of the children in the study learned to talk, children from the very poor households had markedly shorter and fewer utterances than those in working, middle, and professional class households.<sup>37</sup>

Hart and Risley estimated that by age three, there was a “30 million word gap”<sup>38</sup> between the linguistic exposure of children in the poor households and that typically experienced by children in wealthier households. The effects of this extraordinary differential in linguistic experience show up not only in vocabulary, but also in ability to use language effectively, ability to understand longer sentences and more complex concepts, and even in what we call “common

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<sup>35</sup> See generally Kimberly G. Noble et al., *Neurocognitive Correlates of Socioeconomic Status in Kindergarten Children*, 8 DEVELOPMENTAL SCI. 74 (2005) [hereinafter Noble & Norman et al.]; Kimberly G. Noble et al., *Socioeconomic Gradients Predict Individual Differences in Neurocognitive Abilities*, 10 DEVELOPMENTAL SCI. 464 (2007) [hereinafter Noble & McCandliss et al.]. The other neurocognitive function that is particularly vulnerable to socioeconomic factors is executive functioning to the extent that it is intimately connected with language. Noble & Norman et al., *supra*, at 83; Noble & McCandliss et al., *supra*, at 476.

<sup>36</sup> BETTY HART & TODD R. RISLEY, *MEANINGFUL DIFFERENCES IN THE EVERYDAY EXPERIENCES OF YOUNG AMERICAN CHILDREN* (1995)

<sup>37</sup> See generally, *id* (describing methodology of study and results)

<sup>38</sup> Betty Hart & Todd R. Risley, *The Early Catastrophe, The 30 Million Word Gap by Age 3*, 27(1) AMERICAN EDUCATOR 4 (SPRING 2003), *article reprinted from HART & RISLEY supra* note 36

knowledge.”<sup>39</sup> The effects are cumulative, because as Hart and Risley observed, “[linguistic] experience is sequential...the amount and diversity of children’s past [linguistic] experience influences which new opportunities for experience they notice and choose.”<sup>40</sup> In what will be a lifetime trajectory, children need adequate linguistic experience, vocabulary and fund of knowledge in order to acquire more experience, vocabulary, and knowledge.

The large gap in linguistic exposure and its effects has been corroborated by a number of social scientists utilizing different research methodologies<sup>41</sup> and has been rightly called “the early catastrophe.”<sup>42</sup> The explanations for the undeniable and cyclical effects of poverty on language tend to center on isolation, lack of education, dangerous neighborhoods, lack of stability, and the crisis-to-crisis lifestyle brought about by the scarcity of resources.<sup>43</sup> The effects of socioeconomic status on language development are not limited to any particular race or ethnicity nor are they limited to the United States. Poor children in other countries suffer the same long-lasting effects of linguistic deprivation when their parents do not read to them or play with them or talk with them.<sup>44</sup>

#### b. Maltreatment and abuse

Children who are severely abused or neglected have a substantially higher rate of language delay and disorders,

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<sup>39</sup> *Id.* The effects of linguistic exposure in terms of vocabulary and language usage are apparent as early as age three. HART & RISLEY 141-89 (1995).

<sup>40</sup> *Id.*

<sup>41</sup> Hart & Risley, *supra* note 36; *See also.*, Grover J. Whitehurst, *Language Processes in Context: Language Learning in Children Reared in Poverty*, in COMMUNICATION AND LANGUAGE ACQUISITION: DISCOVERIES FROM ATYPICAL DEVELOPMENT 233 (M.A. Ronski & L.B. Adamson 1997).

<sup>42</sup> *Id.*

<sup>43</sup> HART & RISLEY, *supra* note 36, at 69.

<sup>44</sup> *See e.g.*, Whitehurst, *supra* note 41, at 236 (discussing research showing that children from “working-class” families in England are more likely than “middle-class” children to speak in a restricted code) (citing B. BERNSTEIN, CLASS, CODES, AND CONTROL: VOL. 1. THEORETICAL STUDIES TOWARDS A SOCIOLOGY OF LANGUAGE (Routledge & Kegan Paul Ltd. 1971)).

particularly in the areas of expression and social use of language.<sup>45</sup> Language deficit brought about by abuse or neglect has been attributed to reduced verbal and communicative interactions by the abusive or neglecting parent, which are then compounded by the resulting insecure attachment.<sup>46</sup>

Abused and neglected children use language primarily to communicate basic needs rather than for any social or emotional purpose.<sup>47</sup> Researchers have observed both qualitative and quantitative deficiencies in the language and language function of these children. They “tend to have poor conversational skills, the inability to discuss feelings, shorter conversations, and fewer descriptive utterances.”<sup>48</sup> This cluster of linguistic deficits is thought to contribute to long-term difficulty regulating negative emotions.<sup>49</sup>

C. When language acquisition fails: the cognitive, social, and behavioral implications

*Eric, on turning 4, is evaluated for kindergarten...and found to be 1-2 years behind in language and other skills...  
..Now in the seventh grade [after repeating the sixth grade], Eric is academically at a fourth or fifth grade level and has significant problems with learning, behavior and depression.<sup>50</sup>*

<sup>45</sup> TANNER, *supra* note 21, at 131.

<sup>46</sup> Dale, *supra* note 10, at 18.

<sup>47</sup> TANNER, *supra* note 21, at 131.

<sup>48</sup> *Id.* See also Dale, *supra* note 10, at 18 (“Abusive and neglecting parents interact with their young children less; they are less likely to play with their children or talk with them, and more likely to ignore verbal messages from their children. Not surprisingly, maltreated infants are more likely to form insecure attachments with their primary caregivers. Thus, both directly, via reduced communication from their mothers, and indirectly, via higher risk of insecure attachment, maltreated children are at risk for communication disorders.”).

<sup>49</sup> *Id.* at 1.

<sup>50</sup> Bill Lueders, *Eric Hainstock: Free at Last*, Isthmus, July 31, 2008, at 1, available at <http://www.thedailypage.com/isthmus/article.php?article=23349> (excerpted from a timeline of Eric Hainstock’s life) Eric Hainstock was

Given the multi-layered complexity of acquiring language and then acquiring the ability to use it as a tool for social, emotional and cognitive functioning, we should not be surprised that the process can go awry at many points and in many ways.<sup>51</sup> Researchers studying the long-term effects of deficient language acquisition have observed that young children with speech and language impairments are at substantial risk for both communication problems and associated psychiatric, academic, cognitive, social and behavioral difficulties,<sup>52</sup> and these difficulties may not end with childhood. If, as happens all too often, the language impairment is not identified and treated,<sup>53</sup> the effects can continue into late adolescence and adulthood, *even when the individuals appear to have acquired at least the basics of acceptable language.*<sup>54</sup>

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convicted of first-degree intentional homicide for shooting and killing his high school principal when he was 15 years old. The record shows that Eric was subjected to a lifetime of severe abuse from his family and had significant psychological problems, though his overall IQ was in the normal range. State v. Hainstock, Sauk Co., Wis., Case No. 06-CF-341.

<sup>51</sup> Dale, *supra* note 10, at 16.

<sup>52</sup> Carla Johnson et al., *Fourteen-Year Follow-Up of Children With and Without Speech/Language Impairments: Speech/Language Stability and Outcomes*, 42 J. SPEECH, LANGUAGE, & HEARING RES. 744, 744-45 (1999). The substantial effects, especially in the emotional, behavioral, and social realms, appear to be connected with deficits in the content and use aspects of language. Dionne, *supra* note 19 at 332-333

<sup>53</sup> For example the boys who were tested MJTC had language skills that were almost off the bottom of the chart. Yet, in all their years in school, under juvenile court jurisdiction, in out of home placements, and in corrections, no one had identified the problem until MJTC undertook testing.

<sup>54</sup> Dionne, *supra* note 19 at 340. For excellent examples of longitudinal studies that track individuals with language impairments, see, for example, Johnson et al., *supra* note 52; Joseph H. Beitchman et al., *Fourteen-Year Follow-Up of Speech/Language-Impaired and Control Children: Psychiatric Outcome*, 40 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 75 (2001); Joseph H. Beitchman et al., *Long-Term Consistency in Speech/Language Profiles: I. Development and Academic Outcomes*, 35 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 804 (1996); Joseph H. Beitchman et al., *Long-Term Consistency in Speech/Language Profiles: II. Behavioral, Emotional, and Social Outcomes*, 35 J. AM. ACAD. CHILD &

### 1. Pragmatic deficits

*Eric was the type of student who tried to relate in maybe somewhat of a clumsy way that didn't always sit well with [other students]. He tended to irritate people more than befriend them.<sup>55</sup>*

Pragmatics, or “the behavioral effects of communication,”<sup>56</sup> is a linguistic concept that deserves top billing in the canon of essential knowledge for any legal practitioner. Pragmatics is especially significant for juvenile and criminal justice practitioners, not to mention the defendants themselves, because deficits in this aspect of language and language use are common among those who come under the jurisdiction of juvenile and criminal court.<sup>57</sup> At the same time many of the personal judgments the legal system makes about defendants are actually rooted in pragmatics.

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ADOLESCENT PSYCHIATRY 815 (1996); Irene J. Elkins et al., *Characteristics Associated with the Persistence of Antisocial Behavior: Results from Recent Longitudinal Research*, 2(2) AGGRESSION & VIOLENT BEHAV. 101 (1997); April Ann Benasich et al., *Language, Learning, and Behavioral Disturbances in Childhood: A Longitudinal Perspective*, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 585 (1993); M. Brent Donnaellan et al., *Cognitive Abilities in Adolescent-Limited and Life-Course-Persistent Criminal Offenders*, 109 J. ABNORMAL PSYCHOL. 396 (2000); Hakan Stattin & Ingrid Klackenber-Larsson, *Early Language and Intelligence Development and Their Relationship to Future Criminal Behavior*, 102 J. ABNORMAL PSYCHOL. 369 (1993); Sabrina C. Voci et al., *Social Anxiety in Late Adolescence: The Importance of Early Childhood Language Impairment*, 20 J. ANXIETY DISORDERS 915 (2006).

<sup>55</sup> Lueders, *supra* note 50 (quoting Terry Milfred, former superintendent of Ithaca School District, discussing Eric Hainstock, who shot his high school principal when Milfred was superintendent). This type of severe pragmatic deficit would be consistent with findings about the effects of abuse on language function.

<sup>56</sup> PAUL WATZLAWICK ET AL., PRAGMATICS OF HUMAN COMMUNICATION 22 (1967)..

<sup>57</sup> Pragmatic deficits occur at a particularly high rate among individuals that are likely to appear in juvenile and criminal court – i.e. those identified as conduct disordered, chronic-behavior-disordered, or aggressive. Dionne, *supra* note 19, at 338-39.

Pragmatics bears on what we loosely call “politeness.”<sup>58</sup> Pragmatics concerns itself with a variety of verbal aspects of communication such as word and syntax choice, as well as non-verbal or behavioral aspects like turn-taking and body language. Pragmatics is basically a tangled web of cultural and contextual rules, many of which have as much (or more) to do with communication as the surface meaning of the language.<sup>59</sup> When a lawyer cautions her client against saying “yeah,” instead of “yes,” in response to the judge’s questions, or reminds the client not to interrupt the judge, slouch in the chair, “drop the f-bomb,”<sup>60</sup> or wear a tank top to court, the lawyer is addressing pragmatics.

The failure to acquire and develop pragmatic competence is a type of language disorder that can occur in tandem with other language deficits or on its own.<sup>61</sup> Pragmatic language disorder causes impairment in the use and understanding of language in a variety of situations; however, such a clinical description does not begin to do justice to the broad implications of pragmatic disorders. When an individual fails to develop sufficient pragmatic skills, the effects are life altering -- “from failure in the school system to social and cultural exclusion.”<sup>62</sup>

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<sup>58</sup> “Politeness in linguistics does not refer to social etiquette like eating your peas without using your knife.” STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 380 (2007). Rather, it refers to not rubbing the listener the wrong way. “People are very, very touchy, and speakers go to great lengths not to step on their toes.” *Id.* See also, GEORGIA M. GREEN, *PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING* 147-56 (2d ed. 1996).

<sup>59</sup> Gabriele Kasper, *Can Pragmatic Competence Be Taught?*, SECOND LANGUAGE TEACHING & CURRICULUM CENTER (1997), <http://www.nflrc.hawaii.edu/NetWorks/NW06> (last visited 01/20/2010).

<sup>60</sup> “Don’t drop the f-bomb” is a frequent piece of before-court advice to clients by Attorney Ben Gonring who specializes in juvenile law in Madison, Wis. Interview with Ben Gonring, Assistant State Public Defender, Juvenile Division, Madison, Wis. (Sept. 4, 2009).

<sup>61</sup> Dionne, *supra* note 19, at 333.

<sup>62</sup> Peter Chaban, *Understanding Language Dysfunction from a Developmental Perspective: An Overview of Pragmatic Theories*, in *LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS*, *supra* note 10, at 123, 34.

A list of common characteristics of children with pragmatic language deficits compiled by researchers reveals a depressing recipe for poor social development:

- Difficulty answering questions or requesting clarification;
- Difficulty initiating or maintaining conversations, or securing a conversational turn;
- Inability to tailor the message to the listener or repair communication breakdowns;
- Inappropriate topics and off-topic comments;
- Ineffectual or inappropriate comments;
- Difficulty with stylistic variations and speaker-listener roles; and
- Narrative difficulties.<sup>63</sup>

As these children grow older they will be unable to read social situations, social cues, body language, or conform to the rules of social engagement, and may appear “uncooperative at the least, or more seriously, rude or insulting.”<sup>64</sup>

Pragmatic deficits can be deceptive. They are often undiagnosed or overlooked because, unlike receptive and/or expressive deficits, “they do not audibly impair everyday communication.”<sup>65</sup> An individual may have developed acceptable basic language skills in terms of vocabulary and syntax, but still have severe pragmatic deficits, particularly in

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<sup>63</sup> TANNER, *supra* note 21, at 121.

<sup>64</sup> Melinda Edwards & Kata Csizer, *Developing Pragmatic Competence in the EFL Classroom*, 42(3) ENGLISH TEACHING FORUM 16, 17 (July 2004), available at <http://exchanges.state.gov/englishteaching/forum/archives/docs/04-42-3-e.pdf> (last visited 01/21/2010) (quoting K. Bardovi-Harlig et al., *Developing Awareness: Closing the Conversation*, in POWER, PEDAGOGY, AND PRACTICE 324 (T. Hedge & N. Whitney eds. 1996)).

<sup>65</sup> Dionne, *supra* note 19, at 333 (Though pragmatic deficits often accompany expressive and/or receptive deficits, there are many cases where they are the primary deficit.).

high stress, unfamiliar, or socially complicated situations.<sup>66</sup> Meanwhile, because the pragmatic deficit has no “sound,” or is not revealed in standard testing,<sup>67</sup> the individual’s inappropriate behavior is often attributed to deliberate non-compliance, bad attitude or more simply, being “a jerk.”

## 2. Cognitive and emotional effects of language impairment

Most of us already know, at least on an instinctive level, that academic success and success in life are not possible without adequate language. Language is the key to cognitive functioning and its connection with learning almost goes without saying, as does the almost inevitable connection between poor language and poor academic performance.<sup>68</sup> Language is how we acquire and process information about how the world and the people in it operate. While language may not be the same as thought, it is, as psychologist and author Steven Pinker puts it, “the stuff of thought.”<sup>69</sup>

What is less obvious is that language is also the “stuff” of emotional development. Language is the means by which we all come to understand and deal with our own emotions and the emotions of others.<sup>70</sup> When the necessary language skills fail to develop, emotional and behavioral deficits can be found lurking nearby. Research has consistently shown “a strikingly high [though] less than perfect comorbidity of language and learning disabilities with a range of behavioral

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<sup>66</sup> For example, the MJTC staff has observed that despite their severe pragmatic deficits, the youths appear to have no trouble communicating with each other on a superficial level in the day room or in activities.

<sup>67</sup> Dionne, *supra* note 19 at 338-39

<sup>68</sup> These educational deficits are heavily implicated in low literacy, in-school behavioral issues, and high truancy and dropout rates. Sabrina Ford et al., *Neurocognitive Correlates of Problem Behavior in Environmentally At-Risk Adolescents*, 28 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 376 (2007).

<sup>69</sup> See PINKER, *supra* note 58. Or put another way: “Language facilitates thought and thought facilitates language.” TANNER, *supra* note 21, at 120.

<sup>70</sup> Dale, *supra* note 10, at 8. Awareness of the mental states of others is often referred to as *theory of mind*. Tanya Gallagher, *Interrelationships among Children’s Language, Behavior, and Emotional Problems*, 19 TOPICS IN LANGUAGE DISORDERS 1, 6 (1999); Dale, *supra* note 10, at 7.

and emotional disturbances”<sup>71</sup> such as anxiety, depression, hyperactivity, frustration, impulsivity and conduct disorders.<sup>72</sup> Furthermore, the association goes both ways: children and adolescents with emotional and/or behavioral problems are substantially more likely to have language impairments, and children with language impairments are substantially more likely to have emotional and/or behavioral problems.<sup>73</sup>

The connection between language disorder and emotional difficulties is complex, to say the least. A grossly simplified explanation is that early development is thwarted when children fail to acquire emotional or internal state language and knowledge to relate to themselves or others.<sup>74</sup> If not addressed, this emotional incompetence will continue.<sup>75</sup> Moreover, by virtue of wider deficits in language and language use, including “narrative understanding, conversational experience, syntactic competence,”<sup>76</sup> these individuals often lack the ability to understand and interpret the words and actions of other people.<sup>77</sup> In extreme cases, they may be ostracized and perceived as “weird.”<sup>78</sup>

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<sup>71</sup> Dale, *supra* note 10, at 5

<sup>72</sup> Gallagher, *supra* note 70, at 2, citing *inter alia* L. Baker & D. Cantwell, *A Prospective psychiatric follow-up of children with speech and language disorder* 26 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 546 (1987).

<sup>73</sup> Gallagher, *supra* note 70, at 1. Several studies claim that a child with one problem is three to four times more likely to have the other, compared with other children in the community. See, e.g., Dionne, *supra* note 19, at 334.

<sup>74</sup> Dale, *supra* note 10, at 16-20,

<sup>75</sup> Mark Greenberg, Director of the Prevention Research Center at Penn State University has noted that “communication skills (especially about feelings) are often a major stumbling block for youth in correctional situations.” Email to Michele LaVigne, July 19, 2009, 6:48 p.m. CDT.

<sup>76</sup> Ethan Rimmel et al., *Theory of Mind Development in Deaf Children*, in OXFORD HANDBOOK OF DEAF STUDIES, LANGUAGE, AND EDUCATION 113, 125 (Mark Marschark & Patricia E. Spencer eds., 2003).

<sup>77</sup> *Id.*; Heidemarie Lohmann et al., *Linguistic Communication and Social Understanding*, in WHY LANGUAGE MATTERS FOR THEORY OF MIND, 245, 261-63 (Janet Wilde Astington and Jodie A. Baird eds., 2005). The ability to take the perspective of another is known as theory of mind.

<sup>78</sup> Joseph H. Beitchman et al., *Linguistic Impairment and Psychiatric Disorder: Pathways to Outcome*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS, *supra* note 10, at 493, 493 (citing M. Rice, *Don't*

An attorney who specializes in defending juveniles who have been subjected to extreme environmental deprivation poignantly summed up the emotional and cognitive incompetence that can be brought about by severe language impairment: “I asked my client what he thought about. He looked at me like I was crazy. He had no internal life whatsoever. He only knew what went on around him. It was like he was living in a video game.”<sup>79</sup>

### 3. Social development and self-regulation

Social development (the ability to assess social situations and consider the perspective of others) is the product of the integration of the pragmatic, cognitive, and emotional functions that are interconnected with language.<sup>80</sup> When social development proceeds normally, an important feature will be the ability to self-regulate,<sup>81</sup> a complex skill in which cognitive and emotional processes sequentially interact.<sup>82</sup> Psychologists widely agree that self-regulation is inextricably linked with language,<sup>83</sup> with many experts

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*Talk to Him, He's Weird: A Social Consequences Account of Language and Social Interactions*, in ENHANCING CHILDREN'S COMMUNICATION: RESEARCH FOUNDATIONS FOR INTERVENTION 139 (1993)).

<sup>79</sup> Interview with Herschella Conyers, University of Chicago Law School, Mandel Legal Clinic, in Macon, Ga. (June 23, 2009) (describing a severely linguistically-impaired juvenile client charged with homicide).

<sup>80</sup> See generally Dale, *supra* note 10; Jim Stevenson, *Developmental Changes in the Mechanisms Linking Language Disabilities and Behavior Disorders*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS, *supra* note 10, at 78.

<sup>81</sup> For background information on the development of self-regulation, see Margarita Azmitia, *Expertise, Private Speech, and the Development of Self-Regulation*, in PRIVATE SPEECH: FROM SOCIAL INTERACTION TO SELF-REGULATION, 101 (Raphael Diaz & Laura E. Berk eds., 1992).

<sup>82</sup> Walter Mischel et al., *Self-Regulation in the Service of Conflict Resolution*, in THE HANDBOOK OF CONFLICT RESOLUTION 294, 297 (Morton Deutsch et al. eds., 2d ed. 2006).

<sup>83</sup> Executive functioning, a term familiar to juvenile practitioners is also implicated in self-regulation, especially in relation to adolescents. However, executive functioning and language are “difficult to untangle because language is a key component of self-regulation.” E.B. Brownlie et al., *Early Language Impairment and Young Adult Delinquent and*

framing the issue in terms of “inner” or “private” speech.”<sup>84</sup> The operation of inner speech “facilitates the rehearsal of rules, the ability to consider and modify ongoing behavior with respect to its consequences, and the ability to form appropriate plans for future action.”<sup>85</sup> Inner speech is not just for children; adults are equally dependent on a developed facility for inner speech in order to self-regulate, especially when confronted with unfamiliar situations, hostile environments demanding tasks, novel information, obstacles to a goal, and problem solving.<sup>86</sup>

Lack of these essential tools, and thus, the lack of the ability to effectively self-regulate, can be a hallmark characteristic of individuals with language deficits.<sup>87</sup> Verbal skills are required for pro-social behavior, especially in the face of negative emotions, conflict, or ambiguity. When those skills are not developed, an individual may act impulsively, foolishly, irresponsibly, and at times aggressively. While such behavior may seem deliberate or premeditated to the outside viewer, it may in fact be partially driven by the inability to access alternatives.

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*Aggressive Behavior*, 32 J. ABNORMAL CHILD. PSYCHOL. 453, 461 (2004), citing L.E. Berk, *Children's Private Speech: An Overview of Theory and the Status of Research*, in PRIVATE SPEECH: FROM SOCIAL INTERACTION TO SELF-REGULATION, *supra* note 81, at 1-53. It is believed that executive functioning is a bridge between language and conduct. *Id.*; Peter R. Giancola & Ada Mezzich, *Executive Cognitive Functioning Mediates the Relation Between Language Competence and Antisocial Behavior in Conduct-Disordered Adolescent Females*, 26 AGGRESSIVE BEHAV. 359, 360 (2000).

<sup>84</sup> See, e.g., Dionne, *supra* note 19, at 346. The concept of “inner speech” originated in the early Twentieth Century with Russian psychologist Lev Vygotsky who proposed that “inner language is a necessary tool to inhibit social impulses.” *Id.* 346; See generally Lev Vygotsky, *THOUGHT AND LANGUAGE* (Alex Kozulin trans., MIT Press 2d ed. 1986).

<sup>85</sup> Brownlie et al., *supra* note 83, at 461.

<sup>86</sup> Vera John-Steiner, *Private Speech Among Adults*, in PRIVATE SPEECH: FROM SOCIAL INTERACTION TO SELF-REGULATION, *supra* note 81, at 285, 286-90; Raphael Diaz, *Methodological Concerns in the Study of Private Speech*, in PRIVATE SPEECH: FROM SOCIAL INTERACTION TO SELF-REGULATION 63, *supra* note 81, at 63. See generally Mischel et al., *supra* note 82.

<sup>87</sup> Beitchman & Brownlie, *supra* note 22, at 238-42.

#### 4. Aggression

Aggression, specifically reactive (or unplanned or impulsive) aggression<sup>88</sup>, has been a behavioral issue long associated with low language proficiency “as early as the second year of life and throughout the lifespan.”<sup>89</sup> Volumes of research have borne out a frequent co-occurrence of physical aggression and low language skills in children, adolescents, and adults.<sup>90</sup>

There are a number of theories about the language/aggression link, pointing either to shared origins or etiology between aggression and language deficits, or to a cause and effect relationship (i.e. deficient language causes aggression).<sup>91</sup> These theories boil down to a series of overlapping explanations: lack of tools (inner speech) to control impulsive behavior; <sup>92</sup> flawed social information

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<sup>88</sup> Experts who study aggression divide it into two primary types. Michael J. Vitacco et al., *Testing Factor Models of the Psychopathy Checklist: Youth Version and Their Association With Instrumental Aggression*, 87(1) J. PERSONALITY ASSESSMENT 75, 75 (2006). “Reactive aggression is defined by failing to inhibit responses to apparent provocation or frustration.” *Id.*, (citing W.A. Schmitt & J.P. Newman, *Passive Avoidance in Psychopathic Offenders: A Replication and Extension*, 107 J. ABNORMAL PSYCHOL. 527 (1998)) “[I]nstrumental aggression is defined by the presence of planning and the lack of affect.” Vitacco et al., *supra* at 75, citing J.R. Meloy, *The Empirical Basis and Forensic Application of Affective and Predatory Violence*, 40 AUSTRALIA & N.Z. J. PSYCHIATRY 539 (2006).

<sup>89</sup> Dionne, *supra* note 19, at 330. See also Doris Cole, *Narrative Development in Aggressive Boys*, 26 BEHAVIORAL DISORDERS 332, 332-33 (2001).

<sup>90</sup> See generally Dionne, *supra* note 19, at 330 (discussing research linking language deficits and aggression). The correlation is neither perfect nor inevitable. There are countless language-impaired individuals who may have other emotional and behavioral problems that do not involve aggression or who have no co-occurring problems at all. There are also well-educated, verbally-skilled individuals who are aggressive. The bottom-line however is that language deficits “occur more frequently in aggressive individuals.” *Id.* at 342

<sup>91</sup> Dionne, *supra* note 19 at 343-347.

<sup>92</sup> Dionne, *supra* note 19, at 346. In many instances the language/behavior link is not even considered in treatment: “verbal deficits related to externalizing behavior problems [i.e. aggression] have often...been ignored

processing, leading to an inability to accurately read and respond to social situations, and a resulting tendency to “perceive hostile intent in ambiguous situations”;<sup>93</sup> and an impaired ability to understand another person’s perspective.<sup>94</sup> Perhaps the most accessible explanation, though, is one that will have special resonance for any parent who has ever exhorted his or her child to “use your words.” An individual may be aggressive because he does not “have the words,” or does not know how to use them.<sup>95</sup> Thus, aggression may be, at least in part, a symptom of language impairment.<sup>96</sup>

Whatever the explanation (or explanations), an association between aggressive behavior and poor language skills is now beyond dispute, and the association tends to be particularly strong among individuals whose language problems have never been identified and treated.<sup>97</sup> Of all the findings contained within the reams of literature on language disorders, these may be the most salient for legal and correctional professionals.<sup>98</sup> They have the potential to color

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or treated as likely downstream developmental deficits.” Joel T. Nigg & Cynthia L. Huang-Polluck, *An Early-Onset Model of the Role of Executive Functions and Intelligence in Conduct Disorders/Delinquency*, in *CAUSES OF CONDUCT DISORDER AND JUVENILE DELINQUENCY* 227, 241 (Benjamin B. Lahey et al. eds., 2003).

<sup>93</sup> Dionne, *supra* note 19, at 346.

<sup>94</sup> *Id.*

<sup>95</sup> Cole, *supra* note 89, at 332; Gallagher, *supra* note 70, at 8; Dionne, *supra* note 19, at 345.

<sup>96</sup> In no way are we suggesting that reactive aggression is purely a matter of language deficit. Aggression is a complex behavioral issue that is increasingly being treated by a “multi-modal” approach. Within that treatment model, language use or social skills development forms its own important segment. Clive R. Hollin, *Aggression Replacement Training: The Cognitive-Behavioral Content*, in *NEW PERSPECTIVES ON AGGRESSION REPLACEMENT TRAINING*, 3, 4-11 (Arnold P. Goldstein et al. eds., 2004)

<sup>97</sup> Dionne, *supra* note 19 at 338. (This suggests that aggressive individuals “may have more problems with the use and understanding of complex language structures than with lexical knowledge.” *Id.*) Deficits in language use and ability to decipher complex sentences would not necessarily reveal themselves in standard testing. *Id.* at 338-39

<sup>98</sup> “Perhaps reactive violence should be considered the most basic form of aggression among criminal offenders, and instrumental violence should be considered a marker of a more pathological development in the ability to

perspectives and decisions about offenders' motivation, intent, and even culpability. Moreover, this entire field of study may cause us all to reconsider the legal system's approach and to respond more realistically to many individuals previously written off as too unpredictable or dangerous. This is particularly true when the research is viewed in conjunction with the positive findings on the effectiveness of treatment programs, including MJTC, that treat aggression by finally addressing the individual's communication and social deficits.<sup>99</sup>

## II. Why does this matter? The implications

*[I]ndividuals with language disorders are significantly disempowered within a culture that highly values oral and written language skills.<sup>100</sup>*

Poverty, ADHD, learning disabilities, poor academic performance, substandard literacy, behavior problems, and conduct disorders: these conditions are the stock in trade for the juvenile and criminal justice systems and are also closely associated with impaired language skills. This means that the individuals most at risk for language deficit are the very same people who are regularly on the docket in criminal and juvenile court and on the rosters in correctional facilities.

The potential implications of language disorder within the juvenile and criminal justice systems seem infinite. This section focuses on some of the larger constitutional, legal and practical issues that we would expect to arise in the trajectory of a juvenile or criminal case.

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use aggression for goal-directed purposes.” Vitacco et al., *supra* note 88, at 75 (quoting D.G. Cornell et al., *Psychopathy of Instrumental and Reactive Violent Offenders*, 64 J. CONSULTING & CLINICAL PSYCHOL. 783, 788 (1996).

<sup>99</sup> See *infra* Sec. 4.D.

<sup>100</sup> Armstrong, *supra* note 19, at 137.

### A. Constitutional implications

*In theory, communication is said to have taken place if the information received is the same as that sent; in practice one has to allow for all kinds of interfering factors.*<sup>101</sup>

Language-impaired defendants face a daunting series of procedural and linguistic obstacles when they enter the juvenile or criminal process. While most litigants are perplexed by the arcane language and rituals of the legal process, the cognitive and communication difficulties encountered by the defendant with language deficits rise to another level altogether. These communication difficulties threaten his vital constitutional rights to be competent, to assist with his defense, to due process, and to make knowing and intelligent decisions about which rights to waive and which to assert.<sup>102</sup>

#### 1. Competency to stand trial

The constitutional question that should immediately come to mind as we consider the effects of language disorder in the context of juvenile and criminal justice is competency to stand trial. As first defined in *Dusky v. United States*, competency to stand trial requires sufficient present ability to consult with counsel “with a reasonable degree of rational understanding” and possession of a “rational as well as factual understanding of the proceedings.”<sup>103</sup> By its very terms, the *Dusky* standard links language competence and competency to stand trial. In *Cooper v. Oklahoma*, the Supreme Court reinforced the language/competency connection by further

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<sup>101</sup> DAVID CRYSTAL, A DICTIONARY OF LINGUISTICS AND PHONETICS 89 (6th ed. 2008).

<sup>102</sup> See generally *United States ex rel. Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970) (The decision in *Negron* discussed the constitutional rights implicated by the courts’ failure to provide an interpreter for a non-English speaking defendant. While there are some functional differences, the constitutional issues are the same. The constitutional issues discussed here are also the same whether the defendant is in juvenile or criminal court.).

<sup>103</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

defining the ability consult with counsel standard as the ability to “communicate effectively with counsel.”<sup>104</sup>

Despite its seemingly simple definition, competency is a multi-faceted concept encompassing a series of cognitive and communicative functions.<sup>105</sup> At a minimum, competency to stand trial requires that a defendant possess the capacity to:

- Understand the legal process;
- Process information and acquire knowledge;
- Appreciate the significance of legal circumstances as they apply to the defendants’ own life;
- Communicate accurate, relevant information about the allegations, social background, and personal feelings;
- Understand another person’s perspective;<sup>106</sup> and
- Reason both abstractly and concretely,<sup>107</sup> and make decisions based on a rational perception and assessment of the consequences of the alternatives presented.<sup>108</sup>

Even with this abbreviated list, it is hard to miss the potential impact of language disorders on the competency of a juvenile or adult defendant, particularly when the impairment is severe. As a staff member at Mendota Juvenile Treatment Center remarked: “How could these kids possibly be competent?”

Incompetency connected to language impairment will most likely to be encountered with juveniles and young adults. Even without language disorders, youths under 14 are already

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<sup>104</sup> Cooper v. Oklahoma, 517 U.S. 348, 351-52 (1996).

<sup>105</sup> See, e.g., Richard Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992). See also, Thomas Grisso, *What We Know About Youth’s Capacities as Trial Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 146 (Thomas Grisso & Robert G. Schwartz eds., 2003) [hereinafter *What We Know*].

<sup>106</sup> All of these capacities are discussed in *What We Know*, *supra* note 105, at 157.

<sup>107</sup> See United States v. Gigante, 996 F. Supp. 194, 201 (E.D.N.Y. 1998).

<sup>108</sup> See Terry A. Maroney, *Emotional Competence and ‘Rational Understanding’: A Guide for Defense Counsel*, 33 CHAMPION 36 (2009).

substantially less likely to possess the capacities associated with competence.<sup>109</sup> Impaired language skills exacerbate and extend these developmental deficits.<sup>110</sup>

## 2. *Ability to assist counsel*

When a client is impaired but technically competent to stand trial (although it is probably more accurate to say “has not met the standard for incompetence”<sup>111</sup>), the client and attorney are expected to maintain a “normal attorney-client relationship,” despite the impairment.<sup>112</sup> In this normal relationship, counsel shoulders a constitutional and ethical responsibility for shepherding his or her client through the long process of case-assessment, case-building, and decision-making. Correspondingly, the attorney counts on the client’s ability to process information and communicate in a rational

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<sup>109</sup> *What We Know*, *supra* note 105, at 163.

<sup>110</sup> *Id.* at 139, 148; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 13-14 (1997) [hereinafter *Adolescents as Trial Defendants*]. See also, Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 344 (2003) [hereinafter *Juveniles’ Competence to Stand Trial*] (Young adults who were in the criminal justice system showed substantially less capacity for comprehension than young adults within the general public).

<sup>111</sup> Social scientists and legal professionals have long complained that the standard for a finding of competency to stand trial is unrealistically low. For example, public defenders have expressed concern that anywhere from 7.9% to 14.8% of their clients have cognitive deficits that substantially impact pretrial competency. G.B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 669 n.93 (2d ed. 1997). This percentage is well above the number who are found competent or even assessed, See Daniel C. Murrie et al., *Clinical Variation in Findings of Competence to Stand Trial*, 14 PSYCHOL. PUB. POL’Y & L. 177, 177 (Stating that competency-to-stand-trial evaluations are done on approximately 5% of all felony defendants in the United States). Well known defense attorney Ron Kuby has suggested, only half in jest, that a finding of competency “basically means that you know the difference between a judge and a grapefruit.” Interview by Kyra Philips of Ron Kuby, Defense Attorney (October 20, 2003) (Transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0310/20/bn.05.html>).

<sup>112</sup> MODEL RULES OF PROF’L CONDUCT R. 1.14 (2007).

fashion.<sup>113</sup> But when the client lacks language and/or language use skills, the very foundations of the attorney-client relationship are threatened.<sup>114</sup>

As a threshold matter, many clients with the types of language disorders discussed here will not readily comprehend abstract legal vocabulary and concepts.<sup>115</sup> An impaired client may also be unable to process auditory information and/or complex sentences, or discern the motivations and expectations of the attorney or the court. The pragmatic, cognitive, and emotional facets of language impairment can impede a client's ability to strategize, assess options and consequences, and appreciate the human factors that can have such a profound effect on the outcome of a case.

Linguistic deficits will also limit a client's ability to give his lawyer vital background information and factual information about the allegations, recall details, or to even tell a story.<sup>116</sup> This in turn will interfere with the attorney's constitutional obligation to assess potential defenses and mitigating factors, investigate, and mount a defense. As United States District Court Judge Jack Weinstein once observed, "effective assistance of counsel is impossible unless the client can provide his or her lawyer with intelligent and informed input."<sup>117</sup>

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<sup>113</sup> Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings – Cognitive Maturity and the Attorney Client Proceedings*, 33 U. LOUISVILLE J. FAM. L. 629, 642 (1994-1995).

<sup>114</sup> See, e.g., Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 517 (1987).

<sup>115</sup> Reduced comprehension of legal language and concepts has been connected with lower scores on verbal ability and verbal intelligence tests. *What We Know*, *supra* note 105, at 151.

<sup>116</sup> See, e.g., Cole, *supra* note 89, at 338-40 (2001); Armstrong, *supra* note 19, at 147; Cowden & McKee, *supra* note 113, at 642-43; Chad A. Brinkley et al., *Coherence in the Narratives of Psychopathic and Nonpsychopathic Criminal Offenders*, 27 PERSONALITY & INDIVIDUAL DIFFERENCES 519 (1998). Needless to say, narrative deficit would also seriously impair a defendant's ability to testify effectively, or even at all.

<sup>117</sup> *United States v. Mosquera*, 816 F.Supp. 168, 173 (E.D.N.Y. 1993).

Of all of the legal implications for the defendant with a language disorder, the effects on the ability to adequately communicate and assist with counsel are probably the most destructive. Unless an attorney is able to meaningfully adapt to her client's special needs and accommodate the language and communication impairment,<sup>118</sup> the deficit can poison all aspects of the defendant's experience with the legal system, from comprehension in and out of court, to case development, to disposition, and can leave the defendant feeling that he did not understand and he was not understood.<sup>119</sup> Too often, the defendant will be right.

### 3. Waiver of rights: The example of the guilty plea

The most important decisions a juvenile or adult defendant will make will be whether to assert or waive rights, be it the right to remain silent, the right to go to trial or to plead guilty, to testify, or, in juvenile cases, to contest a waiver or transfer to adult court. Although most of these decisions can appear rudimentary to seasoned legal professionals, they depend on the ability to navigate through language and concepts that are both sophisticated and abstract.

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<sup>118</sup> This is analogous to the lawyer with the non-English speaking client. Not only must the attorney use an interpreter, but he/she must make adjustments in interviewing style and content. Otherwise communication may fail. Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV.C.R.-C.L. REV. 543, 557-58 (2004).

<sup>119</sup> A substantial body of research has shown that defendants attach great importance to the quality of communication with counsel when they assess the fairness of the legal system. See, e.g., Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCHOL. REV. 97, 99-102 (2002). Another significant finding from a different line of research is that defendants are more likely to comply with rules and obey the law if they feel they were treated with respect by agents of the criminal justice system. James Travis, Senior Fellow at The Urban Institute, Margaret Mead Address at the National Conference of the International Community: In Thinking About "What Works," What Works Best? (Nov. 10, 2003) (transcript available at [http://www.urban.org/UploadedPDF/410906\\_travis\\_speech\\_transcript.pdf](http://www.urban.org/UploadedPDF/410906_travis_speech_transcript.pdf)) (citing TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)).

Even the very word “right” requires that a defendant “conceptualize a right as a legal entitlement, providing protection that authorities in the justice system cannot arbitrarily set aside.”<sup>120</sup>

In order for waivers to comport with due process, defendants must be informed about the nature of the rights they are contemplating waiving and the consequences of their decisions.<sup>121</sup> For defendants who lack the ability to comprehend the language and its explicit and implicit meanings, however, the process of being informed can be an empty, and often confusing, ritual. Nowhere is that clearer, or more common, than in guilty pleas.

Before a juvenile or criminal court can accept a plea of guilty or no contest, the court must first find that the plea is being entered knowingly, intelligently and voluntarily.<sup>122</sup> To meet that standard (known as the *Boykin* test), the court must find that the defendant understands the array of constitutional rights he is giving up by pleading guilty, the consequences of giving up those rights, and the nature of the charge(s) to which he is pleading.<sup>123</sup> Functionally, this means that defendants are expected to understand their right to a trial; how a trial operates; what is being lost and gained by pleading guilty; the elements of the offense or offenses and how their conduct meets these elements; the potential defenses that might exist; the role of the judge in the plea process; the direct consequences of the conviction (the potential sentence); and the collateral consequences of the conviction.<sup>124</sup>

The “knowing, intelligent and voluntary” standard is ordinarily met if there is some sort of record that the defendant

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<sup>120</sup> *What We Know*, *supra* note 105, at 148. See also THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 109-30 (1981).

<sup>121</sup> *Boykin v. Alabama* 395 U.S. 238, 242 (1969).

<sup>122</sup> *Boykin*, 395 U.S. at 242-43.

<sup>123</sup> *Id.* at 243; *Henderson v. Morgan*, 426 U.S. 637, 645 (1976).

<sup>124</sup> See *Padilla v. Kentucky*. 130 S.Ct. 1473, 1478 (2010) (immigration consequences are part of the penalty of a conviction and must be understood by defendant who enters a plea).

was *told* the requisite information.<sup>125</sup> Courts have taken the position that a defendant may be told this information by an in-court colloquy, a written plea questionnaire, or by counsel.<sup>126</sup> Unfortunately, this practice has allowed courts to conflate “being told” and “comprehension,” and to overlook the real constitutional question -- did the defendant actually understand?<sup>127</sup>

The lack of genuine communication reveals itself when we take time to find out what defendants actually understand of the guilty plea process. A recent study in Massachusetts tested adolescents who pled guilty in juvenile court in order to determine how well the juveniles understood the rights they had just waived and the consequences of their pleas.<sup>128</sup> Researchers were startled to discover that, when it came to key legal words and concepts, seventeen-year-olds were likely to be confused and mistaken, and only slightly more likely to understand than thirteen-year-olds – *even after the words and concepts had been explained, and even among those who had previous juvenile court experience.*<sup>129</sup>

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<sup>125</sup> See Henderson, 426 U.S. at 647; Bradshaw v. Stumpf 545 U.S. 175, 183 (2005).

<sup>126</sup> See, e.g., Bradshaw, 545 U.S. 175; Hill v. Lockhart, 474 U.S. 52 (1985); Padilla 130 S.Ct. at 1486.

<sup>127</sup> See, e.g., Hill, 474 U.S. 52 (Based on defendant’s signed “plea statement,” trial court found plea was knowing, intelligent, and voluntary. This was deemed sufficient to allow a prima facie showing of understanding and to shift the burden require defendant to prove prejudice – i.e. a different outcome – in a post-conviction hearing).

<sup>128</sup> Barbara Kaban & Judith Quinlan, *Rethinking a “Knowing, Intelligent, and Voluntary Waiver” in Massachusetts Juvenile Court*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 35 (2004).

<sup>129</sup> *Id.* at 45-49. This finding is consistent with other studies. See Grisso, *What we know*, *supra* note 105, at 151. The fact that many of the words and concepts are too difficult for 17 year olds in juvenile court takes on significance for criminal court because young adult defendants (over 17) do not seem to have any greater comprehension of the legal system than older adolescents. In other words, additional years do not seem to impart additional knowledge and understanding for many individuals. For a discussion of the relationship between age and competency, see *Juveniles’ Competence to Stand Trial*, *supra* note 110.

A study of the official guilty plea form (known as “Waiver of Rights”) used in Wisconsin criminal courts similarly concluded that a standard method of “informing” defendants does not work. Professor Jean Andrews of Lamar University assessed the reading level of the form at grade 9.7, well above the average reading level found in correctional institutions (or in the general public for that matter) and observed that the form was laden with high-level vocabulary and concepts, as well as complex syntactical and structural features. Dr. Andrews further noted that, in order to understand what the form purported to explain, a defendant would also need prior knowledge and understanding of the constitutional and procedural concepts that are mentioned but not defined or explained in the form.<sup>130</sup>

None of this is meant to suggest that juvenile and adult defendants with deficient language skills are inherently incompetent to plead guilty. But subjecting a defendant with impaired language ability to the standard guilty plea process that features a scripted colloquy, an official plea form, and a routine pre-plea meeting with counsel<sup>131</sup> is in no way evidence

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<sup>130</sup> Jean Andrews et al., *The Bill of Rights, Due Process and the Deaf Suspect/Defendant*, 2007 J. INTERPRETATION 1, 20-22. Plea forms are different in every state and have a range of readability levels. Washington’s plea form (CrR.4.2(g)) has a reading level of grade 11.5 using Flesch-Kincaid Grade Level and a low readability score (i.e. difficult to read) on the Flesch Reading Ease. *available at* <http://www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=21>, Minnesota’s form (CRM101 State ENG Rev 10/06-R) by comparison has a Flesch-Kincaid Grade Level of reading level of 5.4 and a Flesch Reading Ease of 73.4, *available at* [www.courts.state.mn.us/forms](http://www.courts.state.mn.us/forms). (Both forms were analyzed using Flesch Readability feature on Microsoft Word 2004 for Mac) Reading level is not the only question for comprehensibility of course. A defendant would also need to comprehend the concepts underlying the words. This requires background knowledge, especially where terms are not explained, and ability to process the information. Andrews et al, *supra* at 20-22

<sup>131</sup> During the Massachusetts study cited above, researchers observed that “overburdened defense attorneys and prosecutors negotiate a plea bargain on the day of a required court appearance. The defense attorney then finds the child in the crowded hallways of the juvenile court and quickly ‘explains’ the ‘deal’ and the plea process to the child and parent.” Kaban & Quinlain, *supra* note 128, at 38. More than a few commentators have

that the plea was in fact knowing, intelligent and voluntary. It is the due process equivalent of finding that a Spanish-speaking defendant understood his rights because they were read and explained to him in English.<sup>132</sup>

#### 4. The reliability and admissibility of confessions

The communication, cognitive, and interpersonal deficits brought about by language disorder may radically affect an individual's dealings not only with counsel and courts, but also with law enforcement prior to court involvement. Depending on the nature and severity of the impairment, an individual's language deficit may undermine the validity of a *Miranda* waiver or the voluntariness of a confession, and may even place an individual at increased risk for making a false confession.

Waiver of the Fifth Amendment right against self-incrimination during police interrogation, commonly known as *Miranda* rights, is like the waiver of any other constitutional right, in that the suspect must first be properly informed of the rights and the waiver must be knowing, intelligent and voluntary. This means "the waiver [of *Miranda*] must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."<sup>133</sup> To meet this standard, defendants must have the ability to process the language of the warnings, knowledge of the vocabulary and concepts, and the ability to generalize or apply the information to their own situations.<sup>134</sup>

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remarked that many lawyers are not particularly skilled at communicating legal concepts to non-impaired clients, let alone those with deficits. *See, e.g., What We Know, supra* note 105, at 150; ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 99 (2007).

<sup>132</sup> *See, e.g., Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1494-95 (9<sup>th</sup> Cir. 1991), *rev'd on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

<sup>133</sup> *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

<sup>134</sup> For a discussion of the skills that are necessary to understand *Miranda* warnings, see Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980); Richard

When we discuss the comprehensibility of *Miranda* warnings, it is important to bear in mind that there is no such thing as a standard version. The wording and structure of *Miranda* warnings vary among jurisdictions.<sup>135</sup> Nevertheless, researchers have been able to arrive at a number of general conclusions about the comprehensibility of *Miranda*, all of which demonstrate that the warnings are not accessible to a substantial portion of the individuals we purport to “inform.”

First, suspects need a reading level of anywhere from sixth to tenth grade, or higher, in order to understand the standard language of the warnings.<sup>136</sup> This is above the reading and comprehension level of a majority of defendants, particularly indigent defendants.<sup>137</sup> Second, the sentences in *Miranda* warnings tend to be long and syntactically complex, both of which “compromise understanding.”<sup>138</sup> Third, abstract concepts such as “appointment of counsel and the use of statements against you” are not explained and require sophisticated background knowledge.<sup>139</sup> Finally, the standard method of delivery (read aloud, all at once) poses additional challenges, because it exceeds the ability of even those with

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Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 LAW & HUM. BEHAV. 401 (2007).

<sup>135</sup> Richard Rogers, et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW HUM BEHAV 124 (2008) [hereinafter Rogers et al. (2008)]; Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177 (2007) [hereinafter Rogers et al. (2007)]; Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL'Y & L. 63, 70-75 (2008) (The reading level of juvenile *Miranda* warnings is Grade 2.2-postcollege, and are more variable than general *Miranda* warnings).

<sup>136</sup> Rogers et al. *Development and Initial Validation of the Miranda Vocabulary*, 33 LAW & HUM. BEHAV. 381, 386-388 (2009) Jeffrey L. Helms, *Analysis of Miranda Reading Levels Across Jurisdictions: Implications for Evaluating Waiver Competency*, 3 J. FORENSIC PSYCHOL. PRAC. 25, 29-34 (2003); Rogers et al. (2008), *supra* note 135, at 133.

<sup>137</sup> *Id.* at 132.

<sup>138</sup> *Id.* at 134.

<sup>139</sup> *Id.* at 130, Rogers et al. (2007) *supra* note 135, at 189.

adequate language skills to process and recall words and concepts.<sup>140</sup>

Language disorder, like age and intelligence, will not be a *per se* impediment to a valid waiver, even in the case of a severe language deficit.<sup>141</sup> However, the presence of language impairment should play a lead role in the “totality of the circumstances surrounding the interrogation”<sup>142</sup> test that asks whether the defendant knew and understood his rights under *Miranda*, appreciated the consequences of giving up those rights, and voluntarily relinquished those rights.

Language deficit also raises questions about the voluntariness of a confession. Voluntariness is a separate inquiry from the knowing, intelligent and voluntary waiver of *Miranda* rights.<sup>143</sup> It asks whether the police employed coercive tactics (which may include psychologically coercive tactics) sufficient to overcome the will of the suspect, given her particular vulnerabilities and the conditions of the interrogation.<sup>144</sup>

Research in the psychology of confessions has found that conditions that interfere with cognition and mental processing place an individual at heightened susceptibility to techniques used by police during interrogation -- techniques specifically designed to obtain a confession.<sup>145</sup> In his seminal study of confessions, psychologist Gisli Gudjonsson observed that illiteracy, below average intellectual functioning, learning disabilities, and “language problems” were factors that tended to make an individual “vulnerable” in an interrogation.<sup>146</sup> Individuals who are vulnerable or at risk are not only more susceptible to suggestion and more likely to confess, they are more likely to confess to crimes they did not commit.<sup>147</sup> As

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<sup>140</sup> *Id.* at 185.

<sup>141</sup> See *Fare v. Michael C.*, 442 U.S. 707 (1979).

<sup>142</sup> See, e.g., *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

<sup>143</sup> *Smith v. Duckworth*, 856 F.2d 909, 911 (7<sup>th</sup> Cir. 1988).

<sup>144</sup> *Colorado v. Connelly*, 479 U.S. 157, 166 (1987).

<sup>145</sup> See GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS*, at 56-74, 381-85 (2003).

<sup>146</sup> *Id.* at 68.

<sup>147</sup> *Id.* at 66.

with *Miranda*, language deficit will not render a confession *per se* involuntary. Courts apply a totality of the circumstances test that takes into account both the conduct of the police and the characteristics of the suspect, including intellectual functioning, in assessing whether police conduct was sufficient to overcome the will of the suspect.<sup>148</sup> However, as with *Miranda*, language impairment is a factor that demands consideration.

*B. Language impairment and the question of compliance*

From the moment charges are filed, compliance is an ever-present issue for all juvenile and adult defendants. By virtue of their conditional liberty and status as persons charged with or convicted of a crime, defendants are required to comply with rules imposed by the governing authority; i.e. the court, the probation department, bail monitoring, or a supervising social worker.<sup>149</sup> Non-compliance with rules can be punished by loss of property or, more commonly for juvenile and criminal defendants, by incarceration, even if the offending act or omission is non-criminal. Moreover, lack of compliance is often interpreted as a failure of will, or a moral shortcoming, and readily becomes an aggravating factor for sentencing or disposition.<sup>150</sup>

The due process foundation for sanctioning non-compliance is notice or “fair warning” - i.e. actual

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<sup>148</sup> *Fare v. Michael C.*, 442 U.S. 707, 707 (1979).

<sup>149</sup> Prison rules are discussed separately in Part D.

<sup>150</sup> *See, e.g.*, *People v. Erickson*, No. D053454, 2009 WL 3777581, at \*8 (Cal. Ct. App. Nov. 12, 2009) (citing CAL. RULES OF CT., Rule 4.414) (“[T]he trial court’s decision to grant or deny probation is to be guided by criteria concerning the offense and the offender, such as . . . the defendant’s remorse and willingness to comply with probation.”). For a Wisconsin example of how non-compliance with a court order can be punished, see WIS. STAT. § 946.49 (2009) (Wisconsin’s bail jumping statute, which states that “whoever, having been released from custody . . . , intentionally fails to comply with the terms of his or her bond” can be charged with a crime). The Wisconsin Court of Appeals has interpreted this statute to allow a person to be charged with *both* bail jumping *and* any underlying offense if the bail jumping charge is based on a new law violation. *See State v. Harris*, 528 N.W.2d 7 (Wis. Ct. App. 1994).

communication of the rules, especially the non-criminal rules or conditions, to the subject.<sup>151</sup> This means that when an individual cannot speak English, the technical, non-criminal conditions of bail or probation must be translated into a language that the individual can understand.<sup>152</sup> For English speakers, the conditions should be in language that can be readily understood, at least by “men of common intelligence.”<sup>153</sup> For example, a condition that a parolee not “frequent taverns” was held to be too vague for the individual defendant to understand, especially in contrast to the intent of the probation agent, which was that the parolee not “enter” taverns.<sup>154</sup>

In theory then, all defendants on bail or all individuals on supervision should be able to reasonably understand the conditions, rules, or orders before they are revoked or otherwise sanctioned for violations.<sup>155</sup> Once again, however, theory and reality do not match, especially when it comes to individuals with impaired language skills. The notice or warning provided in the lists of rules imposed by courts or administrative agencies, including conditions of bail and rules of supervision, tend to suffer from the same linguistic obtuseness that afflicts waiver of rights forms, rendering them inaccessible to the class of people who lack sufficient linguistic skills.

Rules of probation and parole supervision are particularly problematic. Probation and parole departments make extensive use of formal written rules or conditions, generally in pre-printed official forms. These rules tend to be long, dense, and verbose, and opt for over-inclusion rather

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<sup>151</sup> *United States v. Grant*, 816 F.2d 440, 442 (9<sup>th</sup> Cir. 1987) (quoting *United States v. Dane*, 570 F.2d 840, 843 (9<sup>th</sup> Cir. 1977)). *See also* *Bouie v. City of Columbia* 378 U.S. 347 (1964); *Koeppen v. Smith*, No. 02-C-510, 2006 WL 2519201, at \*3-\*5 (E.D. Wis. Aug. 28, 2006).

<sup>152</sup> *Guerrero-Guerrero v. Clark*, 687 F. Supp. 1022, 1027 (E.D. Va. 1988).

<sup>153</sup> *Panko v. McCauley*, 473 F. Supp. 325, 326 (E.D. Wis. 1979) (citing *Connally v. General Construction Co.*, 269 U.S. 385 (1926)).

<sup>154</sup> *Id.* at 327 (The “not frequent” condition was found unconstitutionally vague as applied.).

<sup>155</sup> *See, e.g., Koeppen*, 2006 WL 2519201, at \*3; *People v. Lopez*, 78 Cal. Rptr. 2d 66 (Cal. Ct. App. 1998).

than under-inclusion.<sup>156</sup> In Wisconsin, for example, the standard issue Rules of Community Supervision (for anyone convicted in adult court) is a pre-printed, single spaced, page-and-a-half list of nineteen rules such as: “*You shall avoid all conduct which is in violation of federal or state statute, municipal or county ordinances, tribal law or which is not in the best interest of the public welfare or your rehabilitation.*”<sup>157</sup> In Texas, all probationers in one county are subject to over two dozen standard rules (posted on-line at the court’s website) that are both all-encompassing and idiosyncratically worded. These include: 2) *Avoid injurious or vicious habits of any nature whatsoever, including but not limited to the use of alcohol, narcotics, controlled substances, or harmful drugs, the sniffing of glue or paint or any chemical compound which might cause intoxication;* 3) *Avoid persons of disreputable and harmful character. Do not associate with persons of questionable character, persons with criminal records, or past or present inmates of penal institutions.*<sup>158</sup>

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<sup>156</sup> The practice of treating almost all offenders on supervision as high risk and subjecting them to a long list of regulations, rules, and conditions, regardless of the circumstances of the individual case has been criticized by experts studying the high rate of revocations for technical violations of supervision. See THE PEW CENTER ON THE STATES, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION (November 2007) [hereinafter WHEN OFFENDERS BREAK THE RULES], available at [www.pewpublicsafety.org](http://www.pewpublicsafety.org) (Follow link in left sidebar to “Research and Reports,” then click on hyperlink to “When Offenders Break the Rules.”).

<sup>157</sup> Wisconsin Department of Corrections, Rules of Community Supervision, Form DOC-10, (revised Dec. 2006) (on file with co-author Michele LaVigne). “This form [DOC-10] establishes rules for offenders, making them aware of their court-ordered conditions, restrictions and responsibilities. In addition, the agent or the court may impose additional special rules which are written on the form.” Wisconsin Department of Corrections, Policies and Procedures, §§ 16.10.01-16.10.02, available at [www.wi-doc.com/04-12-2004-chapter%2016%20forms.pdf](http://www.wi-doc.com/04-12-2004-chapter%2016%20forms.pdf) (on file with co-author Michele LaVigne). A simple readability test of DOC-10 places the reading level at Grade 12. The form has a reading ease score of 40 out of 100, well below the desired reading ease of at least 60 or 70 out of 100 (Using Flesch Readability feature on Microsoft Word 2004 for Mac).

<sup>158</sup> Standard Conditions of Probation for County Court at Law Number 2, Taylor County Texas, <http://www.taylorcountytexas.org/ccl2prob.html>.

Extensive laundry lists of prescribed and proscribed conduct are utterly inappropriate for language-impaired individuals. Once again, it can be the equivalent of giving a defendant whose primary language is Spanish a long list of conditions of supervision in English. Admittedly, it is the rare case in which a judge, clerk of court or probation agent simply hands an individual a document with nothing more; but language processing and comprehension issues are not resolved because some, or all, of the document is read aloud, or “gone over,” or because the conditions are first provided orally.<sup>159</sup> A long recitation of rules is inaccessible for the person with impaired language skills, regardless of whether that recitation is oral or in writing.

Beyond fundamental notions of fairness and due process are questions of effectiveness. The point of rules and conditions, especially of supervision, is to control behavior and encourage rehabilitation. A long list of densely worded rules ends up obfuscating the core requirements that are essential to the individual’s ultimate success.<sup>160</sup> An impaired individual receiving an all-inclusive list of rules will miss the critical components buried within the verbiage, or may simply

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This court imposes 25 standard conditions of probation *in addition to* any imposed by the county department of corrections.

<sup>159</sup> Listening to “literate-based prose” such as legal documents or lists of conditions and rules tends to yield a reduced level of comprehension even among those with strong reading skills. Donald L. Rubin et. al, *Reading and Listening to Oral-Based Versus Literate-Based Discourse*, 49 COMM. EDUC. 121, 130 (April 2000). A person reading written conditions aloud might sound something like the Charlie Brown teacher to a person with a language or communication disorder. To hear Charlie Brown’s teacher, see YouTube – Charlie Brown Teacher, <http://www.youtube.com/watch?v=eUyLwXhqlWU> (last visited Jan. 29, 2010).

<sup>160</sup> WHEN OFFENDERS BREAK THE RULES, *supra* note 156, at 3. For example, Wisconsin has been criticized for the exorbitant percentage of probationers and parolees classified as “high risk,” a status that allows the agent to impose even more rules. *See also* JUSTICE CENTER: THE COUNCIL OF STATE GOVERNMENTS, JUSTICE REINVESTMENT IN WISCONSIN: ANALYSES AND POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS AND INCREASE PUBLIC SAFETY 4 (May 2009), *available at* <http://www.nicic.org/Library/023753> (Click on link under “View/Download” on in the column on the right).

feel overwhelmed. Too often, when we present an impaired defendant with a long list of rules, we are setting him up for failure and the harsh consequences that follow.<sup>161</sup>

Recent studies of correctional policies around the country have confirmed that a high percentage of prison admissions is based on parole or probation revocations, of which a substantial portion is the result of rule or technical violations as opposed to the commission of a new crime.<sup>162</sup> These studies, combined with what we know about the prevalence of language dysfunction among populations likely to be in the justice system, raise a serious public safety question. We have to wonder just how many of those revoked and incarcerated people could have successfully functioned in the community had the rules been relevant and linguistically accessible, and the supervision tailored to their individual circumstances.<sup>163</sup>

*C. Language impairment becomes a legal liability: the danger of subjective judgments of behavior, character, credibility, and remorse*

*Failure to realize the intricacies of the relationships between an event and the matrix in which it takes place, between an organism and its environment, either confronts the*

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<sup>161</sup> Probation and Parole violations are dealt with very harshly in some states. WHEN OFFENDERS BREAK THE RULES, *supra* note 156, at 3. Termination from treatment court for failure to comply with conditions is often similarly punished. A recent study by the National Association of Criminal Defense Lawyers on noted that many courts routinely imposed the maximum or near-maximum sentence on defendants who had been unable to meet all of the conditions of treatment court. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COST OF TREATMENT AND CASE FOR REFORM 29 (2009).

<sup>162</sup> See, e.g., WHEN OFFENDERS BREAK THE RULES, *supra* note 156; Jeffrey Rosen, *Prisoners of Parole*, N. Y. TIMES MAG., Jan. 8, 2010, available at <http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html>.

<sup>163</sup> Travis, *supra* note 119, ("what if we aligned our services – including supervision and support services – with an ambitious goal in mind – to reduce, to the extent possible, the level of re-arrests[.]").

*observer with something “mysterious” or induces him to attribute to his object of study certain properties the object may not possess.*<sup>164</sup>

When making decisions about whether to transfer a juvenile to adult court, revoke supervision, impose a particular disposition or sentence, or even convict or acquit, a judge or a jury makes a variety of subjective judgments about the human being whose fate is on the line. Unfortunately for the communicatively-impaired individual, many of these judgments are rooted in misconceptions about human capabilities and motivations, and in an overestimation of our own ability to accurately assess them.<sup>165</sup> These misconceptions can easily turn the impaired individual’s disability into an even greater liability.

### 1. Character, conduct, and rehabilitation

In fashioning a sentence or deciding a juvenile transfer or waiver, a trial judge will ordinarily look beyond the offense itself to the amorphous group of factors that can generally be classified as defendant’s “character.”<sup>166</sup> Character is, to a large extent, entangled with “rehabilitative potential,”<sup>167</sup> but it cuts a wide swath that encompasses attitude,<sup>168</sup> personality and social traits,<sup>169</sup> prior conduct,<sup>170</sup> and “personal characteristics.”<sup>171</sup>

This entire concept of character is fraught with danger for the communicatively-impaired juvenile or adult

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<sup>164</sup> WATZLAWICK ET AL., *supra* note 56, at 21.

<sup>165</sup> See e.g. *United States v. Grayson*, 438 U.S. 41, 51 (1978).

<sup>166</sup> See *Grayson*, *id See also*, *Commonwealth v. Fowler*, 893 A.2d 758, 766-767 (Pa. Super. Ct. 2006); *People v. Eurioste*, 12 P. 3d 847 (Colo. App 2000).

<sup>167</sup> See *Alabama v. Smith*, 490 U.S. 794, 801 (1989).

<sup>168</sup> *People v. Leckrone*, 481 N.E.2d 343, 347 (Ill. App. Ct. 1985).

<sup>169</sup> *State v. Harris*, 250 N.W.2d 7,11 (Wis. 1977); *State v. Gallion*, 678 N.W.2d 197, 208 (Wis. 2004).

<sup>170</sup> *Alabama v. Smith*, 490 U.S. at 801 (1989).

<sup>171</sup> *Commonwealth v. Fowler*, 893 A.2d at 766.

defendant.<sup>172</sup> Subjective assessments of character can be “highly personal to the decision maker, dependent on personal judgment, perceptions, and disposition, and often lacking in articulated logic.”<sup>173</sup> In fact, many of the character judgments that judges make boil down to little more than a rating of a defendant’s politeness, a quality that Steven Pinker has defined as “the countless adjustments that speakers make to avoid the equally countless ways that their listeners might be put off.”<sup>174</sup>

It is easy to see how the verbal and pragmatic aspects of language deficit can negatively influence a character assessment. A defendant with a receptive or expressive language impairment may lack the ability to sprinkle his utterances with the verbal and non-verbal niceties that can, in Pinker’s words, “lubricate the social interactions.”<sup>175</sup> That defendant may not even know what those niceties are, let alone when or how they ought to be put to use. This in turn finds its way into the decision-maker’s reasoning under many guises. The breakdown may be seemingly trivial, as when a judge takes umbrage to the defendant who does not make eye contact, speaks out of turn, answers a question with “yea” instead of “yes,” or otherwise fails to read the social cues of the courtroom.<sup>176</sup> Or, it may be more damaging, as when a

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<sup>172</sup> An argument can be made that courts ought to never be in the business of making “character” assessments. More and more, psychologists are concluding that character as a constant or fixed trait does not exist. *See*, e.g., KWAME ANTHONY APPIAH, EXPERIMENTS IN ETHICS 33-72 (2008). In addition, research suggests that humans are actually not very good at character assessments and tend to fall prey to “wrongful attributions.” *Id.* at 38-44.

<sup>173</sup> *Kadia v. Gonzales*, 501 F.3d 817, 819 (7<sup>th</sup> Cir. 2007).

<sup>174</sup> PINKER, *supra* note 58, at 380.

<sup>175</sup> *Id.* (Pinker uses the term “Politeness Theory.”).

<sup>176</sup> *See*, e.g., *Warr v. State*, 877 N.E.2d 817, 825 (Ind. Ct. App. 2007) (The trial judge was quoted saying “I’ve been doing this for over ten years and I’ve never seen anybody as disrespectful to the Court as what you have . . .) (Defendant “disrespectful to the system.” *Id.*); *United States v. White*, 582 F.3d 787, 807 (7<sup>th</sup> Cir. 2009) (Defendant “rude and impolite” and “not very nice.” The Court of Appeals found that these comments did not indicate bias when made by the trial judge about defendant who had submitted his own briefs. *Id.* at 807).

defendant with a severe deficit tries to express himself during allocution with his limited palette of language and comes across as abrasive or even aggressive.<sup>177</sup> Or, as when a defendant turns in a poor performance on the witness stand, and the judge makes a finding of poor “moral character”<sup>178</sup> that warrants an increased sentence.<sup>179</sup>

Even more “objectively” supportable assessments of conduct have a strong subjective element that can redound to the disadvantage of the communicatively-impaired defendant. How a judge looks at acting out in school or at home, failure in treatment, inability to hold a job, or impulsive behavior will be driven by a judge’s awareness -- or lack of awareness -- of the complexities of behavior and communication.<sup>180</sup> Absent the realization that self-regulation is not simply the mark of the good person, but is actually the product of skill and knowledge, a judge can too easily label a linguistically-disabled individual “hopeless,” “beyond redemption,” or “at the end of the line at such a young age,”<sup>181</sup> when in fact he

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<sup>177</sup> Example provided by Herschella Conyers. Interview with Herschella Conyers, University of Chicago Law School, Mandel Legal Clinic, in Macon, Ga. (June 23, 2009). Allocution has been called “the one place in the criminal process where every convicted defendant has the chance to speak.” Kimberly A. Thomas, *Beyond Mitigation: Toward a Theory of Allocution*, 75 *FORDHAM L. REV.* 2641, 2643 (2007). Prof. Thomas encourages the use of defendant allocution to humanize the defendant. *Id.* at 2666. However, that is only possible if the defendant possesses the verbal skills to speak effectively in a courtroom.

<sup>178</sup> *Alabama v. Smith*, 490 U.S. 794, 801 (1989).

<sup>179</sup> *Id.*

<sup>180</sup> “[J]udgments about whether a particular adolescent is likely to harm someone in the community..., [or] to benefit from certain interventions...are often made rather haphazardly.” Edward P. Mulvey & Anne-Marie R. Iselin, *Improving Professional Judgments of Risk and Amenability in Juvenile Justice*, 18 *FUTURE CHILD*. 35 (FALL 2008), available at [www.futureofchildren.org/futureofchildren/publications/journals](http://www.futureofchildren.org/futureofchildren/publications/journals) (click on “Juvenile Justice – Volume 18 Number 2 Fall 2008, then click on “View HTML” or “Download PDF” under “Improving Professional Judgments”) (last visited Feb.22, 2010).

<sup>181</sup> Co-author Michele LaVigne has heard all of these comments directed at various clients by judges.

may be an excellent candidate for rehabilitation and even successful functioning in the community if given the tools.

We recognize, of course, that some people are deliberately unpleasant, disruptive, non-compliant, or difficult for reasons having nothing to do with language disorder. The problem arises when attributions of this kind are made based on the conduct or “attitude” alone without any differentiation of individuals who have underlying capacity difficulties that may have contributed to the undesirable behavior or demeanor.

## 2. Credibility

Credibility is a judgment that hinges entirely on the communication skills of the individual who wishes to be believed. This involves overtly verbal skills, i.e. the ability to narrate or describe in a manner that is internally and externally consistent and resonates with the audience. It also implicates those non-verbal signals that fall into the category known as “demeanor.” Demeanor includes “the witnesses’ dress, attitude, behavior, manner, tone of voice, grimaces, gestures, and appearance,”<sup>182</sup> all of which are part and parcel of pragmatics.

For centuries, judges and juries have been given virtual *carte blanche* when it comes to credibility determinations. Reviewing courts give “greater deference”<sup>183</sup> to trial level findings of credibility and will reverse only on a finding that is even more stringent than the already deferential “clearly erroneous” standard.<sup>184</sup> But, credibility determinations, however deeply rooted, are also deeply flawed, as has long been recognized by social scientists.<sup>185</sup> Those flaws are

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<sup>182</sup> James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 907 (2000).

<sup>183</sup> *Anderson v. City of Bessemer City*, North Carolina, 470 U.S. 564, 575 (1985).

<sup>184</sup> *Id.*

<sup>185</sup> See, e.g., Amy-May Leach et al., *The Reliability of Lie Detection Performance*, 33 LAW & HUM. BEHAV. 96 (2009); See also. Richard A. Leo et al., *Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision Making in*

magnified when the individual whose credibility is on the line lacks essential communication skills.

Individuals with language deficit often lack the ability to deliver an effective narrative. Their narratives will be barebones, lacking the details, organizational structure, or cause-and-effect analysis that can make a story ring true.<sup>186</sup> This can have implications not only in court but out of court as well, such as when a presentence investigation report is being prepared. As a result of their constricted vocabulary and language usage ability, exacerbated by their discomfort when speaking in public, people with substandard language skills will also be easy targets for tacit or overt games of “gotcha,” whether during testimony,<sup>187</sup> interrogation, presentence interviews, or allocution.<sup>188</sup>

Demeanor as the basis of a credibility finding is no less problematic. Nervousness, sweaty palms, hesitation, grimaces, and lack of eye contact are all equated with

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PSYCHOLOGICAL EXPERTISE IN COURT: PSYCHOLOGY IN THE COURTROOM, VOLUME II. 25 (Daniel A. Krauss and Joel D. Lieberman eds. 2009). (Police “misclassification error” that a suspect is lying is a frequent contributor to false confessions. *Id* at 32).

<sup>186</sup> See, e.g., Janet A. Norris & Robert H. Bruning, *Cohesion in the Narratives of Good and Poor Readers*, 53 J. SPEECH & HEARING DISORDERS 416 (1988); Anne McKeough et al., *Conceptual Change in Narrative Knowledge: Psychological Understandings of Low-Literacy and Literate Adults*, 5 J. NARRATIVE & LIFE HIST. 21 (1995); Chad A. Brinkley et al., *Coherence in the narratives of psychopathic and nonpsychopathic criminal offenders*, 27 PERSONALITY & INDIVIDUAL DIFFERENCES 519, 525-29 (1999); WILLIAM O’BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM 61-91 (1982).

<sup>187</sup> *Kadia v. Gonzales* 501 F.3d 817, 822-824 (7<sup>th</sup> Cir. 2007) (Court of Appeals criticizes trial court’s hair-splitting analysis of testimony). In Eric Hainstock’s case, the prosecutor “spent more than an hour [in her closing argument] pointing out discrepancies” between the 16 year old special education student’s testimony and his responses during interrogation. Eric Hainstock Trial Blog, <http://www.channel3000.com/news/13757924/detail.html> (last visited Jan. 31, 2010).

<sup>188</sup> Some commentators have suggested relying solely on “the exact words used by a witness” to determine credibility. Timony, *supra* note 182, at 905. This would severely disadvantage individuals who lack the words to make a convincing case.

prevarication. These conditions and behaviors are also what we would expect from a defendant who struggles with language even under the best of circumstances.<sup>189</sup>

A few courts, most notably the Seventh Circuit Court of Appeals, have observed that credibility assessments can be too personal and culturally based, and too often inaccurate, to deserve the deference afforded them.<sup>190</sup> What makes a person appear credible in one culture or from one perspective may (wrongly) make him appear to be lying in the context of the courtroom. The same fate awaits the linguistically-impaired defendant who cannot conform his narratives and demeanor to the rigid expectations of the courtroom.

### 3. *Remorse*

Remorse, a concept that dates back at least to the Old Testament, is a curious legal factor, insofar as it is actually an emotional state or a feeling.<sup>191</sup> Of course, what judges and juries gauge is the quality and credibility of a defendant's *expression* of remorse, on the theory that the expression reveals feeling, and that feeling in turn is indicative of rehabilitative potential.<sup>192</sup> An adequate expression of remorse is often rewarded,<sup>193</sup> while an inadequate expression of

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<sup>189</sup> *Id.* at 941.

<sup>190</sup> Kadia, 501 F.3d at 819-21, citing Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L. J. 367, 374 (2003)). See also Timony, *supra* note 182, at 930-35; Nix v. Whiteside, 475 U.S. 157, 190-91 (1986) (Stevens, J., concurring) (Even attorneys may not be good judges of whether their own clients are telling the truth).

<sup>191</sup> Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L. J. 131, 133-34 (2006), Martha Grace Duncan, "So Young and So Untender": *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1472 (2002).

<sup>192</sup> Ward, *supra* note 191, at 137-40. In a Texas death penalty case, a psychiatrist testified that one of the factors he takes into account in assessing a capital defendant's future dangerousness is "whether the defendant has expressed remorse." Espada v. State, No. AP-75,219, 2008 WL 4809235, at \*8 (Tex. Crim. App. Nov. 5, 2008) (Unpublished opinion).

<sup>193</sup> Remorse is widely treated as a mitigating factor. See, e.g., Pickens v. State, 767 N.E.2d 530 (Ind. 2002)

remorse may lead to harsher treatment.<sup>194</sup> In such a contest, language-impaired individuals are once again disadvantaged.

Successful expression of remorse requires substantial verbal skills. In a survey of “remorse” cases, Professor Bryan Ward observed that trial courts, which are afforded wide latitude in accepting or rejecting an expression of remorse,<sup>195</sup> “engage in an excessively strict examination of the words used by defendants to express their remorse.”<sup>196</sup> Courts have distinguished remorse from sorrow, admission of wrongdoing, shame, and regret in statements by defendants,<sup>197</sup> without recognizing that for less fluent individuals, those are distinctions without a difference.<sup>198</sup>

An appropriate expression of remorse also requires an equally high level of pragmatic skills.<sup>199</sup> Not only must the words be correct, but the delivery, tone of voice, and facial

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<sup>194</sup> For a discussion of the problems the impact of subjective judgments of remorse at sentencing, see Ward, *supra* note 191. See also Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998).

<sup>195</sup> See, e.g., *Commonwealth v. Hanson*, 856 A.2d 1254, 1260 (Pa. Super. Ct. 2004).

<sup>196</sup> Ward, *supra* note 191, at 142-43.

<sup>197</sup> *Id.* at 140-45 (Ward has catalogued the hairsplitting distinctions drawn by trial courts in rejecting expressions of remorse.). See also *Jones v. State*, No. 02A03-0904-CR-176, 2009 WL 3754237 (Ind. Ct. App. Nov. 10, 2009) (“Despite Jones’ claims of remorse, he never actually expressed remorse towards Ellis, whom he choked and punched several times in her face. Instead, his comments at the sentencing hearing were self-serving.”). In November 2009, co-author Michele LaVigne heard a trial court judge berate defendants who say “I apologize to the Court” instead of “I apologize to the victim.”

<sup>198</sup> Ward, *supra* note 191, at 145.

<sup>199</sup> Eric Hainstock, described in note 50, provides a particularly painful example of how pragmatic deficits affect attempts to show remorse. A few weeks after he shot and killed his high school principal, Eric wrote a letter to the principal’s widow. It began, “It’s me Eric. Im sorry for what happened.” He went on to describe how bad he felt and asked for forgiveness. He signed his name and then wrote “PS: plese write back.” At the bottom he had drawn a heart with the words “I’m so sorry.” Lueders, *supra* note 50 (letter available at link at the end of the article “Text of an apology Hainstock wrote to the Klangs.”).

expression must match.<sup>200</sup> If any aspect of the defendant's demeanor falls short, the trial judge may disregard or disbelieve an attempt to show remorse.<sup>201</sup>

Assessments of a defendant's expression of remorse are premised on a belief that there is a universal standard for the proper expression of remorse, that all humans have the basic skill set to meet that standard, and that failure to meet the standard can be fairly interpreted as lack of -- or at least, insufficient -- remorse.<sup>202</sup> This creates a no-win minefield for defendants who simply cannot fulfill the requirements, verbally or pragmatically or both, and who pay a very real price. Professor Ward, who proposes an end to all considerations of remorse because of courts' inability to accurately judge an individual's sincerity in expressing it,<sup>203</sup> summed up the fundamental unfairness this way: "One

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<sup>200</sup> See, e.g., *People v. Jacobson*, 405 P.2d 555, 563-64 (Cal. 1965). *But cf.* *State v. Timmendaquas*, 737 A.2d 55 (N.J. 1999) (A police officer in the death penalty case that gave rise to "Megan's Law" testified that the defendant talked during interrogation, "but not in any tone of voice that would indicate remorse." The trial court sustained the objection and "told the jury to disregard the witness's conclusory statement about defendant's remorse." *Id.* at 703.).

<sup>201</sup> See, e.g., *Williams v. State*, 904 N.E.2d 732 (Ind. Ct. App. 2009) (unpublished table decision) (Trial court stated that defendant's "demeanor [was] 'difficult to read' during the sentencing, thus indicating that the trial court did not fully believe William's expression of remorse." *Id.* ¶ 3.).

<sup>202</sup> Remorse, like other credibility determinations, also has a cultural element that can be easily misinterpreted by factfinders. For example, an expert in the defense of Native Americans in federal court pointed out that within Navajo culture "verbalization of an event creates an immediacy that is more palatable than in Anglo. To tell what happens in Navajo culture is to relive it. As such there is a reticence to discuss traumatic or painful events. The short terse answers can be misinterpreted." Email from Jon Sands, Federal Public Defender of Arizona, to Michele LaVigne, Co-author (June 24, 2009, 21:52:58 EST) (on file with co-author Michele LaVigne); see generally Jon M. Sands & Caitlin E. Bales, *American Indian Culture and Federal Crimes*, in *CULTURAL ISSUES IN CRIMINAL DEFENSE* 523-53 (Linda Friedman Ramirez ed., 2d ed. 2007).

<sup>203</sup> Professor Ward was rightly concerned that defendants who lack verbal skills could not adequately express their true remorse, while the verbally skilled individual who lacks remorse could make a good showing in the courtroom. Ward, *supra* note 191, at 131-32.

wonders how an inarticulate criminal defendant could ever articulate his remorse in a manner that would be acceptable to this sentencing court.”<sup>204</sup>

*D. The human implications: language impairments within correctional institutions*

*What part do communication skills play in relation to other quantifiable factors which distinguish this population?*<sup>205</sup>

*[T]he high percentages of reading, writing, speech and hearing problems among prison inmates make it likely that specific language disabilities do exist to a high degree in this population.*<sup>206</sup>

1. The high rate of language impairments within correctional institutions

Perhaps the most glaring implication of language impairment for the legal system, and our entire society, is the substantial overrepresentation – the sheer numbers – of individuals with language deficits in our correctional institutions. This is hardly a new development, at least for the language professionals and social scientists who have been concerned or curious enough to actually consider the problem over the past forty years. Nevertheless, the statistics, both old and new, speak volumes about the on-going magnitude of this problem, the high costs associated with it, and the need for dramatic rethinking in our societal and legal approach.

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<sup>204</sup> Ward, *supra* 191, at 144.

<sup>205</sup> Maurice L. Joselson, *The Role of Language Skills within the Perspective of Other Psychosocial Factors in a Select Prison Population* 8 (1970) (unpublished Ph.D dissertation, University of Florida) (cited by AMERICAN SPEECH AND HEARING ASSOCIATION, *TASK FORCE REPORT ON SPEECH PATHOLOGY AND AUDIOLOGY SERVICE NEEDS IN PRISON* 9-12 (1974) [hereinafter *TASK FORCE REPORT*]) (on file with author).

<sup>206</sup> *Id.* at 11.

a. Adult prisoners

In 1973, the Task Force on Speech Pathology/Audiology Needs in Penal Institutions (Task Force) was created after research revealed an alarming prevalence of communication disorders in adult correctional facilities all over the country.<sup>207</sup> After reviewing the literature and meeting with a variety of corrections professionals, the Task Force issued a report, concluding that communication and language disorders among prisoners were a significant issue. The report further concluded that because of the lack of services and treatment, the “communicatively handicapped population” in prison “constitute a neglected group.”<sup>208</sup> Among the sources relied upon by the Task Force was a survey of correctional and rehabilitation personnel in federal and state prisons in which 76% of the responders agreed that “psychological effects of serious disorders in speech or hearing could lead to criminal behavior.”<sup>209</sup>

The Task Force issued a series of recommendations encouraging expanded study of reading and learning disabilities and speech pathology/audiology service needs among various incarcerated groups, followed by increased provision of hearing, speech, language, and language-use services for offenders.<sup>210</sup> The Task Force concluded that wide-scale language services “are critically needed as part of medical, education, and rehabilitation programs if indeed there is serious intent to rehabilitate prisoners to function in the social and economic mainstream.”<sup>211</sup>

After this Report was published in 1974, a number of small-scale studies were conducted in prisons and jails throughout the United States.<sup>212</sup> Published reports included a

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<sup>207</sup> See TASK FORCE REPORT, *supra* note 205, at 9-12 (giving a pre-Task Force history of published and unpublished studies pertaining to the incidence of speech, language, and hearing disorders in inmates).

<sup>208</sup> TASK FORCE REPORT, *supra* note 205, at 12.

<sup>209</sup> *Id.* at 13.

<sup>210</sup> *Id.* at 23.

<sup>211</sup> *Id.* at 14.

<sup>212</sup> Carol C. McRandle & Robert Goldstein, *Hearing Loss in Two Prison Populations*, 37 J. CORRECTIONAL EDUC. 147 (Dec 1986).

finding of “a potential deficiency of considerable proportions regarding receptive vocabulary skills.”<sup>213</sup> Another group of researchers found a significant number of inmates with impaired ability to process “basic language concepts” and “serious difficulty with word and sentence structure, ambiguities, idioms, relationships, etc.”<sup>214</sup>

Unfortunately, the Task Force recommendations for widespread research and services never gained much traction.<sup>215</sup> A former corrections administrator recalls that other officials tried to discourage him from permitting a Task Force Report-inspired study of communication disorders in his state’s prisons.<sup>216</sup> The officials suspected that a high rate of disorders would be found, “and then we’d have to do something about it.”<sup>217</sup> They were not motivated by malice or cynicism, but rather by resignation to the fact that services

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<sup>213</sup>Nicholas Bountress & Jacqueline Richards, *Speech, Language and Hearing Disorders in an Adult Penal Institution*, 44 J. SPEECH & HEARING DISORDERS 293, 298 (1979).

<sup>214</sup>Mary H. Sample et al, *Variables Related to Communicative Disorders in An Adult Prison Sample*, 17 J. CRIM. JUST. 457, 467 (1989). For other studies of inmate populations following the Task Force Report, see Nicholas Bountress & Jacqueline Richards, *Speech, Language and Hearing Disorders in an Adult Penal Institution*, 43J SPEECH & HEARING DISORDERS 271 (1979); Cynthia Olson Wagner et al., *Communicative Disorders in a Group of Adult Female Offenders*, J. COMM. DISORDERS 269 (1983); Carol C. McRandle & Robert Goldstein, *supra* note 212; Claire A. Jacobson et al., *Hearing Loss in Prison Inmates*, 10 EAR & HEARING 178 (1989); Corinne K. Jensema, *Hearing Loss Within a Jail Population*, 24 J. AM. DEAFNESS & REHABILITATION ASS’N 49 (Oct. 1990).

<sup>215</sup>In 1984, the American Speech Hearing Association reported that the Task Force recommendations had not panned out. One Task Force member was quoted as saying, “Other than as a curiosity, nobody gives a damn.” *Prisoners: A Neglected Population?*, ASHA, June 1984, at 19, 20.

<sup>216</sup>Interview with Professor Walter J. Dickey, former Administrator of the Wisconsin Division of Corrections (now Dept. of Corrections), Faculty Director of the Frank J. Remington Center, University of Wisconsin Law School, in Madison, Wis. (Aug. 12, 2009).

<sup>217</sup>*Id.* The study was conducted anyway. See, McRandle & Goldstein, *supra* note 212; See also Sample et al., *supra* note 214, at 469 (“One barrier that exists is convincing prison administration official that speech pathology/audiology services are needed”).

contemplated by the Task Force would cost money that the prisons simply did not have.<sup>218</sup>

One substantial body of prison/language research that has continued into the present century is the National Assessment of Adult Literacy Prison Survey (NAALPS), sponsored by the National Center of Education Statistics of the U.S. Department of Education. These assessments of inmates ages 16 and older, conducted in 1992 and 2003, confirm the continued prevalence of underdeveloped language skills among the populations coming into the criminal justice system and into our prisons. In the 2003 assessment, *over 50%* of prison inmates had literacy levels in the two lowest categories: Basic (only those skills necessary to perform simple and every day activities such as reading a simple document); or Below Basic (no more than the most simple and concrete literacy skills in document and prose literacy).<sup>219</sup>

While the NAALPS researchers were not looking for communication and language disorders *per se*, they easily found unequivocal signs of them within American prisons. Low literacy itself is a very common correlate of language deficit, especially in the realms of vocabulary and ability to decipher complex sentence structures.<sup>220</sup> Within prisons, the rate of diagnosed learning disabilities is almost *three times*

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<sup>218</sup> It is not surprising that speech and language services at adult correctional institutions have fallen short since the quality and quantity of services in general at adult institutions are a never ending issue, especially in comparison with services available in juvenile corrections. A law student at Stanford made the following comment about the level of services at California's Correctional Training Facility: "As far as I can tell, the Correctional Training Facility does very little correcting and training." Jessica Feinstein, *Soledad, Revisited*, STANFORD LAWYER, Fall 2009, at 38, 40. She went on to note that almost every program in the institution has a long waiting list. *Id.*

<sup>219</sup> U.S. DEPARTMENT OF EDUCATION: NATIONAL CENTER FOR EDUCATION STATISTICS, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 13 (2007) [hereinafter NAALPS], *available at* <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2007473> (last visited Feb. 28, 2010).

<sup>220</sup> Dionne, *supra* note 19, at 339; Norris & Bruning, *supra* note 186.

that of the general public.<sup>221</sup> Academic deficiency, so common among individuals with language difficulties, is also rampant. The school dropout rate among prisoners is substantially higher than among the general public.<sup>222</sup> In 2003, 35% of inmates had no high school diploma or equivalency certificate.<sup>223</sup> Of that group, one-fourth had dropped out before starting high school.<sup>224</sup>

#### b. Juvenile offenders

The research on communication disorders among delinquent juveniles has traditionally been richer in both quality and quantity than research involving adult offenders.<sup>225</sup> The results of this sizable body of research and literature are consistent, even among studies with different structure and focus. No matter how you look at it, institutionalized delinquent juveniles as a group are significantly more likely to have a language problem than non-delinquent juveniles.<sup>226</sup> Juvenile offenders are academically deficient<sup>227</sup> and have a lower verbal IQ.<sup>228</sup> They tend to “have problems receiving

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<sup>221</sup> NAALPS, *supra* note 219, at 27.

<sup>222</sup> *Id.* at 1.

<sup>223</sup> *Id.* at 11.

<sup>224</sup> *Id.*

<sup>225</sup> The rate of language deficits among juvenile offenders appears to be even higher than among adult offenders, a result, at least in part, of differences in brain development and life experience between juveniles and adults in general. *See* Davis et al., *supra* note 12 at 252 (citing studies that show anywhere from 58%-84% of institutionalized delinquents had language or communication difficulties).

<sup>226</sup> *See generally* Joel T. Nigg & Cynthia L. Huang-Pollock, *An Early-Onset Model of the Role of Executive Functions and Intelligence*, in CAUSES OF CONDUCT DISORDER AND JUVENILE DELINQUENCY 227 (Lahey et al. eds., 2003); Abbe Davis et al., *supra* note 12.

<sup>227</sup> Peter W. Zinkus & Marvin I. Gottlieb, *Patterns of Auditory Processing and Articulation Deficits in Academically Deficient Juvenile Delinquents*, 48 J. Speech & Hearing Disorders 36, 39-40 (1983); Elizabeth Kandel et al., *IQ as a Protective Factor for Subjects at High Risk for Antisocial Behavior*, 56 J. CONSULTING & CLINICAL PSYCHOL. 224, 226 (1988); Stattin & Klackenber-Larsson, *supra* note 54, at 369.

<sup>228</sup> “[W]hereas juvenile delinquents show deficiencies in both performance and verbal IQ, their verbal deficits are more severe.” Peter R. Giancola & Ada Mezzich, *Executive Cognitive Functioning Mediates the Relation Between Language Competence and Antisocial Behavior in Conduct-*

and expressing verbal information,”<sup>229</sup> and pragmatic deficits are practically *de rigueur*.<sup>131</sup>

The prevalence of language disorders appears to be even higher among adolescents who have committed serious assaultive or homicidal offenses. A study in Florida looked at the prevalence of language disorders among incarcerated boys facing charges based on homicidal behavior (homicide or attempted homicide).<sup>230</sup> The youths’ language skills were assessed, and the results were conclusive: *all* of the boys had a language disorder and all scored well below their actual age in language and language function.<sup>231</sup> The findings of the

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*Disordered Adolescent Females*, 26 AGGRESSIVE BEHAVIOR 359, 360 (2000) (includes a survey of research from 1973 – 1994); See also Donald Lynam et al., *Explaining the Relation Between IQ and Delinquency: Class, Race, Test Motivation, School Failure, or Self-Control*, 102 J. ABNORMAL PSYCHOL. 187 (1993).

<sup>229</sup> Giancola & Mezzich, *supra* note 228, at 360. See also Brownlie et al., *supra* note 83.

<sup>131</sup> For examples of studies that have been done on juveniles who have been found to be delinquent, see Frank Kodman, Jr. et al., *Some Implications of Hearing Defective Juvenile Delinquents*, 25 J. EXCEPTIONAL CHILD. 54 (OCT. 1958); Robert Cozad & Clyde Rousey, *Hearing and Speech Disorders Among Delinquent Children*, 12 CORRECTIVE PSYCHIATRY & J. SOC. THERAPY 250 (1966); Charles H. King, *The Ego and the Integration of Violence in Homicidal Youth*, 45 AM. J. ORTHOPSYCHIATRY 134 (1975); Zinkus & Gottlieb, *supra* note 227; Megan R. Klimecki et al., *A Study of Recidivism Among Offenders With an Intellectual Disability*, 19 AUSTL. & N.Z. J. DEVELOPMENTAL DISABILITIES 209 (1994); Lynam et al., *supra* note 228; Nigg & Huang-Pollock, *supra* note 225; Davis et al., *supra* note 12; Giancola & Mezzich, *supra* note 228; Brownlie et al., *supra* note 83; Marty Beyer, *Fifty Delinquents in Juvenile and Adult Court*, 76 AM. J. ORTHOPSYCHIATRY 206 (2006); Peter N.S. Hoaken et al., *Executive Cognitive Functioning and the Recognition of Facial Expressions of Emotion in Incarcerated Violent Offenders, Non-Violent Offenders, and Controls*, 33 AGGRESSIVE BEHAV. 412 (2007).

<sup>230</sup> Wade C. Myers & P. Jane Mutch, *Language Disorders in Disruptive Behavior Disordered Homicidal Youth*, 37 J. FORENSIC SCI. 919 (1992).

<sup>231</sup> *Id.* at 920 The authors also had serious doubts about the youths’ competency to stand trial: “The presence of language disorders in this population of juvenile murderers and near murderers raises important forensic and legal concerns regarding such areas as...competency to stand trial. ...[T]heir capacity to assist counsel in the preparation of a defense may be impaired as well as their ability to testify relevantly in the courtroom.” *Id.* at 921-922.

Florida study meshed with an earlier study of juveniles in New York who had committed homicides.<sup>232</sup> Every one of the youths in the New York study was “drastically stunted in language skills”<sup>233</sup> and unable to “rely upon mastery of language skills to help them interpret the world.”<sup>234</sup>

The research on language impairments among delinquent adolescents has relevance beyond the purview of juvenile court and juvenile corrections. Longitudinal studies have concluded that impaired verbal functioning is a recurring characteristic of that group of offending adolescents who do not age out of anti-social behavior -- i.e. the group that persists in anti-social conduct beyond the peak adolescent and early adulthood years.<sup>235</sup> This phenomenon has been attributed to the snowballing effect of *untreated* language and associated behavior problems.<sup>236</sup> This finding serves to remind us once again that effective intervention for juveniles and adults should be a priority.

## 2. Language impairment and life in correctional institutions

When it comes to language disorders, juvenile and adult correctional institutions are something of a confluence. Not only are individuals with language deficits grossly overrepresented in correctional institutions, they are likely to

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<sup>232</sup> King, *supra* note 131.

<sup>233</sup> *Id.* at 136.

<sup>234</sup> *Id.* at 137. Similar conclusions were reached by psychologist Marty Beyer, who conducted developmental assessments on a group of delinquent juveniles, half of whom had been involved in a murder. *See* Beyer, *supra* note 131. She found that the youths have “difficulty in digesting information, poor academic progress, executive function deficits, attention-regulation problems, and limited understanding of cause and effect were factors in many of the offenses.” *Id.* at 209. Dr. Beyer noted that these characteristics were present at an even higher rate among those juveniles who were involved in a murder or transferred to adult court based on the seriousness of their offenses. *Id.* *See also* Stattin & Klackenberg-Larsson, *supra* note 54.

<sup>235</sup> Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior*, 100 PSYCHOL. REV. 674, 680 (1993).

<sup>236</sup> Moffitt, *id.* at 684, *See also* Stattin & Klackenberg-Larsson, *supra* note 54, at 376-77; Ford et al., *supra* note 68, at 382.

be disproportionately affected by the policies and operation of those institutions.

From the moment the language-impaired individual sets foot in a correctional institution, he is at a marked disadvantage. At orientation, the new inmate is typically given an “inmate handbook,” which describes the rules of the institution in full detail. From then on, the inmate is expected to follow the rules as enforced through oral commands from institution staff. Failure to comply with these rules leads to prison discipline.<sup>237</sup>

Despite their pivotal role for the inmate and the institution, prison handbooks are not particularly accessible for a substantial portion of their intended audiences. Prison handbooks tend to be dense and expansive. A study of adult prison and jail handbooks used in Texas noted that they were all 30 to 40 pages in length.<sup>238</sup> The prison handbook used by the Division of Adult Institutions of the Wisconsin Department of Corrections is even longer – 46 pages, single-spaced, and written in 8-point font – and covers everything from gang activity to laundry to funerals.<sup>239</sup> Readability of the text itself is also a problem. Reading level of the Texas prison handbooks, for example, was assessed at between grade 11.5 and junior year in college.<sup>240</sup>

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<sup>237</sup> Inmate handbooks are the mechanism for providing notice to inmates of rules, regulations, rights, and procedures and are the due process foundation for disciplinary action. *See, e.g.*, *Oliver v. Outhouse*, No. 9:06-cv-1412 (LEK/RFT), 2008 WL 508909 (N.D.N.Y. Feb. 21, 2008); *Murphy v. Schroeder*, Civil No. 06-1104-TC, 2007 WL 539425, at n.1 (D.Or. Feb. 14, 2007). For an example of a disciplinary process, *see* Wisconsin Department of Corrections, Discipline, Ch. DOC 303 (on file with co-author Michele LaVigne).

<sup>238</sup> Bonnie Goben et al., *Comprehending the Inmate Handbook: Solutions for the Deaf Offender*, SPEECH-LANGUAGE PATHOLOGISTS & AUDIOLOGISTS (forthcoming) (on file with co-author Michele LaVigne).

<sup>239</sup> Wisconsin Department of Corrections, Dodge Correctional Institution Assessment and Evaluation Handbook (revised March 2007) (on file with co-author Michele LaVigne).

<sup>240</sup> Goben et al., *supra* note 238.

The actual day-to-day operation of virtually any prison<sup>241</sup> is, by its design, on a collision course with the linguistically-deficient inmate. Prison order and discipline is built on oral communications and expectations of compliance and self-regulation. If one has difficulty in that realm, the troubles cascade and build on each other. This cannot be easily explained or understood by the inmate who has likely had a lifetime of misunderstanding. In the correctional setting, the deficit may reveal itself in more “tickets”<sup>242</sup> and other sanctions. This can create an official perception that the inmate is irresponsible, needs to learn to be accountable, or does not want to learn and conform to the discipline system.<sup>243</sup> Over time, as with life pre-incarceration, these types of problems can be easily compounded, sometimes daily. The boys at MJTC, many of whom spent months in segregation in a correctional facility before being transferred to Mendota Mental Health Institute, are a typical illustration.

Language deficits can have a negative impact on progress even when an inmate does not present behavior problems within in the institution. For example, NAALPS found that inmates with low educational and literacy levels are

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<sup>241</sup> Within this section, reference is made to policies, procedures and practices within the Wisconsin Department of Corrections. This is not intended as a comment on - or criticism of - Wisconsin practices. Rather they are discussed for illustrative purposes since Wisconsin practices appear to be fairly typical (Wisconsin is a member of the American Correctional Association). In addition, the co-authors have access to Wisconsin materials and first-hand knowledge of Wisconsin policies and practices.

<sup>242</sup> “Ticket” is the term inmates frequently use to refer to a “conduct report.” In the federal prison system, conduct reports are often referred to as “shots.”

<sup>243</sup> Interview with Clinical Professor Kenneth Streit, University of Wisconsin Law School, September 8, 2010. Professor Streit has extensive correctional experience, and from 2002-2006 served as co-monitor for implementation of the Federal Consent Decree issued in a lawsuit against the Wisconsin Secure Treatment Facility. Professor Streit believes that language-impaired inmates ages 18-22 would be the most likely to be negatively affected by language deficits because the types of behavior they display mirrors that behavior of older adolescents and young adults who are “testing limits.” Only after that latter group “ages out” of this type of conduct, would the former group’s impairments become more apparent.

substantially less likely to participate in vocational programs.<sup>244</sup> Additionally, inmates who lack sufficient language skills may be unable to take part in, or respond adequately to, the limited modes of verbal-based treatment and therapy generally offered in correctional settings.<sup>245</sup> An inmate's inability to participate in programming or to respond adequately to the types of therapy offered may result in the denial of a transfer to a less secure facility or release on parole.<sup>246</sup> For individuals incarcerated for any type of sex offense, the inability to successfully complete treatment or programming may ultimately lead to a life-long sexual predator commitment.<sup>247</sup>

The 1973 Task Force anticipated this downward spiral in the condition of language-disordered inmates when it referred to the need for increased services as "critical."<sup>248</sup> Despite that unequivocal warning, however, the

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<sup>244</sup> NAALPS, *supra* note 219, at vi-vii. This in turn has a direct effect on recidivism. *Id.* at 47.

<sup>245</sup> This may also raise issues under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq. (2006)). and the Rehabilitation Act of 1973 (29 U.S.C. § 794 (2006)). See *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (ADA and Rehabilitation Act are applicable to prisons). The Seventh Circuit Court of Appeals has observed that disabled prisoners "have the same interest in access to the programs, services, and activities as disabled people on the outside have to the counterpart programs, services, and activities available to free people." *Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 486 (7<sup>th</sup> Cir. 1997). *But cf.* *Stanley v. Litscher*, 213 F.3d 340 (7<sup>th</sup> Cir. 2000) (Prison may exclude diagnosed "psychopath" from sex offender program). See also McCay Vernon, *ADA Routinely Violated by Prisons in the Case of Deaf Inmates*, 20 PRISON LEGAL NEWS 14 (July 2009).

<sup>246</sup> See, e.g., Wis. Stat. 320.11(1g) (2009). See also *State ex rel. Gendrich v. Litscher*, 632 N.W.2d 878, 884 (Wis. Ct. App. 2001) (Release may be denied to an inmate who refuses to participate in programming. Termination from a program, or failure to complete it for any reason, is treated as refusing to participate.).

<sup>247</sup> See *Kansas v. Hendricks*, 521 U.S. 346 (1997). In some states, sexual predator commitments can be used against both juveniles and adults. See, e.g., WIS. STAT. § 980.01(7) (In Wisconsin, the term "sexually violent person," used to describe those eligible for civil commitment, applies to both juveniles and adults).

<sup>248</sup> TASK FORCE REPORT, *supra* note 205, at 19.

recommendation for improved services was dismissed as wishful thinking. Several correctional officials told the Task Force members “that it is difficult to get legislators to vote services for prisoners that are not available to the general public.”<sup>249</sup> Another simply “wished the public and legislators could be convinced that prisoners are worth helping.”<sup>250</sup> Alas, not much has changed.

### III. Now what?

The human, financial, and societal costs of deficient language skills among large segments of our population are astronomical; and, if language dysfunction were a disease, the public would be clamoring for a cure. Instead, language dysfunction is one of many conditions that have been relegated to that overflowing catch basin we call public policy. If we wish to combat widespread language deficits, we need more and better early childhood education, including birth-to-three programs; more and better parenting support services and training; access to assessment; consistent, meaningful intervention; and, increased funding for special education and treatment.<sup>251</sup> Barring those developments, however, the juvenile and criminal justice systems will be left to contend with the fallout, just as they contend with the fallout from many other inadequate public policies.

Meanwhile, what legal and correctional practitioners, ever the pragmatists, want to know -- and need to know -- is what do we do now? When presented with a complex problem that affects a substantial portion of their clientele, practitioners want bottom-line answers to bottom-line

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<sup>249</sup> *Id.* at 21.

<sup>250</sup> *Id.*

<sup>251</sup> See, e.g., Rachel Mayberry, *Cognitive Development in Deaf Children: the Interface of Language and Perception in Neuropsychology*, in 8 HANDBOOK OF NEUROPSYCHOLOGY pt. 2, at 71, 73 (S.J. Segalowitz & I. Rapin eds., 2d ed. 2002) (deaf students with strong reading ability had “access at an early age to high quality intervention services”); See Perri Klass, *When to Worry if a Child Has Too Few Words*, N.Y. TIMES, Feb. 10, 2010, available at [www.newyorktimes.com/2010/02/09/health/09klass.html](http://www.newyorktimes.com/2010/02/09/health/09klass.html) (last visited Feb. 28, 2010) (the importance of early language assessment and intervention).

questions. How do I raise this in court? Can we ever use written documents to inform and communicate? What records should I obtain? What kind of assessment should I get? Is there treatment? How do I communicate with the individual? How do I get the judge/probation agent/social worker/guard to understand? While the problem may seem insurmountable, there are concrete steps that can improve the level of communication, and by extension the quality of justice and treatment, for juveniles and adult defendants with language deficiencies.

#### *A. The front line: attorneys*

When it comes to informing defendants about options; guiding decision-making; exploring and raising legal issues, defenses, and mitigating circumstances; and crafting dispositional alternatives, the defense attorney occupies center stage.<sup>252</sup> Attorneys have an ethical and constitutional obligation to understand the impaired client's communication deficits and the special legal issues presented by those deficits. It is the same ethical and constitutional obligation that attorneys have when they represent clients with a mental illness or deficit or clients who do not speak English.<sup>253</sup>

##### *1. Recognizing language impairment*

The first step for attorneys is to recognize when a client has some sort of language impairment or disorder. Unfortunately, as discussed previously, language impairments are not always obvious, especially in adults who will have generally learned enough language to get by. Ideally, specialized assessments would be available in all cases where attorneys suspect language impairment. However, in the reality of the juvenile and criminal justice world, formal language and language-use assessments for even 10% of the clientele are not realistic. Nevertheless, an attorney who has concerns about a client's ability to comprehend adequately,

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<sup>252</sup> See. Padilla, 130 S. Ct. at 1485 ("It is quintessentially the duty of counsel to provide her client with available advice[.]").

<sup>253</sup> See generally CULTURAL ISSUES IN CRIMINAL DEFENSE (Linda Friedman Ramirez ed. 2d ed. 2007).

self-regulate, or read social cues should consider the possibility of language disorder and investigate further.

Clients themselves can be helpful sources of corroboration, especially in the self-reporting of associated conditions like ADHD or learning disorders. Given the high correlation between these disabilities and continuing language disorder, those diagnoses can be a strong signal that language disorder may be present.

School records can be invaluable sources of information regarding a potential disorder. Any student who received special education services will have had an Individualized Education Plan (IEP), and records of IEP meetings with teachers, counselors, and parents will be in the student's file. Standardized testing, especially of reading and other verbal measures, will be helpful indicators of potential language deficit. A verbal IQ test, in particular, while not a complete test of communication skill, can at least indicate an individual's "ability to use language for thinking."<sup>254</sup>

Of course, there are cases where assessments will always be required, especially in high-stakes matters where the client is facing serious charges or extreme sanctions such as waiver or transfer from juvenile to adult court, extensive incarceration, or death. In these cases, counsel should be requesting full-scale psychological and neuropsychological examinations, including language and language function assessments.<sup>255</sup>

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<sup>254</sup> Carol Musselman et al., *Communicative competence and psychosocial development in deaf children and adolescents*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS, *supra* note 10, at 555, 562; Brownlie et al., *supra* note 83, at 454.

<sup>255</sup> See C. Tane Akamatsu, *Thinking With and Without Language: What is Necessary and Sufficient for School-Based Learning*, in ISSUES UNRESOLVED: NEW PERSPECTIVES ON LANGUAGE AND DEAF EDUCATION 27, 31 (Amanda Weisel ed., 1998). For more information on the connection between language and IQ, see American Speech-Language-Hearing Association, [www.asha.org](http://www.asha.org) (last visited Feb. 6, 2010). In addition, where the client has a severe or greater hearing loss, language assessments should be requested in *any* case where communication difficulties are suspected. See, e.g., LaVigne & Vernon, *supra* note 27, at 931.

1. The way you talk: communicating with the language-impaired client

Any attorney with a linguistically-impaired client has an obligation to do whatever it takes to help her client to understand.<sup>256</sup> As an obvious first step, attorneys need to stop talking in that “strange code that sometimes sounds like English but, other times sounds like a foreign language.”<sup>257</sup> Building effective communication, however, requires more than relinquishment of jargon, passive voice, nominalization, verbification, and obtuse sentence structures.

As lawyers retool their own language and approach to client conversations, they should bear in mind that they function as cultural and linguistic intermediaries, or as “interpreters”<sup>258</sup> or “translators,”<sup>259</sup> standing between their clients and the legal system. The job of the lawyer-as-interpreter is not to recite “magic words” or even to find word substitutes, but to uncover the meaning of the legal language and process and to make that meaning explicit for each individual client.<sup>260</sup> This means much more than simply converting legalese to plain English.

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<sup>256</sup> The current Model Rules of Professional Conduct acknowledge that attorney’s must tailor communication to the needs of each individual client. MODEL RULES OF PROF’L CONDUCT R. 1.4 (b)(2007). (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.).

<sup>257</sup> Howard B. Eisenberg, Address to Law Students (ca. 1996), transcribed in 86 MARQ. L. REV. 352, at 375, 379 (2002).

<sup>258</sup> Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1086 (2007).

<sup>259</sup> Lawyer as “translator” and law as “translation” are common metaphors. As used, they usually refer to the lawyer translating the client’s story to the court or into “corresponding legal categories and roles.” MERTZ, *supra* note 131, at 131-32; Clark Cunningham, *The Lawyer as Translator, Representation as Text: Toward an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1331-39 (1992). In this context, we are talking about the lawyer translating or interpreting the law and the legal system for the client. For that reason, we prefer the term “interpret” for attorney-client interactions because it connotes a deeper process.

<sup>260</sup> DANICA SELESKOVITCH, INTERPRETING FOR INTERNATIONAL CONFERENCES 7 (3d ed. 1998).

Communication methods that specifically assist in the interpreting or explanation process, especially with a language- and knowledge-impaired client, include role-play and diagrams.<sup>261</sup> Analogies may also be effective, though it is important to remember that metaphors and analogies that well-educated, well-read attorneys take for granted may not be accessible to the impaired defendant.<sup>262</sup> Attorneys may also draw on storytelling, a technique that is known to be successful not only with individuals with lower language skills but also with individuals from cultures that are not exposed to or knowledgeable about the American legal system.<sup>263</sup> Describing a right or process within the context of a story can make an abstract concept come alive.<sup>264</sup>

In more severe cases, communication may take some unorthodox turns. An attorney who specializes in difficult juvenile cases in Cook County, Chicago, makes it a point to observe her clients communicate with family or friends in a

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<sup>261</sup> Use of these types of visual aids is consistent with learning theory for individuals with low literacy skills. Individuals with low literacy and linguistic skills have a difficult time creating mental images when they hear words. Realistic visuals facilitate learning. Marilyn S. Townsend et al., *Improving Readability of an Evaluation Tool for Low-income Clients Using Visual Information Processing Theories*, 40 J. NUTRITION EDUC. & BEHAV. 181 (2008).

<sup>262</sup> For example, *To Kill a Mockingbird* – or even *Law and Order* – is not a reference that would be particularly useful.

<sup>263</sup> See e.g. Ahmad, *supra* note 258, at 1063-1064 (2007). In fact, stories or narratives, are an effective mechanism for communicating difficult or complex information to most people in general. Daniel T. Willingham, *The Privileged Status of Story*, AMERICAN FEDERATION OF TEACHERS 43 (Summer 2004); BRUCE JACKSON, *THE STORY IS TRUE* 8-9 (2007).

<sup>264</sup> For example, to explain jury decision-making and unanimity for a deaf defendant with limited language skills, Timothy Jaech, former teacher, Superintendent of the Wisconsin School for the Deaf, and School Administrative Consultant, portrays the action: *The jury* (the concept of jury having already been described) *sits, watches, and listens to both sides. Then the jury goes off to a private room and talks and votes. Meanwhile you (the defendant) sit and wait nervously. Finally the jury comes out and announces its vote. The vote must be 12 – 0 that you did something wrong (guilty) or didn't (not guilty). If the vote is not 12 – 0, if the vote is 11 – 1, it doesn't count. You might have another trial, or you might go home free.* A demonstration of this explanation has been videotaped and is on file with the author.

non-legal setting.<sup>265</sup> This has given her insight into communication styles that can work, especially when her clients are talking with their mothers.<sup>266</sup> Other attorneys take their impaired clients into the courtroom and preview the trial or plea process with a walk-through.<sup>267</sup> In the same vein, counsel may rehearse a proceeding such as a guilty plea to afford the client an opportunity to practice using affect, tone, and words that will be acceptable to the court.<sup>268</sup>

It is important to bear in mind that in adapting their communication methods to their individual clients, lawyers are not “dumbing down” the law,<sup>269</sup> nor are they abandoning their professional training. Actually, learning to express the legal system in something other than abstract vernacular takes practice and awareness and, in the end, makes for better lawyers.<sup>270</sup> Meanwhile, attorneys will be fulfilling their ethical and constitutional obligation to communicate effectively with all of their clients.<sup>271</sup>

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<sup>265</sup> Interview with Herschella Conyers, Clinical Professor of Law, University of Chicago Law School, Mandel Legal Clinic, in Macon, Ga. (June 23, 2009).

<sup>266</sup> *Id.*

<sup>267</sup> Interview with Ben Gonring, Assistant State Public Defender, Juvenile Division, in Madison, Wis. (Sept. 4, 2009).

<sup>268</sup> Modeling, role play, and rehearsal are a very common technique in a number of arenas where the individual lacks the knowledge and skills to participate effectively in a procedure or program. See Mischel et al., *supra* note 83, at 309. This is somewhat analogous to witness preparation; however many of the individuals we are discussing here would have great difficulty testifying and as a result would elect to forego that right. Or they may testify with disastrous results.

<sup>269</sup> The belief that we are “dumbing down” the law if we do not use the “magic” or “correct” words is commonly expressed by both judges and lawyers. See, e.g., Leonard Post, *Spelling It Out in Plain English*, NAT’L L.J. (Nov. 10, 2004), available at <http://www.law.com> (Enter “Leonard Post Spelling It Out in Plain English” in the search bar in the upper left corner, then click on the second result) (last visited Feb. 7, 2010).

<sup>270</sup> To quote Albert Einstein: “You do not really understand something unless you can explain it to your grandmother.”

<sup>271</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2007).

### 3. Where and how to raise the issue?

Language impairment and its effects on comprehension and behavior are relevant from the moment a person comes into the juvenile or criminal justice system. The following are examples of where the issue may present itself with suggestions for addressing it. The list is not meant to be exhaustive, but rather provides a starting point for attorneys.

#### a. Competency to stand trial

In cases where language disorder is the most obvious, competency to stand trial will often be the first issue that presents itself. In these instances, counsel should request a competency assessment, both as a matter of strategy and as a matter of professional responsibility.<sup>272</sup> It is critical that the competency evaluation include an accurate assessment of a defendant's ability to communicate with counsel and to process the information necessary for decision-making.<sup>273</sup>

Any competency assessment should test the defendant's ability to actually function in the criminal justice system, as opposed to simply parroting answers about the process and the players.<sup>274</sup> The MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA) has been widely recognized for its more realistic approach to competency.<sup>275</sup> The MacCAT-CA measures the defendant's appreciation, understanding, and reasoning.<sup>276</sup> In juvenile

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<sup>272</sup> State v. Johnson, 395 N.W.2d 176 (Wis. 1986); Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant, Zealous Advocate or Officer of the Court?* 1988 WIS. L. REV. 65. State v. Johnson, 133 Wis. 2d 207 (1986).

<sup>273</sup> LaVigne & Vernon, *supra* note 27, at 931.

<sup>274</sup> See, e.g., United States v. Duhon, 104 F.Supp.2d 663 (W.D. La. 2000).

<sup>275</sup> GARY MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS, A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS, 145-150 (1997).

<sup>276</sup> See, e.g., Jennifer L. Woolard & N. Dickon Reppucci, *Researching Adolescents' Capacities as Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 105, at 173; LaVigne & Vernon, *supra* note 27, at 926-27; Norman Poythress et al., *The Competence-Related Abilities of Adolescent Defendants in Criminal Court*, 30 LAW & HUM. BEHAV. 75, 80-81 (2006); See also, Jodi L. Viljoen et al, *The Use of the MacCAT-CA with Adolescents*" An Item

cases, the MacArthur Judgment Evaluation and Juvenile Adjudicative Competence Interview can be additional tools for competency assessment.<sup>277</sup> In any instance where the defendant's responses in the evaluation process are deficient, a supplemental language assessment would be in order.<sup>278</sup>

A competency determination involving a linguistically-impaired defendant will almost always call for a multi-disciplinary approach. As a starting place, the attorney should sensitize the examining psychiatrist or psychologist to her concerns about her client's potential language deficits and why they matter for representation. These kinds of contacts can lead the evaluator to carry out, or request, an additional language assessment directly related to the ability to assist counsel. Counsel may also consider an independent assessment from a language specialist. At the competency hearing, the testimony of the forensic psychiatrist or psychologist should be supplemented with testimony from a specialist who can discuss the cognitive and behavioral aspects of language impairment and their potential effect on the defendant's ability to communicate with counsel and meaningfully participate in legal proceedings.<sup>279</sup>

b. Ensuring comprehension in court for the linguistically-impaired client

Since most individuals with language impairments, even severe impairments, will be found competent, it will be incumbent on counsel to protect her client's constitutional

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*Response Theory Investigation of Age-Related Measurement Bias*, 33 LAW & HUM. BEHAV. 283 (2009) (suitability of MacCAT-CA for juveniles).

<sup>277</sup> Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 336 (2003); an additional instrument would be the Fitness Interview Test – Revised (the FIT-R can be used for both adults and juveniles). Randy K. Otto, *Considerations in the Assessment of Competent to Proceed in Juvenile Court*, 34 N. KY. L. REV. 323, 335-39 (2007).

<sup>278</sup> Poythress et al., *supra* note 276, at 81.

<sup>279</sup> LaVigne and Vernon, *supra* note 27, at 928-29.

right to understand all legal proceedings.<sup>280</sup> This may require educating the court, on or off the record, about the language needs of the defendant; making timely objections to the sophisticated language used by the legal professionals in the courtroom; and requesting accommodations such as more time, breaks to monitor comprehension, or even an “interpreter,” who may be a teacher, counselor, or other professional familiar with the defendant’s communication style.<sup>281</sup>

### c. Suppression of statements

Another important legal issue for counsel to explore will be suppression of statements. Inability to comprehend *Miranda* warnings adequately is perhaps the most concrete basis for suppression of statements by a linguistically-deficient client, especially since counsel can perform an initial informal assessment herself through open-ended questions.<sup>282</sup> Where counsel suspects that the client did not understand the *Miranda* warnings, the next step to consider is a *formal language assessment* that includes Thomas Grisso’s *Instruments for Assessing and Understanding Appreciation of*

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<sup>280</sup> See *United States ex rel Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970) (Constitutional rights implicated include right to be present, to confront witnesses, to assist counsel, and to due process). Although the trial court has the ultimate responsibility for insuring that the defendant comprehends the legal proceedings, *id.*, defense counsel is responsible for informing the court when her client is unable to comprehend legal proceedings and for making a timely objections. Failure to do so constitutes waiver. –See generally, Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Use or Non-use of Interpreter at Prosecution of Foreign Language Speaking Defendant* 79 A.L.R.4<sup>th</sup> 1102 (1990). Case law in this area almost always relates to foreign language speaking defendants. The issues are, however, identical.

<sup>281</sup> LaVigne & Vernon, *supra* note 27, at 901.

<sup>282</sup> Defense attorneys in California estimated that 48.4% of the defendants they represented “did not understand the basics of *Miranda* at the time they confessed or made important admissions to law enforcement.” Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 LAW HUM. BEHAV. 401, 402 (2007) (citing R. Rogers, Survey data on *Miranda* practices by attorneys of the California Association for Criminal Justice (2005) (unpublished raw data).

*Miranda Rights*,<sup>283</sup> a series of tests that measure different facets of a defendant's comprehension of the warnings.<sup>284</sup> Additional listening comprehension tests will also be in order for defendants with receptive and processing deficits, since *Miranda* warnings are almost always read or recited aloud.<sup>285</sup> A speech pathologist or psychologist who specializes in language-use issues, or in certain instances an audiologist, would be an appropriate resource for assessment and expert testimony.

Voluntariness, whether of the *Miranda* waiver or a confession, is a somewhat more ephemeral standard, insofar as it focuses on the specific characteristics of the individual in the context of the specific police conduct.<sup>286</sup> However, in addition to the appropriate standard psychological and cognitive assessments, the *Gudjonsson Suggestibility Scales* and the *Gudjonsson Compliance Scale*<sup>287</sup> can test and provide insights into the potential vulnerability of a suspect specifically in the interrogation context.<sup>288</sup> Again, a successful outcome will depend on testimony by an expert

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<sup>283</sup> Thomas Grisso, INSTRUMENTS FOR ASSESSING UNDERSTANDING AND APPRECIATION OF MIRANDA RIGHTS (1998).

<sup>284</sup> Ironically, one of the biggest hurdles for any defendant claiming not to have understood *Miranda* warnings will their wide repetition in television and movies. As the late Chief Justice Rehnquist noted, *Miranda* warnings are "part of the national culture." *Dickerson v. United States*, 530 U.S. 428 (2000). Although research has unequivocally demonstrated that understanding *Miranda* warnings requires complex linguistic abilities, courts, prosecutors, and law enforcement tend to assume that *Miranda* warnings can be readily understood by most individuals simply because people have heard them so many times. *See, e.g., United States v. Harris*, 515 F.3d 1307, 1311 (D.C. Cir. 2008) ("As every television viewer knows an officer ordinarily may not interrogate a suspect who is in custody without informing her of her *Miranda* rights."); *United States v. Alexander*, No. 5:08CR27-01, 2008 WL 4763309, at \*7 (N.D. Va. 2008) ("Even if Defendant were not college educated and intelligent, virtually everyone in this country who has watched television in the last forty years knows what a *Miranda* warning is and the consequences of talking to law enforcement officers.")

<sup>285</sup> *See Rogers et al.* (2007), *supra* note 135, at 189.

<sup>286</sup> *Supra* note 148.

<sup>287</sup> GUDJONSSON, *supra* note 145, at 361-68.

<sup>288</sup> *Id.* at 370-75.

who can connect a defendant's susceptibility with his language deficit.<sup>289</sup>

4. Language impairment as a defense, explanation, or mitigating factor

Language impairment and its effects may be at their most powerful when they are brought to bear on the questions of culpability, character, and rehabilitative potential of a defendant. In some instances, comprehension deficits even may be an actual defense. This would arise in cases where notice or warning is either an element of the offense (as is the case with bail jumping) or a pre-condition for incarceration (as in contempt or probation and parole revocations). Most commonly though, counsel will raise a defendant's language deficit and its permutations in mitigation, to counter negative perceptions of the defendant, and -- to use a phrase well-known to all defense attorneys -- to "humanize" the defendant.

Potential contexts for this type of evidence and argument include:

- Mitigating or explaining non-compliance. Here counsel would be advancing an argument that non-compliance does not equal defiance but may instead arise from lack of comprehension and/or skill;
- Countering an allegation or finding of "no remorse" or "lying"; and
- Addressing pragmatic deficits that create demeanor issues and give rise to findings of "bad attitude," "disrespect," or "lack of concern." This applies not only to the client's conduct in the courtroom, but also in programs, on supervision, in school, and at work.<sup>290</sup>

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<sup>289</sup> See, Leo, *supra* note 185, at 49.

<sup>290</sup> This could be called "translating the attitude." See Cunningham, *supra* note 259 at 1357-79 (explaining actions of defendant who had received an "attitude ticket").

The most substantive use of evidence regarding language deficits and their effects will ordinarily be in the sentencing or disposition process, including juvenile transfers or waivers, when counsel is crafting and proposing dispositional alternatives that are responsive to the range of issues presented by an individual's deficits. In essence, counsel will be presenting language impairment as a mitigating factor.

At first blush, such an argument may seem like a risky long-shot – i.e. yet another excuse or claim of non-responsibility, couched in science. It may seem even more improbable when the judge is looking at a defendant whose impulsive behavior makes him appear unpredictable or even “dangerous.” Yet we must remember that a linguistically-impaired defendant often lacks a fully developed ability to read a situation, constructively problem-solve, or self-regulate -- the same factors that diminish the culpability of, *though do not excuse*, defendants who are under 18, have a low IQ, or are mentally ill.<sup>291</sup>

More importantly, research and experience have demonstrated that the lack of language skills associated with undesirable behavior *can* be treated *successfully*, and that doing so can substantially alter the behavior as well. These findings have implications that should make a nuanced, informed approach to an impaired defendant more appealing to any sentencing judge concerned about public safety. As discussed below, a number of treatment models aimed at disruptive, troubled juveniles and adults have dramatically improved social functioning by targeting the communication and social skills necessary to read a situation, effectively problem-solve, and self-regulate. As a result, those

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<sup>291</sup> These are all factors that contribute to reduced culpability of juveniles and mentally ill and mentally retarded individuals. *Roper v. Simmons*, 543 U.S. 551, 564-75 (2005); *Graham v. Florida*, 130 S.Ct. 2011, 2025-2028(2010).

individuals have become *less* dangerous than comparable individuals who have simply received punitive sanctions.<sup>292</sup>

Effective advocacy about language impairment or disorder and its effects will, by necessity, require that the attorney bring the social science into the courtroom, often through an expert.<sup>293</sup> This will not always be easy. Despite universal acceptance among a variety of disciplines that the “relevance of social sciences to our ordinary lives is fairly straightforward,”<sup>294</sup> courts do not always welcome social science,<sup>295</sup> nor are they always willing or able to apply it.<sup>296</sup> Nevertheless, the science of language disorder and its effects is so entrenched that it should satisfy *Daubert, Frye*, “general relevance,” or any other standard for admissibility of expert testimony.<sup>297</sup> Moreover, the long-standing, unequivocal

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<sup>292</sup> See *infra* notes 323-327.

<sup>293</sup> We are advocating the use of social science in much the same way that it is beginning to be used in juvenile cases. See, e.g., Staci A. Gruber & Deborah A. Yurgelum-Todd, *Neurobiology and the Law: A Role in Juvenile Justice*, 3 OHIO ST. J. CRIM. L. 321 (2006).

<sup>294</sup> APPIAH, *supra* note 173, at 1.

<sup>295</sup> For example, social scientists have known for over 100 years that eyewitness identifications are unreliable, yet even into the 21<sup>st</sup> century, courts have disregarded or disbelieved the social science and have excluded expert testimony on the issue. JAMES M. DOYLE, TRUE WITNESS 9-34 (2005). See, e.g., *United States v. Hall*, 165 F.3d 1095 (7<sup>th</sup> Cir. 1999); *State v. Shomberg*, 709 N.W.2d 370 (Wis. 2006).

<sup>296</sup> See, e.g., *State v. Ninham*, 767 N.W.2d 326, 331 (Wis. Ct. App. 2009) (juvenile brain development findings are not “new” and do not warrant sentence modification in case of 14 year old sentenced to life imprisonment); See also Deborah Teurkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1 (2009). In her book on the language of law, Prof. Elizabeth Mertz discusses how much we struggle when we attempt to insert other disciplines (e.g. social science) into our discussions of law and policy. MERTZ, *supra* note 131, at 77.

<sup>297</sup> See *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (giving a four part test for admissibility of expert testimony in federal court: 1) whether the expert testimony been tested, 2) whether the theory or technique been subjected to peer review and publication, 3) the known or potential rate of error, and 4) the degree of acceptance in the scientific community.) See also *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (promoting a “general acceptance” test for admissibility of expert testimony, similar to the fourth factor in *Daubert, supra*) (superceded by

nature of the findings renders them highly relevant, informative, and helpful to any decision maker.<sup>298</sup> The expansive body of knowledge about language deficits, their effects, and the solutions is a natural fit with the juvenile and criminal justice system and could shed much needed light on a thorny and complex problem.

*B. Make it readable: rewriting legal forms*

*Like all human language, legal language is embedded in a particular setting...Excellent translation, whether across disciplines or among people, begins with epistemological modesty; it is only when we recognize that there are other possible perspectives and frameworks that we can start to comprehend them.*<sup>299</sup>

The legal system, correctional institutions, and treatment providers will all continue to make use of written forms to inform, educate, and remind individuals. Forms are efficient, and in the high-volume world of juvenile and criminal justice, efficiency matters. And, if the forms are written in a manner that is accessible to a substantial percentage of the intended audience, they can also be effective tools in the communication process.

In order to achieve that goal, we must first recognize that utility of any written document is directly dependent on

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Daubert, *supra*); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (applying *Daubert* to non-scientific evidence). In Wisconsin, the test for admissibility of expert testimony is “general relevance.” See *State v. Walstad*, 351 N.W.2d 469 (Wis. 1984).

<sup>298</sup> FED. R. EVID. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”).

<sup>299</sup> Mertz, *supra* note 131, at 223.

the actual (as opposed to a theoretical) reader's ability to read and understand the language in the document and to draw the necessary inferences contained within the text.<sup>300</sup> This means that documents such as guilty plea forms, bail conditions, appellate rights, conditions of probation or parole, and prison rule books must be rewritten and redesigned to be more readable -- i.e. understandable -- for the actual consumers of those documents.

Basic principles for increasing document readability<sup>301</sup> for individuals with limited language skills have been widely accepted within other fields, most notably the medical profession, and would be readily adaptable for legal documents. These principles include:

- Match the reading grade level to that of the average user of the document. Most complicated procedures can be written at a sixth or even a fourth grade reading level,<sup>302</sup>
- Use shorter sentences;
- Use familiar words and phrasings;
- Avoid jargon;

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<sup>300</sup> See generally, WILLIAM H. DUBAY, THE PRINCIPLES OF READABILITY (2004), available at

<http://www.nald.ca/fulltext/readab/readab.pdf> (last visited Feb. 7, 2010).

<sup>301</sup> Readability formulas, several of which are available via word processing programs such as Microsoft Word, can be a useful tool. Readability tools can generally be accessed through a word processing program's spelling and grammar check tools. Norman Otto Stockmeyer, *Using Microsoft Word's Readability Program*, MICH. B. J. 46, 46 (Jan. 2009), available at <http://www.docstoc.com/docs/19934275/Using-Microsoft-Words-Readability-Program>. . For example, using Microsoft Word 2003, you would "click on Tools, then Spelling and Grammar, then Options, and then check Show readability statistics." *Id.* Then, readability statistics would display each time you use the spell check function. *Id.*

<sup>302</sup> Medical literacy experts have had success reducing the reading level of medical documents designed to inform consumers. See, e.g., Michael K. Paasche-Orlow et al., *Readability Standards for Informed-Consent Forms as Compared with Actual Readability*, 348 NEW ENGL. J. MED. 728 (February 20, 2003).

- Where technical terms are used, provide an accessible explanation or definition;
- Use active voice and direct address;
- Use format and layout that does not intimidate, including 12 point font, bullet points and white space, and
- Include visuals, both representative and design.<sup>303</sup> For certain documents, it may even be appropriate to have a graphic or illustrated version available for some consumers.<sup>304</sup>

Where conditions or rules of supervision, release, treatment, or programming are provided in written form, it is critical that they be tailored to the circumstances of the individual. A one-size-fits-all approach, inherent in a pre-printed list of conditions, is an impediment not only to document readability, but also to the efficacy of the conditions as tools for rehabilitation, behavior modification, and protection of the public.<sup>305</sup>

Redesigning legal forms and documents to make them readable for individuals who lack strong language skills will

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<sup>303</sup> See Townsend et al., *supra* note 261, at 185; Cecelia DOAK ET AL, TEACHING PATIENTS WITH LOW LITERACY SKILLS 61 - 71 (2d ed. 1996), available at <http://www.hsph.harvard.edu/healthliteracy/doak.html> (last visited Feb. 7, 2010).

<sup>304</sup> For example, in 1997 South Africa distributed its millions of copies of its new Constitution, each of which included an illustrated guide to facilitate understanding and accessibility. HASEN EBRABIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA, ch.13 (1998), available at <http://sahistory.org.za> (Click on “resources” at the top of the page, then under “Archives” click on “Online books,” then find and click on “The Soul of a Nation” in the list of online books) (last visited Fe. 11, 2010). The illustrated guide was in the form of a book titled “You and the Constitution.” GREG MORAN, YOU AND THE CONSTITUTION (1997).

<sup>305</sup> See THE PEW CENTER ON THE STATES, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION: KEY QUESTIONS 2 (November 2007), available at [www.pewpublicsafety.org](http://www.pewpublicsafety.org) (Follow link in left sidebar to “Research and Reports,” then click on hyperlink to “Key Questions” under “When Offenders Break the Rules”) (last visited Feb. 7, 2010).

not be a simple matter of having a committee of legal professionals sit down and rewrite the forms and documents, especially since judges and lawyers are notorious for overestimating the ability of the lay public to understand legal language.<sup>306</sup> Including reading specialists and educators is essential. Pilot testing, often ignored when legal documents are created, must also be a part of process.<sup>307</sup>

It is unrealistic to suppose that we will ever create forms that can communicate with all or even most adult and juvenile defendants. The number of variables is simply too great to anticipate and accommodate in a single written form. Nor can forms ever take the place of a meaningful conversation with counsel or the supervising probation agent or social worker. Nevertheless, we can effectively reach a larger audience with a greater range of linguistic skills if we begin to create important written documents with the needs of the readers in mind.

### C. Judges

Trial courts have the ultimate responsibility for ensuring that the defendant understands all legal proceedings, including the rights he may be giving up and the consequences of his decisions.<sup>308</sup> The most effective way, indeed the only way, to achieve this goal is for judges to actually interact with defendants, especially those whose deficits may interfere with their ability to effectively cope with legal concepts.

First and foremost, judges must abandon the ubiquitous practice of asking some form of “do you understand?”<sup>309</sup> to ascertain whether an individual

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<sup>306</sup> See, e.g., Maria Mindlin, *Is Plain Language Better? Comparative Readability Study of Plain Language Court Forms*, available at <http://www.transcend.net/library.htm> (Click on “Is Plain Language Better” for the full text of the article) (last visited Feb. 7, 2010).

<sup>307</sup> DuBay, *supra* note 300, at 55.

<sup>308</sup> See, e.g., *United States ex rel Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *Boykin v. Alabama* 395 U.S. 238 (1969); *Henderson v. Morgan*, 426 U.S. 637 (1976).

<sup>309</sup> “Do you understand” is also widely used in medical settings, much to the chagrin of health literacy specialists. DOAK ET al *supra* note 303, at 61.

understands the legal process, the nature of his case, his rights, his responsibilities, and the consequences of failing to meet those responsibilities. The Wisconsin Court of Appeals has referred to this practice as the “standard script of ‘yes-and-no’ type colloquies that permeate so many of our judicial tasks.”<sup>310</sup> The problem with “do you understand?” is that it is essentially a leading question that demands an affirmative answer, especially where there is a power imbalance and the defendant is aware of his limitations. Both research and practice have shown that in such circumstances “do you understand?” is probably the *least* effective means of gauging an individual’s comprehension.<sup>311</sup>

Instead, judges should be asking defendants to explain the relevant information *in their own words*. Paraphrasing is a remarkably useful technique that can reveal how well an individual comprehends his situation, the decisions he must make, and the meaning and intent of questions and information.<sup>312</sup> It can be particularly effective when used with individuals with reduced language skills, since the trouble spots can be readily identified.<sup>313</sup>

If they are serious about ascertaining whether a defendant understands, judges should also refrain from relying on written forms such as plea questionnaires as proof of comprehension.<sup>314</sup> Such documents are essentially long-form versions of “do you understand?” and reveal nothing about what a defendant actually understands.

Neither should a judge simply rely on counsel’s assurances that she has explained the required material to her

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<sup>310</sup> *Strook v. Kedinger* 2009 WI APP 31, ¶ 32 (2009).

<sup>311</sup> DOAK ET AL., *supra* note 303, at 61-66.

<sup>312</sup> *Id.* at 65.

<sup>313</sup> See, e.g., Milagros C. Rosal et al., *Use of Cognitive Interviewing to Adapt Measurement Instruments for Low-Literate Hispanics*, 29 DIABETES EDUCATOR 1006, 1008 (2003).

<sup>314</sup> *State v. Hoppe*, 2009 WI 41, ¶ 31, 765 N.W.2d 794, ¶ 31 (Wis. 2009)(under Wis. Procedure, a signed plea questionnaire form is not enough to demonstrate comprehension). *But cf.* *Hill v. Lockhart*, 474 U.S. 52 (1985) (U.S. Supreme Court affirmed trial court’s reliance on guilty plea questionnaire as proof of understanding).

client and that he understands.<sup>315</sup> While counsel is the primary source of information for her client, the judge must make an independent inquiry. Where that independent inquiry reveals confusion or lack of understanding on the part of the defendant, the judge should send the case back to counsel for more work with her client. No doubt, this will occasionally disrupt the court calendar, but such is the price of due process.<sup>316</sup>

#### D. Assessment and Treatment

*There is so much talent there to be reached.<sup>317</sup>  
In a rational and humane system, you wouldn't  
have to choose between rehabilitation and  
public safety.<sup>318</sup>*

The fact that a defendant has reached late adolescence or adulthood with a communication deficit does not mean that he cannot learn or that he is untreatable, even if that deficit has negative behavioral implications.<sup>319</sup> In fact, quite the opposite is true. Contrary to common wisdom that the brain is more or less fixed by adulthood,<sup>320</sup> current neuroscience research “point[s] to the brain’s lifelong capacity to reshape itself in

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<sup>315</sup> *But cf.* Bradshaw v. Stumpf 545 U.S. 175, 183 (2005) (“Where a defendant is represented by competent counsel, the court usually may rely on that counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.”).

<sup>316</sup> “If the government cannot afford to provide due process to those it prosecutes, it must forego prosecution.” United States v. Mosquera, 816 F. Supp. 168, 176 (E.D.N.Y. 1993).

<sup>317</sup> Eugene L. Walle, speech-language pathologist and audiologist, Patuxent Institute, *quoted in Prisoners: A Neglected Population?* 26 AM. SPEECH HEARING ASS’N 19, 22 (June 1984).

<sup>318</sup> Rev. Jerry Hancock, *quoted in Lueders, supra* note 50.

<sup>319</sup> “For years the doctrine of neuroscientists has been that the brain is a machine: break a part and you lose that function permanently. But more and more evidence is turning up to show that the brain can rewire itself.” Publishers Weekly Nonfiction Reviews: Week of 12/4/2006, <http://www.publishersweekly.com/article/CA6395994.html> (Staff review of NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF: STORIES OF PERSONAL TRIUMPH FROM THE FRONTIERS OF BRAIN SCIENCE* (2007)).

<sup>320</sup> DOIDGE, *id.* at xvii.

response to experience.”<sup>321</sup> Neuroscientists now believe that “the functions of the brain can be strengthened just like a weak muscle.”<sup>322</sup>

Assessment and treatment of language disorders, and their emotional and behavioral connections and co-occurrences, are research specialties of their own, and this is not the place for an in-depth discussion of methodologies. But it is vital that we all understand the critical need for rehabilitative services<sup>323</sup> and the potential for successful remediation among impaired individuals, including many that we may consider too difficult or even too old.<sup>324</sup>

Forty years ago, speech and hearing experts optimistically, if unrealistically, recommended full-scale speech, hearing, and language examinations and therapy for a substantial portion of the prison population as a step toward “the improvement of society.”<sup>325</sup> Sadly, that level of testing and service is likely to remain beyond our reach. However,

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<sup>321</sup> THOMAS G. STICHT, *THE ADULT EDUCATION AND LITERACY SYSTEM (AELS) IN THE UNITED STATES: MOVING FROM THE MARGINS TO THE MAINSTREAM OF EDUCATION* (2000), available at <http://www.nald.ca/fulltext/sticht/aelsinus/inUS.pdf> (last visited Feb. 11, 2010) (citing J. Bruer, *Let's Put Brain Science on the Back Burner*, 82 *NASSP Bulletin* 9, 17 (1998)).

<sup>322</sup> Publishers Weekly Nonfiction Reviews: Week of 12/4/2006, *supra* note 319. Doidge posits that the brain can be changed by, among other things culture and exposure. He uses the term “neuroplasticity.” DOIDGE, *id.* at xviii-xix.

<sup>323</sup> Allison E. Mack & Genese A. Warr-Leeper, *Language Abilities in Boys With Chronic Behavior Disorders*, 23 *LANGUAGE, SPEECH, & HEARING SERVICES IN SCHOOLS* 214, 221 (1992) (“If the [delinquent boys] are to become productive members of society, it appears that these language abilities first need to be recognized and then addressed.”).

<sup>324</sup> See e.g., Michael F. Caldwell et al., *Are Violent Delinquents Worth Treating?* 43 *J. RES. IN CRIME & DELINQ.* 148, 152 (2006); Michael F. Caldwell et al., *Evidence of Treatment Progress and Therapeutic Outcomes Among Adolescents with Psychopathic Features*, 34 *CRIM. JUST. & BEHAV.* 573, 585 (May 2007).

<sup>325</sup> Eugene L. Walle & Peter L. Morris, *Hearing & Speech Research and Therapy with Sociopathic Criminals*, *HEARING & SPEECH NEWS* 8, 12 (March 1966). The authors recommended language assessment and treatment for any inmate diagnosed as “sociopathic” (now known as Anti-social Personality Disorder).

language and language-use assessments,<sup>326</sup> and appropriate treatment and programming that deal with language improvement *and* associated behavioral issues,<sup>327</sup> are neither exotic nor revolutionary. They must be included more frequently in court-ordered and corrections-based assessments and services if, as the 1973 Task Force cautioned, we are “serious” about rehabilitation and public safety.

#### IV. Conclusion: Why Don’t We Know This?

Perhaps the most startling aspect of all of the conclusions in the decades of research regarding language impairments -- the at-risk populations, the link with poverty, the consequences for development and communication, the connection between behavior and language, and the prevalence within correctional institutions -- is that the research and conclusions remain virtually unknown within the legal community. While many defense lawyers, judges, prosecutors, probation agents, and social workers have a sense that many defendants are “inarticulate,” otherwise communicatively delayed, or in some way “off,” we are generally still in the dark about what may lie behind that delay, what it means, or what to do about it.<sup>328</sup> Given the

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<sup>326</sup> The website for the American Speech-Hearing-Language Association has lists of instruments for a wide variety of language and language function assessments. See American Speech-Language Hearing Association (ASHA), *Directory of Speech-Language Pathology Instruments*, <http://www.asha.org/assessments.aspx> (last visited February 11, 2010).

<sup>327</sup> See e.g. James McGuire, *A Review of Effective Interventions for Reducing Aggression and Violence*, 363 *PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY B* 2577 (2008). For a general resource on language impairments and available testing and treatment, see American Speech-Language-Hearing Association, [www.asha.org](http://www.asha.org) (last visited Feb. 24, 2010).

<sup>328</sup> An example is the attorney who testified during post-conviction proceedings that, while her death penalty client “sometimes exhibited an inability to follow conversations and make eye contact, his behavior was not noticeably different from that of other jail inmates she had interviewed.” *People v. Kinkead*, 695 N.E. 2d 1255, 1273 (Ill. 1998). Co-counsel in the same case testified that the defendant “appeared to understand some of the matters discussed while he had difficulties with others,” *id.* at 1258, but did not raise competency. The fact that so many language deficits remain unsuspected and untreated is a testament to the

depth, breadth, and volume of research, and its potential impact on justice and public safety, we should all be wondering, “why don’t we know this?”

In the face of unrelenting caseload and financial pressures, expecting lawyers, judges, social workers, and corrections staff to contemplate yet another aspect of the human condition may seem almost cruel. Yet the juvenile and criminal justice systems have shown that they can adapt and retool (albeit slowly at times) when presented with the facts. Over the past decade and a half, courts have gone from fretting over juvenile “superpredators” to discussing juvenile brain development and acknowledging that juveniles are not mini-adults.<sup>329</sup> In the same vein, as the number of non-English speaking participants has risen, legal professionals have moved away from solving communication problems by bringing a neighbor in to court to interpret<sup>330</sup> and are beginning to embrace the concept of interpreter certification and cultural competency.<sup>331</sup> Similarly, the practices related to eyewitness identification are undergoing a radical transformation, based upon a large body of research and a distressing number of wrongful convictions.<sup>332</sup> Language deficiencies and their ramifications deserve equal attention, not only because of the numbers, but also because this cluster of disabilities strikes at the very heart of the assumptions we make about communication, due process, and human interactions. Furthermore, this knowledge can help shape our

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lack of awareness among educational, psychological, and legal professionals.

<sup>329</sup> *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 130 S.Ct. at 2025-2028 (2010).

<sup>330</sup> *State of Wisconsin v. Besso*, 240 N.W.2d 895 (Wis. 1976).

<sup>331</sup> *See, e.g.*, Federal Court Interpreters Act, 28 U.S.C. §§ 1827-1828 (2006).

<sup>332</sup> *See, e.g.*, Keith A. Findley *Reforming Eyewitness Identification Procedures to Enhance Reliability and Protect the Innocent* in ADAPTING TO NEW EYEWITNESS IDENTIFICATION PROCEDURES 103-20 (Thompson West 2010); *See also* *State v. Shomberg*, 288 Wis. 2d 1 (2006) (*dissent* by J. Butler reviewing social science on the accuracy of eyewitness identification and official recommendations for changes in identification practice).

perspective of culpability and the potential for intervention and rehabilitation.

The first step toward change is knowledge, and perhaps a humble acknowledgment that “we don’t even know what we don’t know.”<sup>333</sup> Basic information about language and behavior is crucial for criminal and juvenile justice practitioners. Just as practitioners are now required -- or at least strongly encouraged -- to acquire familiarity with the effects of cultural differences on communication and behavior,<sup>334</sup> so too should we all be exposed to language deficits and their effects.<sup>335</sup> This information can be disseminated through continuing legal and judicial education and correctional training. Ideally, it would find its way into professional school classrooms and clinical programs as well, especially those programs training professionals who will interface with the legal system.

Armed with this knowledge, we can all begin to effectively incorporate changes concerning language impairments and disorders into our practices and procedures. While the criminal and juvenile justice systems may not be able to change the circumstances and conditions that give rise to widespread language disorders, we can at least ensure that the system is fair, transparent, and responsive to those many juvenile and adult defendants whose communication deficits may impair their ability to adequately participate in the legal process, benefit from services, and function in the community. This just makes sense: as a matter of due process, as a matter of ethical and effective practice, as a matter of sound policy

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<sup>333</sup> Hon. Ronald. B. Adrine, *Fundamental Fairness and Limited English Proficiency: One Should Not Prevent the Other*, 18 PROTEUS 1, 4 (Fall 2009) (edited text of speech by Judge Adrine to the National Association of Judiciary Interpreters and Translators).

<sup>334</sup> See, e.g., American Bar Association, Standing Committee on Legal Education, Commission on Racial and Ethnic Diversity in the Profession, *Report to the House of Delegates*, [www.abanet.org/crimjust/policy/my04110.pdf](http://www.abanet.org/crimjust/policy/my04110.pdf) (last visited Feb. 11, 2010).

<sup>335</sup> One commentator has gone so far as to suggest that attorneys cannot begin to understand or address language difference without “first understanding the nature of language itself.” Ahmad, *supra* note 258, at 1031 (2007).

and public safety, and, to borrow a phrase from the United States Court of Appeals for the Second Circuit, as a “matter of simple humaneness.”<sup>336</sup>

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<sup>336</sup> United States *ex rel* Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

