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CIVIL PROCEDURE

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REGENTS OF THE UNIVERSITY OF CALIFORNIA v. HARTFORD ACCIDENT & INDEMNITY CO.:¹

RUNNING OF STATUTE OF LIMITATIONS IN FAVOR OF A PRINCIPAL DOES NOT EXONERATE A SURETY

The supreme court held that a construction surety is not directly protected by section 337.15 of the Civil Procedure Code,² which prohibits the maintenance of certain actions against contractors, architects, and others that are initiated more than ten years after the substantial completion of a project. The court also held that a surety is not indirectly exonerated under the section 337.15 bar to an action against its principal, thus affirming the rule that the running of a statute of limitations in favor of a principal does not exonerate a surety from liability on that principal’s obligation. Finally, the court held that a surety that is found to be liable may seek reimbursement from its contractor-principal, under Civil Code section 2847.³

The decision is anomalous. While the contractor is protected by section 337.15 against direct suits arising ten years after project completion, he nonetheless is subjected to reimbursement actions brought by

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2. CAL. CIV. PROC. CODE § 337.15 (West Supp. 1978) provides:
   (a) No action may be brought to recover damages from any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of such development or improvement for any of the following:
      (1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.
      (2) Injury to property, real or personal, arising out of such latent deficiency.
      (b) As used in this section, 'latent deficiency' means a deficiency which is not apparent by reasonable inspection.
      (c) As used in this section, 'action' includes an action for indemnity brought against a person arising out of his performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to Section 442 in an action which has been brought within the time period set forth in subdivision (a) of this section.
      (d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.
      (e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such improvement constitutes the proximate cause for which it is proposed to bring an action.
      (f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

3. Section 2847 of the Civil Code provides:
   "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what [the surety] has disbursed, including necessary costs and expenses . . . ." CAL. CIV. CODE § 2847 (West 1974).
his surety, who is not so protected. This Note will argue that the court incorrectly read the legislature's intent in passing section 337.15. Moreover, the court's decision likely will have adverse collateral effects such as decreasing judicial efficiency and increasing the rates of surety bonds, a consequence that the legislature sought to avoid by promulgating section 337.15.

I

In 1960, the Regents of the University of California entered into a contract with a general contractor for the construction of a student apartment project. Defendant Hartford Accident & Indemnity Company issued a bond guaranteeing the contractor's performance. The project was completed in 1962. The University discovered in 1972 that certain parts of the project's balconies and supporting structures were suffering damage due to moisture infiltration. In 1974, the University sued the general contractor and Hartford, as surety, alleging negligence, implied warranty, and breach of contract.

Before the 1971 enactment of section 337.15, the University's action would have been governed by the statute of limitations of section 337.1 of the Code of Civil Procedure. That section provides that any action based on a construction defect must be brought within four years of the discovery of the defect. Since the University brought its action within four years of discovery of the defect, its action would have been timely. With the enactment of section 337.15, however, action against architects or general contractors arising from latent construction defects must be brought within ten years of the date of substantial completion of the construction. The University brought its action nearly twelve years after substantial completion. The trial court, relying on section 337.15, granted summary judgment in favor of the contractor and Hartford. The University appealed from the portion of the judgment in favor of Hartford.

In its decision to reverse, the supreme court considered and rejected three theories under which the defendant-surety sought to avoid liability. Hartford first argued that sureties are among those parties directly protected by the ten-year limitations period of section 337.15. Second, Hartford contended that the running of the statute of limitations on claims against principals, as a general rule, should exonerate

4. The court assumed that the University, using reasonable diligence, could not have discovered the defect prior to 1972.
6. The court also rejected the surety's argument that the terms of the surety bond constituted a contractual stipulation that any event which discharged the principal from liability—including the running of the statute of limitations—would have the same effect on the surety.
sureties. Finally, Hartford argued that section 337.15 is a substantive statute of limitations and therefore warrants exception from the general rule of nonexoneration established by the rejection of the second theory.

II

ANALYSIS

A. The Legislature Did Not Intend to Directly Protect Sureties

In rejecting the theory that sureties are among those parties directly protected by the ten-year limitations period in section 337.15, the court inferred that the legislature intended to apply the established rule that the running of the statute of limitations in favor of the principal does not bar actions against the surety. This inference is questionable, however. The statutes of limitations involved in the cases that established the nonexoneration rule were general limitations on when plaintiffs could bring actions. They were not designed to further any purpose beyond that served by ordinary statutes of limitations—to force plaintiffs to bring claims before those claims become stale. In contrast, section 337.15 has little to do with the problems of litigating a stale claim. Rather, the primary purpose of section 337.15 is to relieve contractors of the possibility of being held liable when a defect arises long after construction is completed. This distinction plainly can be seen by comparing section 337.15 with the statute of limitations that previously applied to the construction contract situation, section 337.1. The latter statute, which provides that a plaintiff can sue up to four years after discovery of the defect, is designed to encourage plaintiffs

7. *See, e.g.*, Bloom v. Bender, 48 Cal. 2d 793, 313 P.2d 568 (1957). The action in that case was governed by the general statute of limitations for actions based on contracts, § 337 of the California Code of Civil Procedure. Section 337 was not aimed specifically at determining the liabilities of guarantors and principal debtors; rather it governs numerous actions related only by the fact that they are brought pursuant to a contract. Since § 337 is general, it made sense to apply the nonexoneration rule to that statute. The statute of limitations at issue in *Regents*, on the other hand, was drafted specifically to determine the extent of the construction industry's liability for latent defects. The application of the nonexoneration rule to that statute would affect a surety's liability. Since the surety is neither specifically included nor excluded from the statute, a court cannot as easily presume that the legislature, merely by failing to include sureties in § 337.15, both was aware of the nonexoneration rule and also intended the rule to apply to actions governed by § 337.15.


promptly to litigate construction claims. Under section 337.15, however, the statute of limitations might run prior to the plaintiff's discovery of the defect. Inferring the legislature's intent from its silence is hazardous under the best of circumstances, but it especially is risky when the court bases its inference on case law that dealt with a different situation.

Since the language of section 337.15 is broad enough to encompass sureties, the court's presumption that the legislature did not intend to protect sureties is also less than compelling. While the section does not specifically mention sureties, it applies to "any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction." Such broad language could be construed to include sureties, especially if one considers that a surety often must complete construction projects pursuant to its surety bond when a contractor defaults.

Recent decisions in the only other jurisdiction that has dealt with the application of a similar statute to a surety support such a construction. New Jersey courts have held both contractors and sureties to be protected absolutely where the limitations period has run.  

B. The Running of the Statute of Limitations on the Principal's Obligation Does Not Exonerate the Surety

Hartford's second theory, which the court also rejected, was that the running of the statute of limitations on claims against principals, as a general rule, should exonerate sureties. Although the court stated that the exoneration or nonexoneration of a surety is a question that depends on the proper interpretation of various statutes governing suretyship, it found that none of the statutes explicitly resolved the

10. See, e.g., Hudson Co. v. Terminal Constr. Corp., 154 N.J. Super. 264, 381 A.2d 355 (1977). In language almost identical to the California statute, the New Jersey statute provides:

No action whether in contract, in tort, or otherwise to recover damages for any deficiency in the design, planning, supervision or construction of an improvement to real property... shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause or the injury of damage for which the action is brought.


In *Hudson*, the court held that this statute protected the surety as well as the contractor. *See also* O'Connor v. Altus, 67 N.J. 106, 118, 335 A.2d 545, 551 (1975); Rosenberg v. Town of North Bergen, 61 N.J. 190, 198, 293 A.2d 662, 666 (1972) (§ 2A:14-1.1 should be read as applying to all who could, by a sensible reading of the statute, be brought within its ambit).

11. Section 2809 of the Civil Code establishes the general rule that "[t]he obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal... ." CAL. CIV. CODE § 2809 (West 1974).
problem. The court instead turned to an inconsistent line of cases that had dealt with the issue. While the court acknowledged that it "share[d] defendants' doubts" about the propriety of the most recent cases espousing the surety nonexoneration rule, it reasoned that, re-

Subsequent sections of the Civil Code express a variety of exceptions to this rule. Section 2810 stipulates:

A surety is liable, notwithstanding any mere personal disability of the principal... but he is not liable if for any other reason there is no liability upon the part of the principal at the time of the execution of the contract, or the liability of the principal thereafter ceases, unless the surety has assumed liability with knowledge of the existence of the defense.

CAL. CIV. CODE § 2810 (West 1974). Thus, if the running of a statute of limitations is considered to be "a mere personal disability," the surety is not exonerated. See also CAL. CIV. CODE § 2823 (West 1974): "Mere delay on the part of a creditor to proceed against the principal... does not exonerate a surety." Under this statute the surety would not be exonerated. But cf. CAL. CIV. CODE § 2825 (West 1974): "A surety is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor." Thus, if the expiration of a statute of limitations were considered an "omission of the creditor," the surety would be exonerated.

12. The first case in this line was Whiting v. Clark, 17 Cal. 407 (1861), in which the supreme court introduced the doctrine that the running of a statute of limitations in favor of a principal does not exonerate a surety. The court reversed its position in 1882, however, and held that the surety is exonerated. Paige v. Carroll, 61 Cal. 211 (1882). In 1888 the court, in Bull v. Coe, 77 Cal. 54, 18 P. 808 (1888), overlooked its decision in Paige and returned to the stance it took in Whiting that a surety is not exonerated. The supreme court reversed its position once again in 1901, holding in County of Sonoma v. Hall, 132 Cal. 589, 62 P. 257 (1901), that the surety must be exonerated since it should be placed in no worse a position than its principal. During the next 35 years, the courts of appeal followed the Hall rule of exonerating the surety. Towle v. Sweeney, 2 Cal. App. 29, 83 P. 74 (1st Dist. 1905); Anderson v. Shaffer, 98 Cal. App. 457, 277 P. 185 (2d Dist. 1929). In 1934, the supreme court in Gaffigan v. Lawton, 1 Cal. 2d 722, 37 P.2d 79 (1934), although recognizing that "there is conflict in the authorities," returned to the nonexoneration rule. Finally, in Bloom v. Bender, 48 Cal. 2d 793, 313 P.2d 568 (1957), the court purported to reconcile the inconsistent precedents and to establish conclusively the correctness of a nonexoneration rule. The court claimed that the inconsistency of the previous decisions was due to the different treatment of sureties and guarantors in California—while courts had barred actions against guarantors when a statute of limitations had run on the action against their principals, the courts did not bar actions against sureties in similar circumstances. The supreme court contended that the legislature's 1939 amendment to § 2787 of the Civil Code, see CAL. CIV. CODE § 2787 (West 1974), clarified the controversy by abolishing the distinction between sureties and guarantors. The court concluded that actions against both sureties and guarantors should be governed by "the more reasonable and logical rule" of nonexoneration espoused in Gaffigan. 48 Cal. 2d at 798, 313 P.2d at 571.

13. Professor Brudno (formerly Rintala) has criticized the court's attempt in Bloom to reconcile the previous conflicting decisions on the basis of whether those held secondarily liable were characterized as "guarantors" or "sureties." She dismissed this argument as "at best a hopeless rationalization." In addition, she criticized the court's failure to come to terms with the conflicts between §§ 2809, 2810, and 2825 of the Civil Code. Rintala, California's Anti-Deficiency Legislation and Suretyship Law: The Transversion of Protective Statutory Schemes, 17 U.C.L.A. L. REV. 245, 298-315 (1969). See notes 7 & 11 supra.

By relying solely on these cases, the Regents court also refused to determine definitively whether the running of a statute of limitations in favor of a principal involves a principal's "mere personal disability" which, under § 2810, would constitute an exception to the rule that a surety's liability should be coextensive with that of its principal.

14. 21 Cal. 3d at 636, 581 P.2d at 204, 147 Cal. Rptr. at 493.
To determine the nonexoneration rule, the nonexoneration rule should be retained in order to preserve certainty in the law:

Defendant's criticism of prior authority, however, does not convince us that this court should now do another about face and, for the fifth time, diametrically change its position on the issue of the surety's exoneration. In this area of the law in particular we recognize the need for consistency and reliability.\(^{15}\)

The court failed to justify its concern for "the need for consistency and reliability." Although the court declared that many transactions had been based upon the nonexoneration rule, it did not indicate whether the construction industry in fact had relied on the rule. Indeed, it is even doubtful whether sureties have considered the nonexoneration rule in calculating the rates of their bonds.\(^{16}\) Nonetheless, while there is a split over the issue, the court's affirmation of the nonexoneration rule is in accord with the view of the majority of the established authorities,\(^{17}\) as well as with most of the recent decisions in other jurisdictions that have dealt with this issue.\(^{18}\)

\[C. \text{ Section 337.15 Should Not be Treated as an Exception to the Nonexoneration Rule}\]

The third theory that the court considered was that section 337.15 is sufficiently different from the statutes at issue in prior cases as to require exoneration of the surety notwithstanding the general nonexoneration rule. In addressing this argument the majority responded primarily to Justice Clark's dissenting opinion. The Justice first contended that the nonexoneration rule should not apply where the statute

\(^{15}\) Id. at 637, 581 P.2d at 204, 147 Cal. Rptr. at 493.

\(^{16}\) James Fleshman, head of the bond department at Transamerica Insurance Company in Los Angeles, stated that prior to the Regents decision he believed that if the statute of limitations ran in favor of the contractor, it ran in favor of the surety as well. Mr. Fleshman declared that the general view of the surety's position has always been that "the surety stands in the shoes of the principal." In addition, he confirmed that the nonexoneration rule was not considered in calculating the rates of surety bonds. Rather, rates are predicated solely on the basis of the contract price for a construction project at the time bonds are issued. While premiums are adjusted when there is a change in the quantities of materials needed or a change in the unit price of these materials, premiums are not affected by the chance that a surety might be held liable after the statute of limitations has run in favor of the contractor. Telephone conversation with James Fleshman, head of the bond department at Transamerica Insurance Company (Apr. 6, 1979).

\(^{17}\) See, e.g., Restatement of Security §§ 120, 130, Comment a (1941); Conners, California Surety & Fidelity Bond Practice 22-23 (1969); Annot., 58 A.L.R.2d 1272 (1958); Annot., 122 A.L.R. 204 (1929).

of limitations involved is a limitation on a substantive right, rather than a procedural limitation on a remedy. Justice Clark viewed section 337.15 as a substantive limit on the creditor's right and the principal's obligation, not merely as a procedural bar to a remedy. Justice Clark observed that the section does not affirmatively permit actions to be brought within ten years and noted that other statutes may terminate such suits earlier. He argued instead that section 337.15 places an absolute limit on when such causes of action may accrue. He noted further that some actions will be foreclosed by the statute before discovery of the latent defects on which they are based, because the ten-year period begins on completion of construction rather than on discovery of the alleged defect. Interpreting the statute in this fashion, Justice Clark found a "clear legislative intent that lack of discovery or lack of injury shall not extend the contractor's responsibility for latent defects, and that his responsibility terminates in all events ten years after the improvements' substantial completion."\(^\text{19}\)

Second, Justice Clark contended that a surety compelled to pay pursuant to its bond is entitled to reimbursement from its principal. Yet, given the absolute termination of the contractor's responsibility, he concluded that contractors could not be held liable indirectly through a surety's suit for reimbursement where they clearly could not be held liable directly.

Third, Justice Clark argued that section 2809 mandates that a surety's liability be identical to that of its principal. In his view, the general doctrine of nonexoneration can be reconciled with this section only by the preservation of the surety's right to reimbursement under section 2847.\(^\text{20}\) He contended that since the right to reimbursement was proscribed by the substantive protection afforded principals under section 337.15, a surety could not equitably be held liable.

The majority summarily rejected Justice Clark's argument, stating that it had no reason to believe that the legislature intended to create "anything other than an ordinary, procedural statute of limitation."\(^\text{21}\) Courts in other states, however, have construed similar statutes the way Justice Clark characterized section 337.15—as a limitation on a substantive right as well as a limitation on a remedy.\(^\text{22}\) Nevertheless, by

\(^{19}\) 21 Cal. 3d at 646, 581 P.2d at 210, 147 Cal. Rptr. at 499 (Clark, J., dissenting).

\(^{20}\) See note 3 supra.

\(^{21}\) 21 Cal. 3d at 641, 581 P.2d at 207, 147 Cal. Rptr. at 496.

\(^{22}\) See, e.g., Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Hudson County v. Terminal Constr. Corp., 154 N.J. Super. 264, 381 A.2d 355 (1977). In Rosenberg, the court said of the statute, N.J. STAT. ANN. § 2A:14-1.1 (see note 10 supra): "The function of the statute is thus rather to define substantive rights than to alter or modify a remedy." 61 N.J. at 199, 293 A.2d at 372. In Hudson, the court, referring to Rosenberg, stated:

Although this statute does set a time limitation on causes of action, it is not actually a
ruling that section 337.15 was merely procedural, the majority held that the surety was liable under the nonexoneration rule, but that the surety was entitled to seek reimbursement from the contractor notwithstanding the protection afforded the contractor in section 337.15. Ironically, while the status of sureties under section 337.15 may be ambiguous, by the majority holding it is the liability of contractors that ultimately will be affected most adversely. Moreover, the court's ruling contradicts Justice Tobriner's own analysis that the surety is more capable of bearing the burden of uncertain liability and late judgments than is the contractor.23

CONCLUSION

The ultimate effect of the court's decision in Regents was to impose indirect liability on the contractor despite the direct protection provided the contractor in section 337.15. This result appears to undermine the legislature's intent in promulgating section 337.15.

statute of limitation. N.J.S.A. 2A:14-1.1 not only bars the institution of suit after the expiration of ten years for a cause of action arising within the ten-year period, but prevents a cause of action from ever arising after a ten-year period. Any harm resulting after that period of time is deemed to be damnnum absque injuria. 154 N.J. Super. at 270, 381 A.2d at 358.

See Federal Reserve Bank of Richmond v. Wright, 392 F. Supp. 1126 (E.D. Va. 1975). The Virginia statute that governs actions involving construction defects, VA. CODE ANN. § 8.01-250 (1977), states in part: "No action to recover for any injury to property, real or personal . . . shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvements to real property more than five years after the performance of furnishing of such services and construction." In Wright, the court discussed the predecessor of § 8.01-250 which substantively was the same as the new section:

Upon analyzing § 8-24.2, the Court is of the view that it does not constitute a statute of limitations in the strict sense . . . . The statute, by its wording does not require that every action to which it applies shall be brought within the specified period of time provided therein, as is typical of statutes of limitation generally . . . . Rather, it requires that no action to recover damages of the type specified shall be brought more than five years after the performance or furnishing of such services and construction . . . . . . In effect, the statute says that no matter when a cause of action accrues, those involved in the design, planning and construction of improvements to realty cannot be sued after five years from completion of the services and construction.

392 F. Supp. at 1129.

See also Schafer v. Wegner, 78 Wis. 2d 127, 254 N.W.2d 193 (1977); Johnson v. Hcintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

23. In discussing the constitutionality of § 337.15, Justice Tobriner denied that the section deprived the surety of equal protection of the laws. He stated that, as between sureties and contractors, sureties ought to bear the burden of uncertain liability:

A contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise. The construction surety, on the other hand, is in the business of assuming and evaluating risks derived from construction projects; it has the ability to spread such risks among the many contractors whose performance it guarantees, and to adjust its rates to assure that the substandard performance of any individual contractor will not prove disastrous.

21 Cal. 3d at 633 n.2, 581 P.2d at 201-02 n.2, 147 Cal. Rptr. at 490-91 n.2.
A typical statute of limitations represents a legislative weighing of several interests. The first is the plaintiff's interest in being able to bring actions and to obtain relief. The second is the defendant's interest in being free of responsibility for his actions at some time after the plaintiff has had a reasonable opportunity to bring his action. In addition, it is unfair to allow plaintiffs to turn delaying tactics into advantage by forcing a defendant to prove facts long after they have occurred. Proof problems may also be of concern in the area of judicial administration, since the accuracy and efficiency of judicial resolution of conflicts may depend on the freshness of the evidence. Finally, limitations periods may reflect the general desirability of not disturbing a state of repose—of "letting sleeping dogs lie."

Supreme Court has characterized this trend as a response to two developments in the common law which had served to expand greatly the liabilities of contractors and architects.25 The first development was the advent of the “discovery rule,” under which the statute of limitations does not begin to run until a wrong has been, or should have been, discovered. The second development was the determination that architects and contractors remain liable for negligent planning or construction even after they have completed their work and the owner has accepted it.26 A third development that has contributed to the trend was the abolition of lack of privity as a defense to actions arising out of defective improvements to real property.27

These three developments produced serious problems of indefinite liability for contractors and architects due to the long-term latency of many construction and design defects. In response to the problem, section 337.15 elevates the policy of freeing defendants from future responsibility to a status paramount even to the rights of a plaintiff to bring suit. Thus, where a latent defect becomes patent after the ten-year period has elapsed, a plaintiff may be barred from suing before he even knows that he has a cause of action. In light of this it is evident that section 337.15 has nothing to do with encouraging plaintiff diligence or avoiding prejudice to a defendant arising from a plaintiff’s dilatory behavior. Section 337.15 also may draw some force from the difficulty of defending against actions brought more than ten years after completion of a project. It is unlikely that many contractors keep records for such long periods. Again, the prevalence of latent defects in the construction context exacerbates the problem.

If the purpose of section 337.15 is absolutely to terminate the liability of the contractor after ten years, it does not make sense to allow a surety to be held liable and then to allow the surety to exact reimbursement from the contractor. Not only will the contractor ultimately be held liable under such an interpretation, but the surety also will face the same proof problems in defending the action as would the contractor. This being so, the court should have found some way to relieve the surety of responsibility for the defect. It could have done so by adopting Justice Clark’s substantive/procedural distinction as other courts have done or by creating a specific exception to the general nonexoneration rule. In view of the unique context and purposes of section 337.15, the court could have employed either alternative.

Whether rightly or wrongly decided, the court’s construction of section 337.15 might be short-lived. In direct response to the Regents decision, Assemblyman Alister McAlister has introduced a bill in the California Legislature to amend section 337.15 to include sureties within the group of parties entitled to the statute’s ten-year limitation. If the bill becomes law, the negative effects of the Regents decision will be checked. Sureties will not need to seek reimbursement from contractors, thus relieving contractors of life-long liability. In addition, courts and sureties alike will be spared the proof problems associated with such late actions.

Richard K. Freedman*

Jara v. Municipal Court: The Right to a Court-Appointed Interpreter in Civil Litigation

The supreme court held that a court’s refusal to appoint an interpreter for an indigent non-English-speaking civil defendant did not violate the federal or state constitutions. The court’s holding not only dealt a setback to linguistic minorities in California but also limited hopes raised by Payne v. Superior Court that the supreme court was prepared to significantly expand the right of meaningful access to civil courts.

The court found a defensible basis for its decision in the meager development of the constitutional right to a civil hearing. But the majority opinion’s cursory treatment of the issues raised in Jara reflects an insensitivity to the indignity, disadvantage, and resulting alienation from civil courts that is experienced by non-English-speaking litigants in California. Justice Tobriner argued in dissent that due process re-

29. The bill was heard by the Assembly on March 21, 1979, and approved and sent to the Senate on April 2.
* A.B. 1977, Stanford University; second-year student, Boalt Hall School of Law.

2. 21 Cal. 3d at 186, 578 P.2d at 97, 145 Cal. Rptr. at 850.
3. This Note does not distinguish citizens and aliens because the fourteenth amendment grants due process and equal protection rights to “any person” regardless of citizenship. U.S. Const. amend. XIV, § 1. Deaf persons are also considered to be non-English-speaking persons in this Note.
5. See notes 41-52 and accompanying text infra.
6. 21 Cal. 3d at 187, 578 P.2d at 97, 145 Cal. Rptr. at 850. Chief Justice Bird and Justice Newman concurred in the dissenting opinion.
quires appointment of an interpreter for a civil defendant who has no alternative means to obtain adequate interpretation of the proceedings. The dissenting opinion illustrates a humane approach which hopefully will characterize future efforts by the court to deal with California's problems of linguistic diversity.

Part I of this Note presents the factual background and the court's treatment of the case. Part II argues that due process precedents did not compel the *Jara* decision and that policy considerations support the recognition of a constitutional right to a court interpreter. Part III analyzes the equal protection aspect of the case, a legal theory not fully discussed by the court. Part IV briefly examines a recent California statute that undercuts the decision in *Jara*, and outlines the major elements of proposed legislation that is designed to provide civil litigants with the right to a qualified court-appointed interpreter.

I

**Summary of the Case**

Aurelio Jara was a defendant in a municipal court property damage action. Alleging indigency and inability to speak or understand English, Jara, through his legal aid attorney, moved to have a court interpreter appointed.\(^7\) When the municipal court denied the motion, Jara unsuccessfully petitioned the superior court for a writ of mandate to compel the appointment of an interpreter. The court of appeals reversed, holding that the refusal by the municipal court to appoint an interpreter violated Jara's federal and state constitutional rights of due process and equal protection of the law.\(^8\)

On appeal, the supreme court affirmed the superior court's denial of Jara's appeal. The court held first that neither statutory\(^9\) nor conversational means provided adequate interpretation of the proceedings. The dissenting opinion illustrates a humane approach which hopefully will characterize future efforts by the court to deal with California's problems of linguistic diversity.

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7. Supplemental Brief for Appellant at 10.
9. Article I, § 14 of the California Constitution was amended in 1974 to provide a right to a court interpreter for criminal defendants. The amendment does not define the scope of the right, the procedures to be used to ensure the right, or say whether the service is to be provided at public expense.
CAL. EVID. CODE § 752 (West 1955) mandates the use of court interpreters in both criminal and civil proceedings, but only to translate non-English testimony of witnesses. Thus, its intent is to benefit the court, not a non-English-speaking litigant.
A recent California statute mandates a program to train and certify California court interpreters. A.B. 2400, 1978 Cal. Legis. Serv. 498 (West) (to be codified as CAL. GOV'T CODE §§ 68560-68564). The urgency clause specifically mentions the *Jara* decision with disapproval. The text of the statute does not provide, however, that court interpreters be appointed in civil cases. For further discussion of the possible effect of this statute, see text accompanying notes 101-02 infra. A deaf person has a statutory right to a court-appointed interpreter in any criminal
mon law\textsuperscript{10} authority requires courts to appoint interpreters for civil litigants. To reach this conclusion the court distinguished \textit{Gardiana v. Small Claims Court}\textsuperscript{11} that held that courts have the inherent power and duty to appoint publicly compensated interpreters for indigent litigants in small claims court.\textsuperscript{12} The \textit{Gardiana} holding, it was noted, was not based upon any constitutional rights. Further, the absence of attorneys and the informal nature of procedural rules and decisions in small claims court were cited as factors limiting the scope of the \textit{Gardiana} holding to small claims proceedings.\textsuperscript{13}

The court decided that the constitutional guarantees of due process and equal protection are not violated when a trial court refuses the request of an indigent non-English-speaking civil defendant for a court-appointed interpreter. The majority acknowledged that the right of meaningful access to civil courts mandates publicly funded services in limited cases but held that infringement upon this right had not been shown.\textsuperscript{14} This determination was based in part on the fact that Jara was represented by counsel and on the court's view that it is a litigant's attorney who controls courtroom proceedings. A second factor was the court's belief that language assistance was available from alternative sources such as relatives, friends, and volunteers. Since Jara's right of access to the courts was not impaired, the court concluded that he had no right to a court-appointed interpreter.

The three dissenting justices took issue with the majority's "cavalier assumption" that family, friends, or volunteers would have the linguistic expertise, education, and free time to provide a viable alternative to court-appointed interpreters.\textsuperscript{15} Their opinion drew sup-

\textsuperscript{10} see \textit{Action or any action in which that person may be committed to a mental institution.} \textsc{Cal. Evid. Code} § 754 (West Supp. 1977).

Cases ruling on requirements for court appointment of third-party services must be distinguished from cases explaining a court's inherent power of appointment under the common law. In \textit{People v. Walker}, 69 Cal. App. 475, 231 P. 572 (2d Dist. 1924), it was held that a court has the inherent power to appoint an interpreter. \textit{Accord}, \textit{People v. Holtzclaw}, 76 Cal. App. 168, 171, 243 P. 894, 896 (2d Dist. 1926). The court in \textit{Walker} did not discuss the source of payment for the service.

\textsuperscript{12} \textit{Id.} at 421, 130 Cal. Rptr. at 680.
\textsuperscript{13} 21 Cal. 3d at 185, 578 P.2d at 96, 145 Cal. Rptr. at 849.
\textsuperscript{14} \textit{Id.} at 186, 578 P.2d at 97, 145 Cal. Rptr. at 847. For analysis of this argument, see notes 41-52 and accompanying text \textit{infra}.

\textsuperscript{15} \textit{Id.} at 187-88, 578 P.2d at 98, 145 Cal. Rptr. at 851. For a discussion of this point, see notes 41-46 and accompanying text \textit{infra}.
port from the court's prior decision in *Payne v. Superior Court* where it was held that the defense of one's property interests constitutes a fundamental right that is to be protected by due process of law. The dissent also looked to criminal cases in which the right to a court interpreter was based not only on the defendants' rights of confrontation and effective assistance of counsel, but also on their right to due process of law. To implement the due process right Justice Tobriner invoked a court's inherent power to waive its costs. Since interpreter's fees are deemed "costs" by statute, he reasoned that a court has the implicit power to waive their collection. The dissent thus concluded that courts have both the power to provide court-appointed interpreters at no expense and the constitutional duty to do so when an indigent non-English-speaking civil defendant lacks alternative means of obtaining an interpreter.

II

DUE PROCESS

A. The Due Process Precedents

The decision in *Jara* was consistent with federal and state due process precedents. Courts have held that many procedural protections that are constitutionally mandated in criminal trials are not required in civil hearings. Of particular relevance is the failure of courts to expand to civil proceedings the right to a court-appointed interpreter that is generally recognized for indigent non-English-speaking criminal defendants. The differential treatment has been justified by the sixth amendment which guarantees the right to counsel and to confront adverse witnesses, but which is limited by its terms to criminal proceedings. Some courts have implied, additionally, that the individual

17. 21 Cal. 3d at 190-91, 578 P.2d at 99-100, 145 Cal. Rptr. at 852-53.
18. See CAL. EVID. CODE §§ 752(b), 730, and 731(c) (West 1966); CAL. GOV'T CODE § 26806(c) (West 1968); id. at § 68092 (West 1976).
19. 21 Cal. 3d at 193, 578 P.2d at 101, 145 Cal. Rptr. at 854.
20. Id. at 187, 578 P.2d at 97, 145 Cal. Rptr. at 850.
23. The sixth amendment states in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.
interest at stake in a criminal case, the right to liberty, is more important than the interests at stake in civil actions. Rigid application of this distinction has been criticized by commentators because in many civil hearings where needed protections are not required more important interests are at stake than in criminal hearings where they are required. Nonetheless, the distinction generally has been respected in judicial decisions.

Thus, while the policy considerations at issue in many criminal and civil procedural due process questions are substantially similar, a parallel doctrine is needed to define the constitutional rights that should attach in civil hearings. The United States Supreme Court provided the germ for such a doctrine in Boddie v. Connecticut. It held that the failure of a trial court to waive filing fees for an indigent couple who wished to dissolve their marriage was a denial of their due process right of access to civil courts. The right of access, the Court said, required a meaningful hearing appropriate to the nature of the civil case. The case thus established the existence of a constitutional right derived from the due process clause to have meaningful access to courts, a right that in some civil cases requires the waiver of filing fees for indigents. The scope of the holding in Boddie was limited, however, by subsequent cases and the Court has not expanded the right to

25. See, e.g., Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 549 (1967); Comment, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966) (author also argues that the limitation on the scope of the Sixth Amendment was the result of historical accident rather than intent of the founding fathers to provide greater protections in criminal hearings); Comment, The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings, 9 Mich. J.L. Ref. 554, 558 (1976).

In many nominally civil trials, loss of liberty may result, and some courts have recognized that due process requires representation by counsel. See, e.g., In re Gault, 387 U.S. 1 (1967) (right to counsel in juvenile proceeding where commitment may result); Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) (juvenile dependency proceeding); In re Love, 11 Cal. 3d 179, 520 P.2d 713, 113 Cal. Rptr. 89 (1974) (parole revocation). But even in many civil cases where incarceration is not at stake the distinction is questionable. An indigent facing the possible loss of his or her job, license to work or drive an automobile, tools, or possession of a tenement may feel more threatened than if he or she were accused of a criminal offense carrying a maximum punishment of ten days in jail.

28. Id. at 377-78 (citation omitted).
29. In United States v. Kras, 409 U.S. 434 (1973), and Ortwein v. Schwab, 410 U.S. 656 (1973), the Court upheld lower court refusals to waive fees for indigents filing for bankruptcy and filing an appeal of a reduction in welfare benefits. Taken together, the cases suggest that the federal constitutional right to fee waiver for indigents is limited to those situations where the litigant is seeking to vindicate a right intertwined with a fundamental interest, and where the state possesses a "monopoly of the means" of effectuating a resolution to the conflicts. Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

The monopoly of means test has been criticized because "the state holds the ultimate remedy
meaningful access.

By contrast, the California Supreme Court has broadly interpreted the right of meaningful access as defined in Boddie. In Payne v. Superior Court, a state prisoner who was a defendant in civil litigation was denied both an opportunity to appear in court and appointed counsel. Concluding that the right to defend one's property is as constitutionally important as the right to dissolve a marriage which was at stake in Boddie, the California Supreme Court held that the dual denial in Payne was impermissible under the due process and equal protection clauses of the California and federal constitutions, unless justified by a compelling state interest. The Payne court found that the interests advanced by the state did not justify denying the defendant an opportunity to appear personally or through counsel. The court limited its holding to civil defendants who are prisoners and who suffer "the dual deprivations in almost every property dispute." Meltzer v. Lecraw & Co. (Indigents' Cases) 402 U.S. 954, 955-58 (1970) (Black, J., dissenting from denial of certiorari). See also Boddie v. Connecticut, 401 U.S. 371, 387 (Brennan, J., concurring).

The Court in Kras and Ortwein did not numerate the asserted alternatives to a civil suit, but seemed to be referring to arbitration and out-of-court settlement. Yet the less financially able a person is to mount an effective legal attack or defense, the less disposed the other party to the dispute will be to negotiate seriously. See Goodpaster, The Integration of Equal Protection, Due Process Standards and the Indigent's Right of Free Access to the Courts, 56 IOWA L. REV. 223, 234-36 (1970). For further criticism of the decisions in Kras and Ortwein, see Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I, 1973 DUKE L.J. 1153 (1973); Comment, The Heirs of Boddie, Court Access for Indigents After Kras and Ortwein, 8 HARv. CIV. RIGHTS-CIV. LIB. L. REV. 571 (1973).

31. Id at 922-23, 553 P.2d at 576, 132 Cal. Rptr. at 416. The indigent prisoner had been sued in civil court and had been denied by prison officials the opportunity to appear personally to defend the action. The court left open the question of the state's power to refuse a prisoner a personal appearance. It ruled simply that if an appearance were not permitted, due process required the appointment of counsel to protect the prisoner's interests.
32. Id at 919-22, 553 P.2d at 573-75, 132 Cal. Rptr. at 413-15. The interests that were rejected by the court included the danger of frivolous and contrived suits and the financial burden on the state. The opinion distinguished Kras and Ortwein as cases in which the plaintiffs had alternative means to resolve their litigation that were unavailable to the petitioner in Payne—in Kras, a negotiated settlement agreement, and in Ortwein, administrative hearings. Id at 916-17, 553 P.2d at 572, 132 Cal. Rptr. at 412. The court also pointed out that a discharge in bankruptcy and an increase in welfare benefits are statutory rights creating a mere expectancy that the legislature can withdraw at any time. Id at 916, 553 P.2d at 571, 132 Cal. Rptr. at 411. The court found these interests different from the right to defend one's private property, which "is a right of fundamental constitutional dimension." Id at 919, 553 P.2d at 573, 132 Cal. Rptr. at 413.
33. The distinction between "plaintiffs" and "defendants" does not withstand scrutiny because such labels are often determined merely by the order in which the parties to a dispute file their respective claims. See Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I, 1973 DUKE L.J. 1153, 1183, 1184. The author concludes that the state's failure to waive filing fees for indigents often causes greater injury to potential plaintiffs than to potential defendants. Id at 1196-97. In a particular case the right to defend one's property may best be effectuated by an action to enjoin some threatening activity or to regain lost property interests. Further, as one writer has pointed out, "[f]or a poor person the inability to sue effectively on a good claim for damages is, realistically speaking, likely to be a graver injury than
vation of appointed counsel and the right to personal presence in court.” This deprivation was more severe than the harm suffered in Jara. 34 Nevertheless, the Payne decision may be read as generally establishing that the defense of one’s property interests is of such constitutional significance that under certain circumstances the civil courts must take extraordinary action to guarantee the litigant’s right of meaningful access to the courts. In some cases, this requires the provision of free third-party services. 35 This focus on the constitutional importance of the interests at stake in certain civil hearings is an important step in the development of a doctrine to provide procedural rights in California civil cases similar to those accorded criminal defendants.

B. Defining the Hearing Required by the Right of Meaningful Access

The United States Supreme Court has stated that the right of access to courts requires more than mere presence, but rather an “‘opportunity . . . granted at a meaningful time and in a meaningful manner . . . for [a] hearing appropriate to the nature of the case. . . .’” 36 In Goldberg v. Kelly, 37 the Court concluded generally that “[t]he opportunity to be heard must be tailored to the capacities and circumstances of an adverse money judgment, because the judgment will probably never be enforced.” Note, Indigent Prisoner Defendants’ Rights in Civil Litigation: Payne v. Superior Court, 90 Harv. L. Rev. 1029, 1039 n.68 (1977).

34. One important factual limitation on the holding in Payne, the inability of the defendant to personally appear, was recently relaxed in Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979), where the supreme court held that an indigent defendant in a paternity suit has a constitutional right to appointed counsel when free legal services are unavailable. While the scope of the decision was unclear, it did demonstrate that third-party services may be required under more general circumstances than existed in Payne.

The opinion emphasized that the case involved an individual defending against “the full power of the state” and that “serious financial, legal and moral obligations were at stake.” Id. at 32, 593 P.2d at 233, 154 Cal. Rptr. at 536. The dissent felt that each of the distinctions was insignificant. First, ordinary tort or contract suits are litigated by the state without triggering special safeguards for its adversary. Second, because the state cannot “order a man to act as a father,” money is almost exclusively at stake in a paternity suit, making it little different from other property litigation. If the dissent is correct, Salas is additional precedent for a broad interpretation of the right to meaningful access to California courts, including free third-party services whenever property interests are at stake. More probably, paternity hearings will take a place among a small but growing list of civil hearings in which the importance of the rights being adjudicated requires the appointment of counsel. A strong argument is available that at least in those hearings the indigent non-English-speaking defendant also has a constitutional right to an appointed interpreter.

35. The court refrained from ruling that appointed counsel be compensated from public funds, but instead indicated that attorneys would have to serve gratuitously if legal aid attorneys or public defenders are unavailable. In the more recent decision of Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, however, the supreme court required appointment of counsel at state expense. See note 34 supra.


those who are to be heard.”38 Specifically, the Court ruled that a hearing on an appeal of a decision to terminate certain welfare benefits must include the following rights: 1) to be represented by counsel (although appointment is not required), 2) to personally appear, 3) to offer oral evidence, 4) to confront and cross-examine witnesses, and 5) to have an independent hearing officer.39

The right to such a hearing at present appears limited to cases in which the state with its full panoply of force moves against an individual.40 Yet the description in those cases of the attributes of a meaningful hearing should be applied to private property damage suits, in light of the important constitutional status assigned to the defense of one’s property interests in Payne. The Supreme Court informed administrative agencies in Goldberg that if they purported to have a hearing they had to make it a meaningful one. The judicial system should heed its own advice when it determines the property rights of civil defendants.

C. Indigent Non-English Speaking Persons Cannot Have Meaningful Hearings Without Appointed Interpreters

The California Supreme Court has recognized that representation by counsel is necessary in some cases for an indigent civil defendant to have a meaningful hearing. It is appropriate to ask next whether the right to a meaningful hearing also requires interpretive services for an indigent non-English-speaking defendant in a civil hearing.

The Jara court based its finding that there was no infringement on the petitioner’s right to a meaningful hearing on two dubious factual assumptions. First, the court said that a non-English-speaking defendant has “‘. . . access to a variety of sources for language assistance. Members of his family, friends or neighbors may provide aid. Private organizations also exist to aid immigrants.’”41 This assumption exposes the court’s lack of familiarity with non-English-speaking Californians. A typical member of that group often lives in a neighborhood in which his family and most of his friends understand little fluent English. It has been estimated that there are 1,225,000 persons in California who are unable to speak English, or approximately six percent of the 1974

38. Id. at 268-69.
39. Id. at 267-71.
40. The cases do not all involve essential rights akin to the welfare rights in Goldberg. See Goss v. Lopez, 419 U.S. 565 (1975) (informal hearing before suspension of high school student); Perry v. Sindermann, 408 U.S. 593 (1972) (fired state college professor had right to hearing to prove tenure). The enforcement of judgments in civil suits, however, has never been held to constitute the level of state involvement in these cases. For a criticism of the Court’s narrow interpretation of the right to a meaningful civil hearing, see Van Alstyne, Cracks in “The New Property”: Adjudicative Due Process in the Administrative State, 62 CORNELL L. REV. 445 (1977).
41. 21 Cal. 3d at 184, 578 P.2d at 95, 145 Cal. Rptr. at 848.
population. Among this group, more than three-fourths of those aged sixteen and older have not graduated from high school. Due to the sophisticated and important legal terminology with which issues are explained in a judicial proceeding and the skill required to translate rapid speech, it is unlikely that non-English-speaking litigants will be able to find competent persons to interpret. Moreover, even assuming that friends or relatives are capable of interpreting, they may not be free to give up their daily work or child-care responsibilities to spend as much as a week or more in court. The majority's second, more fundamental erroneous assumption was that the absence of an interpreter to explain proceedings as they occur is not a substantial burden on the litigant's right to a meaningful hearing. The assumption conflicts with the opinions of courts and commentators who have faced this

42. Arthur Young & Co., A Report to the Judicial Council on the Language Needs of Non-English-Speaking Persons in Relation to the State's Judicial System (hereinafter Report to Judicial Council), Phase I, at VI-11 (January 1976). For a discussion of the methodology used in arriving at this estimate, see Report to Judicial Council, Phase I at VI-4 to VI-9. A non-English-speaking person, as defined in the study, is a person "who communicates in his or her home language only. Such a [person] is unable to conduct basic conversations in English . . . ." Id. at VI-3.

43. Id. at Exhibit VI-2.


45. Justice Clark would rely on volunteer organizations which aid immigrants to provide interpretation services. This reliance seems to assume that non-English-speakers are immigrants. In fact it is not uncommon to find second generation Chicanos who would be unable to comprehend a judicial proceeding in English. Sugarman and Widess, Equal Protection for Non-English-Speaking School Children: Lau v. Nichols, 62 Calif. L. Rev. 157, 160 (1974). It is also unreasonable to suppose that these scattered volunteer organizations have the numbers or expertise to ensure that every indigent non-English-speaking litigant who is unable to find a family interpreter has a competent volunteer interpreter. Furthermore, serious questions have been raised as to the quality of interpretation litigants have received from both volunteer and currently employed translators. One such conclusion was based upon interviews with over 350 judges, court officials, attorneys, and employees of state agencies and upon random observations in various California courts by a consulting specialist. Report to Judicial Council, Phase I, supra note 42, at V-5 to V-9.

As one noted commentator has observed:

It may be suspected that courts in the metropolitan cities do not exercise sufficient care to provide a staff of honest and competent interpreters. They become callous to the grist of petty criminal cases; and they tend to forget that one of the cruelest injustices is to place at the bar a person of alien tongue and then fail to provide him with the means of defending himself by intelligible testimony.

3 J. Wigmore, Evidence 226 (3d ed. 1940). See also Safford, No Comprendo: The Non-English-Speaking Defendant and the Criminal Process, 68 J. of Crim. Law & Criminology 15, 25-29, for cases in which an inaccurate translation proved important.

46. The court's argument has been undermined by a recent California statute. See notes 101-02 and accompanying text infra.

47. 21 Cal. 3d at 184, 578 P.2d at 95, 145 Cal. Rptr. at 848.
question in the context of criminal trials. In *Negron v. New York*, 48 for example, Judge Kaufman found that the defendant’s “incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination.” 49 The disadvantage is heightened when indigents are represented by legal aid attorneys who are not able under the circumstances to engage in discovery. To the extent that investigation is carried out, it will be especially difficult where the client and key witnesses do not speak English. The combination of inadequate pretrial investigation and language barriers in the courtroom reduces the opportunity to confront witnesses to a mere formality. In general, where the indigent’s attorney does not speak the foreign language of his client, there will be very poor communications between the two persons even with the informal aid of friends or relatives. In the resulting confusion, valid defenses may be overlooked, and defendants may, in their bewilderment, agree to disadvantageous settlements. Without adequate communication, assistance of counsel must inevitably be ineffective.

In addition to overlooking these procedural handicaps the court’s remark exhibits an unfortunate callousness to the inhumane plight of the non-English-speaking defendant who must sit for days in ignorance while his rights are adjudicated. The First Circuit has described such a scene as “Kafkaesque.” 50 As Justice Tobriner pointed out in his dissent, the majority did not confront this human side of the court inter-

48. 434 F.2d 386 (2d Cir. 1970).
49. Id. at 390. Similarly, the Arizona Supreme Court has recognized that “[a] defendant’s inability to spontaneously understand testimony being given would undoubtedly limit his attorney’s effectiveness, especially on cross-examination.” Arizona v. Natividad, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974) (conviction of a deaf mute). Another court concluded that “mere confrontation of the witnesses would be useless bordering on the farcical, if the accused could not hear or understand their testimony.” Terry v. State, 21 Ala. App. 100, 102, 105 So. 386, 387 (1925). See also *The King v. Silvester*, [1912] 1 K.B. 337 (Can.), in which the court stated:

“To say that the deaf man or the foreigner who does not understand the language of the proceedings has not the inherent right to have them made intelligible to him is to say that the privilege of being present during his trial and the privilege of hearing and cross-examining the witnesses against him was a mere form and that the common law was satisfied to have the letter of its requirement complied with while its spirit and substance went unfulfilled.

*Id.* at 339, cited in *Chang & Araujo, Interpreters for the Defense: Due Process for the Non-English-speaking Defendant*, 63 CALIF. L. REV. 801, 823 (1975) [hereinafter cited as *Chang & Araujo*]. While this criticism generally has been made in criminal proceedings, it applies with equal force to civil proceedings.

50. United States v. Carrion, 488 F.2d 12 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974). This point had been made earlier in United States v. Desist, 384 F.2d 889 (2d Cir. 1967), aff’d, 394 U.S. 244 (1969), where the court noted, “We are aware that trying a defendant in a language he does not understand has a Kafka-like quality . . . .” 384 F.2d at 902. Similarly, the Second Circuit, in *Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), observed that “[n]ot only for the sake of effective cross-examination . . . but as a matter of simple humanness, [the defendant] deserved more than to sit in total incomprehension as the trial proceeded.” *Id.* at 390.
preter issue.\textsuperscript{51} Thus, the majority's assumptions as to alternative sources for interpretation and the unimportance of a represented litigant's comprehension of the proceedings are questionable.\textsuperscript{52} At least two of the hearing requirements enumerated in \textit{Goldberg v. Kelly}—confrontation and cross-examination of witnesses and effective assistance of counsel—were impaired by the trial court's refusal in \textit{Jara} to appoint a court interpreter. These procedural violations, coupled with a humane consideration of the plight of the indigent non-English-speaking defendant, militate forcefully against the notion that such persons can have meaningful hearings without appointed interpreters.

\section*{D. The State Interest in Not Appointing Interpreters}

This Note has argued that the opportunity to have meaningful access to courts to defend one's property interests has been recognized in California as a right of fundamental constitutional importance. Therefore, a right to the type of hearing described in \textit{Goldberg} should attach absent an overriding state interest. It has also been argued that an indigent non-English-speaking defendant cannot receive a meaningful hearing without an interpreter and thus suffers an impairment of this due process right. Assuming this to be true, one next must decide whether there are state interests which outbalance the infringement

\textsuperscript{51} 21 Cal. 3d at 188, 578 P.2d at 98, 145 Cal. Rptr. at 85. In failing to recognize the inhumane quality of trial in a foreign language without interpretation, the court also overlooked the deterrent effect of an absence of interpreters on potential plaintiffs with meritorious claims. As a report to Congress stated, "The language barrier is one of the primary causes preventing many from becoming involved in our judicial system . . . . [It] acts as a 'chilling effect' upon those who would otherwise seek justice within the legal system. . . ." \textit{Senate Comm. on the Judiciary, Bilingual Court Proceedings, S. Rep. No. 93-1185, 93rd Cong., 2d Sess. 4} (1974) (hereinafter \textit{Sen. Rep. on Bilingual Proc.}). \textit{See also Report to Judicial Council, Phase I, supra note 42, at V-16 to V-18.} This alienation from the judicial process poses questions as to the integrity of our courts. The absence of interpretive services both narrows the availability of the judicial forum and undercuts its claimed fairness.

In rejecting the notion that absence of court-supplied interpretive services imposed a substantial burden on the indigent defendants, the \textit{Jara} court noted that there had been no showing as to whether non-English-speaking litigants, able to afford paid interpreters, are likely to secure them for consulting with counsel and translating legal proceedings." 21 Cal. 3d at 185, 578 P.2d at 96, 145 Cal. Rptr. at 849. The court asks for unobtainable evidence with little relevance to the issue before it. The need for courtroom consultation between the attorney and his client varies from case to case. Private attorneys hired by more affluent civil defendants may have more time and resources to prepare their cases before trial and thus be less dependent on their clients' insights during the trial itself. Whether many indigents desire and need a court interpreter in order to obtain a fair hearing is the question upon which the court should have focused. A like criticism can be made of the court's comment that \textit{Jara} was in no worse position than litigants who elect not to appear in court. \textit{Id.} at 186, 578 P.2d at 96-97, 145 Cal. Rptr. at 849-50. Justice Clark was again comparing a fair hearing safeguard voluntarily unexercised to one which is, in effect, denied.

\textsuperscript{52} The reasoning used by the court was especially unfortunate because the idea that the inability to speak English is not a disadvantage meriting special judicial attention could pose dangers in areas such as education, social services, employment and voting.
upon this right or, whether the state interests are overriding in certain categories of civil cases but not others. 53

The primary state interest at stake is in limiting the cost of the administration of justice. It has been said that without statutory authority, the judiciary is powerless to order the expenditure of public funds to compensate interpreters. 54 This assertion is dubious. Although financial considerations are weighed in determining whether a violation of due process has occurred, once such a finding is made a court has the power to provide a remedy which will require the state to spend money. Due process decisions expanding the right to counsel in criminal cases had this effect. 55 A second rebuttal to the argument that courts may not order expenditure of public funds for interpretation, one noted by the Jara dissent, is that by statute interpreter payments are defined as "costs" which are waivable by the court. 56 It may indeed be expensive to provide court interpreters. But the cost of such services would not significantly strain government budgets. 57 Repayment of the costs could be required when the indigent becomes financially able. 58 Further, it must be remembered that financial cost is a factor in the balancing process but does not have controlling weight. 59

53. The proper process of identifying and balancing interests was recently described by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976):

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 425 U.S. at 335.

Balancing was employed in Payne when the California Supreme Court left much discretion to the trial court in determining whether the right to counsel attached in a particular case and what specific remedy is necessary to ensure a meaningful opportunity to be heard. 17 Cal. 3d at 923-24, 927, 553 P.2d at 576-77, 579, 132 Cal. Rptr. at 416-17, 419. See also Gagnon v. Scarpelli, 411 U.S. 778 (1973) (right to counsel in probation revocation hearings).

54. See, e.g., Jara v. Municipal Court, 21 Cal. 3d at 184, 578 P.2d at 95, 145 Cal. Rptr. at 848; Payne v. Superior Court, 17 Cal. 3d at 920 n.6, 553 P.2d at 577, 632 Cal. Rptr. at 414 n.6.


56. CAL. EVID. CODE §§ 752(b), 730, 731(c) (West 1966).

57. As Justice Black stated: "[I] believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their [civil] disputes." Meltzer v. Lecraw & Co. (Indigents' Cases), 402 U.S. 954, 956 (Black, J., dissenting from denial of certiorari). The Canadian experience with appointed court interpreters lends support to the view that overall costs would be manageable. See REPORT TO JUDICIAL COUNCIL, PHASE I, supra note 42, at V-18. See also Samore, Legal Services for the Poor, 32 ALBANY L. REV. 509 (1968); Note, Dollars and Sense of an Expanded Right to Counsel, 55 IOWA L. REV. 1249 (1970).


While the California Supreme Court has required the appointment of counsel at state expense in at least one civil case, the court has also implied that civil defendants have no general constitutional right to counsel. It does not follow, however, that a balancing of interests at stake in the court interpreter question should give the same result. Implementation of the right to an interpreter would be much less expensive for the state. Under Justice Tobiner's dissenting analysis, interpreters would only be needed for a relatively select group of litigants: non-English-speaking civil defendants who demonstrate their indigency and lack of alternative sources of competent interpretation. Unlike appointed attorneys, who must do extensive pretrial preparation, interpreters could be employed merely at actual trials and pretrial proceedings involving witness testimony. Interpreters could also be employed in other administrative positions when they are not interpreting and trained volunteers could interpret when they are available. Traditionally low interpreters' salaries further limit potential expense.

In light of these cost-mitigating factors, the state fiscal interest in not implementing a right to a court interpreter is much smaller than its interest in not providing counsel. This Note concludes that a balancing of the interests at stake supports the view of the dissenters in Jara that due process requires a trial court "to provide an interpreter for an indigent defendant in a civil action if the defendant lacks alternative means by which to obtain a translation of the proceedings against him."

It may be argued that it would be financially impossible to provide interpreters in each of the scores of foreign dialects spoken in some states. This fact poses no real analytic or practical problem because the due process balance of interests will shift according to the burden on the government in supplying the service. Substitute safeguards will have to be used when no qualified interpreter can reasonably be obtained for an indigent who speaks an uncommon language.

60. See note 36 and accompanying text supra.

61. A cost analysis was done in REPORT TO JUDICIAL COUNCIL, PHASE III, supra note 42, of a proposed court interpreter training and testing program which would have involved 407 enrollees in 29 county sites. The goal was to produce 187 certified interpreters who would be available for use at state expense in criminal proceedings. Initial cost to the state was estimated at $199,000. Annual local costs associated with coordination, list maintenance, scheduling and periodic evaluation of interpreters were estimated at $46,000 for the 29 counties. For details as to the methodology used in cost analysis, see id. at 33-40.

62. 21 Cal. 3d at 187, 578 P.2d at 97, 145 Cal. Rptr. at 850.

63. It is assumed that in an unhurried setting outside the courthouse the attorney and client will be better able to obtain adequate volunteer interpretation supplied by either government agency employees, friends, relatives or volunteer agencies.

64. See REPORT TO JUDICIAL COUNCIL, PHASE I, supra note 42, at V-7 to V-8. Appendix A-1 cites the California State Bar Committee on Disadvantaged Persons and the Law, REPORT OF COMMITTEE ON "DISADVANTAGED PERSONS AND THE LAW": TESTING, QUALIFICATIONS OF COURT INTERPRETERS (1975), which found the average interpreter's compensation rate to be $50 per day.

65. 21 Cal. 3d at 187, 578 P.2d at 97, 145 Cal. Rptr. at 850. In civil proceedings which have been identified by the courts as involving especially important rights, the balance is struck even more in favor of the indigent non-English-speaking defendant's interest in a meaningful hearing.
To summarize, most courts have recognized the non-English-speaking defendant's constitutional right to an appointed interpreter in criminal hearings but have failed to recognize the right in civil hearings. The California Supreme Court has identified the right to defend one’s property interests as one of fundamental constitutional significance. Such an important right merits the minimum requirements for a fair hearing, as described by the United States Supreme Court in *Goldberg v. Kelley*. At least two of these protections are impaired by a refusal to appoint an interpreter for an indigent non-English-speaking defendant who has no other means of obtaining interpretation. A strong argument can be made that the state interests in not appointing interpreters in such circumstances do not override the infringement upon this right. Therefore, the right to a court interpreter should be expanded from criminal to civil hearings, or at least to those categories of civil hearings where especially important rights are adjudicated.

### III

**Equal Protection**

In light of the statutorily required use of English in California courtrooms, the failure to appoint court interpreters disadvantages indigent non-English-speaking defendants and may violate the equal protection clauses of the federal and state constitutions. The argument, which neither the majority nor the dissent in *Jara* fully addressed, is not without obstacles. However, the California Supreme Court's broad interpretation of equal protection in recent years makes the argument persuasive when applied to indigent non-English-speaking civil defendants.

The equal protection clause of the fourteenth amendment prohibits certain forms of differential treatment by the state. Not all state

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*See, e.g., Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979) (paternity suit involves “serious financial, legal and moral obligations” which required appointment of counsel where free legal services unavailable). For further discussion, see note 35 *supra.*


68. The issue was raised in Supplemental Brief for Appellant at 14-18.

action, however, which discriminates among groups violates this guarantee. Courts have had the difficult task of interpreting the clause to determine whether state action disadvantaging various groups is within constitutional limits. During the 1960s, equal protection doctrine evolved into a two-tier analysis of state action. Under the lower tier, the Court has applied traditional deference to government decisions and has sustained a legislative classification if it was rationally related to a legitimate governmental objective. The upper level, called strict scrutiny, has been applied to state action which either unjustifiably disadvantages “suspect” groups or infringes upon a right implicitly guar-


70. For example, an increase in the cost of passports would affect indigent travelers more than wealthy ones yet such an action would not be struck down. Every legislative action, in fact, can be seen as discriminating against some class of persons.


72. See, e.g., McGowan v. Maryland, 366 U.S. 420, 425-26 (1970) (under the rational basis test a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it).

The Supreme Court has periodically employed in recent years an intensified version of the rational relation test to strike down statutes, but this has been done on a rather ad hoc basis. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down ban on sale of contraceptives to unmarrieds). For a more recent discussion of this approach, see Yarbrough, The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental “Rights” or “Interests” Through a Flexible Conception of Equal Protection, 1977 Duke L.J. 143, 147-49 (the Burger Court has “plowed a middle ground” between the two equal protection tiers).


Although illegitimates are not a suspect class, they have been protected with close judicial scrutiny. See, e.g., Mathews v. Lucas, 427 U.S. 495 (1976); Gomez v. Perez, 409 U.S. 535 (1973) (per curiam); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

Classifications based upon wealth have, until recently, often been judged by the strict scrutiny standard. See Mayer v. City of Chicago, 404 U.S. 189 (1971) (right of criminal defendant to appellate record on appeal from misdemeanor conviction); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (lines drawn on basis of wealth or race render a classification highly suspect); Douglas v. California, 372 U.S. 353 (1963) (upheld on equal protection grounds an indigent's right to court-appointed counsel on criminal appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (dictum) (equal protection and due process violated by refusal to provide indigent criminal defendant with an appellate record). See also Michelman, The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 20-21 (1969). However, the Burger Court has rejected this approach. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Powell's opinion in Rodriguez left open the possibility that an "absolute deprivation" of a meaningful opportunity to enjoy a benefit based on wealth may still violate equal protection. 411 U.S. at 23. But to date the Court has not used this rationale to find invidious discrimination on the basis of wealth.
anteed by the Constitution. If strict scrutiny is triggered, the state must show that it has a compelling interest in continuing the action and that there are no less restrictive alternative means to reach its objective. The burden is almost never carried.

A. Discriminatory State Action

When a state requires all judicial proceedings to be conducted in English and then fails to provide interpreters for indigent, non-English-speaking litigants, there is state action. This is not merely the impartial enforcement of private judgments but rather a structuring of the hearing procedure in a way which disadvantages a class of persons. Assuming state action is present, the next question is whether the action is discriminatory.

The county in Jara contended in the district court of appeal that the actions of the state did not discriminate because "[a]ll civil litigants, whether rich or poor, must provide their own interpreters in civil actions." This argument ignored the fact that there can be discrimination in the equal treatment of unequals. For example, the California Supreme Court and other courts have struck down English-language literacy tests for voter eligibility, despite the fact that they applied both to English and non-English-speaking persons. Similarly, in Lau v. Nichols, the United States Supreme Court rejected the state educational program for non-English-speaking students on the grounds that equal treatment was not attainable "merely by providing students with the same facilities, textbooks, teachers and curriculum." Without fur-
ther affirmative steps, students who did not understand English could not receive a meaningful education. In *Jara*, the state law requiring that only English be used in courtroom proceedings disadvantages all persons who do not speak English, although the requirement may be a practical necessity. The discrimination at issue, however, results when the law mandating English usage is combined with the failure of the legislature to provide interpreters to non-English-speaking persons who cannot afford to provide their own. These state acts, taken together, deprive this particular group of the meaningful hearing other litigants obtain.

B. Rational Relation Test

A court will rarely interfere with state action analyzed under the rational relation test because the state will almost always be able to articulate some rational basis for its actions. If a court were to apply the test to the state action in *Jara*, no equal protection violation would be found because the state could show a rational relation between the action and the legitimate objective of conserving resources. Therefore, unless a higher level of scrutiny is employed, the refusal to appoint an interpreter probably will not be found to violate the equal protection clause.

C. Strict Scrutiny

The Supreme Court has not recognized non-English-speakers as a suspect group. While an argument can be made that they should be

82. 414 U.S. at 566.
84. In recent years the court has applied an intermediate level of scrutiny to certain cases involving gender-based discrimination. See, e.g., Craig v. Boren, 429 U.S. 190 (1976), in which the Court struck down a statute permitting the sale of beer to females at a lower age than males. The Court stated that "classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197 (emphasis added). The test has not been used in cases outside this area, however. But cf: Hawkins v. Superior Court, 22 Cal. 3d 584, 595-603, 586 P.2d 916, 923-28, 150 Cal. Rptr. 435, 442-47 (1978) (Mosk, J., concurring) (an intermediate level of equal protection analysis should be adopted). Justice Marshall has unsuccessfully urged the use of a "sliding scale" of scrutiny. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (dissenting opinion).
85. In Lau v. Nichols, 414 U.S. 563, 566 (1974), the Court may have passed up an opportunity to include the group in that category. The Court could have found the school board's decision to conduct classes solely in English was discrimination against non-English-speaking students as a suspect group, or as discrimination based on a trait linked both to the students' national origin or race. The Court upheld the right of the students to educational programs designed to meet their language needs by finding a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970). Thus, the equal protection question was not reached.
Some support for an equal protection argument in the *Jara* situation based on discrimination against a suspect group may be found in a subsequent interpretation of *Lau* and Title VI, 42 U.S.C. § 2000d (1970), by Justice Powell in Regents of Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2745
so treated, neither the United States Supreme Court nor the California Supreme Court has shown an inclination toward expanding its

(1978). The Justice stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." 98 S. Ct. at 2747 (Justices Brennan, White, Marshall, and Blackmun concurring). Under this rule, the violation of Title VI based on discrimination against non-English-speakers as a class which was found in Lau, also constituted a violation of equal protection. If the deprivation of a meaningful hearing on the basis of language and poverty is similar to the deprivation of an opportunity for a meaningful education in Lau, the holding in Bakke as to Title VI supports the finding of an equal protection violation under the facts in Jara.

86. Attributes common to recognized suspect groups include a history of discrimination, lack of political influence and the inability of a group member to free himself of the classifying trait. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). The California Supreme Court has acknowledged a history of language discrimination in California. See Castro v. State, 2 Cal. 3d 223, 230-31 nn.11-14, 466 P.2d 244, 248-49 nn. 11-14, 85 Cal. Rptr. 20, 24-25 nn. 11-14 (1970). Linguistic minorities exhibit the political vulnerability which is characteristic of recognized suspect groups. Members of a linguistic minority are powerless in the short run to change their status as non-English-speakers.

It may be argued, however, that language inability is not as permanent a characteristic as, for example, race. While some persons never learn to speak English while living in this country, other non-English-speakers, especially the young, can become fluent in a few years. Moreover, it may be argued that there has not been a strong history of discrimination against non-English-speakers on the basis of language. Finally, the political interests of non-English-speaking ethnic minorities are arguably protected by members of those minorities who do speak English and can fully participate in the democratic process.

The best response to the permanency argument is that the same opportunity to escape one's classifying trait is generally available to at least one recognized suspect group, aliens. Since aliens can often become citizens in just a few years, the Supreme Court must not believe that impermanency alone prevents recognition as a suspect group. The argument that linguistic minorities have normal access to the political process is also dubious because it is unlikely that English speakers of a particular national origin are adequately responsive to the political issues which affect non-English-speakers as a class. Further, it is doubtful that persons of the same ethnic background have the ability to protect the political interests of non-English-speaking compatriots. Ninety percent of all linguistic minority members in California also belong to racial or national origin minority groups. See Report to Judicial Council, supra note 42, at Exhibit VI-2. Because these minority groups have difficulty protecting their own interests through the political process, it is unreasonable to expect that they would be able to protect the special interests of non-English-speakers any more effectively.

An alternative to establishing non-English-speaking persons as a suspect group on the basis of their language capability alone is to base strict scrutiny on racial or national origin discrimination. Although this seems reasonable, given the high correlation between non-English-speaking and minority status, there is little authority for such a conclusion. Cf. Sugarman and Widess, supra note 45, at 164. It has been argued that the Lau opinion may have recognized the functional equivalence of language discrimination and racial and national origin discrimination. See Chang & Araujo, supra note 49, at 808. The argument relies on the Court's upholding in Lau a finding that national origin or racial discrimination occurred when Chinese-speaking children were required to attend class in English. See note 85 supra. But as the authors acknowledge, the Court's action may well have been based more narrowly on the congressional determination that, in the particular area of education, special attention for language minorities was necessary to enforce the fourteenth amendment. Chang & Araujo, supra note 49, at 808 n.42. See also Jefferson v. Hackney, 406 U.S. 535 (1972), in which a Texas welfare rule gave families receiving Aid to Families with Dependent Children (AFDC) a smaller proportion of federal guideline amounts than that given to other welfare classes. Although 87% of the AFDC class were black and Mexican-American and the minority membership in the other classes was 40% or less, the Court found no racial or national origin discrimination. 406 U.S. at 545-51.
list of suspect groups.\textsuperscript{87} It is unlikely, therefore, that the Court will find a suspect classification in analyzing discrimination against language minorities. State action can also trigger strict scrutiny by the courts if it infringes upon a fundamental interest.\textsuperscript{88} Voting,\textsuperscript{89} criminal appeals\textsuperscript{90} and interstate travel\textsuperscript{91} are examples of the relatively small list of interests recognized as fundamental by the United States Supreme Court. The Court has not ruled that access to civil courts is a fundamental right\textsuperscript{92} and has not seemed disposed in recent years to expand the list of fundamental interests.\textsuperscript{93}

However, the set of fundamental interests recognized by the California Supreme Court is larger than that identified by the United States Supreme Court.\textsuperscript{94} In \textit{Payne v. Superior Court}\textsuperscript{95} the court held that the opportunity "to be heard in court to defend one's property is a right of fundamental constitutional dimension; in order to justify granting the right to one group while denying it to another, the state must show a compelling state interest."\textsuperscript{96} That same court had previously found impairment of a fundamental right in a classification unfairly disadvantaging non-English speakers in the context of voting rights.\textsuperscript{97} Part II of this Note concluded that the due process right of an indigent non-English-speaking litigant to a meaningful hearing is impaired

\textsuperscript{87} See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (gender-based classifications must serve important governmental objectives and be substantially related to achievement of those objectives); Mathews v. Lucas, 427 U.S. 495, 506 (1976) (discrimination on the basis of illegitimacy does not trigger the Court's "most exacting scrutiny"); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 311-12 (1976) (per curiam) (classifications discriminating on the basis of old age do not call for strict scrutiny).

\textsuperscript{88} Fundamental interests are interests implicitly guaranteed by the Constitution. See generally GUNTER, supra note 71, at 8-9.

\textsuperscript{89} See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (classification infringing on right to vote must be necessary to promote a compelling state interest).


\textsuperscript{91} See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969).


\textsuperscript{95} 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976). See discussion in notes 31-36 and accompanying text supra.

\textsuperscript{96} 17 Cal. 3d at 919, 553 P.2d at 573, 132 Cal. Rptr. at 413.

\textsuperscript{97} Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970). In \textit{Castro} strict scrutiny was employed to strike down an English literacy requirement in the California Constitution because it infringed upon the right of non-English-speaking Californians to vote.
when the court does not provide him with an interpreter. 98 Accepting this conclusion, where the hearing involves the defense of the indigent's property interests, he suffers impairment of a fundamental interest because of his lack of wealth. It follows that strict scrutiny should be applied to a court's decision not to appoint a court interpreter for an indigent non-English-speaking civil litigant in court to defend his or her property interests.

Once impairment of a fundamental right is found, the state must show that its action was necessary to further a compelling state interest. 99 The state's interest in the efficient administration of justice has been held not to be such an interest. 100 If strict scrutiny were applied to the refusal to appoint a court interpreter, the state action would probably be struck down. Thus had the majority in Jara not erroneously concluded that the indigent's ability to defend was not impaired by the refusal to appoint an interpreter, equal protection analysis should have led to a finding that the refusal was unconstitutional.

IV

LEGISLATIVE SOLUTIONS

Approximately three weeks after the announcement of the Jara decision, legislation was signed into law that provided for training, testing and certification of Spanish-language court interpreters. 101 While Assembly Bill 2400 did little more than lay the groundwork for developing a corps of certified interpreters, it did require that only such certified interpreters be used in California courts absent good cause, a policy which undercuts the Jara majority's view that friends and relatives can usually provide adequate interpretation. However, the text of the statute did not indicate to whom the interpretation is to be provided or who is to pay for the service. Nor did it provide for the training of interpreters. If the "equal justice" sought in A.B. 2400 102 is to be attained, additional legislation is needed to answer these questions and mandate speedy local implementation of an interpretive services program. Such a statute should specifically provide for:

1. expansion of the current program to test, certify and periodically

98. See note 52 and accompanying text supra.
99. See notes 74-76 and accompanying text supra.
100. In Castro v. State, 2 Cal. 3d 223, 242, 466 P.2d 244, 257, 85 Cal. Rptr. 20, 33 (1970), the court said: "Avoidance or recoupment of administrative costs, while a valid state concern, cannot justify imposition of an otherwise improper classification especially when, as here, it touches on matters close to the core of our constitutional system." See also Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (fiscal integrity is a valid state interest but not a compelling one).
102. Id. at 499 (to be codified as CAL. GOV'T CODE § 68560(d)).
evaluate interpreters to meet the needs of more non-English-speaking litigants \(^{103}\) by expanding the number of common \(^{104}\) languages for which interpretation is available;

2. a model training program to ensure the availability of skilled legal interpreters; \(^{105}\)

3. promulgation of an examination to guide trial courts in determining whether a litigant is a non-English-speaking person; \(^{106}\)

4. appointment, upon motion, of a certified court interpreter for all non-English-speaking litigants who:
   a. speak a common foreign language;
   b. meet local requirements to proceed \emph{in forma pauperis}; and
   c. make an unrebutted showing that they have no alternative means of obtaining simultaneous interpretation; \(^{107}\)

5. appointment of recommended court interpreters \(^{108}\) for non-English-speaking litigants who satisfy conditions 4(b) and 4(c) but do not speak a common foreign language;

6. implementation of alternative safeguards where no certified or recommended court interpreters are reasonably available to interpret in the language of the litigant; \(^{109}\)

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103. Deaf persons should be included in the definition of non-English-speakers.

104. The definition of a common language may be any language which is the native tongue of non-English-speaking persons who comprise one percent of the population of a county, or more than 1,000 persons within a county. According to demographic estimates compiled by the California Judicial Council in 1974, in 36 California counties (out of a total of 58) one percent of the population were limited English, Spanish-speaking persons. Two other counties had over 1,000 such persons. Cantonese was a common language by these estimates in approximately ten counties; Tagalog and Portuguese in approximately seven counties; Japanese in approximately three counties; German in two counties; and French in one county. \textit{Report to Judicial Council, Phase I, supra} note 42, Exhibit VI-4 and VI-5.

105. For an assessment of the insufficient number of competent interpreters and the need for a model training program, see \textit{Report to the Judicial Council, Phase I, supra} note 42, at V-5 to V-9, VII-3.

106. The examination would also provide evidence for review of determinations that a person is not a non-English-speaker. Trial courts are presently given wide discretion as to the method used to determine whether an interpreter is necessary. Cases evidence the insufficient attention paid by some trial courts to this determination. \textit{See, e.g.,} People v. Annett, 251 Cal. App. 2d 858, 59 Cal. Rptr. 888 (2d Dist. 1967), \emph{cert.} denied, 390 U.S. 1029 (1968) (defendant answered "yes" to approximately twelve questions); \textit{In re Muraviov}, 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (2d Dist. 1961) (defendant was merely asked four "yes or no" questions). One writer noted: "Though the examination in Annett constituted much stronger evidence than that produced in Muraviov, it was still inadequate to prove the defendant's level of fluency and comprehension in the English language with any degree of certainty. Annett reflects a common practice in the trial courts." \textit{Comment, The Right to an Interpreter, 25 Rutgers L. Rev.} 145, 158 (1970).

107. Simultaneous interpretation refers to interpretation as close in time to the speaker's utterance as possible and as close to verbatim as practical, given the lack of one-to-one correspondence between languages and the uniqueness of many idiomatic expressions.

108. A recommended court interpreter should be one who is not certified but has shown competence as determined by the local court and subject to review.

109. Suggested means include the use of interpreters who are not certified or recommended interpreters, slowing down the flow of testimony and pausing regularly for questions from the interpreter or non-English speaker.
7. use of interpreters during a waiver of the right to a court interpreter,\textsuperscript{110}

8. simultaneous translation by all court interpreters of trial and pre-trial proceedings at which the litigant is present, and simultaneous or consecutive\textsuperscript{111} interpretation of attorney-client communication;
   a. with the exception that summary translation\textsuperscript{112} of technical expert testimony and minor procedural matters\textsuperscript{113} may be permitted in the court’s discretion.

\textbf{CONCLUSION}

In \textit{Jara} the Supreme Court held that the Constitution does not require a trial court to appoint an interpreter where an indigent non-English-speaking civil litigant has appeared in court to defend his property interests. Although the decision is defensible in light of the slow development of the due process right of meaningful access to civil courts, the reasons given by the majority showed insensitivity to the hardship linguistic minority members experience when drawn into litigation. Both due process, as the dissent concluded, and equal protection doctrines analytically may support a constitutional right to an interpreter in civil hearings. Until the issue is relitigated, however, the responsibility for remedying the problem lies with the legislature.

\textit{Philip Miller}\textsuperscript{*}

\textbf{ISBELL v. COUNTY OF SONOMA: CONSTITUTIONALITY OF NONCONSUMER CONFESSIONS OF JUDGMENT}

While the confession of judgment has long been regarded as a use-
ful creditor's remedy, its drastic nature has made it controversial. Much of the controversy has involved the use of confessions against uninformed and unsophisticated debtors in consumer transactions. In *Isbell v. County of Sonoma*, the supreme court struck down the portion of California's confession of judgment statute applicable to nonconsumer transactions as a violation of the due process clause of the fourteenth amendment to the United States Constitution. This result was based on the failure of the statute to provide procedural safeguards adequate to assure that a debtor's confession constituted a valid waiver of due process rights. The court declined, however, to specify the precise protections required by due process.

This Note argues that the court incorrectly analogized the confessions in *Isbell* to those in prior decisions that rely on the dangers uniquely inherent in allowing confessions of judgment in consumer cases. Consequently, the court did not adequately support its decision to invalidate the confessions executed in the nonconsumer context of *Isbell*. After setting forth the facts of the case and the court's reasoning in Part I, this Note will examine the court's application of prior case law in Part II. In Part III an alternative and more principled mode of analysis is advanced that supports the result reached by the court and tests the probable scope of the court's holding.

I

THE OPINION

A. The Facts

The plaintiffs in *Isbell* were Sonoma County welfare recipients. Isbell had pled guilty to welfare fraud. While in jail, she executed, at the behest of a county representative, a confession of judgment for the amount of welfare benefits improperly received. A judgment was entered against her when the confession was filed with the clerk of the municipal court. When Isbell purchased a home in 1974, this judgment became a lien against that property. The Pearsons were not charged

1. 21 Cal. 3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978) (Tobriner, J.) (4-3 decision), cert. denied, 99 S. Ct. 597 (1978). The petition for certiorari was denied for failure to file the petition within the time provided by 28 U.S.C. § 2101(c).
3. 21 Cal. 3d at 75, 577 P.2d at 196, 145 Cal. Rptr. at 376. In salient part the fourteenth amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.
4. 21 Cal. 3d at 65, 577 P.2d at 190, 145 Cal. Rptr. at 370.
with a criminal offense; however, they executed a confession of judgment at the request of a county representative for the amount of welfare benefits allegedly received in excess of their entitlement. The Pearsons' confession was filed with the municipal court and judgment was entered upon it.  

Neither Isbell nor the Pearsons received the advice of counsel before executing the confessions. The parties stipulated that the plaintiffs had only a lay person's knowledge and understanding of the legal consequences of such a confession.

B. The Court's Analysis

In striking down the relevant portion of the confession of judgment statutes, the court noted that due process requires notice and hearing before entry of a final judgment which deprives a person of a protected property interest. As a confession of judgment allows entry of a final judgment without notice and hearing, the court reasoned that the procedure was unconstitutional unless the confession evidenced a valid waiver of due process rights. The California confession of judgment procedure required the clerk of the court to enter judgment upon the presentation of the confession with no consideration of the probable validity of the waiver. Thus, the court reasoned, the procedure could be upheld only if a confession is sufficient on its face to establish a voluntary, knowing, and intelligent waiver.

The court's analysis therefore focused on whether a confession could be presumed to document a voluntary, knowing, and intelligent waiver of due process rights. Analogizing the confessions of judgment in Isbell to cognovit clauses contained in form contracts, the court concluded that the debtor's assent could not be presumed to be voluntary, given the potential disparity in bargaining power. The court concluded that even where the terms of the confession are not dictated by the creditor, the "drastic nature of the device" should create a presumption of "substantial disparity of bargaining position and implies overreaching on the part of the creditor." In evaluating the knowing and intelligent quality of the plaintiffs' waivers the majority concluded that "historical experience" demonstrated that cognovit clauses are most frequently employed against the uninformed and unsophistica-

5.  Id. at 65-66, 577 P.2d at 190, 145 Cal. Rptr. at 370.
6.  Id. at 66, 577 P.2d at 190, 145 Cal. Rptr. at 370.
7.  Id. at 68, 577 P.2d at 192, 145 Cal. Rptr. at 372.
8.  See Part II infra.
9. 21 Cal. 3d at 69-70, 577 P.2d at 193, 145 Cal. Rptr. at 373.
10. Presumably, the suggestion applies to all confessions of judgment by some form of taxonomically compelled logic.
In light of these dangers, and the established presumption against waiver of constitutional rights, the court concluded that a confession of judgment could not, prima facie, be presumed to constitute a voluntary, knowing, and intelligent waiver of due process rights.

Although the court recognized that a confession of judgment could establish a valid waiver, it rejected the suggestion that the validity of confessions should be tested on a case-by-case basis. The court noted that the California statutory scheme did not allow a prejudgment or postjudgment judicial determination of the validity of the confessions as waivers of due process rights. The court also concluded that the limited postjudgment relief which was available in California did not satisfy the due process requirement of an opportunity to defend one's property interest "at a meaningful time and in a meaningful manner."13

II

PROCEDURAL DUE PROCESS AND CONFESSIONS OF JUDGMENT

A. Background

Due process requires notice that is reasonably calculated to apprise interested parties of the pendency of an action and to afford them an opportunity to be heard at a meaningful time and in a meaningful manner consonant with the demands of the subject matter of the controversy.14 Although parties may waive their due process rights,15 such

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11. 21 Cal. 3d at 70, 577 P.2d at 193, 145 Cal. Rptr. at 373.
12. Id. at 71, 577 P.2d at 193, 145 Cal. Rptr. at 373.
13. Id. at 72, 577 P.2d at 194, 145 Cal. Rptr. at 374 (quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972)).
waivers must be made voluntarily and with full knowledge of the attendant consequences. Courts generally indulge every reasonable presumption against waiver of fundamental constitutional rights; in California, this presumption has been particularly strong when the purported waiver is contained in an adhesion contract. Thus, confessions of judgment, inasmuch as they allow the summary entry of final judgment without notice and an opportunity to be heard, can only meet the demands of due process where the confession operates as a valid waiver.

Confessions of judgment usually are signed before the commencement of a judicial proceeding and commonly take one of two forms: cognovit clauses or the noncontractual confessions at issue in Isbell. Cognovit clauses are provisions incorporated in form contracts generally characterized by unequal bargaining power between the parties which purport, in advance of any actual controversy, to authorize the entry of judgment in the event of a default without prior notice or hearing. In contrast, the confessions of judgment entered in Isbell were executed after the existence of an actual controversy.

The question raised by confessions of judgment in the abstract is whether due process rights may be waived at a time when the circumstances that would trigger those rights and give them definition are not yet ascertainable. This issue was considered by the United States Supreme Court in D.H. Overmyer v. Frick Co. The Court held that

15. Swarb v. Lennox, 405 U.S. 191 (1972); D.H. Overmyer v. Frick Co., 405 U.S. 174 (1972); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964); Blair v. Pitchess, 5 Cal. 3d 258, 274, 486 P.2d 1242, 1253, 96 Cal. Rptr. 42, 53 (1971). It is noteworthy that the cases all speak of the requirement that an individual be given an opportunity to be heard. The implication is clear that a hearing is waivable.


19. See note 2 supra.

20. 405 U.S. 174 (1972). Overmyer had contracted with Frick for the installation of a refrigeration system in one of its warehouses. Having fallen behind in its progress payments, Overmyer negotiated a new agreement with Frick. This note contained a provision in which Frick agreed to forego enforcement of its rights under three mechanics liens, as long as Overmyer remained current in its payments. It contained no confession of judgment clause. After completion of the contract Overmyer requested additional time to make the payments, and a release of the mechanics liens against its plant. Negotiations over these requests led to agreement on revised terms contained in a second note. This note contained a cognovit clause in which Overmyer confessed judgment in Frick's favor should it default on payments under the new terms. Overmyer eventually ceased making payments, claiming a breach of the original contract by Frick, and obtained a temporary stay against any proceedings by Frick under the second note. The stay was vacated,
there was no per se constitutional impediment to advance waiver. It
was persuaded on the facts that the debtor's confession in Overmyer
operated as a voluntary, knowing, and intelligent waiver of its right to
prejudgment notice and hearing. The Court cautioned, however, that
"other legal consequences" might ensue where a confession is extracted
in an adhesion contract, or where the debtor receives nothing in ex-
change for the confession.

B. Conceptual Shell Game: Cognovit Clauses
and Confessions of Judgment

The question that the Court left open in Overmyer was whether
due process requires minimum procedural safeguards to ensure the
probable validity of a waiver by confession if judgment is to be entered
upon the waiver. The California Supreme Court correctly perceived
that Isbell squarely presented this question. In considering this consti-
tutional question, the court should have focused its attention on the
probable validity of waivers obtained pursuant to the California con-
fession of judgment procedure in the nonconsumer context of Isbell.

In its zeal to protect uninformed and unsophisticated debtors from
the foreclosure of legal alternatives, the court incorrectly analogized
Isbell to prior decisions that involved confessions of judgment
obtained prior to the existence of an actual controversy, as opposed to
and Frick entered judgment on the basis of Overmyer's confession, without prior notice or an
opportunity for a hearing. 405 U.S. at 178-82.

It is significant that none of the notice and hearing cases addresses the due process question in
the context of a signed confession of judgment which purported to waive the debtor's rights in
advance of entry of judgment. See Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971), and note
infra.

In a companion case to Overmyer the court strongly implied that lower courts may be more
likely to find cognovit clauses to be invalid exertions of a creditor's power, inherent in adhesion
contracts, where the debtor is an individual rather than a corporate entity. Swarb v. Lennox, 405
1203 (D.V.I. 1973). The Court in the latter case held that the presumption against waiver of an
individual's rights grows stronger as the right becomes more important, and if the party alleged to
have waived his right is less sophisticated and less apt to have "penetrated the fine print." Id. at
1206. Note the applicability of this holding primarily to a waiver in contractual form. This con-
cern with the intrinsic dangers of confessions of judgment contained in contracts of adhesion has
also been expressed by the California Supreme Court. See Hulland v. State Bar, 8 Cal. 3d 440,
503 P.2d 608, 105 Cal. Rptr. 152 (1972); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal.
Rptr. 42 (1971).

those secured after the creation of a genuinely justiciable dispute.\textsuperscript{23} In doing so, the court obscured an analytically significant distinction central to the question of the voluntary, knowing, and intelligent quality of the plaintiffs’ waiver of their right to a judicial determination prior to a final judgment affecting a property interest. Precedent does not support the court’s conclusion that the confession procedure is subject to abuse and overreaching in the nonconsumer context.\textsuperscript{24} The result—invalidation of a statute recently reconsidered by the legislature—demands a more substantial justification than the court’s evaluation of “historical experience.”\textsuperscript{25}

The court’s inquiry should have centered on the mechanics of the procedure in nonconsumer cases and on the nonconsumer, noncontractual circumstances in which the procedure was likely to be used. The court failed, however, to identify the distinguishing features of nonconsumer confessions and to narrow its inquiry to the operation of the portion of the statutes which was being challenged. Instead, the court relied exclusively on cases involving consumer transactions. A comparison of the consumer and nonconsumer settings in which confessions may be employed demonstrates the dramatic analytical significance of this overlooked distinction.

\textsuperscript{23} Isbell and the Pearsons did not execute confessions of judgment in advance of an actual controversy. Indeed, Mrs. Isbell did so while in jail, having already pled guilty to criminal charges arising from the same facts on which her confession of judgment was founded. See text accompanying note 4 supra. The weight of the evidence against the Pearsons is unclear from the court’s opinion.

\textsuperscript{24} The court relied heavily upon its decision in Hulland v. State Bar, 8 Cal. 3d 440, 503 P.2d 608, 105 Cal. Rptr. 152 (1972), as a basis for the transfer of the logic behind the dangers inherent in the cognovit cases to the nonconsumer context of Isbell. Hulland, an attorney, had required his prospective client to execute an advance confession of judgment, on the contingency that she might fail to pay for the services which he was to render. After some dispute over the adequacy of Hulland’s representation, his client refused to pay for the services allegedly rendered. Hulland thereupon had judgment entered against her, and subsequently garnished her wages on two occasions.

\textit{Hulland, however, is distinguishable on two grounds. First, it is unqualifiedly based upon an advance confession of judgment in an extension of credit (i.e., rendition of services) context—a classic case in which the dangers intrinsic to adhesion contracts and disparity of bargaining power dictate the requirements of due process. Such a case would clearly be governed by the new Cal. Civ. Proc. Code § 1132(b). Second, it is unique as a case in which “the client’s ignorance of legal matters” is determinative. 8 Cal. 3d at 450, 503 P.2d at 614, 105 Cal. Rptr. at 158. Hulland, therefore, represents the court’s refusal to allow a confession of judgment in a consumer setting, where the disparity in knowledge and bargaining power is so striking as to compel a finding of overreaching and abuse. To transfer the holding of such a case to a nonconsumer confession of judgment, where there is no evidence of manipulation, is a questionable analytical maneuver.}

\textsuperscript{25} The majority recognized that the dangers associated with confessions of judgment are primarily restricted to the consumer/adhesion contract setting. This acknowledgement is evident in the court’s apparent approval of the 1975 amendment to Cal. Civ. Proc. Code § 1132, requiring a certificate from an attorney independently representing the debtor in consumer actions, which indicates that he has advised the latter of the consequences of executing the confession of judgment. See 21 Cal. 3d at 70-71, 577 P.2d at 193, 145 Cal. Rptr. at 373. See also note 28 infra.
In the consumer or contractual setting now controlled by the 1975 amendments to the confession of judgment statutes, the confession is used both as a security device and as a means for the debtor to obtain credit. This species of confession usually appears in a cognovit clause, and is typically included in the fine print of an adhesion contract. In executing the contract, the debtor consents to have judgment entered against him, without prior notice or hearing, in the event of a default under the terms of the contract. In a cognovit note, the purported waiver of notice and hearing is made before any controversy actually has arisen. Thus, an infinite variety of unanticipated contingencies may trigger operation of the confession. This uncertainty and element of fortuity casts doubt on the knowing and intelligent quality of the waiver. Because the clause is hidden in the fine print of a document that primarily is concerned with other matters, the debtor’s attention is not focused on its significance. Finally, the case law suggests that the cognovit device is likely to be used to the detriment of unsophisticated debtors where there is a disparity of bargaining power. Consequently, there is a distinct possibility that the debtor may not voluntarily have accepted the clause.

In recognition of these dangers, the legislature amended the statutes in 1975 to require a certificate from an attorney independently representing the debtor in consumer actions which indicates that he has advised the latter of the consequences of executing the confession of judgment.

In nonconsumer, noncontractual settings, California’s confession
of judgment procedure operates in a less coercive fashion and is subject to much less restrictive regulation. Such confessions always follow an incident that creates a current, actual controversy. In marked contrast to the fine print in which cognovit clauses appear, a nonconsumer, noncontractual confession of judgment is executed as an independent document. Moreover, the California statute requires noncontractual confessions to include the debtor’s verified statement of the facts constituting liability. Thus, in most instances in which the debtor and creditor have complied with the requirements of the statute, it is less likely that the debtor who executes the waiver of due process rights has done so without understanding its effect on the contemporaneous dispute. Generally, in nonconsumer transactions no contractual balance is sought. Unlike the contractual dynamic of an adhesion contract, where the creditor/seller has power over the primary subject matter of the contract and uses this leverage to force acceptance of the cognovit clause, the parties in the noncontractual setting are “bargaining” solely over the confession of judgment. The only leverage available to the creditor is the threat of legal action, an advantage that is counterbalanced by the debtor’s threat of legal defense. Consequently, it is less clear that the parties are of unequal bargaining power and, hence, that the waiver of rights represented by the confession is not made voluntarily.

It seems clear that cases and “historical experience” involving cognovit notes in consumer transactions cannot safely be relied on in evaluating the probable validity of nonconsumer, noncontractual confession/waivers. This is exactly what the Isbell court did, however. The majority failed to establish an adequate justification for its essentially legislative judgment that nonconsumer confessions of judg-

29. It is not insignificant that Isbell had pled guilty to criminal charges arising from the same facts which impelled her to execute the confession of judgment while in jail. It would indeed be curious if a court did not find that a confession of judgment executed under those circumstances was sufficient to establish the probable validity of the waiver. See text accompanying note 4 supra.

30. CAL. CIV. PROC. CODE § 1133 (West 1972). Both confessions in Isbell contained handwritten admissions of the facts creating the liability. 21 Cal. 3d at 77, 577 P.2d at 197-98, 145 Cal. Rptr. at 377-78.

31. See 21 Cal. 3d at 77, 577 P.2d at 197, 145 Cal. Rptr. at 377.

32. Having failed in its attempt to find direct support in the case law for its conclusion the court noted: By parity of reasoning the debtor’s assent to a contract of adhesion with a cognovit clause, or to a confession of judgment form presented by the creditor, cannot operate as a valid waiver of constitutional rights. But even if the terms of the confession are not dictated by the creditor, the drastic nature of the device—the debtor’s advance waiver of all possible defenses and even the right to be notified of the existence of the proceeding—strongly suggests a substantial disparity in bargaining position and implies overreaching on the part of the creditor.

21 Cal. 3d at 69-70, 577 P.2d at 193, 145 Cal. Rptr. at 373.
ment are likely to be obtained by overreaching creditors. Rather, the court's conclusion that a confession of judgment obtained pursuant to the California statutes cannot be presumed to be a valid waiver of due process rights was apparently based on the court's subjective apprehension that the "drastic nature" of the confession device invites abuse. By focusing its attention on cases involving a distinct variety of confession of judgment, the *Isbell* majority arrived at a result not prescribed by the demands of stare decisis. It was, at root, an enunciation of the majority's normative determination that certain safeguards are required by the logic of due process.

The *Isbell* court held that due process at least prohibits summary entry of judgment upon a waiver which could not be presumed to be valid. Because the court's earlier conclusion that validity cannot be assumed from the face of a properly executed nonconsumer confession was unsupported, however, that holding becomes a non sequitur. A more exacting analysis is required to determine precisely what procedure is required to ensure the validity of a waiver. The application of an interest balancing analysis to the circumstances in *Isbell* provides analytical support and a more principled basis for the *Isbell* court's holding.

III

AN ALTERNATIVE MODE OF ANALYSIS

A. Interest Balancing

Where due process protections are invoked by a governmentally inflicted deprivation of an individual's liberty or property interest, the procedural safeguards required are determined as the situation demands, rather than as the product of an invariable mechanical formula. The specification of required procedures turns on a subjective balancing of the conflicting interests of the individual in the requested procedure and of the government in summary or informal action. There are no established normative standards by which accurately to measure and balance the personal loss to an individual and the gov-


ernment's ability to protect public interests.35 Such an assessment requires the assignment of values to the preservation of individual rights and the protection of the general welfare. Indeed, these values are internally fluid, changing with the consumer or nonconsumer context of the transaction.36

In Mathews v. Eldridge,37 Justice Powell stressed consideration of three factors in assessing the requirements of due process:

1) the private interest that will be affected by the affirmative action of the government;
2) the danger of an erroneous deprivation of that interest through the procedures implemented, as well as the probable value, if any, of additional or substitute procedural safeguards; and
3) the government's interest, including the function involved and the fiscal and administrative burdens that any additional or substitute procedure would entail.38

It is noteworthy that in Justice Powell's scheme the relative "weight" of the private and governmental interests are subsumed into a framework which also balances the "functional appropriateness"39 of the requested procedure for resolving the particular type of dispute in question.

I. The Debtor's Interest.

The deprivations involved in Isbell were dissimilar to those involved in the attachment and garnishment cases from which modern procedural due process standards have evolved.40 The attachment and

35. Note, supra note 33, at 1519-20.
36. See note 27 and text accompanying note 9 supra.
38. Id. at 334-35. Cf. Note, supra note 33, at 1514.
39. See Note, supra note 33, at 1514.
40. The Supreme Court increasingly has relied heavily on predeprivation judicial determination of the safeguards required by due process. In Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), the Supreme Court struck down a Wisconsin procedure which allowed garnishment of wages without notice and an opportunity to be heard. The Court held that even a temporary, nonfinal deprivation of property is a taking within the purview of the fourteenth amendment. The principles announced in Sniadach were expanded in Fuentes v. Shevin, 407 U.S. 67 (1972), where the Court invalidated a statute authorizing summary seizure of goods on the basis of an ex parte application for a writ of replevin. Fuentes made clear that due process protections are not limited to shielding the "necessities" of life from arbitrary seizure, and that the ownership rights protected by due process included rights under a conditional sales contract. Id. at 87. In Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), the Court sanctioned a scheme which allowed sequestration of specific property obtained in an installment sales contract, on the basis of a sworn ex parte affidavit presented to a judicial officer. The statute in Mitchell required the creditor to post a bond, and prove the grounds upon which seizure was based in an immediate hearing. The Mitchell Court held that notice and hearing are not required prior to a seizure if an "adequate" opportunity for judicial determination was afforded before any final deprivation. Id. at 612-13.

The California Supreme Court acted quickly to adopt the safeguards articulated by the United States Supreme Court in Sniadach. McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); accord, Cline v. Credit Bureau of Santa Clara Valley, 1 Cal. 3d 908, 464
garnishment cases involved the temporary deprivation of a property interest pending final adjudication on the merits. The entry of final judgment affecting an unspecified property interest on the basis of the confessions in *Isbell*, without an opportunity to challenge the validity of the confessions as waivers or to litigate the underlying controversy, is potentially much more serious.

In *Isbell*’s case, a lien was imposed upon property purchased six years after the entry of judgment against her. Various attempts had been made to collect from the Pearsons, but were not specified in the court’s opinion. Although the debtors in *Isbell* were not deprived of


The California decisions have also been in accord with those of the United States Supreme Court with regard to the balancing of interests, and a refusal to allow even a temporary, nonfinal deprivation without prior notice and hearing, absent extraordinary circumstances or “weighty state or creditor interests.” See, e.g., Beaudreau v. Superior Court, 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975); Brooks v. Small Claims Court, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973); Randone v. Appellate Dep’t, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). See text accompanying note 34 supra and notes 46-48 infra.

Due process, as it has evolved through the *Sniadach* line, requires a predeprivation hearing where a judicial determination that seizure, based upon a bonded *ex parte* application establishing the need to secure the underlying property from deterioration or conversion, is not statutorily prescribed, and where a postdeprivation hearing will not provide adequate relief. While this formulation appears to give a fixed form to the historically fluid concept of procedural due process, in reality it adds little to the well established principle that some form of notice and hearing must be provided at a meaningful time and in a meaningful manner before an individual is finally deprived of a property interest. Accord, *Mathews v. Eldridge*, 424 U.S. 319 (1976). See note 42 infra. To this extent the clatter following *Sniadach* amounts to little more than the due process requirement of notice and hearing at a point in the litigation at which the deprivation may be prevented without causing grievous injury to either party. Central to the search for the meaningful time is a very clear requirement that all relevant interests be balanced in an equitable fashion.

The conclusion that this lien constitutes a significant deprivation in terms of the requirements of due process stands in marked contrast to Justice Tobriner’s position in *Connolly Dev., Inc.* v. Superior Court, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976). In *Connolly*, Justice Tobriner argued that while the imposition of a mechanics lien constituted a “taking” in the constitutional sense, it did not operate as a significant deprivation since the landowner retains possession, use, and enjoyment of the property pending trial. Subject to the lien, the owner may sell or encumber the property, although his ability to do so may be diminished.

Although *Connolly* dealt with only a temporary deprivation of specific property, the significance of the deprivation to the owner’s interest, in the period between the imposition of the lien and the time of trial, was no less serious than if the lien had been imposed after the entry of final judgment.

Curiously, *Isbell* marks a reversal of roles for Justices Tobriner and Richardson from those assumed in *Connolly*. In minimizing the significance of the deprivation effected by the lien in *Connolly*, Justice Tobriner suggested that an alternative remedy was available in the form of a suit for injunctive or declaratory relief, after the lien was imposed. In marked contrast to his advocacy, in *Isbell*, of a postdeprivation case-by-case review of the validity of the waivers represented by the confessions of judgment, Justice Richardson dissented in *Connolly*, arguing that Justice Tobriner’s alternative was an inadequate substitute for the unqualified right to an early hearing as guaranteed by due process principles.
the "necessities of life," they forfeited the opportunity to obtain a judicial determination of their liability, and were deprived of the unconditional right of ownership and alienation.

That the confessions in Isbell did not deprive plaintiffs of current use of, or otherwise encumber their property (e.g., as with an attachment or garnishment) does not minimize the dangers of denying a judicial resolution of the controversy. The confessions authorized the entry of judgments on the basis of which later attempts at collection could be undertaken. \textsuperscript{42} Because the plaintiffs were entitled to no judicial deter-

\textsuperscript{42} The question of whether a debtor has been deprived of a property interest that invokes the protections of the due process clause is subtle but significant. Is the debtor deprived of such an interest when a final judgment is entered on the basis of a confession of judgment, or when an attempt is made to execute the judgment?

In Endicott Co. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924), the United States Supreme Court upheld a New York statute authorizing a judgment creditor to apply to a court for a writ of garnishment, without notice to the debtor. The Court observed that the debtor was entitled to no notice or further right to be heard after entry of an adverse judgment, or before garnishment was authorized, as he had had his day in court and an opportunity to be heard at the time that the initial judgment was entered.

The Court has never reaffirmed or expressly overruled its holding in Endicott. In Griffin v. Griffin, 327 U.S. 220 (1946), the path was implicitly tapered by the rejection of an attempt to enter a judgment for an arrears in alimony, without notice or a hearing, on the basis of a divorce procured two years earlier. Conceding that the earlier decree gave the petitioner notice that other proceedings might follow, the Court concluded in Griffin that due process required notice of further proceedings which undertook to substantially affect the petitioner's rights in ways in which the earlier decree had not. \textit{Id.} at 229. This was not the precise issue before the Court in Endicott, and hence, Griffin has not been regarded as overruling that decision. \textit{See} Hanner v. DeMarcus, 390 U.S. 736 (1967).

The Court granted certiorari in Hanner v. DeMarcus, 390 U.S. 736 (1967), for the express purpose of determining whether Endicott should be overruled. \textit{Id.} at 737. Hanner involved the sufficiency of notice by newspaper and public posting of an execution sale of the petitioner's property where she received no direct notice of the sale. Dissenting from the per curiam opinion dismissing certiorari as improvidently granted, Justice Douglas questioned the contemporary meaning of Endicott following the expansion of the scope of notice requirements, the emerging trends in the sufficiency of the "means" of giving notice in particular types of cases, and the limiting effect of Griffin. \textbf{See} text accompanying note 14 \textit{supra} and notes 54 & 57 infra.

In Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972), a district court refused to extend Endicott to cases involving original judgments entered pursuant to a cognovit clause. The court based this refusal on the failure to afford notice or an opportunity to be heard in the underlying adjudication. The court concluded that the debtor must either be given notice and an opportunity to be heard at the time of the subsequent action, or the creditor must prove a knowing and voluntary waiver—presumably of the debtor's entitlement to these rights at the time of the subsequent adjudications. \textit{Id.} at 1277. The relevance of this conclusion to waivers obtained by confessions of judgment after the existence of an actual controversy is more tenuous. In the latter case there is more reason to presume that the waiver is valid, and hence, the rationale underlying Scott's attempt to distinguish Endicott (i.e., that the debtor is entitled to notice and hearing at some time) becomes far less compelling.

The precise importance of Endicott as precedent is therefore unclear, but nonetheless important. In Isbell, the plaintiffs filed their actions only after suffering the imposition of liens and collection attempts based upon the judgments entered pursuant to their confessions. While the validity of the plaintiffs' waivers is still dispositive in Isbell, the court failed to address the possibility that a postjudgment determination of validity, prior to execution of the judgments, would
mination of the validity of their waivers, their interests appear even more compelling than those of garnishees. The degree to which alternative methods of judicial review are "functionally appropriate" to protect debtors' substantial interests in a confession of judgment context thus becomes the determinative inquiry.\footnote{3}

2. The Government's Interest

The government's substantive interest is in stimulating commerce by facilitating the extension of credit and debt collection.\footnote{4} This entails protecting the security interests of creditors and providing debtors with the option of electing procedures that are inexpensive and attractive to potential creditors.\footnote{44} Although these are valid and important state have been sufficient to satisfy the demands of due process. \textit{See} text accompanying note 57 infra. If \textit{Endicott} is no longer good law, the attempts by the county to capitalize on the confessions of judgment in \textit{Isbell} would be vulnerable to attack even if the confessions were deemed to be sufficient as waivers of the plaintiffs' due process rights at the time of their execution.\footnote{43} \textit{See} Part IIIA3 infra.

44. To the extent that this correctly states the government's concern it is irrelevant that the government and the creditor share the same identity in \textit{Isbell}.\footnote{45}

45. In the nonconsumer context confessions of judgment arise only \textit{after} the occurrence of an actual controversy. The debtor may prefer a summary procedure auxiliary to the formal adjudicative process, or full notice and hearing. This preference will vary with the particular debtor. Justice Harlan's treatment of the value of extrajudicial resolution of breaches in relationships poses an interesting sidelight to the waiver of judicial determination in \textit{Isbell}. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court considered a challenge by an indigent individual to Connecticut's requirement of a filing and service of process fee in all divorce actions. Recognizing that resort to the state's judicial machinery was imperative to the procurement of a legal divorce, the Court struck down the statute as a prohibition on access to the courts, and hence, a violation of due process. Writing for the Court, Justice Harlan observed that private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount. Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendant's rights. For at that point, the judicial proceedings becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy. 401 U.S. at 375-76. Holding that its decision was only applicable to the disputed divorce statute the Court concluded:

\textit{We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.} 401 U.S. at 382-83.

\textit{Isbell} raises a philosophically similar issue in a different context. In its concentration on assessing the \textit{validity} of the plaintiffs' waivers the Court leaves the clear impression that the disputes could have been settled without resort to the state's judicial machinery. It therefore becomes less certain than the \textit{Isbell} court would have us believe that due process frowns on the use of any device which seeks to resolve a controversy involving litigants of apparently unequal bargaining power through avoidance of formal adjudicative processes. If it is true that due process forbids
objectives it is difficult to measure them in the confession of judgment context.

Where a state's action has impinged upon a protected right, that action can be upheld only where it is necessary to meet the demands of an overriding public interest. Where such extraordinary situations exist, summary procedures may satisfy the demands of due process. The greater the deprivation to the individual, however, the greater the public urgency must be to justify the imposition of loss without notice and a hearing. None of the factors that in the past have prompted courts to conclude that the "extraordinary situation" justified summary

the use of a procedure which bars access to the courts only where such access is mandatory for a legitimate termination of the controversy, the validity of the plaintiffs' election to settle the dispute summarily does become the central, but not the threshold, inquiry. Rather than focusing on a "valid waiver" of an otherwise presumably mandatory procedure, the court's attention should have been focused initially on the "validity" of the plaintiffs' election of a nonjudicial forum for settlement of their disputes. The line between the two ways of viewing the issue is philosophically subtle, but not insignificant. Indeed, this distinction may explain the court's implicit preoccupation with the normative value of allowing confessions of judgment, as contrasted with its charge to evaluate the constitutionality of the statutory procedure authorizing such confessions.


47. In Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), the court isolated the following five characteristics present in each instance in which the government's action has been held to justify summary proceedings:

1. Seizures were undertaken to benefit the general public rather than a private individual or class.
2. The statutes only authorized government officials charged with public responsibility to take the action.
3. The nature of the risk required immediate action—any delay occasioned by a prior hearing could have potentially caused serious harm to the public.
4. The property affected did not vitaliy touch an individual's life or livelihood.
5. The statutes were narrowly drawn and sanctioned summary procedures only when great necessity actually arose.

Id. at 554, 488 P.2d at 24-25, 96 Cal. Rptr. at 720-21.

As an action in which the government sought to secure its financial obligations, Isbell is not unlike Phillips v. Commissioner, 283 U.S. 589 (1931), albeit on a smaller scale.

In Phillips the United States Supreme Court held that where there was a government need—there compensation for an assessment by the Internal Revenue Service against a shareholder for the deficiencies of a dissolved corporation—the balancing of interests requires individual property rights to provisionally yield, on the condition that there be an opportunity for ultimate judicial determination of the individual's liability. Id. at 595-97. Unlike most due process adjudications, which address themselves to the sufficiency of the timing of the notice and hearing, Isbell is more concerned with the validity of a waiver of the right to any judicial determination. (In Mitchell the Court iterated the rule enunciated in Phillips approving the postponement of judicial determination where only property rights are involved. 416 U.S. 600, 611 (1974). Phillips had been conspicuously absent from the court's analysis in Sniadach and Fuentes. But see Fuentes v. Shevin, 407 U.S. 67, 92 n.24 (1972)).

The limited availability of postjudgment review distinguishes Isbell from Phillips. Moreover, the general nature of the statutes in Isbell minimizes any compelling quality attributable to the government's interest in securing its outstanding obligations.

action were present in *Isbell*. 49

One important variable in assessing the weight of the government's interest is the extent to which the substantive concerns of those groups that the government seeks to protect are tantamount to "rights" on a par with the individual's recognized constitutional right to procedural due process. 50 While facilitation of credit transactions is a valid public objective, it does not rise to the level of urgency associated with situations in which summary procedures will be sanctioned.

In applying the due process balancing test, the weight accorded even an important interest must be devalued to the extent that the use of summary procedures is not necessary to realization of the government's objective. 51 As no specific property must be secured from deterioration or conversion in the nonconsumer context of *Isbell*, the use of summary procedures is unnecessary to protect the creditor's security interests. 52 Similarly, the use of summary procedures in nonconsumer cases is not essential to the general governmental objective of facilitating credit transactions. In the context of the debtor's concern with having the option of summary procedures the government's substantive interest obviously requires the availability of those summary procedures, and therefore should not be devalued.

3. "Functional Appropriateness"

The third element that must be weighed in ascertaining the mandates of procedural due process requires the specification of the functions to be performed by the existing procedures and the extent to which they effectively fulfill the objectives of the parties. To the degree that "functional appropriateness" examines the purposes that confessions of judgment serve and the extent to which the requested proce-

49. *See* Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950) (FDA permitted to seize summarily misbranded drugs when probable cause existed to believe that they would endanger health or mislead consumers); Fahey v. Mallonee, 332 U.S. 245 (1947) (specialized government officials permitted to react immediately to serious financial difficulties of a banking institution by seizing operational control of its assets); Coffin Bros v. Bennett, 227 U.S. 29 (1928) (same); United States v. Pitsch, 256 U.S. 547 (1921) (allowing summary action to meet the needs of the war effort); Stoehr v. Wallace, 255 U.S. 239 (1921) (same); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (same); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (allowing summary action to protect the public against contaminated food).

50. *See* Note, *supra* note 33, at 1528-30. Note especially the proposed test for determining whether the government's interest is a "right."

51. *Id.* at 1515.

52. One ground for the validation of the Louisiana procedure in *Mitchell* was the Court's concern that the use of the specific property in dispute by the debtor who has defaulted in his installment payments, pending a full hearing, would leave the creditor uncompensated for the continuing deterioration of his property. The Court also was concerned with the danger that the debtor, with notice that the action was pending, might destroy or transfer the property. *Mitchell* v. W.T. Grant Co., 416 U.S. 600, 608-10 (1974).
dures serve those purposes, the actual balancing of these variables is accomplished within this third element of the formula. In *Isbell* the question is more precisely whether the existing procedures are effective in insuring that judgment will not be entered pursuant to a confession that does not constitute a valid waiver. If that procedure is effective in reaching this result the concerns of all interested parties can be accommodated.

The California confession of judgment procedure requires, in non-consumer cases, that the debtor execute with the confession a statement of the facts upon which the confessed liability is based. Moreover, in such cases the confession is signed after a controversy has arisen between parties who are likely to be of relatively equivalent bargaining power.\(^3\) Where there is compliance with the statutes, a confession thus should be sufficient to establish the validity of a waiver of due process rights as a general matter. However, the statutes require ministerial entry of judgment without notice to the debtor and without consideration of the sufficiency of the particular confession as a waiver of due process rights. No opportunity for postjudgment litigation on the merits is provided. The procedure might be relatively effective in prescribing a form for the confession which tends to maximize the chances of a voluntary, knowing, and intelligent waiver, but it completely fails to provide any mechanism by which the validity of particular waivers could be determined. In every case in which a confession does not actually document an effective waiver, an alleged debtor thus will be deprived of his due process rights.

The concern for minimizing the risk of reaching an erroneous result therefore focuses on providing an opportunity to be heard at a "meaningful time" and in a "meaningful manner." There was no dispute in *Isbell* that absent extraordinary circumstances, or a valid waiver, due process requires notice and a hearing at some stage of an adjudication.\(^4\) If this rule is to have any meaning, these requirements must be met at a point at which the deprivation may be avoided without serious consequences to any of the litigants.

The degree to which they are met will thus be the central criterion

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\(^3\) See Part IIB supra.

\(^4\) In stressing the distinction between cognovit clauses and confessions of judgment following the existence of an actual controversy the dissenters clearly recognized that notice and an opportunity to contest the claim were required at some point before the entry of judgment. See 21 Cal. 3d at 77, 577 P.2d at 197, 145 Cal. Rptr. at 377. For a discussion of the centrality of these requirements to due process, see generally Mathews v. Eldridge, 424 U.S. 319 (1976); Lambert v. California, 355 U.S. 225 (1957); Joint Anti-Fascist Refugee Comm'n v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring); Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio, 301 U.S. 292 (1937); Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).
in evaluation of possible alternatives to the procedure disapproved by the court.

B. Alternative Confession of Judgment Procedures in Nonconsumer Cases

The California Law Revision Commission has proposed three possible alternatives to the discredited confession of judgment procedures:

1) Require advice to debtor of independent counsel before signing confession, in same manner as in consumer cases under Code of Civil Procedure Section 1132(b).

2) Require that a confession of judgment be a separately signed document in large type and plain language executed only after default, that informs the debtor that signature waives all rights to assert defenses and subjects property to immediate execution, and that the debtor may seek the advice of an attorney.

3) Require notice to the debtor immediately upon entry of judgment and permit debtor to challenge validity of judgment in court by raising defenses for a period of 30 days after entry of judgment, during which period enforcement of judgment may not proceed.\footnote{55}

A fourth alternative would be to provide judicial determination of the validity of the purported waiver prior to entry of judgment.

\textit{Alternative 1:} Requiring procedures identical to those authorized in consumer cases by Code of Civil Procedure § 1132(b) would clearly satisfy the requirement of facial validity of the confessions as waivers. While this procedure protects the due process rights of those who elect full litigation of their liability, it creates a cumbersome mechanism for the debtor who wishes to avoid formal adjudication by execution of the confession. While this proposal arguably preserves the debtor's options without unduly jeopardizing the creditor's interest in swift proceedings, its complicated procedural requirements reduce the effectiveness and desirability of confessions as a creditor's remedy.\footnote{56}

\textit{Alternative 2:} This alternative also preserves the creditor's interest in expeditious resolution, and the debtor's option to elect summary procedures. It does not, however, guarantee the voluntary, knowing, and

56. The California Law Revision Commission has concluded that the changes codified in Code of Civil Procedure § 1132(b) have practically eliminated the usefulness of confessions of judgment in consumer cases. Memorandum 78-72, Cal. Law Rev. Comm'n, Confession of Judgment Procedures, D-500 (Nov. 13, 1978). In the nonconsumer context a procedure such as that required by § 1132(b) would prove no less complicated or distracting than the procedure invalidated in \textit{Asbell}. In fact, with the invalidation of the statutes in nonconsumer cases, creditors need only initiate a law suit by the filing of a complaint, and instruct a willing debtor to admit all of the counts contained therein in his answer. A judgment could thereafter be entered. Although this preserves the debtor's options, as an unregulated act it is subject to more abuse than was the old procedure. It also subjects the parties to unnecessary expense and delay.}
intelligent quality of the waiver to any greater extent than the verified statement required by Code of Civil Procedure section 1133. Although plainly informing the debtor that he is waiving his right to notice and hearing, it fails to provide any opportunity for judicial review and therefore may continue to mask coercive extraction of reluctant waivers.

**Alternative 3:** This method allows summary entry of a judgment, thereby securing the creditor's financial interest, while allowing the debtor to challenge the validity of the waiver implicit in his confession. The principal utility of this procedure is in initially securing the creditor's property while preserving the debtor's option. To the extent that valid waivers will not be challenged this alternative will not be costly or cause great delays in conflict resolution. However, as the property interest in the nonconsumer context is not subject to deterioration or conversion to the extent that it is in installment sales cases, the advantage of securing the creditor's financial interest is negligible. Further it is not clear that such postjudgment relief satisfies the requirement of notice and hearing at a meaningful time and in a meaningful manner. It is arguable that entry of a final judgment that may affect unspecified property pending notice and hearing constitutes a deprivation within the purview of the due process clause as clearly as would an attachment or garnishment. This alternative may therefore be inadequate to meet the demands of due process.

**Alternative 4:** Prior determination of the validity of the waiver would clearly provide the notice and opportunity to be heard required by due process. To the extent that the waivers are valid, and the debtors are informed of the opportunity to challenge them prior to entry of judgment, the interests of the litigants will rarely be disturbed. Most debtors will not incur the expenses of challenging their confessions unless they were coerced, and therefore, the additional administrative burden would be minimal. The guarantee of such a proceeding would, however, guard against the possibility of an involuntary, uninformed waiver in nonconsumer cases. As this alternative preserves the due process rights of debtors without unduly jeopardizing creditors' interests in swift proceedings, it appears to be the optimal replacement for the invalidated procedures.

57. See note 42 supra.

58. This conclusion is firmly reinforced by the majority's correct reading of the case law which rejects the sufficiency of postjudgment review, except upon very narrow grounds, such as those in *Mitchell*.

Conclusion

The actual impact of the decision in *Isbell* is not readily apparent. Since 1975, the legislature has placed numerous restrictions on the use of the confession of judgment device in a wide range of consumer transactions. As suggested throughout this Note, the dangers that alarmed the majority in *Isbell* are endemic to those consumer dealings. They are relevant to other varieties of confessions of judgment only to the extent that they inspire strict scrutiny of the validity of the waivers contained therein.

*Isbell* clearly does not invalidate confessions of judgment, under the revised statutes, in the consumer context. Rather, it invalidates confessions of judgment in a nonconsumer context, in the absence of a clear determination of the validity of the waiver involved in the confession.

In an overburdened judicial system there is a temptation to elect short cuts, not all of which are justifiable as legitimate modes of extra-judicial conflict resolution. In *Isbell* the court feared that California's confession of judgment procedure, with its potential for extracting invalid waivers, constituted such a method. In its efforts to protect against the potential abuses of that system, however, the Court engaged in an imprecise reading of the case law, and an implicit exercise of its normative judgment. The result is the elimination of a useful creditors' remedy, and an invitation to replace it with inefficient alternatives no less prone to abuse.

This Note has suggested that by explicitly engaging in a tripartite balancing of interests the *Isbell* majority could have reached the same result without resort to an unnecessary search for support in readily distinguishable cases. Further, it has suggested that the now discarded procedures should be replaced by one which grants debtors notice and opportunity to challenge the validity of their waivers before entry of final judgment on their confessions.

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60. See note 26 and accompanying text supra.

61. 21 Cal. 3d at 73 n.7, 577 P.2d at 196 n.7, 145 Cal. Rptr. at 376 n.7.

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Ezekial v. Winkley.1 The court held that a physician involved in a residency program at a private hospital cannot be dismissed from that program without first being accorded a "fair procedure" to determine whether the expulsion is justified.

After completing one year of surgical residency, the plaintiff joined the surgical residency program at defendant Kaiser Hospital for the remaining three years necessary to complete his residency. After completing his second year at the hospital, and after being orally informed that he would be allowed to continue in the program, plaintiff was told that he was to be expelled from the program in six months.

Plaintiff sued the hospital, alleging that the dismissal would effectively prevent his entry into the medical specialty for which he was being trained. He requested that the hospital be required to give him a notice of the charges, including a statement of the reasons for its decision to dismiss him, and a hearing on the merits of such charges. The trial court sustained defendant's demurrer and dismissed plaintiff's cause of action.

The supreme court, in reversing, determined that by undertaking the residency program, the plaintiff acquired a valuable interest which could not be taken away without proper notice or hearing.2 This interest, inherent in the residency, was the plaintiff's expectation of achieving the certification necessary to practice as a surgeon.3 Plaintiff alleged that dismissal from the defendant hospital's surgical residency program foreclosed acceptance into other such programs, and that the hospital had consequently "assumed the power to permit or prevent . . . [the resident physicians'] practice of a surgical specialty and to thwart the enjoyment of the economic and professional benefits flowing therefrom."4 Dismissal without notice or a hearing in such a situation, the court ruled, would violate the common law right to "fair procedure."5

The court buttressed its conclusion that the common law right to

2. Id. at 273, 572 P.2d at 36, 142 Cal. Rptr. at 422.
3. Id. at 275, 572 P.2d at 37, 142 Cal. Rptr. at 423.
4. Id. at 274, 572 P.2d at 37, 142 Cal. Rptr. at 423.
5. The court referred to a line of cases commencing with Janes v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944), and ending with Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974), that, it concluded, stood for the principle that "fair procedure" was required in cases in which "certain private entities possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced." 20 Cal. 3d at 272, 572 P.2d at 35, 142 Cal. Rptr. at 421. Justice Mosk in dissent argued that such a characterization of this line of cases was inaccurate; in his view, "fair procedure" is mandated by these cases only when there is an element of monopoly control of the professional practice involved. 20 Cal. 3d at 281, 572 P.2d at 41, 142 Cal. Rptr. at 427.
"fair procedure" required notice and a hearing with a second principle derived from case law. Prior cases which articulated the doctrine of "fair procedure" typically dealt with the initial exclusion from membership in private associations. In this case, however, Kaiser sought to expel the plaintiff from a residency program into which he had already been admitted. Relying on the common law principle that "membership in an association . . . once attained, is a valuable interest which cannot be arbitrarily withdrawn," the court reasoned that the fact that Kaiser's action was an expulsion constituted an additional reason for granting the protection of "fair procedure."

The majority opinion, while noting that the "fair procedure" doctrine had never been applied to an employment relationship alone, denied that its result was based on plaintiff's status as a Kaiser employee. Rather, the holding was based on his expectation of fulfilling the requirements for practice as a surgeon. By contrast, Justice Mosk, in dissent, viewed the majority decision as granting the right to demand a hearing upon termination to any employee with a subjective expectation of continued employment. Because he believed employers would be unable to adopt acceptable procedures for these hearings, Justice Mosk foresaw an added burden on the courts as a result of the majority's result. The majority, with its narrower reading of the requirements of "fair procedure," suggested that hospitals would have no problem adopting suitable procedures in light of the "fair procedure model" available to them.

Both the majority and dissenting opinions considered the practical impact of a "fair procedure" requirement on the hospital's malpractice liability as an employer, under the doctrine of respondeat superior. In light of this potential liability, Justice Mosk noted the unfairness of eliminating the one form of control maintained by the hospital over training and assignment of its medical residents. The majority opinion, in contrast, attempted to accommodate both the hospital's interest in controlling its residents and the resident physician's interest in protecting his expectation of practicing specialized medicine, by allowing for the suspension or reassignment of a medical resident during the time period preceding the termination hearing.

Unless the Ezekial decision is construed so broadly as to apply to all types of employment, as Justice Mosk predicted, the effect of this
decision will be relatively minor. It merely requires that a hospital wishing to expel a medical resident from its residency program first afford him a "fair proceeding." It is difficult to believe that massive judicial scrutiny will be needed. The hospitals will no doubt adapt quickly to judicial decision in this area and will therefore make continued litigation unnecessary. In addition, there is already valuable guidance in this area. At the very most, this decision may force the hospitals to reassign unsatisfactory residents as overpaid and overtrained "orderlies" pending resolution of their cases. This seems a small price to pay for the protection of a resident's legitimate professional expectations.

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International Industries, Inc. v. Olen. The court held that a defendant in an action based on contract, where the contract permits recovery of costs and attorney's fees by a party, may recover only costs and not attorney's fees when the action is voluntarily dismissed prior to trial.

Plaintiff sublessor sued defendant sublessee for damages caused by defendant's breach of the sublease. The agreement provided the sublessor was entitled to recover costs and attorney fees incurred in enforcing its rights under the contract. Several months later, plaintiff requested voluntary dismissal of the action without prejudice. Defendant then moved for entry of judgment, and filed a memorandum of costs alleging a filing fee and attorney's fees. The trial court struck the memorandum of costs on the ground that defendant was not the prevailing party and, therefore, was not entitled to recover costs or fees.

In reversing the trial court's denial of defendant's costs, the court noted that under section 1032(b) of the Code of Civil Procedure a defendant is expressly entitled to recover costs upon a judgment in defendant's favor or upon dismissal of the action. Since filing fees are recoverable as costs, the court held that defendant was entitled to recover the filing fee as a matter of right. In any action on a contract, where such contract specifically provides that attorney's fees

9. See Joint Comm'n on Accreditation of Hospitals, Guidelines for the Foundation of Medical Staff By-Laws, Rules and Regulations (1971).

1. 21 Cal. 3d 218, 577 P.2d 1031, 145 Cal. Rptr. 691 (1978) (Clark, J.) (4-3 decision).
2. CAL. CIV. PROC. CODE § 1032(b) (West Supp. 1978).
3. CAL. CIV. CODE § 1717 (West 1973) provides in part:
   In any action on a contract, where such contract specifically provides that attorney's fees
party in certain contract actions to recover costs and attorney's fees. The court based its decision on its concern for the "efficient and equitable administration of justice." Specifically, the court feared that a rule which automatically permitted a defendant to recover attorney fees following pretrial dismissal by the plaintiff would encourage plaintiffs to maintain pointless litigation in order to avoid liability for defendant's attorney's fees. In holding that parties in pretrial dismissal cases must bear their own attorney's fees, the court rejected the defendant's suggestion that a decision to award attorney fees in pretrial dismissal cases be based on whether plaintiff's complaint is meritorious; the court concluded that such a determination would require the trial court to try the entire case and thereby contribute the court congestion.

Justice Mosk dissented on the grounds that settling a cost bill is in all respects a final judgment, and thus satisfies the "final judgment" requirement of section 1717. He also noted that attorney's fees are an element of costs which should be recoverable whenever other costs are properly recoverable. In a separate dissent, Justice Jefferson contended that the legislature did not intend the phrase "final judgment" in section 1717 to require a judgment on the merits and that a voluntary dismissal should be deemed a final judgment for purposes of section 1717. Justice Jefferson also turned the majority's efficiency argument on its head, arguing that to allow defendants to recover attorney's fees in pretrial voluntary dismissal cases would discourage the filing of non-meritorious claims by a party to a contract containing an attorney's-fee clause.

The public policy arguments relied on by the majority are unconvincing. It is unlikely that a plaintiff will continue pointless litigation rather than seek dismissal solely to avoid liability for defendant's attorney fees, since the direct costs of such a course may well exceed plaintiff's potential liability for defendant's fees. Moreover, while the majority expressed concern for "equitable" considerations, the decision may lead to inequitable results. A plaintiff, now immunized

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4. 21 Cal. 3d at 225, 577 P.2d at 1035, 145 Cal. Rptr. at 695.
5. "[P]ermitting recovery of attorney fees by defendant in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for those fees." Id. at 224, 577 P.2d at 1035, 145 Cal. Rptr. at 695.
6. For example, it is doubtful that a plaintiff will pursue an action against an insolvent defendant, as the majority feared, since this will only increase plaintiff's own expenses and will not make the defendant solvent.
7. 21 Cal. 3d at 224, 577 P.2d at 1034, 145 Cal. Rptr. at 694.
against liability for defendant's attorney's fees if the action is dismissed prior to trial, may be encouraged to file a dubious action in hopes of pressuring a defendant to settle the claim rather than incur the costs of litigation. If the defendant resists settlement, as happened in the instant case, the plaintiff can simply dismiss the action without incurring liability for defendant's attorney's fees.

Although the court's policy arguments may be questioned, the legislative history of section 1717—apparently overlooked by the court—supports the court's holding. The court observed in passing that section 1717, unlike Code of Civil Procedure section 1032(b), contains no provision expressly allowing defendant to recover fees upon dismissal. In fact, section 1717, as originally introduced in the legislature, contained just such a provision. Shortly before the first committee hearing on the measure, however, the language entitling a defendant to recover costs and attorney fees in the event of dismissal was deleted from the bill. This deletion and the concurrent addition of the provision defining "prevailing party" as one in whose favor "final judgment" is rendered strongly suggests that the legislature did not intend a defendant to recover attorney fees in the event of voluntary dismissal.

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Merco Construction Engineers, Inc. v. Municipal Court. The court held that a corporation could not appear in a civil action in municipal court through a corporate officer who was not an attorney.

Petitioner Merco was defendant in a civil action brought in muni-
CIVIL PROCEDURE

principal court. Merco filed an answer and cross-complaint and attempted to appear in propria persona through its treasurer, who was not a member of the State Bar. In doing so, Merco relied on former Code of Civil Procedure section 90, which purported to authorize such an appearance. The trial court sustained plaintiff's demurrer on the ground that a corporation could not appear in propria persona.

In affirming the trial court's action, the supreme court restated the accepted view that "it is this court and not the Legislature which exercises ultimate control over admissions to practice law." In this regard, "legislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary."

The court reasoned that a corporation could not appear in propria persona since it is not recognized by law as a natural person. As a result, "[a] corporation cannot in fact appear in court except through an agent." Therefore, the court concluded that section 90 "does not . . . purport to grant to a corporation a right to represent itself—it purports only to change the identity of the representative through whom it may appear."

Because it is for the judiciary to determine who may represent a corporation in court, section 90 is no more than "the Legislature's invitation" to allow non-attorney representatives. The issue then became whether the court would accept this invitation. A similar legislative suggestion was accepted in Prudential Insurance Co. v. Small Claims Court, where the court sanctioned Code of Civil Procedure section 117g, which the court interpreted as authorizing corporations to be represented by non-attorney employees in small claims court. But the Prudential court took note of special circumstances—without lay representation, corporations would effectively be denied the right to sue or

2. In one's own proper person. BLACK'S LAW DICTIONARY 899 (rev. 4th ed. 1968). In California parties appearing before municipal court in propria persona need not be represented by counsel.
3. Ch. 633, § 1, 1975 Cal. Stats. 1370 (current version at CAL. CIV. PROC. CODE § 87 (West Supp. 1979)). At the time of this action, § 90 provided: "Where a corporation is a party in the municipal court it may appear through a director, an officer, or an employee, whether or not such person is an attorney at law." Code of Civil Procedure § 87, § 90's successor, is identical to § 90 except that it also applies to proceedings in justice courts.
4. 21 Cal. 3d at 731, 581 P.2d at 640, 147 Cal. Rptr. at 635.
5. Id. at 728-29, 581 P.2d at 638, 147 Cal. Rptr. at 633.
6. Id. at 730, 581 P.2d at 639, 147 Cal. Rptr. at 634 (court's emphasis).
7. Id. at 730, 581 P.2d at 639, 147 Cal. Rptr. at 634.
9. CAL. CIV. PROC. CODE § 117g (West 1954) (current version at CAL. CIV. PROC. CODE § 117.4 (West Supp. 1979)).
defend in small claims court.\textsuperscript{10}

The majority, in declining to accept the legislature’s suggestion, found that “[t]he special circumstances which were deemed necessary for such representation in small claims proceedings do not exist in the municipal court.”\textsuperscript{11} Unlike small claims court, municipal courts use formal rules of procedure and evidence. The court argued that as a result, the courts have an important interest in having qualified professionals aid them in the presentation and resolution of cases. Furthermore, the court was concerned about creating “a cadre of unprofessional practitioners”\textsuperscript{12}—disbarred attorneys or paraprofessionals, who could move from corporation to corporation as “employees” and who would not be subject to professional rules of conduct or the ethical standards of the State Bar.

In dissent, Justice Tobriner agreed with the majority that the court has the power to accept or reject section 90. But, he argued, the majority failed to consider the important public policy in favor of providing an economically feasible forum for potential litigants in controversies involving small amounts. Justice Tobriner would have deferred to the legislature’s judgment until such time as its decision “prove[s] to create a significant danger to the public or the administration of justice.”\textsuperscript{13}

\textit{Merco} is the first time the court has invalidated a statute which expressly permitted a corporation to be represented by a non-attorney employee. In previous decisions the courts had only adopted the common law rule that in the absence of specific statutory authorization, corporations must be represented by attorneys in courts of record.\textsuperscript{14}

It is unfortunate that the court was forced to decide either that all corporations could appear \textit{in propria persona} or that none of them could. The court’s concern with possible abuses resulting from according corporations this privilege is not really a function of the corporate form of a business enterprise so much as it is a function of the size and nature of a business’s activities. A large corporation which is involved in frequent municipal court litigation may present a situation prone to abuse, and such a business’s financial resources would probably not be strained by being required to appear through an attorney. In contrast, a small corporation with more limited financial resources, and which is not involved in frequent municipal court litigation, presents much less

\textsuperscript{10} No attorney may appear on behalf of plaintiff or defendant in small claims court. \textsc{Cal. C \textit{Cv. Proc. Code} § 117.4 (West Supp. 1979).}
\textsuperscript{11} 21 Cal. 3d at 731, 581 P.2d at 640, 147 Cal. Rptr. at 635.
\textsuperscript{12} \textit{Id.} at 732, 581 P.2d at 641, 147 Cal. Rptr. at 636.
\textsuperscript{13} \textit{Id.} at 737, 581 P.2d at 644, 147 Cal. Rptr. at 639 (Tobriner, J., dissenting).