

20th Anniversary of the Americans with Disabilities Act

When a Threat is Not a Threat: Why Persons Who Are Deaf or Hard of Hearing Are Left Unprotected by California Penal Code Section 422 and How the Courts Could Rectify It

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WHEN A THREAT IS NOT A THREAT: WHY PERSONS WHO ARE DEAF OR HARD OF HEARING ARE LEFT UNPROTECTED BY CALIFORNIA PENAL CODE SECTION 422 AND HOW THE COURTS COULD RECTIFY IT

Benjamin Thomas Greer* and Scott J. Modell**

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I. INTRODUCTION

The California State Legislature has amended Penal Code section 422,¹ commonly referred to as terrorist, criminal, or credible threats, three times since 1988.² In doing so, the Legislature declared that “every person has the right to be protected from fear and intimidation,”³ recognizing the growing number and severity of threats against California’s peaceful citizenry.⁴ Appellate courts have interpreted the law to require an audible utterance to accompany threatening physical gestures to fall within its ambit. This is an aberrant reading of the statute

¹ CAL. PENAL CODE § 422 (West 2010). Section 422 states the following:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family’s safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

For the purposes of this section, “immediate family” means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

“Electronic communication device” includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. “Electronic communication” has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

Id.

² *Id.*

³ *People v. Solis*, 109 Cal. Rptr. 2d 464, 473 (Cal. Ct. App. 2001) (quoting *People v. Martinez*, 62 Cal. Rptr. 2d 303, 309 (Cal. Ct. App. 1997)).

⁴ *Id.*

and fails to protect a significant segment of our community, whose only avenue of communication is through the medium of sign language.

This interpretation of section 422 would also provide would-be perpetrators, who communicate via sign language, an avenue to threaten others with impunity if their threats are conducted silently. This Article will do the following: (1) examine the courts' reasoning and application of Penal Code section 422 in cases where hand gestures were used to threaten; (2) analyze the relevant portions of the statute's construction; and (3) propose reasonable and logical grounds for a nuanced application of section 422 to threats made using American Sign Language.

II. JUDICIAL INTERPRETATIONS AND THE DEVELOPMENT OF PENAL CODE SECTION 422

Currently, only one California case applies Penal Code section 422 to a factual situation involving gestures. In *People v. Franz*, the victim maintained a contentious, domestic, violence-filled relationship with the defendant.⁵ The defendant, a jealous boyfriend, saw the victim, her sister's boyfriend, and a male friend talking on a street corner and confronted them.⁶ The victim and the two male friends got in a cab and left, seeking refuge at the victim's home where they "shut . . . the curtains and locked all the doors."⁷ Someone repeatedly called the victim's home, though there was no answer. The defendant went to the home and started knocking on the door.⁸ Receiving no response, the defendant attempted to gain access through a window.⁹

Recognizing the defendant was not going to be dissuaded, the victim agreed to come outside to talk to him.¹⁰ The defendant pushed his way into the home, looking for the two men he had seen previously.¹¹ The defendant began striking one of the men "several times" as the victim grabbed the cordless phone in an attempt to call the police.¹² Without successfully notifying law enforcement, the victim ran out of the house, as the defendant redirected his attention toward her.¹³ The defendant gave chase, "took the phone and punched her several times, causing her

⁵ 106 Cal. Rptr. 2d 773, 777-78 (Cal. Ct. App. 2001).

⁶ *Id.* at 777.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

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nose to bleed.”¹⁴ The defendant dragged her back into the home telling her, “I’m going to fucking kill you.”¹⁵ When law enforcement arrived, the victim ran outside but was too afraid of the defendant to tell the officer what had happened.¹⁶ Later at the hospital, she fully divulged what had transpired.¹⁷

As the officers were conducting their in-field investigation and questioning of witnesses, the defendant positioned himself behind the officer and “did a gesture like this, like shush. And then ran his finger across his throat.”¹⁸ The victim’s sister’s boyfriend understood the defendant was threatening to “slice his throat” if he continued speaking with the police.¹⁹ As a result, the boyfriend stopped talking and only shared the story of the threatening gesture later to another officer when the defendant was no longer present.²⁰

At trial, the officer testified that he had heard the “defendant utter[] a sound that was either ‘shush’ or ‘sh’” while making the slashing gesture.²¹ On appeal, the defendant argued there was insufficient evidence “to support his conviction of terrorist threats” under Penal Code section 422, as there was “no substantial evidence he made a verbal, written, or electronic statement, as required by section 422.”²² The prosecution argued that “nonverbal conduct may constitute a ‘statement’ within the meaning of section 422” and cited “a dictionary . . . definition of ‘verbal’ as including a verbal symbol.”²³ The appellate court located an alternate dictionary definition in which “verbal” is defined as “concerned merely with words, as distinguished from facts, ideas, or actions.”²⁴

Based on the two definitions provided to the district court, the court found statutory ambiguity and turned to other avenues for interpretation. The court cited *People v. Snyder*, which held that

[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its

¹⁴ *Id.*

¹⁵ *Id.* at 777-78.

¹⁶ *Id.* at 778.

¹⁷ *Id.*

¹⁸ *Id.* at 779.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 785.

²² *Id.* at 781.

²³ *Id.* at 782.

²⁴ *Id.* (quoting WEBSTER’S NEW WORLD DICTIONARY 1482 (3d college ed. 1988)).

application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of [the] statute.²⁵

The prosecution went as far as to argue the similarity of the defendant's motions to sign language, that a "finger to lips and throat-slashing constituted a verbal or written statement as surely as sign language would."²⁶ But the *Franz* court made a special point to highlight that "the People cite[d] no authority applying section 422 to sign language."²⁷

The court ultimately held that there was credible evidence (the noise to which the officer testified, in conjunction with the throat-slashing gesture) constituting a threat to kill the victim if he talked to the police.²⁸ The court limited its holding to the facts therein and stated, "we do not have to decide whether section 422 requires that a defendant use a word in order to fulfill the requirement of a 'statement made verbally.'"²⁹

This holding raises these questions: is the court's understanding of what constitutes a verbal communication too narrow, and can a person be statutorily threatened using solely American Sign Language as it is currently drafted?

III. THE CAUSES OF HEARING LOSS AND ITS PREVALENCE IN THE UNITED STATES

Hearing loss can be divided into three main causal categories: (1) idiopathic- or disease-based; (2) noise-induced; and (3) age-based or presbycusis. Diseases attributed to hearing loss include childhood infections such as mumps and measles and special infections such as syphilis, Lyme disease, herpes, cytomegalo virus (CMV), mononucleosis, chickenpox, pneumonia, influenza, and numerous other fungal diseases.³⁰ "Hearing loss is one of the most common consequences of

²⁵ 992 P.2d 1102, 1108 (Cal. 2000) (quoting *People v. Overstreet*, 726 P.2d 1288, 1290 (Cal. 1986)) (internal quotation marks omitted).

²⁶ *Franz*, 106 Cal. Rptr. 2d at 783.

²⁷ *Id.* (emphasis added).

²⁸ *Id.*

²⁹ *Id.* at 785 (emphasis added).

³⁰ *What Other Conditions Can Cause Hearing Loss?*, EHEALTHMD, http://www.ehealthmd.com/library/hearingloss/HL_conditions.html (last visited Jan. 24, 2011).

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meningitis, especially bacterial or fungal meningitis.”³¹ AIDS has been associated with ear infections leaving nerve damage.³² Individuals who suffer from tuberculosis, forms of arthritis like rheumatoid arthritis, lupus erythematosus, and diabetes often sustain hearing loss.³³ These conditions and diseases are not race or age specific.

There are three main types of hearing loss: (1) conductive, (2) sensorineural, and (3) mixed hearing loss.³⁴ Conductive hearing loss occurs in the middle or outer ear and generally leads to hard of hearing conditions, not deafness.³⁵ Sensorineural hearing loss is more serious, occurring in the inner ear and is generally irreversible.³⁶ Mixed hearing loss occurs when there is damage in the middle or outer as well as damage in the inner ear.³⁷

The communities of individuals who are hard of hearing or deaf represent a significant portion of our society. According to Gallaudet University statistics, hearing loss is an extremely common disability that

³¹ *Id.*; see also *Hearing Loss: Risk Factors*, MAYO CLINIC (Aug. 22, 2009), <http://www.mayoclinic.com/health/hearing-loss/DS00172/DSECTION=risk-factors> (listing risk factors, including meningitis, that could lead to hearing loss).

³² See *What Other Conditions Can Cause Hearing Loss?*, *supra* note 30 (“Conductive and sensorineural hearing loss both occur in people with AIDS. AIDS is also associated with tumors in the head and neck that can cause hearing loss.”).

³³ *Id.*

³⁴ *Types of Hearing Loss*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <http://www.asha.org/public/hearing/disorders/types.htm> (last visited Jan. 23, 2011).

³⁵ *Conductive Hearing Loss*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <http://www.asha.org/public/hearing/Conductive-Hearing-Loss/> (last visited Jan. 17, 2011). The article states that

[c]onductive hearing loss occurs when sound is not conducted efficiently through the outer ear canal to the eardrum and the tiny bones (ossicles) of the middle ear. Conductive hearing loss usually involves a reduction in sound level or the ability to hear faint sounds. This type of hearing loss can often be corrected medically or surgically.

Id.

³⁶ *Sensorineural Hearing Loss*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <http://www.asha.org/public/hearing/Sensorineural-Hearing-Loss/> (last visited Jan. 17, 2011). This type of hearing loss

occurs when there is damage to the inner ear (cochlea), or to the nerve pathways from the inner ear to the brain. Most of the time, [sensorineural hearing loss (“SNHL”)] cannot be medically or surgically corrected. This is the most common type of permanent hearing loss. SNHL reduces the ability to hear faint sounds. Even when speech is loud enough to hear, it may still be unclear or sound muffled.

Id. (listing possible causes of SNHL such as illnesses, exposure to loud music, aging, head trauma, and the use of drugs that are toxic to hearing).

³⁷ *Mixed Hearing Loss*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <http://www.asha.org/public/hearing/Mixed-Hearing-Loss/> (last visited Jan. 23, 2011).

affects more than three percent or 11.8 million Americans.³⁸ According to a recent study by the Western Interstate Commission for Higher Education (“WICHE”),³⁹ at a number of 3,086,866, California has the highest population of deaf and hard of hearing individuals, “more than five times that of the next largest state” population of deaf and hard of hearing.⁴⁰ The 3,086,866 deaf and hard of hearing individuals constitutes 8.6 percent of California’s population.⁴¹ As with most disabilities, there is a spectrum of persons who are hard of hearing and deaf in terms of severity. A significant segment of these citizens are classified as “culturally deaf,” meaning their first native language is sign language; a number of “culturally deaf” citizens only communicate through some form of sign language.⁴²

IV. PENAL CODE SECTION 422 HAS A POTENTIAL LOOPHOLE THAT WOULD ALLOW A PERPETRATOR TO THREATEN THEIR VICTIMS WITH IMPUNITY

In 1989, sections 422 and 646.9 were amended, adding the term “electronic communication device” as a prohibited conduit by which to

³⁸ FAQ: *Deaf Population of Individual States, Territories, & Localities*, GALLAUDET U. (July 2004), [http://library.gallaudet.edu/Library/Deaf_Research_Help/Frequently_Asked_Questions_\(FAQs\)/Statistics_on_Deafness/Deaf_Population_of_Individual_States_Territories_and_Localities.html](http://library.gallaudet.edu/Library/Deaf_Research_Help/Frequently_Asked_Questions_(FAQs)/Statistics_on_Deafness/Deaf_Population_of_Individual_States_Territories_and_Localities.html). The following statistical data is based off the 1994–95 United States Census Bureau data collection and is an estimated population (from greatest to least) of deaf and hard of hearing by state: California (1,169,273); New York (823,173); Florida (809,571); Texas (727,512); Pennsylvania (624,061); Ohio (520,965); Illinois (512,818); Michigan (426,772); New Jersey (357,699); North Carolina (340,459); Georgia (298,185); Virginia (288,546); Massachusetts (286,122); Tennessee (267,724); Indiana (261,117); Missouri (255,930); Wisconsin (234,452); Washington (221,077); Maryland (219,702); Alabama (217,915); Kentucky (209,772); Minnesota (201,666); Louisiana (200,437); Oklahoma (175,799); South Carolina (168,600); Arizona (167,652); Connecticut (153,573); Iowa (144,346); Oregon (143,755); Mississippi (142,001); Arkansas (140,625); Colorado (131,358); Kansas (117,430); West Virginia (115,491); Nebraska (76,506); Utah (62,299); Maine (61,836); New Mexico (58,420); Nevada (54,195); Rhode Island (51,118); New Hampshire (48,970); Hawaii (47,817); Idaho (46,424); Montana (39,433); South Dakota (34,849); Delaware (33,184); North Dakota (31,362); Vermont (25,618); District of Columbia (25,214); Wyoming (19,135); and Alaska (15,877). *Id.*

³⁹ W. INTERSTATE COMM’N FOR HIGHER EDUC., <http://www.wiche.edu/> (last visited Jan. 24, 2011). “WICHE and its 15 member states work to improve access to higher education and ensure student success. [Their] student exchange programs, regional initiatives, and . . . research and policy work allow [WICHE] to assist constituents throughout the West and beyond.” *Id.*

⁴⁰ W. INTERSTATE COMM’N FOR HIGHER EDUC. MENTAL HEALTH PROGRAM, INFORMATION GAPS ON THE DEAF AND HARD OF HEARING POPULATION: A BACKGROUND PAPER 6 (May 2006), available at <http://www.wiche.edu/info/publications/InformationGapsResearchPaper.pdf>.

⁴¹ *Id.* at 14.

⁴² *Hearing Impairment vs. Deafness*, AUDIOLOGY AWARENESS CAMPAIGN, http://www.audiologyawareness.com/hearinfo_impairdeaf.asp (last visited Sept. 7, 2010).

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stalk and communicate criminal threats.⁴³ In the *Franz* case, the defendant argued that if the California Legislature intended so, they could have expressly amended section 422 to include nonverbal communication.⁴⁴ The defense pointed to the language of Penal Code section 646.9(g), which defines a possible course of conduct for a stalking credible threat as “a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct.”⁴⁵ The court agreed with the defendant’s contention, finding the Legislature did not intend section 422 to include nonverbal gestures as prohibited conduct.⁴⁶

This analogy, drawn by the defense, is fundamentally defective. Stalking, by its nature, is a pattern of prohibited physical conduct that is designed to harass or place another in a constant state of fear or paranoia, whereas a terrorist threat is a credible communication of imminent peril designed to place another into a present state of apprehension of bodily harm. To compare and analogize the statutory construction of these two sections is an error. The actus reus prohibited by law for these crimes are different; therefore, statutory language describing the prohibited conduct would naturally prohibit different forms of physical action. The 1998 amendment updating these sections of the Penal Code was the Legislature’s attempt to keep pace with technology (e.g., internet chat rooms and text messaging) and was not designed to alter the fundamental tenets of the prohibited actus reus.⁴⁷

A fair reading of the court’s reasoning in *Franz* would allow a perpetrator to make terrorist threats, made with the specific intent to place another in imminent fear of physical violence, and to escape prosecution of this assault as long as they did not use a form of writing or failed to make an audible sound. The perpetrator need not intend to communicate with a person who is deaf or hard of hearing, but just be an individual who understands the threatening sign language and was placed in a state of reasonable apprehension of harm. This analysis described in *Franz* gives a clever, inventive, and well-advised perpetrator the opportunity to threaten people with impunity.

⁴³ S.B. 1796, 1998 Leg., Reg. Sess. (Cal. 1998), available at http://info.sen.ca.gov/pub/97-98/bill/sen/sb_1751-1800/sb_1796_bill_19980925_chaptered.pdf (last visited Sept. 23, 2010). “An act to amend Section 1708.7 of the Civil Code, and to amend Sections 422, 646.9, and 653m of the Penal Code, relating to stalking,” *Id.*

⁴⁴ *People v. Franz*, 106 Cal. Rptr. 2d 773, 782 (Cal. Ct. App. 2001).

⁴⁵ CAL. PENAL CODE § 646.9(g) (West 2010).

⁴⁶ *Franz*, 106 Cal. Rptr. 2d at 782–83.

⁴⁷ Cal. S.B. 1796.

V. OPTIONS AVAILABLE TO BETTER PERFECT AND FACILITATE THE ORIGINAL INTENT UNDERPINNING PENAL CODE SECTION 422

A. *Penal Code Section 422 Is Not Ambiguous and the Statutory Terms Therein Ought to Be Credited with Their Proper Definitions in Order to Effectuate the Intended Application of the Law*

Although the Legislature could have used more precise and explicit terminology, the language currently codified adequately conveys grounds for terrorist threats communicated via sign language to be prosecuted under Penal Code section 422.

When the court interprets the effect of a statute, they are guided by the axiom that words will be given their plain language meaning⁴⁸ and understood in the context in which they are constructed.⁴⁹ The court in *Franz* grappled with the term “verbal” in its analysis and by its own account found two “differing dictionary definitions”: first, “as including a verbal symbol”⁵⁰ and second, “concerned merely with words, as distinguished from facts, ideas, or actions.”⁵¹ Finding ambiguity in the statutory construction, the court was guided by *People v. Snyder*, which held that when language in a penal law is susceptible of two constructions, the language will be construed favorably to the defendant, thus receiving the benefit of the doubt in interpreting words or the construction of a statute.⁵²

These two definitions are complementary, not contradictory. A written language is a compilation of characters which the reader has

⁴⁸ This axiom is also known as the rule of lenity. See *McNally v. United States*, 483 U.S. 350, 375 (1987) (“The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment.”); see also *Muscarello v. United States*, 524 U.S. 125 (1998) (declining to apply the rule of lenity); *Evans v. United States*, 504 U.S. 255 (1992) (Thomas, J., dissenting) (same); *Scarborough v. United States*, 431 U.S. 563 (1977) (Stewart, J., dissenting) (same).

⁴⁹ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.

Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.

Id. (internal citations omitted).

⁵⁰ *Franz*, 106 Cal. Rptr. 2d at 782.

⁵¹ *Id.* (quoting WEBSTER’S NEW WORLD DICTIONARY 1482 (3d college ed. 1988)); see also *supra* notes 23–24 and accompanying text (discussing the use of the term “verbal”).

⁵² 992 P.2d 1102, 1108 (Cal. 2000) (quoting *People v. Overstreet*, 231 Cal. Rptr. 213 (Cal. 1986)).

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associated with audible tones and/or sounds. The first definition the court cited should be understood to mean an expression of letters and/or characters that build meaningful words. *Black's Law Dictionary* defines "verbal" as an adjective which is "[o]f, relating to, or expressed in words."⁵³ "Symbol" has been defined as a "letter, character, [or] sign of written communication."⁵⁴

Here, a word would be an amalgamation of letters or characters made with the intent of communicating through a written medium. The first definition is a definition by example, giving the reader an example of the form in which a verbal statement may occur. The second definition serves the reader as a limiter, or definition by exclusion. In this definition, the author is attempting to convey to the reader what a word is not. Here the definition attempts to convey to the reader that words are not intangible things like ideas or actions. These definitions are not vague, ambiguous, or contradictory. Rather, they attempt to give meaning to the same term by approaching it from alternate definitional angles. The terms used in Penal Code section 422 are not ambiguous and should be given their full definitional credit and not be framed by our colloquial usage.

B. *The Term "Verbal" Is Not Synonymous with the Word "Audible"*

The court in *Franz*, makes an assumption that the statutory word "verbal," used in Penal Code section 422, has the same definition as the word "audible." It does not.

Black's Law Dictionary defines "verbal" as an adjective which is "[o]f, relating to, or expressed in words."⁵⁵ It is not until the alternate or second definition, "[l]oosely, of, relating to, or expressed in spoken words,"⁵⁶ that there is any indication of the manner in which the words are communicated. Contrast the expression in words to the *Merriam-Webster's Dictionary* definition of "audible": "heard or capable of being heard."⁵⁷ These two words are closely related, in that they are describing language and its transmission; however, the definition for "verbal" is focused on the speaker's means of communication of an idea, and the definition for "audible" is centered on the mode of reception of another's idea. This would indicate that, while nuanced, these words are

⁵³ BLACK'S LAW DICTIONARY 1696 (9th ed. 2009).

⁵⁴ *Symbol*, THESAURUS.COM, <http://thesaurus.com/browse/symbol> (last visited June 28, 2010).

⁵⁵ BLACK'S LAW DICTIONARY, *supra* note 53, at 1696.

⁵⁶ *Id.* (emphasis added).

⁵⁷ *Audible*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/audible> (last visited June 28, 2010).

describing different components of a transmission of an idea or thought. In short, “verbal” means expressed in words, and “audible” means the capability of being heard. The court has confused these two definitions, assuming they are synonymous; they are not.

Meaning can be conveyed by words through numerous forms of transmission. American Sign Language (“ASL”) is globally recognized and is a popular medium for conveying words and ideas for those who are deaf or hard of hearing. Specifically, the “culturally deaf”⁵⁸ utilize ASL as their sole mode of communication.⁵⁹

C. *American Sign Language Is a Fully Recognized Foreign Language and As Such, a Concrete Form of Communication, Which Should Be Considered an Adequate Conduit of Expression to Satisfy the “Verbal” Transmission Element of Penal Code Section 422*

ASL uses visually transmitted signal patterns rather than acoustically transmitted sound patterns to convey meaning.⁶⁰ With its origins rooted in seventeenth century Martha’s Vineyard where a large and disproportionate percentage of the population was deaf,⁶¹ ASL has become the fourth most widely used and understood language within the United States.⁶² ASL contains phonology,⁶³ morphology,⁶⁴

⁵⁸ CAROL PADDEN & TOM HUMPHRIES, *DEAF IN AMERICA: VOICES FROM A CULTURE* (1988) (explaining that people who are culturally deaf are (1) audilogically deaf or hard of hearing, (2) use a sign language, and (3) identify themselves with the larger cultural group).

⁵⁹ *Hearing Impairment vs. Deafness*, *supra* note 42.

⁶⁰ *Sign Language and Deaf Communication Methods and Information*, *DISABLED WORLD*, <http://www.disabled-world.com/disability/types/hearing/communication/> (last visited Sept. 7, 2010).

⁶¹ *The History of American Sign Language*, *START AMERICAN SIGN LANGUAGE*, <http://www.start-american-sign-language.com/history-of-american-sign-language.html> (last visited Jan. 14, 2011). Hartford, Connecticut, was the home to Dr. Mason Cogswell who recruited a local minister, Thomas Hopkins Gallaudet, to help educate his deaf daughter, Alice. *Id.* In 1815, Gallaudet traveled to Europe in search of a method to help young Alice. *Id.* Gallaudet traveled to Paris where he was exposed to the educational methods of the National Institute for Deaf-Mutes which taught sign language. *Id.* After returning from his journey, Gallaudet started his own school for the deaf named the American Asylum for Deaf-Mutes (modern day American School for the Deaf). *Id.*

⁶² *American Sign Language*, *MEDICINENET*, http://www.medicinenet.com/sign_language/article.htm (last visited Jan. 14, 2011).

⁶³ Stephen R. Anderson, *Phonology*, <http://bloch.ling.yale.edu/Files/Phonology.htm> (last visited Jan. 17, 2011). Phonology is

the study of the sound structure of units (*morphemes, words, phrases, utterances*) within individual languages. Its goal is to elucidate the system of distinctions in sound which differentiate such units within a particular language, and the range of realizations of a given unit’s sound structure as a function of the shape of other units in its context.

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semantics,⁶⁵ syntax,⁶⁶ and pragmatics,⁶⁷ analogous to spoken languages.⁶⁸ Where spoken languages are produced by the vocal cords and can be duplicated in a linear written format, ASL is three-dimensional.⁶⁹ ASL simultaneously combines hand shapes, spatial orientation, and movement of the hands, arms, or body, and facial expressions to fluidly express a communicator's thoughts and emotions.⁷⁰

1. California Recognizes the Benefits and Virtues of Sign Language as Reflected by Its Specific Inclusion in Numerous Statutes and Its Recognition as a Foreign Language in Many of the State's Schools and Colleges

California law generally embraces sign language as an integral and trusted means of communication in judicial proceedings. California Evidence Code section 754(b) states that "proceedings shall be interpreted in a language that the individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority."⁷¹ The section goes on to clarify that a sign language interpreter is a type of "interpreter"⁷² and that

'intermediary interpreter' means an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between

Id.

⁶⁴ *Morphology*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/morphology> (last visited Sept. 7, 2010). Morphology is "a study and description of word formation (as inflection, derivation, and compounding) in language."

Id.

⁶⁵ *Semantics*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/semantics?show=0&t=1283895331> (last visited Sept. 7, 2010). Semantics is described in an alternate definition as "the meaning or relationship of meanings of a sign or set of signs; *especially*: connotative meaning." *Id.*

⁶⁶ *Syntax*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/syntax> (last visited Sept. 7, 2010). Syntax is "the way in which linguistic elements (as words) are put together to form constituents (as phrases or clauses)." *Id.*

⁶⁷ *Pragmatics*, OHIO ST. U., <http://www.ling.ohio-state.edu/~kdk/201/spring02/slides/pragmatics-4up.pdf> (last visited Sept. 7, 2010). "Pragmatics is the study of how language is used and of the effect of context on language." *Id.* (emphasis omitted).

⁶⁸ *American Sign Language Linguistic Research Project*, BOSTON U., <http://www.bu.edu/asllrp/> (last visited June 28, 2010).

⁶⁹ Wendy Sandler, *Symbiotic Symbolization by Hand and Mouth in Sign Language*, SEMIOTICA, Apr. 2009, at 241 (Ger.).

⁷⁰ *Id.*

⁷¹ CAL. EVID. CODE § 754(b) (West 1995 & Supp. 2010).

⁷² *Id.* § 754(d).

variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the individual who is deaf or hearing impaired and the qualified interpreter.⁷³

Here, the legislature has rightfully placed its reliance in ASL to help mitigate and guard against due process challenges that criminal defendants may assert. The Legislature also gives great significance to sign language interpreters, as they are an integral conduit for the deaf and hard of hearing while testifying, helping them to relay their observations to the finder of fact.

A vast and growing number of schools and universities regard ASL as an acceptable substitute for foreign language requirements, and California is no exception.⁷⁴ California Education Code section 51225.3(a)(1)(E) expressly states the following: “For the purposes of satisfying the requirement [that a student complete one course in foreign language], a course in American Sign Language shall be deemed a course in foreign language.”⁷⁵ Currently, more than a dozen California universities accept ASL as a suitable proxy for foreign language matriculation requirements.⁷⁶

2. The Transmission/Communication Element of Penal Code Section 422 Should Be Given the Same or Similar Consideration as the Totality of Surrounding Circumstances Analysis Courts Have Applied to the Unconditional/Unequivocal Element

California courts have looked to the surrounding facts and special characteristics of the parties, applying a totality of circumstances analysis, when assessing whether a threat falls within the prescription of the unconditional and unequivocal elements of Penal Code section 422.⁷⁷ Courts have chosen this approach because it best furthers the legislative intent of protecting “every person . . . from fear and intimidation.”⁷⁸ It would additionally advance the Legislature’s intent to apply the same totality of circumstances analysis when applying the transmission or communication element of the statute.

⁷³ *Id.* § 754(e).

⁷⁴ Sherman Wilcox, *Universities That Accept ASL in Fulfillment of Foreign Language Requirements*, WASH. STATE-AM. SIGN LANGUAGE TEACHER’S ASS’N, http://www.waasla.org/U_accepts_ASL_Wilcox%5B1%5D.pdf (last visited June 28, 2010).

⁷⁵ CAL. EDUC. CODE § 51225.3(a)(1)(E) (West 2006 & Supp. 2010).

⁷⁶ Wilcox, *supra* note 74.

⁷⁷ *People v. Solis*, 109 Cal. Rptr. 2d, 464, 473 (Cal. Ct. App. 2001).

⁷⁸ *Id.* (quoting *People v. Martinez*, 62 Cal. Rptr. 2d 303, 309 (Cal. Ct. App. 1997)).

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In *People v. Martinez*, the court allowed the jury to consider evidence of the defendant's subsequent actions, setting fire to a building where the victim worked a day after the defendant had made the charged threat.⁷⁹ The appellate court agreed with the defense that the threat, in a vacuum, may not have conveyed a threat to commit great harm, but held the trier of fact could consider all of the surrounding circumstances in deciding whether the threat was ardent when conferred.⁸⁰

In *People v. Mendoza*,⁸¹ the court also allowed the trier of fact to evaluate peripheral information, expanding the scope to include unique and subjective characteristics of the specific party's personal history.⁸² Here, shortly after the charged threat was made, members of the defendant's gang parked their vehicle in front of the victim's home and honked the horn to gain her attention.⁸³ This evidence was submitted to show the lack of ambiguity of the threat, as the victim knew that the defendant was a gang member and his threats should not be understood as hollow.

The above are examples of the court utilizing the tools of logic and reason to achieve the maximum desired effect of a statute. It behooves the court to employ this same framework of analysis when applying the verbal element of Penal Code section 422. In doing so, they would be able to allow the trier of fact to understand the communication patterns of the deaf and hard of hearing communities and to appreciate that sign language is their form of verbalization, thus making threatening sign language subject to Penal Code section 422 culpability.

3. The California Legislature Could Amend Section 422 to Address and Clarify Their Intended Scope of Protection

One avenue available to remedy Penal Code section 422's deficiency is to amend the existing codified language. The California Legislature has amended Penal Code section 422 several times since its initial enactment. These changes have updated the Code to encompass and keep pace with technological advancements. The Legislature could easily amend it again, so as to ensure protection for the deaf and hard of hearing. Although the legislative process is often cumbersome and

⁷⁹ 62 Cal. Rptr. 2d 303, 308 (Cal. Ct. App. 1997).

⁸⁰ *Id.*

⁸¹ 69 Cal. Rptr. 2d 728 (Cal. Ct. App. 1997).

⁸² *Solis*, 109 Cal. Rptr. 2d at 473-74 (citing *Mendoza*, 69 Cal. Rptr. 2d at 732-34).

⁸³ *Id.* at 474.

fraught with political detours, new and explicit language would serve as the most effective and legally clear option.⁸⁴

VI. JURISDICTIONS OUGHT TO CAREFULLY EXAMINE THEIR CRIMINAL THREATS STATUTORY SCHEME AND CONSTRUCTION TO ENSURE A SUFFICIENT SCOPE OF PROTECTION

Many jurisdictions have codified similar language to California's Penal Code section 422; however, they have adopted broader expressive language, selecting the term "communicate" or "conduct."⁸⁵ The election

⁸⁴ The following is the existing statutory language, followed by two proposals for alternative statutory language with added language in italics:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out.

Cal. Penal Code § 422 (West 2010).

Amended language option 1: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, *made visually*, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out."

Amended language option 2: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, by means of an electronic communication device, *or conducted through American Sign Language*, is to be taken as a threat, even if there is no intent of actually carrying it out."

Depending on the language adopted, this code section, as amended, could be an opportunity to encompass threats communicated with street gang hand signals. While this expansion would confer additional protection for California citizenry, it could have an unattended negative correlative effect on charging and plea agreements for prosecutors. The lesser count of a criminal threat is a "strike" qualifying act, while the completed threatened act may not be. This dichotomy drastically complicates plea negotiations.

⁸⁵ Criminal threats are classified and labeled differently state by state. Threatening actions can be found under menacing charges. In Oregon, "menacing" is defined as follows: "(1) A person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." OR. REV. STAT. § 163.190(1) (2009). They can also be found under assault charges and intimidation charges. *See, e.g.*, IND. CODE ANN. § 35-45-2-1(a)(2) (West 2004 & Supp. 2010) (defining "Intimidation" as "[a] person who communicates a threat to another person, with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act."). It furthermore can be found under its own standalone enumerated crime. *See, e.g.*, KAN. STAT. ANN. § 21-3419(a)(1) (Supp. 2009) (defining "Criminal threat" as "any threat to: (1) Commit violence communicated with intent to terrorize another, or to cause the

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of these terms allows the courts broader discretion when applying the statutory language.

Kansas court holdings include the following understandings: that “[c]ommunicated intent can be inferred from physical acts as well as verbal statements;”⁸⁶ that “[a]ll circumstances surrounding the communication, including the relationship between the parties, must be considered in determining whether the communication in issue is a terroristic threat;”⁸⁷ and that in order to come within the purview of the statute, making it unlawful to communicate a terroristic threat, the threat need not be in any particular form or in any particular words.⁸⁸ Although there is no case law specifically addressing the issue of threatening sign language, these holdings may provide grounds to find culpability in threats made by way of signing. Jurisdictions that have deficient language or uninformed interpreting case law may need to amend their statutes or advocate for a comprehensive judicial review to ensure adequate protection for the deaf or hard of hearing.

VII. CONCLUSION

California courts have given strong indications that Penal Code section 422 may require threatening gestures to be accompanied by an audible utterance in order to attach culpability.⁸⁹ This statutory reading fails to protect a significant segment of our community that uses the medium of sign language to communicate. This construction of Penal Code section 422 provides would-be perpetrators, who verbalize via sign language, an avenue to threaten others with impunity if conducted silently. As codified, section 422 does provide adequate grounds for terrorist threats communicated via sign language to be prosecuted.

Though the outcome in *Franz* would not have been dissimilar if any of the above proposals had been applied, the court’s analysis provides precious insight into its understanding of how Penal Code section 422 would be interpreted in the future. Without a finding of credible evidence that the defendant made an audible sound, they might find future charges lacking in foundation, leading to preliminary dismissals. The court’s explanation and understanding of this statute is dangerous,

evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such terror or evacuation”); see also CAL. PENAL CODE § 422.

⁸⁶ State v. Cope, 29 P.3d 974, 978 (Kan. Ct. App. 2001).

⁸⁷ State v. Abu-Isba, 685 P.2d 856, 863 (Kan. Ct. App. 1984).

⁸⁸ State v. Knight, 549 P.2d 1397 (Kan. Ct. App. 1976).

⁸⁹ People v. Franz, 106 Cal. Rptr. 2d 773 (Cal. Ct. App. 2001).

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and future application, as intimated, could obfuscate the spirit and intent of the law.

From the California Legislature's 1998 amending of section 422 to encapsulate and expand its protection to the advancements in electronic communication, it is reasonable to infer that this was a comprehensive attempt to encompass all legitimate forms of word transfer. Why would the Legislature intend Penal Code section 422 to leave the deaf or hard of hearing unprotected when threatened through sign language? There is no reasonable or logical explanation to believe that the Legislature would not have intended to protect one of the most vulnerable segments of our society. While a nuanced understanding of the law is required for a proper administration of justice, so too is it required to ensure proper protection for its intended class.