

## Repressive Laws, Language Crimes, and Other Linguistic Misbehavior

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### Abstract

America's traditional language policy has been one of laissez-faire rather than intervention. Yet the recent political debate between advocates of English Only and English Plus has made such a hands off policy less and less tenable. As members of the public have become increasingly aware of and sensitive to their legal rights, the courts have been finding it necessary to step in and provide some legal structure.

This paper focuses on *de jure* national language policy: the statutes that define federal policy and the judicial decisions that interpret it and restrict state and local policies. The paper explores both (a) their relation to constitutional principles of due process, equal protection, and free speech and (b) the judicial process that mediates this relationship.

People often think of language as just a tool for the exchange and storage of information, a very powerful tool that has made human civilization possible (Burling, 1992). It is, however, also a tool for social structuring. Linguistic boundaries unite us and divide *us* from *them*. Linguists point out that our ability to use languages is what makes us human in the psychological sense and separates us from all other animals (see Hockett, 1960). Languages and dialects are probably the most conspicuous markers of our cultures and of cultural distances. Within any given language, social dialects further separate us by age, race, gender, and socio-economic class. The way we speak often validates, or even defines, who we are. Thus it is not surprising to find linguistic issues become political, or even, institutionalized in government policy.

“[T]he national language of the United States is English.”  
(Soberal-Perez v. Schweiker, 1982, 1175)

The language policy of the United States is conspicuously absent from the Constitution and has only recently appeared deep in the shadows of our laws and regulations. The quote above is a pronouncement not of Congress nor of any part of the executive branch of government, but of the courts. Despite America's traditional policy of *laissez-faire* towards linguistic diversity (Sagarin & Kelly, 1985), the judicial branch is now finding it necessary to step into the void and provide some sort of legal structure.

Language policy has not often flared up as a national political issue in the United States, and when it has, it has done so in conjunction with other issues, such as immigration (Leibowitz, 1978). Early immigrants found tolerance for their languages, even for the native language schools that they established. They tended to settle in groups and in locations where there was little contact with English speakers. Perhaps their presence went unnoticed. Not until the last two decades of the nineteenth century did this attitude begin to change, in response to the large number of immigrants, particularly Catholic immigrants.

In the twentieth century, two periods stand out for the extent to which popular attitudes towards minority languages became polarized: the years

after World War I and the present period beginning in the early 1980s. A substantial number of books and articles describe and analyze the politics involved in the growing debate concerning the choice of language (see Baron, 1990 and Crawford, 1992). The topic of language politics has been covered exhaustively. What this focus misses, however, is the language policy itself and the legal process whereby it has been formulated. The present paper will try to remedy this deficiency by concentrating on *de jure* national language policy, government decisions that are written into federal law—the United States Constitution, the United States Code (U.S.C.), and the Code of Federal Regulations (C.F.R.)—and into the federal judicial decisions which are contained in United States Reports (U.S.), the Federal Reporter (F.2d and F.3d), and the Federal Supplement (F. Supp.).

Language policy involves a range of language choices: choices of vocabulary, grammar, and accent. But these micro-choices are imbedded in the macro-choice of which language or dialect to use and constrained by the linguistic abilities of the individuals involved. The scope of this paper will be restricted to language policy concerning this most fundamental choice, the choice of which language to use.

Governments have three basic domestic functions: (a) the primary function of establishing and enforcing rules of conduct, (b) the recently enhanced function of service provider, and (c) the corollary function of employer. Choice of language issues have permeated all three functions. In this very brief paper, however, I will be discussing three federal cases in the first category, where state or local government attempted to control the linguistic behavior of private individuals or businesses. This was not control through the subtle political or economic pressure that seems to characterize post-colonialist linguistic imperialism (see Phillipson 1988 and 1992). Certain choices of language were simply repressed as a matter of law, thus creating language crimes and linguistic violations.

A handful of journal articles (see Lippi-Green, 1994 and Matsuda, 1991) and a single book by Bill Piatt (1990) cite the relevant statutes and court cases. Their analyses, however, lack a grounding in the factual contexts of the cases and a focus on the courts' rationales and on the judicial process itself. Thus, in this paper, we will examine (a) the judicial decisions on

national language policy, (b) the rationale behind them, (c) the judicial process that is continuing to mold this policy, and (d) the limits of that judicial process.

### Language and Democracy

Judicial decisions differ from those made by legislative bodies in some important ways: (a) Each judicial decision is driven by a real context. Even when abstract principles and policy are involved, real people are before the court with real concerns about specific, concrete events and situations. (b) Issues may be avoided, but a decision must be made. (c) There are immediate consequences for the people present or represented in court. Though each decision is context specific, it may, through an inductive process, be applied as a legal precedent to other similar contexts in subsequent cases, even in cases that arise in different jurisdictions (see *Yu Cong Eng v. Trinidad*, 1925, reported below). This is what makes the factual context of court decisions of such paramount importance to their interpretations. The landmark case of *Meyer v. Nebraska* (1922; see Crawford, 2000 for excerpts) illustrates these points.

Isolationist sentiment following World War I brought with it proposals at the state and federal levels that would linguistically distance America from the problems of Europe. In Washington, Rep. McCormick from Montana introduced a bill to establish "American" as the nation's official language and to replace all references in our laws to the English language with that term (Baron, 1992 and Crawford, 2000). Although Illinois (1848) and California (1879) had earlier adopted constitutional amendments that established English as the language of state government, those provisions were not strictly enforced. McCormick's bill died in committee, as did similar bills in a number of state legislatures. Two states, however, emerged as the first in the twentieth century to enact official state languages. Nebraska declared English official in 1920, and Illinois declared American (amended to English in 1969) its official language in 1923. It would be 55 years before Hawai'i became the next state to establish official languages (English and

Hawaiian). In the aftermath of the Great War, anti-German sentiment motivated the state legislatures in Nebraska, Ohio, Iowa, and 19 other states to go beyond the legal symbolism of an official language by issuing repressive language laws directed against the teaching of foreign languages and the use of foreign languages for instruction. Some states, such as Ohio, enacted criminal penalties against the German language only. Others, such as Nebraska (Nebraska Laws 1919, 249), prohibited any language other than English. The idea was to “prevent children reared in America from being trained and educated in foreign languages and foreign ideals” (Meyer v. Nebraska, 1922, 394).

Robert Meyer, a German teacher at Zion Parochial School, was convicted for teaching ten-year-old Raymond Papart on the afternoon of May 25, 1920 how to read Bible stories in German. The Nebraska Supreme Court affirmed the conviction and the state legislature’s attempt to counter

the baneful effects of permitting [foreign residents] to rear and educate their children in the language of their native land. ...so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of [America]. (quoted in Meyer v. Nebraska, 1922, 397–398)

The Nebraska statute prohibited two activities: (a) teaching *in* a language other than English and (b) the teaching *of* a language other than English. These restrictions only applied to teaching in educational institutions where students had not yet passed the eighth grade. Since German was the target language rather than the medium of instruction, the United States Supreme Court explicitly declined to consider as an issue the legality of requiring school instruction to be in English. In addition, since Meyer was teaching at a private school, the Court did not rule on the State’s power to restrict the curriculum in public schools. In fact, the teaching of courses, other than foreign languages, in any non-English language remained technically against the law into the 1960s in a majority of states (Crawford, 1992). In seven states—Alabama, Arkansas, Delaware, Nebraska, North Carolina, Oklahoma, and West Virginia—such laws are still on the books.

In deciding *Meyer v. Nebraska* (1922), the Court characterized the legislation as prohibitive, rather than regulatory. Thus the rights of the State would have to be balanced against the rights of its citizens. Justice McReynolds, aware of the law's impact on the rights of school children to acquire knowledge and of their parents to guide the children's education, acknowledged those rights in delivering the Court's opinion. Neither the children nor their parents, however, had been charged with violating the law. Only Meyer's right to choose and pursue a legitimate profession, that of a teacher of modern languages, had standing before the bar. The Court rejected the prosecution's contention that mere knowledge of German could reasonably be regarded as harmful. With the weight of the government's argument gone, Meyer's rights under the due process clause of the Fourteenth Amendment triumphed.

The Meyer case presents two very important issues, one linguistic and one political. The language issue anticipated what would later come to be known as the Sapir-Whorf hypothesis of linguistic determinism. This hypothesis reverses the common sense notion that thought shapes language and speculates instead that human thought is constrained by the language that a person speaks (Sampson, 1980). Thus, it is argued, speakers of different languages carve up the color spectrum differently (Gleason, 1961 and Berlin & Kay, 1969) and have different concepts of time (Whorf, 1939). The theory's most recent incarnation is in the work of ecolinguistics (Fill, 1998 and Farb, 1973). The twenty-two states that had restricted the use of foreign languages in teaching apparently believed that English was the best linguistic environment for propagating democratic ideals. The State of Nebraska presented the U.S. Supreme Court with this argument, yet, as far as can be determined from the published record, provided not a shred of linguistic evidence to support their contention. Nor did the judges feel the need to hear any expert testimony. They dismissed the argument, not for lack of evidence, but on the basis of implied judicial notice. That is, they simply concluded on the basis of their own personal experience that a knowledge of German was not harmful.

The political issue was whether educators have the legal right to teach

languages other than English, the common language of the United States, or to use such languages to teach other subjects. As a matter of principle, courts focus their attention on achieving a just outcome, while trying to avoid rulings that have broad, and perhaps unforeseen, legal consequences. Narrow rulings leave a court more leeway in deciding future cases. Moreover, a ruling of unconstitutionality, regardless of legal rationale, has the same effect on a conviction—reversal—and on the law—repeal. Instead of creating a broad-based language right, the Meyer court affirmed a less controversial, more narrowly constructed occupational right. Teachers have the right to teach without direct legislative interference in the curriculum. Most important of all, justice was served; the decision reversed Meyer's conviction and voided the provision in Nebraska's repressive language law that had been challenged.

### **The Chinese Bookkeeping Act**

Judicial decisions are under more restrictions than those of legislative or administrative bodies. Within the federal system, Congress has the greatest amount of freedom in making laws, being restricted only by the framework of the Constitution. The President has to stay within the statutory framework created by the legislature as well as the Constitution. Judicial decisions have to stay within all three frameworks of the legal code: the Constitution, statutes, and regulations, unless there are internal contradictions. Any judicial interpretation must be justified by reference to specific provisions in the law. While judges may be able to expand (or contract) legal rights through the interpretations they give legislative acts, they are not empowered to create new rights from scratch. They must have some legal foundation on which to build.

Legislatures establish those foundations, but they, too, are somewhat limited in exercising their legislative powers. Congressional powers are derived from Article I, Section 8 of the U.S. Constitution (1789) and limited by the Tenth Amendment (1791). Article I gives Congress the power to make laws in 17 specific, yet broadly defined, areas and to carry out other powers, but only those which are vested in the federal government by the

Constitution. Hence the Constitution prescribes the legitimate scope of federal statutes; all else is proscribed. As if to emphasize the point, Amendment X reserves “powers not delegated to the United States by the Constitution...to the States respectively, or to the people.”

The case of *Yu Cong Eng v. Trinidad* (1925) sheds some light on this point. It also exemplifies the legal importance of defining legislative terms explicitly and with precision.

In 1921, while the Philippines was a territory of the United States, the Philippine Legislature enacted a law that made it a crime for anyone engaged in business to keep account books in any language other than the territory’s official languages—English and Spanish—or a local dialect. The act, which established a maximum penalty of two years imprisonment and a fine of ten thousand pesos, went into effect on the first day of 1923. This did not sit well with the 12 thousand Chinese merchants, who accounted for 60 percent of the business activity in the Philippines. Yu Cong Eng, a lumber merchant in Manila, was arrested and his books seized. Before trial, he and another Chinese merchant who did not read, write, or understand any of the languages that the law mandated filed suit requesting that the law be declared unconstitutional and that the charges against them be dismissed.

Early in the judicial proceedings it became apparent that the act had been too broadly constructed. It prohibited individuals and businesses from keeping their “account books” in Chinese and other languages, but did not specify precisely what that term was to include. The Philippine Supreme Court suggested three possible constructions: (a) all account books, including any duplicate sets, whether necessary for tax purposes or not, (b) a single set of all account books kept, or (c) a single set of only such books as would be needed to determine tax liability. In order to make the law conform to the territorial constitution, the judges imposed the last, and narrowest, definition. They then declared the reconstructed law to be legally valid and allowed the charges against Eng to stand.

Yu Cong Eng and Co Liam appealed the Philippine Territorial Supreme Court’s decision to the U.S. Supreme Court for a final review as to whether the Chinese Bookkeeping Act violated the due process and equal protection



clauses of the Territorial Constitution of the Philippines. It should be noted here that Filipino territorial laws at that time, like state laws, were American laws subject to review by the federal court system, because the Philippines were a part of the United States. Furthermore, there were no substantial differences between the provisions in the Filipino Territorial Constitution and the U.S. Constitution. They were legally equivalent, so that any interpretation of one would apply equally to the other. Lawyers representing the territorial government argued for separate criteria. The argument, however, failed, and the principles expounded in *Yu Cong Eng v. Trinidad* (1925) have been cited in dozens of subsequent federal court cases (Sheperd's Federal Court Citations, 1994).

While the U.S. Supreme Court Justices found the constitutional provisions indistinguishable, they found a very clear distinction between the territorial court's interpretation of the act and the law that its legislature had passed. The legislative act had been a blanket prohibition against keeping any and all account books, including duplicates, in languages, like Chinese, that had not been specified. The judicial interpretation had transformed the prohibition into a mandate requiring the use of certain languages for narrowly defined regulatory purposes. The territorial court had, in effect, usurped the legislative function of government and created a new law. The U.S. Supreme Court reinterpreted the law in the broad terms it deemed the legislature had originally intended, declared the law unconstitutional and void, and dismissed the charges that had been pending against Yu Cong Eng.

This case illustrates the more extensive legal restrictions that the U.S. Constitution places on judicial, as opposed to legislative, bodies. The judiciary is only supposed to interpret laws, not create them. Thus courts are legally prohibited from creating policy. They have to find it in the Constitution, the statutes passed by legislatures, and the regulations issued by an executive administration. Sometimes judges have to look very hard to find anything they can point to as an expression of legislative or executive policy, and then the line between creation and discovery can become extremely fuzzy. With very few exceptions, the formulation of a language policy has not been considered a necessary or proper government activity.

This has left the courts little policy on which to base their interpretations. The line is indeed fuzzy, but it still exists. The decision in *Yu Cong Eng v. Trinidad* (1925), where the law needed a minor, but substantive, revision in order to make it conform to the territorial and United States constitutions, illustrates the point most clearly. The justices refused to cross the line and make a substantive change in the guise of judicial interpretation. Instead, they used the only legitimate judicial remedy at their disposal, they struck the law down.

The *Yu Cong Eng* case also demonstrates the constitutional limits placed even on legislative language policy. Lawmakers must confine themselves to the exercise of those powers specified in the Constitution, such as the power to tax. The power to tax, in turn, implies the power to inspect certain business records and to mandate that they be in a form, which might include linguistic form, that will facilitate the process of inspection. Because the Constitution lacks any provisions that would give Congress a specific power to regulate language use, however, any linguistic restrictions must be justified by tying them to some explicitly designated powers. Straying beyond the scope of such regulatory responsibilities, leaves an act vulnerable to judicial invalidation.

Lurking in the background of these rather delicate legal points is the demographic evidence concerning language use that was presented to the court. It showed two things about the local Chinese community: (a) an overwhelming rate of monolingualism and (b) the extent of its economic power. Both factors seem to have favored the petitioners. The message was that the Chinese community could not switch linguistic codes without incurring a great burden. Even the government, after all, pleaded inability to procure enough bilingual investigators, so how could small, private businesses be expected to find and support an army of bilingual bookkeepers? Placing such an unbearable burden on the Chinese business community would likely have dire consequences for the Philippine economy and society as a whole.

## Inscrutable Signs

The above cases from the 1920s show how the federal judiciary has protected individuals from repressive language policies enacted at the state and territorial level of government. Though the policies challenged in *Meyer v. Nebraska* (1922) and *Yu Cong Eng v. Trinidad* (1925) focused on language use, they also had dire consequences for an individual's occupation or business. As a result, the issues were treated strictly in terms of due process and equal protection of the law, rather than speech rights.

In contrast, this next case, *Asian American Business Group v. City of Pomona* (1989; see Crawford, 2000 for excerpts), challenged a local ordinance that neither deprived individuals of a livelihood nor placed an unbearable burden on their businesses. By the 1980's, however, individual citizens and minority groups had developed such a conscientious awareness of and sensitivity to their legal rights that language restrictions were perceived as discriminatory and offensive on their own account, so that the city's attempt to regulate the choice of written language was challenged on the basis of the First Amendment right to freedom of speech as well as Fourteenth Amendment rights to due process and equal protection. In addition, this case further illustrates the importance of giving a precise definition to all legislative terms.

The City of Pomona, California passed a law that required commercial and manufacturing establishments which had "advertising copy in foreign alphabetical characters" to display their addresses in Arabic numerals and to devote half the sign area to "advertising copy in English (sic) alphabetical characters". In response, the Asian American Business Group filed suit against the city, claiming violations of their members' freedom of speech, due process, and equal protection of the law. Federal Judge Takasugi agreed.

He found two reasons to subject the city ordinance to strict scrutiny. First, choice of language is a noncommercial aspect of speech, a form of cultural expression protected by the First Amendment. Secondly, choice of language is directly related to national origin, which is a "suspect classification". Strict scrutiny under the law specifically requires (a) not only substantial, but a

compelling state interest and (b) that the law be narrowly tailored. The city claimed its compelling interest was to facilitate the reporting of emergencies by requiring the posting of the names of business establishments in English and their addresses in Arabic numerals. The fact, however, that neither the ordinance in question nor any other city ordinance compelled any business to post such names or addresses cast serious doubt upon the effectiveness of the law for the stated purpose and thus on the sincerity of the government in claiming that purpose as a compelling interest.

The law also failed the test of being narrowly tailored. The posting of street addresses, which the business group did not oppose, should have been sufficient, even without a business name, for the purposes stated. Nor would half of each sign, regardless of location and size, be necessary to identify buildings. In short, the ordinance was found to be ineffective and discriminatory.

Finally, the ordinance violated Constitutional provisions for due process of law which compel every law to clearly state what it requires. The ordinance failed to define the term "advertising copy", which might apply to promotions in commercial and noncommercial contexts. Without an unambiguous definition, those to whom the law might be applied had not been given fair warning, and those to whom it did not apply might have felt inhibited when they should not have. The law was not only discriminatory and an infringement of freedom of speech, it was also unconstitutionally vague.

### **Summary of Legal Points**

In order for a question to enter the judicial system, a deprivation of a person's liberty, property, or legal rights has to have occurred or be threatened. This gives the issue standing before a court. A court will not review legislative policy or executive actions, no matter how ineffective or counterproductive they may be, unless they can be shown to specifically infringe on someone's rights. The person harmed must then initiate an action by requesting the intervention of the court.

Issues may be raised before the court as a defense to criminal charges, as

they were in *Meyer v. Nebraska* (1922), but this is rare for language issues. Even when criminal statutes or ordinances dealing with language issues are enacted, those at risk of prosecution are likely to file suit in civil court before a criminal action is taken against them. Yu Cong Eng filed suit after being arrested, but before going to trial. Co Liam (Yu Cong Eng's co-plaintiff) and the various businesses represented by the Asian American Business Group filed suit before any charged had been filed.

The laws of any government—federal, state, or local—must fall within the powers granted that government in its constitution, and traditionally the regulation of language is not among them. Thus it is almost axiomatic that any language regulations must be tied to some other regulatory power. In *Yu Cong Eng v. Trinidad* (1925) and *Asian American Business Group v. City of Pomona* (1989) the governments were unable to justify their actions in terms of their proper regulatory powers.

Choice of language is an essential aspect of speech protected by the First Amendment, but not an absolute right. The individual's rights must be balanced against other legitimate interests. Because it is a protected right, however, and because the choice of language is closely related to national origin—a suspect classification, prohibitive language laws are subject to strict scrutiny. Strict scrutiny means that (a) there must be a compelling state interest and (b) the laws must be as narrowly tailored as possible to further that interest.

In addition, like any other laws, the definition of the prohibited activity must be explicit and precise in order to give clear and fair warning of the prohibition. Two of the cases above illustrate problems with the definitions of even minor terms. Thus one might expect similar problems with defining the boundaries between languages. Languages change constantly and encompass an extreme amount of linguistic diversity. Vocabulary crosses borders effortlessly, sometimes on a massive scale. What percentage of English vocabulary comes from French? Wasn't English originally a variety of German? What about linguistic code switching (Heller, 1988 and Scotton, 1988), pidgins, creoles (see Sato, 1991), and interlanguages (Selinker, 1972)? Although these issues have yet to appear in court, they could easily present a major stumbling block to any laws dealing with choice of language.

American courts are very reluctant to recognize legal rights, unless they are explicitly and unambiguously written into a legislative statute or an administrative regulation. Judges are supposed to find policy, not formulate it. They look for internal contradictions within a complex system of laws. When they find them, the higher laws take precedence—the Constitution over statutes, statutes over regulations, federal law over state and local law. Courts do not rewrite the lower laws in order to make them conform; they simply void them. The offending law is simply taken off the books.

### Conclusions

In talking about language rights and the choice of language one has to make the basic distinction between linguistic production and linguistic reception. The record shows that the federal courts have consistently supported the choice of language as a productive right, the right to speak or write in any language. Repressive language laws have been voided, even as judges avoided making decisions about broad-based language issues with potentially far-ranging consequences.

In cases where both parties—speaker/interlocutor or writer/reader—agree on the choice of language legal restrictions are clearly inappropriate. This does not mean that government may not have some legitimate control over language choice. These three cases leave many questions unanswered. How much control, for example, does government properly have over language choice (a) in the public school curriculum, (b) in the record keeping which it monitors, (c) in mandated communication to the public by non-government entities? How are decisions about language use properly formulated in a government or business organization?

In addition to these questions of productive language rights, there is the whole area of receptive rights—the right to receive communications and have your communications received in a minority language. Federal courts are being urged to recognize not only the traditional Freedom of Speech, but broader communicative rights. This important discussion will be the subject of a future paper.

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