Language Rights

Article 2 of the ICCPR requires that the rights of the Covenant be recognized "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Similarly, Article 26 forbids discrimination on the basis of any of these grounds. In addition to this unequivocal protection, the ICCPR extends an affirmative right of language use in Article 27, which declares that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language."

In contrast to the broad language rights of the ICCPR, U.S. law provides only small pockets of protection against language discrimination, the result of piecemeal legislation rather than a comprehensive policy. Federal courts have refused to equate language discrimination with national origin discrimination, which, like race and religion, warrants the highest level of judicial scrutiny; in the three-tier system of evaluating discrimination claims, language-based claims have been slotted into the lowest level, where the government must show only a "rational basis" for discriminatory government action. Meanwhile, attacks continue against minority language use in the schools, workplace and voting booth. The ICCPR should influence the development of U.S. case law toward a heightened judicial scrutiny of language-based discrimination, an approach that recognizes its connection to national origin discrimination and affords it the highest level of legal protection available.

Introduction

Language minorities have always been and continue to be a substantial part of America, a nation largely of immigrants. According to the 1990 census, there are over 30 million Americans who speak a language other than English in their homes.[1] In California, 2.4 million people do not speak English.[2]

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[1] Vol. 3, No. 4, Numbers & Needs, Ethnic & Linguistic Minorities in the United States, p. 1., (July, 1993).

[2] McKeod & Schreiner, "One in 11 Have Trouble Speaking California's Official Language," San Francisco Chronicle, p. A4 (5/13/92).

The plight of language minorities is a difficult one. Language presents a substantial barrier to socio-economic mobility in a society that is geared almost exclusively to English speakers. In many localities, there are tremendous barriers to employment, health care, social services, and political participation. It is not uncommon for police departments not to have officers bilingual in languages spoken by a substantial population such as Chinese or Vietnamese. Although criminal defendants have a right to a translator in proceedings, defendants in civil lawsuits and administrative proceedings generally do not. Thousands of language minorities have limited access to health care; in many communities there are few if any health care and mental health workers who speak, for instance, Farsi, Vietnamese, or other major foreign languages. And although federal law requires that non-English speaking students be afforded an education comprehensible to them, there is a tremendous shortage of bilingual teachers available to meet that mandate. Thus, it is not surprising that the high school drop-out rate for those with no or limited English proficiency is more than double the rate for English speakers. Likewise, the unemployment and poverty rates of limited English proficient adults greatly exceeds that of English speakers.

The socio-economic deprivation of language minorities is exacerbated by active discrimination against speakers of foreign languages and those who speak with "foreign" accents, particularly in a climate of rising hostilities against immigrants, as is now occurring.

The International Covenant on Civil & Political Rights (ICCPR) provides significantly more protection for the rights of language minorities than current United States law. Under existing constitutional jurisprudence, language minorities (*i.e.* those who speak a language other than English) have no explicit protection against discrimination on the basis of language. The Bill of Rights to the United States Constitution does not address language rights, and judicial interpretation of constitutional protections have not articulated a coherent theory under which language minorities are afforded meaningful protection. While legislation affords limited rights to language minorities, it is not comprehensive; currently laws provide only isolated legal protections in narrowly defined circumstances. By explicitly recognizing language rights, the ICCPR provides protection currently absent from American law.

Language rights in the United States

A Historical Perspective

Social attitudes and public policy towards language minorities in the United States have been and continue to be ambivalent and subject to social and economic vicissitudes. Until the late 1800's, our nation was tolerant towards linguistic diversity. Bilingualism in government and education was prevalent in many areas. The German language, for instance, was prevalent in schools throughout the midwest. The influx of Eastern and Southern Europeans and Asians gave rise to nativist movements and restrictionist language laws in the late 1800's and early 1900's, as evidenced by a report issued in 1911 by the Federal Immigration Commission contrasting the "old" and "new" immigrant. The report argued that the "old" immigrants had mingled quickly with native-born Americans and became assimilated, while "new" immigrants from Italy, Russia, Hungary, and other countries were less intelligent, less willing to learn English, had intentions of not settling permanently in the United States, and were more susceptible to political subversion.

The English language became the *sine qua non* of Americanism, the ticket to assimilation into the American "melting pot". Accordingly, English literacy requirements were erected as conditions for public employment, naturalization, immigration, and suffrage in order to "Americanize" these "new" immigrants and exclude those perceived to be lower class and "ignorant of our laws and language."

Language restrictions were employed as a means of social control and exclusion. For instance, the New York Constitution was amended to disenfranchise over one million Yiddish-speaking citizens by a Republican administration fearful of Jewish voters. The California Constitution was similarly amended to disenfranchise Chinese voters who were seen as a threat to the "purity of the ballot box." World War I gave rise to intense anti-German sentiment. A number of states, previously tolerant of bilingual schools, enacted extreme English-only laws. For instance, Nebraska and Ohio passed laws in 1919 and 1923 prohibiting the teaching of any language other than English until the student passed the eighth grade.[3]

Native Americans were also subject to federal English-only policies in the late 1800's and early 1900's. Native American children were separated from their families and forced to attend English language boarding schools, where they were punished for speaking their native language.[4]

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[3] *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[4] For a more detailed description of America's historical policy on language and the use of language as a means of controlling and discriminating against immigrants and minorities,

Tolerance of language diversity emerged as part of the civil rights movement of the 1960's. Major civil rights legislation benefitted language minorities. As discussed in greater detail below, Title VII of the Civil Rights Act of 1964 afforded workers some degree of protection against discrimination on the basis of language; Title VI of that same Act was successfully employed to require schools receiving federal funding to provide a meaningful and comprehensible education to non English-speaking students; and the Voting Rights Act of 1965 was amended in 1975 to explicitly require certain jurisdictions to provide language assistance to language minority voters. Moreover, some states enacted laws or policies providing language assistance to non-English speakers in certain defined situations. For instance, under California law

> all state agencies that provide information or render services to the public, if a substantial proportion of their clients are non-English speakers, are required to employ a sufficient number of qualified bilingual persons in public contact positions. Further, any materials explaining the agency's services must be translated into languages spoken by a substantial number of clients. For these provisions to become effective, non-English speakers must represent at least 5 percent of those served by any local office of facility.
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> Cal. Gov't Code § 7290.

Concurrently with a revitalized tolerance of linguistic diversity came an emerging movement towards multi-culturalism. Both the civil rights movement

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see Liebowitz, "English Literacy: Legal Sanction for Discrimination," 45 *Notre Dame Lawyer* 7 (1969); Comment, "Official English: Federal Courts on Efforts to Curtail Bilingual Services in the United States," 100 *Harv. L. Rev*. 1345 (1987); Califa, "Declaring English the Official Language: Prejudice Spoken Here," 24 *Harv. Civil Rights-Civil Liberties L. Rev*. 293 (1989); S.B. Heath & C.A. Ferguson (eds.), "English in Our Language Heritage," in *Language in the U.S.A.*, p.6 (Cambridge Univ. Press 1981); Liebowitz, "The Official Character of Language in the United States: Literacy Requirements for Immigration, Citizenship, and Entrance into American Life," 15 *Aztlan* 25 (1984); Liebowitz, "The Proposed English Language Amendment: Shield or Sword," 3 *Yale Law and Policy Review* 519 (1985); J. Crawford (ed.), *Language Loyalties: A Source Book on the Official English Controversy* (Univ. of Chicago Press 1992).

and efforts to foster multi-culturalism, however, have suffered a backlash over the last decade. Increasing hostility to claims to civil rights and entitlements by racial minorities has been exacerbated by a rise in anti-immigrant sentiment, fueled by economic downturn and the substantial influx of immigrants to the United States. In the 1980's, an English-only movement emerged, initially in local areas (such as Miami, Florida) and later organized by several nationally-based organizations. The English-only movement, tapping the fear that America is being overrun by immigrants who don't speak English and are unwilling to assimilate, seeks to establish English as the "official" language and to restrict or terminate the use of languages other than English by the government and, in some cases, private businesses. Thus, local laws have been passed limiting the amount of foreign languages that can appear on private business signs.[5] Until its recent repeal, Dade County had a law prohibiting county funds from being expended on activities which use a foreign language or promote a culture other than "American" culture.[6] Numerous states have passed laws or constitutional amendments declaring English the state's "official" language; some of these laws appear to impose restrictions on the use of foreign languages by the government.[7] Reports of workplace discrimination against employees with an accent and workplace rules prohibiting language minority workers from speaking in their native languages are escalating.[8] Bilingual education and voting rights are constantly under political fire.

The recent retrenchment on civil rights, and attacks upon the rights of language minorities in particular, underscores the importance of legal protections against language-based discrimination. However, current law fails to provide any coherent scheme of protection.

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[5] *See, e.g.*, *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989).

[6] *See* J. Crawford (ed.), *Language Loyalties: A Source Book On the Official English Controversy*, p.131 (Univ. of Chicago Press 1992).

[7] *See EPIC Events*, March/April 1991. *EPIC Events* is a publication of the English Plus Information Clearinghouse, a project of the National Immigration Forum and the Joint National Committee for Languages.

[8] *See* Henry, "Fighting Words," *Los Angeles Times Magazine*, p. 10 (June 10, 1990); Yang, "In Any Language, It's Unfair," *Business Week*, pp.110-111 (June 21, 1993).

American Jurisprudence and Language Rights

The United States Constitution neither makes reference to an "official" language nor expressly addresses the rights of language minorities. Constitutional litigation challenging language discrimination has been relatively sparse, and virtually always turns on more general constitutional rights, such as the right to due process or the right to be free from racial or national origin discrimination. The United States Supreme Court has yet to rule on a claim of language discrimination *per se*; lower federal courts have generally refused to establish a constitutionally-based right to be free from language discrimination.

The United States Supreme Court has addressed the rights of language minorities on just four occasions. In *Meyer v. Nebraska*, the Supreme Court invalidated a state law, passed during the rash of anti-German sentiment engendered by the First World War, that prohibited the teaching of German in private and public schools to students below the ninth grade. The U.S. Supreme Court eloquently affirmed the fact that non-English speakers are not excluded from the Constitution:

> "The protection of the Constitution extends to all, -- to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had real understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution -- a desirable end cannot be promoted by prohibited means."
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> 262 U.S. 390 (1923).

Most scholars agree, however, that *Meyer* was based primarily on the due process right of the parents to rear their children without state interference. Others have read the case as primarily involving religious rights, since the law affected private religious institutions and interfered with the free exercise of religion. The Court did not expressly hold that language-based discrimination violated the right to equal protection.

Three years later, in *Yu Cong Eng v. Trinidad*, the Supreme Court invalidated an ordinance requiring that accounting records of businesses be kept in English, Spanish, or local dialects of the Philippines, but not in Chinese. The Court found that the ordinance was a form of national origin discrimination against Chinese merchants, since they were singled out for unequal treatment, and was thus

unconstitutional. Again, the Court did not articulate a constitutional right to use of native language *per se*.[9]

In *Lau v. Nichols*, the Court held that placing non-English speaking students in a classroom with no special assistance and providing them with instruction in a language that was not comprehensible to them deprived them of an equal educational opportunity and thus violated Title VI of the federal Civil Rights Act of 1964.[10] Although the Civil Rights Act did not expressly bar language discrimination, it prohibited national origin discrimination, and the Court assumed that denial of a meaningful education to non-English speakers constituted national origin discrimination. While the case is significant in holding that the concept of national origin discrimination is broad enough to encompass discrimination on the basis of language fluency, the Court refused to rule on constitutional grounds.

In *Hernandez v. New York*, the Supreme Court held that the prosecutor's exclusion of Spanish-speaking Latinos from a jury on the ground that they seemed uncertain whether they would accept the court interpreter's translation of Spanish-speaking witnesses rather than their own translation did not violate equal protection.[11] The Court found there was no intentional attempt to exclude Latinos from the jury; rather, their exclusion was based on a race-neutral ground. Although the Court ignored the obvious effect of such a practice upon Latinos generally and Spanish speakers in particular, it did state that the case might have been analyzed differently had the prosecutor summarily excluded all Spanish speakers as a matter of policy. In *dicta*, the Court exhibited some sensitivity to the social significance of language:

> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. . . .
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> Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a

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[9] 271 U.S. 500 (1926).

[10] 414 U.S. 563 (1974).

[11] 114 L.Ed.2d 395 (1991).

> response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. . . .[12]

The lower federal courts have generally rejected constitutionally-based claims of language discrimination. They have refused to hold that language is synonymous with national origin and have refused to closely scrutinize constitutional claims brought by non-English speaking litigants. Typical of the courts' holdings is the Second Circuit's opinion in *Soberal-Perez v. Heckler*, which rejected an equal protection challenge to the failure to provide information in Spanish to Social Security recipients and applicants:

> The Secretary's failure to provide forms and services in the Spanish language, does not on its face make any classification with respect to Hispanics as an ethnic group. The classification is implicitly made, but it is on the basis of language, i.e., English-speaking v. non-English-speaking individuals, and not on the basis of race, religion, or national origin. Language, by itself, does not identify members of a suspect class. [Citations omitted.][13]

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[12] 114 L.Ed.2d at 413.

[13] 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984). *See also Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (Court applies rational basis test in upholding English-only civil service exams); *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978) (no constitutional right to bilingual/biculturaleducation where adequate remedial programs are provided to

The few cases which have found violations of the constitutional rights of non-English speakers have been based on some independent fundamental or constitutional right, such as the right of parents to rear their children without state interference (*Meyer v. Nebraska*, *supra*), the right to basic due process protections, including a translator, in a criminal prosecution (*e.g. United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), or the right of free expression. *See Asian American Business Group v. City of Pomona*, *supra*, 716 F.Supp. 1328; *Yniguez v. Mofford*, 730 F.Supp. 309 (D. Ariz. 1990), *app. pending* (striking down Arizona state constitutional amendment that made English the official language and prevented state officials and employees from using foreign languages in the performance of their duties, on the grounds that it was overbroad and violative of officers' and employees' First Amendment rights).

Federal Legislation and Language Rights

Congress has not recognized any comprehensive right to use a language other than English, nor has it established any coherent protection against language discrimination. The government's response to deprivation suffered by language minorities has been sporadic, limited and reactive, usually to a situation where prohibiting use of a language other than English would have impinged on other important rights, such as the right to a fair trial.

The federal government presently requires use of a foreign language in various defined circumstances. Interpreters are used in the physical and mental examination of alien immigrants who want to enter the United States.[14] Service of

non-English-speaking children); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (failure to provide information in Spanish regarding unemployment insurance benefits not violative of equal protection under rational basis test); *Pabon v. MacIntosh*, 546 F.Supp. 1328, 1340-41 (E.D. Pa. 1982) (English-only classes provided to Spanish-speaking prisoners not violation of equal protection in absence of suspect classification or fundamental right). *But see Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328, 1332 (C.D. Cal. 1989) (holding city ordinance limiting proportion of business signs that can be in a foreign language violates First Amendment and equal protection since "the use of foreign languages is clearly an expression of national origin").

[14] 8 U.S.C. § 1224.

process on a foreign nation must be accompanied by a translation into the foreign language.[15] Where there is a substantial number of non-English speakers, federally funded migrant and community healthy centers[16] and alcohol abuse and treatment programs[17] have to employ people who can communicate with the non-English speaking clients. Additionally, many agencies of the Federal government, including the Department of Health and Human Services and the Internal Revenue Service provide information in languages other than English.

The most vital areas affecting the lives of language minorities are voting, education and employment discrimination. In the area of voting, minorities have suffered discrimination on the basis of language. English literacy requirements presented a substantial barrier to voting. In California, for instance, a state constitutional literacy requirement barred citizens with limited English proficiency from voting until that provision was held violative of the federal constitution in 1970.[18] The lack of bilingual assistance has also impeded the exercise of the franchise by limited English proficient citizens, many of whom are poor and elderly. Congress has found that elderly citizens, who are least likely to learn English as a second language,[19] are the ones most likely to need bilingual assistance. A 1982 study for the Mexican American Legal Defense Fund and Educational Fund found that seventy percent of monolingual Spanish-speaking citizens would be less likely to register to vote if bilingual assistance were

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[15] 28 U.S.C. § 1827.

[16] 42 U.S.C. § 254 (b) and (c).

[17] 42 U.S.C. § 4577 (b).

[18] *Castro v. State of California*, 2 Cal.3d 223 (1970).

[19] J. Crawford, Bilingual Education: History, Politics, Theory and Practice 52-69 (1989) (describing history of the English-only movement). Veltman found that approximately 80% of those aged 15 through 24 at time of arrival will come to speak English on a regular basis. This figure declines in inverse correlation with the age of the immigrant at the time of arrival. Thus, of those aged 25-34 at time of arrival, 70% will become regular English speakers. Fifty percent of those aged 35-44 and 30% of those aged 45 and over will come to speak English on a regular basis. C. Veltman, The Future of the Spanish Language in the United States (1988).

eliminated.[20] If bilingual ballots were unavailable, 72% of the monolingual Spanish-speakers would be less likely to cast a vote.[21]

In 1975, Congress declared that language discrimination was "pervasive and national in scope" and added bilingual provisions to the Voting Rights Act.[22] The bilingual provisions required a jurisdiction to provide assistance in a language other than English if the jurisdiction met two conditions. First, over five percent of voting-age citizens must belong to a single minority group.[23] Second, either the jurisdiction-wide or state-wide illiteracy rate must exceed the national rate.[24] In 1982, the bilingual provisions of the Voting Rights Act were extended until 1992, although its reach was considerably narrowed.[25]

In 1992, the Voting Rights Act was once again amended. The Voting Rights Act of 1992 extended the bilingual assistance provisions to the year 2007.[26] In addition, it expanded the provisions to encompass a greater number of non-English speaking voters.[27] Bilingual services are now to be provided even if the non-English speaking group does not make up 5% of the total population, provided there are at least 10,000 members of the particular language group in the jurisdiction.

The rights accorded to language minorities under the Voting Rights Act is

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[20] R. Brischetto, "Bilingual Elections at Work in the Southwest" 68, 100 (1982).

[21] *Id.*

[22] Pub. L. No. 94-73, 1975 U.S. Code Cong. & Admin. News (89 Stat.) 401 (codified as amended at 42 U.S.C. § 1973b(f)(1) (1982).

[23] 2 U.S.C. § 1973aa-1a(b) (1983).

[24] *Id.*

[25] Pub. L. No. 97-205, S. 4, 1982 U.S. Code Cong. & Admin. News (96 Stat.) 134. The 1982 amendment imposed the additional requirement that the five percent be comprised of members of a single minority group who were not English proficient.

[26] 1992 Congressional Quarterly Almanac 329, 330.

[27] *Id.*

perhaps the most successful language rights legislation enacted by Congress thus far. Nonetheless, its provisions have been subject to political attack -- it has been the target of English-only advocates, and is the issue which appears to strike a consistent chord of discontent among Americans. The voters of California, for example, overwhelmingly passed an initiative in 1983 that urged the elimination of bilingual ballots.[28]

The rights of language minority students to an equal education is addressed primarily by the Equal Educational Opportunities and Transportation Act (EEOA) which essentially codified the Supreme Court's ruling in *Lau v. Nichols*, mentioned above. In *Lau*, non-English speaking Chinese students sued the San Francisco Unified School District for its failure to provide them with meaningful English language instruction and the same educational opportunities as provided to their English speaking counterparts. The Court ruled for the students and succinctly framed the issue when it stated:

> [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.[29]

Section 1703(f) of the EEOA was adopted by Congress in direct response to the *Lau* decision. Section 1703(f) sets forth the legal standard upon which to judge whether a school district is meeting its obligations under federal law to its limited English proficient students. It states that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Nonetheless, the general nature of the statutory mandate of §1703(f) makes enforcement difficult. The statute does not define what is "equal participation" for

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[28] California Proposition 38 appeared on the November 1993 ballot.

[29] 414 U.S. 563, 566 (1974).

students or the obligation to take "appropriate action" to achieve equal participation. There is virtually no legislative history regarding this provision, and the law's ambiguity has been problematic in attempting to establish clear rights for language minority students. A number of federal courts have held that *Lau* and § 1703(f) do not mandate bilingual education as the sole means of satisfying federal law.[30]

The ill-defined nature of federal law has created inconsistencies and inadequacies in the quality of education afforded to minority language students. Moreover, bilingual education, like bilingual voting assistance, has been targeted for attack by English-only advocates. Federal funding for bilingual education has been weakened over the last ten years.

In the area of employment, language minorities have been and continue to be subject to discrimination on the basis of language. Such discrimination is typically embodied in three kinds of employment practices: (1) requiring employees to have a degree of fluency in English beyond that necessary for the job; (2) refusal to hire or promote individuals with a "foreign" accent; and (3) prohibiting language minorities from conversing with their co-workers in their native languages. With both increasing ethnic diversity in the American workplace and emerging anti-immigrant sentiment, complaints about these forms of employment discrimination appear to be on the rise.

Employment discrimination is addressed by Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex and national origin.[31] Although Title VII does not explicitly address language discrimination, the Equal Employment Opportunity Commission (EEOC), the administrative agency charged with its enforcement, has issued guidelines which define national origin

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[30] *See United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Guadalupe Organization, Inc. v. Tempe Elementary School*, 587 F.2d 1022 (9th Cir. 1978); *Terese P. v. Berkeley Unified School District*, 724 F.Supp. 698 (N.D. Cal. 1989). Compliance with § 1703(f) is satisfied merely if three elements are met: (1) the theory underlying the school's program must be "sound"; (2) the program must be "reasonably calculated" to implement the chosen theory; and (3) the program must actually be adequate in overcoming language barriers. *Castaneda v. Pickard* at 1009-10.

[31] 42 U.S.C. § 2000e to 2000e-17 (1982).

> broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or *linguistic characteristics* of a national origin group.[32]

The courts have generally accepted the theory that discrimination on the basis of one's accent is unlawful under Title VII unless the accent "interferes materially with job performance."[33] Of course, whether an accent or lack of English fluency materially impairs job performance is ill-defined and capable of inconsistent and unfair application, particularly since the evaluation of accents is subjective and vulnerable to subtle biases. This is especially true in regard to accents indicative of languages or ethnic groups that are devalued in our society.[34]

The right of language minority workers to converse with their co-workers in their native languages, a phenomenon that occurs frequently in low paying industries where language minorities are heavily concentrated, is even more problematic. The courts have thus far been inhospitable to claims of discrimination that challenge rules restricting bilingual employees from conversing in their primary and native languages. In upholding a speak-English-only rule imposed on Latino workers in a lumberyard, the Fifth Circuit found that, despite the importance of one's language to self identity and ethnic heritage, and the disproportionate impact such a rule would have on national origin minorities, an "English-only" rule as applied to a bilingual worker did not constitute discrimination on the basis of national origin, since a bilingual worker could readily comply with the rule.[35]

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[32] 29 C.F.R. § 1606.1 (emphasis added).

[33] *See Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989); *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 819 (10th Cir. 1984); *Berke v. Ohio Dept. of Public Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam). Likewise, an English fluency requirement must be demonstrably job related. *Mejia v. New York Sheraton Hotel*, 459 F.Supp. 375, 377 (S.D.N.Y. 1978).

[34] *See* Matsuda, "Voices of America: Accent, Anti-Discrimination Law, and A Jurisprudence for the Last Reconstruction," 100 *Yale L. J.* 1329 (1991).

[35] *Garcia v. Gloor*, 618 F.2d 264, 269-70 (5th Cir. 1980), *cert. denied*, 449 U.S. 113 (1981).

In 1980, the EEOC issued a guideline specifically addressing English-only rules. It provides in pertinent part:

> (a) *When Applied at all Times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.
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> (b) *When Applied Only at Certain Times*. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.[36]

In *Gutierrez v. Municipal Court*, the Ninth Circuit invalidated a speak-English-only rule imposed upon bilingual court clerks, agreeing with the EEOC that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized.[37] The court further agreed with the EEOC that English-only rules can create an atmosphere of "inferiority, isolation and intimidation," since language use is closely intertwined with ethnic identity and serves as an affirmation of one's cultural heritage.[38] However, the case has no precedential value because it was vacated on grounds of mootness.

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[36] 29 C.F.R. § 1606.7. The guideline was affirmed by the Ninth Circuit in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated on grounds of mootness*, 490 U.S. 1016 (1989).

[37] *Guttierez*, *supra* note 28, at 1040.

[38] *Id*. (*quoting* 29 C.F.R. § 1606.7 (1987)).

The Ninth Circuit subsequently issued a ruling completely contrary to *Gutierrez*. In *Garcia v. Spun Steak Company*, the court invalidated the EEOC guideline, holding that nothing in the legislative text or history allowed the EEOC to promulgate guidelines that presumed all English-only rules to be discriminatory.[39] The court held there is no right to express one's cultural heritage in the workplace, and embraced the reasoning that, if one is bilingual, he or she can readily comply with an English-only requirement and thus is not substantially affected by the rule. The court discounted the effect of such rules of suppressing a central aspect of ethnic identity and creating an atmosphere of inferiority and intimidation for language minorities.

The importance of the ICCPR

The lack of any explicit constitutional protection against language discrimination in the Constitution and the vagaries of statutory law make implementation of the ICCPR particularly important. The ICCPR expressly refers to the rights of language minorities. Article 2 provides that "the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" will be respected and ensured. Article 26 states:

> "All persons are equal before the law and are entitled without any distinct discrimination to the equal protection of the law. To this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

Article 27 further provides:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own

[39] 998 F. 2d 1480 (9th Cir. 1993).

religion or to use their own language."[40]

To be sure, there is ambiguity about the precise effect these provisions would have upon the laws in the United States; the reservations, declarations, and understandings imposed by the United States Senate upon ratification state that "the United States understands distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status -- as those terms are used in Article II, paragraph 1 and Article XXVI -- to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective." The understanding does not state that only the rational basis test would apply to all such forms of discrimination. Obviously this is not the case, since, under existing constitutional jurisprudence, intentional governmental discrimination on the basis of race is subject to strict scrutiny rather than the weaker rational basis test.

As previously noted, the Supreme Court has not resolved the question whether language-based discrimination constitutes a "suspect" classification which warrants heightened judicial scrutiny. It did not have to address the issue in *Yu Cong Eng*, *Meyer*, *Lau*, or *Hernandez*. A number of legal commentators have argued that language-based discrimination should be afforded close scrutiny because of its intimate relationship to national origin discrimination and the fact that non-English speakers as a class have suffered a history of discrimination, are politically powerless, suffer economic and social disadvantage, and are readily identifiable -- all traditional indicators of "suspectness" which justify special judicial protection.[41] By expressly incorporating linguistic discrimination into the

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[40] Article XIV assures that all persons "shall be equal before the courts and tribunals", and expressly provides that in criminal matters, every person is entitled to "be informed properly and in detail in a language in which he understands of the nature and cause of the charge against him."

[41] *See* Note, "Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model", 90 Yale Law Journal 912 (1981); Comment, "`Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States," 100 Harvard Law Review 1345 (1987); Califa, "Declaring English the Official Language: Prejudice Spoken Here," Harvard Civil Rights - Civil Liberties Law Review 293 24 (1989). *Cf. Olagues v. Russonielle*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), *vacated on grounds of mootness*, 484 U.S. 806 (1987) (foreign-born, recently registered, and bilingual ballot voters possessed sufficient indicia of suspectness to warrant heightened scrutiny under equal protection analysis).

fabric of American legal rights, the ICCPR would greatly strengthen the argument that language discrimination should be afforded heightened scrutiny by the courts as a suspect or quasi-suspect classification in equal protection challenges.

Furthermore, establishing the principle of language rights in the ICCPR may give guidance to the judiciary in matters of statutory interpretation. In particular, Article 27's articulation of the rights of language minorities "in community with other members of their group, to enjoy their own culture . . . or use their own language" establishes an important human rights principle that should inform the analysis of Title VII as applied to speak-English-only rules. This would further a greater respect for the rights of language minorities than that reached by the courts to date.

Recommendations

1) Reject attempts to amend the constitution to make English the official language or otherwise restrict the power and duty of the government to utilize languages other than English in serving and communicating with the public.

2) Urge Congress to amend federal anti-discrimination laws, including Title VI (discrimination in federally funded programs), Title VII (employment discrimination), and Title VIII (housing discrimination) to make explicit the prohibition on language discrimination in the absence of business necessity and compelling justification.

3) Urge Congress to pass federal legislation requiring federal, state and local governmental agencies to employ sufficient numbers of qualified bilingual staff persons and provide bilingual written materials where a substantial number of their clients belong to particular language minority groups.

4) Urge Congress to pass federal legislation ensuring the availability of certified translators for litigants who cannot afford them in all criminal and civil proceedings and all administrative proceedings where liberty or other important rights are at stake, including asylum proceedings before the INS.