Language and the Justice System: Problems and Issues

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LANGUAGE AND THE JUSTICE SYSTEM: PROBLEMS AND ISSUES

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This is an article about non-English speaking peoples and the courts. The wave of immigration currently taking place in America brings with it both confusion and problems for the new immigrant when confronted with our judicial system. The primary purpose of this article is to heighten the awareness of officials to the language problems faced by these new immigrants when interfacing with American courts. The article identifies areas of concern that should be addressed by administrators, planners, and judges involved in the delivery of court services to non-English speaking peoples.

Introduction

America has historically thrived on the infusion of waves of new immigrants. Principal immigration waves in American history occurred during the mid-1800s, the late 1800s, and the early part of this century. Stories of German settlers along the Ohio River, Irish in Boston, and Italians in New York are commonplace in our literature. While the cultural and demographic ethenticities of these earlier immigrants were diverse, they retained a common heritage from Europe. Influenced by Judaeo-Christian traditions, each group cultivated its distinct way in the new country, yet they had much more in common with the original settlers of this country than many of the current immigrants.

During these earlier immigration periods, America was experiencing the settling of the Western frontier and the building of the industrial infrastructure—there seemed to be room and a place for everyone. Also, pressure on the new immigrants to learn the English language was significant. The school system, with few exceptions, compelled literacy and fluency in English.

During the early years of the Republic, our sense of due process with respect to legal rights had not developed to the same level as today. Clearly, the Declaration of Independence indicates the expectations of the founding fathers with respect to certain rights of individuals. As the Declaration of Independence indicates:

> "All men are created equal by their Creator with certain inalienable rights. That among those are life, liberty and the

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> pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness."

It is with this fundamental reference that we begin to explore the issue of language and the justice system. How do we treat people who have a different primary language? How should we treat them? These are questions that call for a more thorough explanation than can be presented here. This article focuses on how the justice system treats people with different languages. The relationship of language to culture and the interrelationship of the two will be explored. An attempt will be made to answer questions such as: What are the issues that face professionals in the justice system in this area? What are the risks of not adequately addressing these issues? Who must take the leadership role in this area?

Language and Culture

Language is one of the most taken-for-granted human functions. It serves to establish bonds of understanding between humans. The function of language must be to enable us to communicate, understand and draw closer as a humanity. Yet, more often than not, it serves to foster division and create differences among peoples (Sapir, 1929).

The connection between thought and language is a much discussed issue. For some time it had been considered that thought followed language. More recently, it has been recognized that there is a possibility that different language structures might determine, or at least influence, different ways of understanding and thinking about the world.

Even though we obviously inhabit a similar world as peoples, many individuals have different perceptions of the events that shape life. It is apparent that people do not experience life in the same way. In recognition of these differences, the translation of words becomes more than the mere exchange of different labels; it must also involve the exchange of equivalent labels. It is apparent that translation, which is focused on the most rudimentary common language, simply fails to construe the entire communication. As Sapir notes,

> No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached (1929:207).

We should also be mindful that nonverbal language is an integral part of

the meaning of communication. In the books on body language, facial and body movements are generally accepted as indices of the total communication intent. These features of the communication process are often omitted from formal translation procedures. What is not clear is how universal are the reactions of individuals with different cultural backgrounds to the same stimuli and, therefore, the danger on the part of officials to interpret these nonverbal acts as though they arose in identical cultural contexts (see Fieg and Yaffee, 1977).

Language is learned in a social context, and it is shaped by and reflects the dominant culture in which a person is reared. In a study to show the comprehension of language across social classes, it was shown that distinct subcultures have thought structures and language patterns different from those of the middle class (Bernstein, 1961). The inability to master the dominant language excludes one from the general society. Exclusion leads to alienation. Perhaps the single largest group of alienated peoples are Native Americans who are a linguistic minority. In a 1967 study of the Oglala Sioux (Bryde, 1966), it was found that there was a correlation in the dropout rate of students in the upper elementary and intermediate grades when English became the critical variable affecting academic success. In the same study, it was noted that Indian students scored significantly higher than national test norms from the fourth through the sixth grade; at the eighth grade level the Indian students were significantly below national norms. In later life, the same issues persist for the Native American. In a 1962 study on the relationship of English to vocational success it was found that English capability is the best vocational preparation (Thompson, 1964).

Language and the American Judicial System

Our justice system uses a peculiar language. It is often understood only by those who use it, regardless of whether they speak English as a primary language or not. The cultivation of this unique sublanguage comes from our common law history (see e.g., Mellinoff, 1963). Our legal language has caused so much misunderstanding with the English-speaking community that for the past ten to fifteen years we have seen the evolution of a "movement" to delegalize language and make it more comprehensible. Manifestations of this movement are the insurance contracts which are required in some jurisdictions to be written in plain and simple English (see Black, 1981).

Books for lawyers (see e.g., Leri, 1982; Mellinoff, 1963; Wydick and Danet, 1980) call for the demystification of the language. Yet ancient

terms persist. Demurrer is still used in California. Chancery and equity courts, courts of common pleas, plennary jurisdiction, *habeas corpus* and writs of *coram nobis* are terms commonly used by practitioners and professionals in the system and are, by and large, totally misunderstood or incomprehensible to the public at large (see Charrow and Charrow, 1979). It takes little imagination to see how these same issues affect immigrants and non-English speaking people who have not had a common law heritage or familiarity with a judicial structure like ours.

In addition to the issues facing language minorities, the unique language of the law often serves to "linguistically" segregate lawyers, judges and other court officials from the general public. This language isolation causes misunderstandings and creates false perceptions which must be addressed. These existing linguistic barriers that confront English speaking people are an integral part of the problems that face non-English speaking people. Thus, language minorities face a double barrier: one of understanding the English language and one of understanding legal language.

The rule of law is premised in part upon voluntary adherence and compliance with the laws of the country. For the public to support the law and monitor its enforcement and observe its adjudicating process, there needs to be public familiarity with the legal structure and procedures. In addition, the ability to focus on long-term goals and design methods of achieving these goals depends upon the existence of a secure legal framework. The law assists in securing stability in social relationships, which, if not for the law, may disintegrate or develop into erratic or unpredictable patterns.

The expectation is that the new cultural groups in America will grow to recognize this key facet of social order. In so doing, it is anticipated that they will become a part of the same system and become voluntary participants in its maintenance. These thoughts and hopes, however manifested, are clearly inhibited by the maintenance of language and cultural barriers that preclude this level of understanding and commitment.

In order for people to make the transition to believe in and support a legal system, there must be concerted efforts to bridge the gap of understanding. Many of the new immigrants are fleeing countries where expectations of a legal system were virtually nonexistent; in fact, a contrary view was often more prevalent. One author suggests that the absence of trust and predictability in social and legal relationships which exists in the Central American countries is a major cause for flight and disruption in the affairs of those countries. These are the refugees now landing in

American cities and this is the baggage they carry. Those groups which do not yet have command of English nor understand American law and the legal system are years away from taking bold initiative to redress their grievances. For many of the language minorities, they are often illiterate in their own language as well as English.

A Need for Language Services

The enactment of federal legislation, coupled with a number of states where similar actions have been taken, indicates a legislative recognition of need for language services in the legal process. However, this need is often not recognized by judicial officials. In fact, proceedings of past U.S. Judicial Conferences indicate that no such legislation is needed (Judicial Conference of the U.S., 1974, 1977). More recently, an evaluation of the New Jersey system of provision of language services clearly reflects that the recognition of needs is not widely understood in one jurisdiction (New Jersey Supreme Court, 1985). In California, which undertook a study of needs over ten years ago, it was only this year that the California Judges' Association had a specific program on the issues and problems facing courts in the provision of interpreter services.

A study conducted by Dr. Carlos Astiz (1983) investigated the delivery of language services in a number of major metropolitan areas throughout the United States. The overwhelming majority of the officials contacted in the study were not convinced that constitutional protections regarding the provision of interpreter services should be extended to non-Engish speaking individuals. The focus of concern of the administrators interviewed in Dr. Astiz's study was the provision of a minimum level of service. The thought of providing more than the most nominal level of service did not appear in any of the cities studied. Is this because the administrators recognize that there is little, if any, danger that these groups will protest? It appears that administrators, like judges, view the response required in purely technical, legal terms, not qualitative ones.

In 1975 the Judicial Council of California, under a mandate by the California legislature, began a study on the language needs of non-English speaking people in the justice system (Judicial Council of California, 1977). This study began by identifying the needs throughout the system. Public hearings were held in five cities where more than 200 individuals appeared before a select advisory committee to testify regarding their language problems in the criminal justice system. The committee heard witness after witness cite problems that had occurred when officials in the system were unable to respond to a given circumstance or totally misun-

derstood the meaning of a communication. In addition, the 150 people who were interviewed, representing a broad cross-section of concerned individuals in community and criminal justice agencies, reported widespread alienation and loss of confidence in the system that failed to communicate with the public.

The report found that law enforcement agencies needed to provide language services to handle requests of non-English speaking persons who are often inhibited from requesting assistance of law enforcement where there are no, or an insufficient number of, bilingual personnel to handle their requests. It appears that the official response to these problems is to encourage the language minorities to value action outside the system.

In the study of the New Jersey courts commissioned by the state Supreme Court, the task force found that courts provide uneven, substandard services to non-English speaking litigants that severely impair access to justice. Among the key findings of the study is that only 17 percent of current interpreters meet a minimum standard of proficiency. Additionally, the study raises the question that standards of due process being applied in all cases do not apply equally to non-English speaking individuals.

The language used in the legal process is unfamiliar to the vast majority of the English speaking public. In tests done on the Miranda warnings, the language used was determined to be the equivalent of the level of English expected of a sophomore in college. The need for interpreters is obvious when the individual does not speak or understand English. The language chosen for formal procedures is at such a level that many English speaking people are equally precluded from understanding the intended meaning.

The summary of the California report (Judicial Council of California, 1977) suggests the following needs:

- availability of an adequate number of bilingual and culturally sensitive personnel at every stage of the judicial process;
- promotion of improved communications and rapport between non-English speaking persons and law enforcement agencies;
- a consistent supply of qualified and competent interpreters.

Nearly ten years later these needs persist. Some of them have been partially addressed with the passage of interpreter legislation, employment of more bilingual personnel in agencies, and establishment of tests for interpreters to qualify for appearance in the courtroom.

Ongoing programs in cross-cultural training and language-related issues for all officials in the judicial process are needed. These programs should focus on developing an improved understanding on everyone's part

about the cultural issues in the behaviors of different people.

We do not know the benefits of encouraging and establishing greater bilingual capacities within our system. It seems that, rather than embracing this idea, we begrudgingly accept it as a necessity. By limiting our inquiry of concern to the need for court interpreters, we effectively narrow our response to the stage of the process that is easiest to see. We do not have to inquire about attitudes, past practices, or continuing education programs for staff and judges. Efforts should be made to identify attitudes of all personnel regarding these issues.

Language and Legal Issues

Most articles and studies in the area of problems of language minorities focus initially upon decisions by the U.S. Supreme Court, U.S. Court of Appeals, and state supreme courts. Most of the case law has not demonstrated a recognition of the need to protect human rights. The begrudging acceptance of the need to address the linguistic issues facing language minorities is a recent phenomenon. Since we have approached most human rights issues on the basis that no redress is provided until a legal right is established, it is not surprising that the inadequate response to the language issues has only come after court decisions.

The Universal Declaration of Human Rights, Article 2 states as follows:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.

For thirty-seven years the legally binding principle found in the Charter of the United Nations has served as a statement against which to measure the legal standards being applied by the U.S. Courts. It is, after all, the point of the justice system to both protect and serve the human rights of the people. The legal community has not seen fit to use the treaties of the United States in arguing for the provisions of services to linguistic minorities. With the 1978 enactment by Congress of the Federal Interpreter's Act (28 U.S.C. § 1827), we find for the first time a public policy statement reflecting the principles enumerated in the 1948 Charter on Human Rights. The number of cases arising in the federal courts asserting the denial of interpreter services as a denial of equal protection has diminished. Prior to the enactment of the legislation there were several important federal cases often cited in the literature.

Appellate decisions generally have granted broad discretion to the trial judge to determine if an interpreter is required. The federal rules and

Supreme Court decisions in *Perovich v. U.S.* (1907), prior to the adoption of the Interpreter Act, required a finding by the court of the need for an interpreter. Obviously, the requirement proved to be a wholly inadequate method of providing services due to the insensitivity of those court officials to this need.

A pivotal federal case in this area is *Negron vs. State of New York* (1976). The Second Circuit held that a Spanish speaking criminal defendant is entitled to translator services, and failure to provide a translator rendered the trial unconstitutional, notwithstanding the occasional services provided by the prosecution interpreter. The court noted that the defendant had not been able to "understand the precise nature of the testimony against him." The Fifth Circuit in *Torres vs. U.S.* (1974), reversed a guilty plea on the grounds that "the statement of the factual basis for the plea was not translated for [defendant]." A similar reversal occurred two years later in *U.S. vs. Dilarce-Estrada* (1976).

Much of the case law related to non-English speaking defendants' right to an interpreter has been based on the Sixth Amendment protection. The emphasis in the case law appears to be that the defendant must not only be present but should also be able to comprehend the nature of the proceedings against him and therefore be able to participate in the proceedings. (See generally *State v. Natividad* 1974; *U.S. v. Carreon,* 1976; *Garcia v. State,* 1948).

It may be anticipated that the next level of litigation in this area, in addition to providing services, will be the quality of the services. The certification procedures in use in most state jurisdictions appear to be inadequate when compared to the federal standards developed for the Spanish language. California and New York have adopted certification procedures for language interpretation, yet in a recent study they were found to be inadequate. State courts are involved with a significantly larger number of cases requiring language assistance, and it may be anticipated that equal protection arguments under the Fourteenth Amendment will be made regarding the provision of uncertified interpreters.

In public hearings on the subject of language problems inherent in the California justice system in 1975, testimony was given from members of the Chinese community in San Francisco in response to the recommendations of probation officers concerning Chinese youth who were incarcerated in juvenile facilities. It seems that family members did not visit the youth. Probation reports had contained references about the absence of parental concern for the detained youth. Further investigation, however,

showed that the youths were incarcerated in facilities that were inaccessible to public transit. Family members of youths could not read English and it required several bus transfers to make the trip from Chinatown.

The issues are not simply the provision of interpreters, although that is clearly a practical and necessary step to address part of the problem. What is required is an awareness of the problems encountered by the language minority and a willingness to fashion appropriate responses to these problems. Not all the responses should be expected from the process. The most significant are within the grasp of the administrative personnel.

Measuring the Performance of Interpreters

In the study by Astiz (1983), the author notes Los Angeles County's history in providing interpreter services. The focus of the administrative staff is on the maintenance of a pool of individuals available for interpreting. An examination testing for the minimum level of competence in Spanish was developed. Astiz observed that the real concern of the administrative staff appeared to be in satisfying the demand for services, and they evidenced little concern for the quality of interpretation.

It appears from reviewing the literature on the use of interpreter services that the primary focus of administration has been the provision of services and not the adequacy of those services. There do not seem to be on-going evaluation procedures. Assessment of adequacy appears to be based on the number of complaints received. As pointed out earlier, this criteria is particularly inadequate to this problem, as those in the position to make complaints are muted by their limited access to the process.

In testimony before Congress, the federal judiciary reported that there were not any problems requiring the enactment of legislation creating interpreters' examination. Yet, how can judges know these things if they do not speak the translated language? The notion that there are not any problems in this area generally stems from the no-complaint method of determining how well things are operating. This does not provide the kind of quality assessment of performance that is needed. This point is particularly acute in an area where there has been so little education of judges and administrators.

In the case of *U.S. v. Salas Aleman* (1976), the issue of adequacy of performance was addressed because the record included both the original Spanish and the interpretation of the testimony. It became obvious from this record that serious errors were made in the translation. How can the system of criminal justice be so confident of delivery of service or of the comprehensive on-going evaluation of performance? The system that

takes pride in provision of due process treating everyone equally cannot claim such a certainty in the area of language services.

In *Cervantes v. Cox* (1965), the Court found that a defendant unable to understand the nature and cause of the accusations against him, or to participate in his own defense, is denied due process of the law as provided by the Sixth and Fourteenth Amendments. How can the Court determine whether the criminal can understand the nature and cause of the accusations against him? Who will provide those services? Is the standard merely that the individual "comprehends" in a rudimentary sense what is transpiring, or should the substance of the communication be understood?

A related problem is that it appears that the interpreter is provided to benefit the court and not the defendant. If the perspective of most judges and administrators is adopted, it is not surprising that there is so little on-going evaluation of performance of interpreters. It is understandable how one could easily confuse the perspective necessary to manage the process. All schedules and appearances are generally arranged to suit judges and attorneys. The victim, witnesses and defendants are seemingly adjuncts to the process.

The establishment of review systems for performance of interpreters is much needed. Such a system may be designed around the use of tape recorders in the courtrooms. Tapes of interpreters could be reviewed on a periodic basis with a panel of experts in the language. Such a review would also serve as a method of continuing education of the individuals. This recommendation was made ten years ago by the Select Advisory Committee of the Judicial Council of California studying the language problems of the non-English speaking. It is not surprising that courts have not responded to this issue. What is difficult to understand is why defense lawyers have not asserted the need for such a check and balance in the process.

It would be advisable that, in those translated proceedings, tape recordings be made as a matter of course. In this manner the defendant is able to have access to that portion of the record during the trial. The omission of this integral part of the proceedings from the formal record is incomprehensible. It becomes an impossibility to ascertain the accuracy of the interpretation without this part of the trial. Copies of tapes can be made inexpensively and quickly. This is the only manner in which the accuracy of the interpretation could be tested. Since the non-English speaking defendant is unable to understand the interpretation, how is it that he or she can be assured of a fair trial or fair review of the record on appeal?

Assessing Needs

Courts and the supporting organizations should begin the process of assessing needs. This process should begin by enlisting the support of ethnic community groups. The needs identification procedures should be comprehensive and sensitive to unique aspects of each language group. In the process of conducting such a survey, criminal justice officials can establish closer relationships with the communities.

In addition, efforts to survey the public, special groups, the bar, and other public institutions, are an excellent method of measuring performance. Specific surveys of language minorities should be done on a regular basis to keep in touch with issues and problems of interest to their communities.

The standards of judicial administration adopted by the California Judicial Council serve as a sound example of policy direction and sensitivity to the problems of administration in this area.[2] Sec. 18(b) states that the court should conduct an examination on the record to determine if a court interpreter is needed "[u]pon request by a party or counsel, or whenever it appears that a party's or witness's primary language is not English . . .". After the hearing the court should state its conclusions on the record.

In addition, Sec. 18(c) contains several questions which may be asked of the party or witness to determine if an interpreter is needed:

- Identification (for example: name, address, birthdate, age, place of birth).
- Active vocabulary in vernacular English (for example: "How did you come to court today? What was the highest grade you completed?). Questions should be phrased to avoid yes-no replies.
- An understanding of the court proceeding (for example: questioning the defendant regarding the nature of the charge or the type of case before the court).

Although these questions do not clarify what is an adequate level of response to make the determination to provide services, they go a long way towards determining the necessity for interpreter services and ensuring the competency of the individual to participate in the process.

Conclusion

All agencies involved in criminal justice have similar obligations to be in touch with the community and its needs. The most important response is one that seeks to identify problems and develop programs, and cultivate attitudes that extend the institutional response beyond acceptance of the minimum level of performance.

When a significant percentage of the entire population is in the category of being in a country but not being able to take advantage of and use its processes of government, the immediate social costs are high. It might well be anticipated that many people will find themselves in the justice system as a result of disasters or divorces, or as delinquents, victims of crime, and perpetrators of crimes. The justice system cannot be held responsible for balancing all the ills of the society. However, it must be in a position to maintain its integrity and credibility by being responsive to needs of the people.

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