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University of Miami

July, 1999

LENGTH: 1569 words

ANTI-SUBORDINATION AND THE LEGAL STRUGGLE OVER CONTROL OF THE "MEANS OF COMMUNICATION": Law and Economics of English Only

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SUMMARY: ... We had each come to appreciate our 3 million New York area Latino neighbors; we had each become conscious of their social, economic, and legal status; we had each become acutely dismayed by Anglo attitudes and behavior patterns toward them. ... Simply, under the economics of language acquisition, Latino immigrants have a high-powered incentive to incur the cost of learning English. ... If that's the case, they say, why do they live in enclave communities and why have they not dispersed across the continent like their European immigrant predecessors? The answer is that the same economics that give immigrants the incentive to learn English also make it rational for them to live in enclaves. Quite apart from family and cultural ties, the economic opportunity set in the enclave will be better for anybody whose English is less than fluent and idiomatic. ... And its rate will depend on the quantum of economic opportunity on offer a fuera del barrio. So the real question is whether some sticking point might cause Latino dispersion to proceed more slowly than that of previous immigrant generations. If there is such a friction, it must be ethnic and racial discrimination. ... This literature begins with Becker's famous story of inevitable free market correction. ... The final phase of the economic case addresses the Title VII status of English Only in the workplace. ...

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Buenos dias. Estoy aqui con mucho gusto. About a year ago Drucilla and I discovered that our paths in life, which had intersected before on several important occasions, had crossed again in an unexpected way. We had each come to appreciate our 3 million New York area Latino neighbors; we had each become conscious of their social, economic, and legal status; we had each become acutely dismayed by Anglo attitudes and behavior patterns toward them. And we each wanted to learn more. Happily, since we are both law teachers, no clear line separates such self-educational initiatives from scholarly initiatives. So we just upped one day and decided to collaborate on a paper on English Only.

We knew from the outset that we'd have nothing new to add to the bottom line so well articulated in the existing literature. But we went ahead anyway, assuming that if we each did here what we already do as scholars - in each case at several steps removed from race critical theory and civil rights discourse - we might have something to offer at a perspectival level. Our draft paper's title tells you what's up - its called Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish. I do the deadweight cost economics; Drucilla does the intrinsic wrongs and the freedom.

I regret to inform you that you have to hear about my part of the paper before you get to hear from Drucilla, who is going to talk about the relationship between the perspective she articulates in the paper and that of race critical theory. So I will keep it short.

Why a law and economics of English Only? Two reasons. First, what I do these days is write papers designed to destabilize propositions dear to the law and economics movement. I do this by making reference over to - now get ready - economics. Say there's an individualist position out there that you don't

like that's backed by an economic story. I've discovered that when you confront that position, you don't have to avoid addressing those economic presuppositions, and you don't have to content yourself with a dismissive, global rejection of microeconomic analysis. You can instead jump over the law and economics, and go to real economics. There you find out that things are, well, much more complicated and friendly to regulation than your law and economics colleagues want you to know. But, hey, what about the math? No te preocupes. Many law and economics people don't understand it either.

[*974] The second reason for doing economics is situation specific. English Only is supported by a plausible cost case. This says that since multiple languages amount to a barrier to trade and other economic cooperation, we therefore are all better off economically if everybody speaks the same language. Now, this is right so far as it goes, and no one understands the point better than Latinos. The problem comes at the public policy level. English Only has it that law can be a means to the end of enhancing social welfare if used as a stick that heightens immigrant incentives to learn English. It is held to follow that public service provision should be monolingual and that employers should have complete discretion to mandate English speech in the workplace.

The paper draws on the economics of language difference and of discrimination to refute this. The case has four phases. The first plays the cards of wealth redistribution and cultural diversity. Now, since the game is to stay inside an orthodox microeconomic framework, these can't be trump cards. But it's still important to work them in. As to redistribution, the economics highlight a commonality of interest between language minorities and other minorities that has important implications for majoritarian political preference aggregation. The economics also make racial segregation cost reductive. It follows as matter of political preference aggregation that those protected by Title VII on the basis of race and gender have a rational and solidaristic interest in supporting Title VII protection for language minorities. And this isn't just old-time socialist ideology - the result follows from evolutionary game theory.

As to diversity, the assumption that sameness lowers costs at some point has to be qualified by the counter-assumption that diversity leads to creative interaction. No one knows where the optimum lies as between the two. But there is a strong possibility that the economic optimum may not converge with the culturally preferred result. For example, I think it's safe to project that white Anglos would resist mandatory multicultural education for their children as invasive of cultural autonomy, even if it were more probable than not that such a program would make their children better off economically in the long run. Ironically, a major difference between that resistance and Latino resistance to English Only lies in the numbers - the objecting majority wins where the objecting minority loses.

Now to the second phase of the case. This assumes that English Only may be Kaldor-Hicks efficient, but turns around and attacks it on the standard law and economics ground that regulation is unnecessary where spontaneous order is adequate to the job. Simply, under the economics of language acquisition, Latino immigrants have a high-powered [*975] incentive to incur the cost of learning English. Accordingly, no regulatory problem is presented. Given this, you can reinterpret English Only in public choice terms as Anglo interest group legislation. The paper explicates this with a series of little population sorting models. They show that, at the margin, state level Official English could deter Latino in-migration and labor market competition; it also could protect the job prospects of Anglo civil servants. This is particularly likely in a state with an overall Anglo majority but Latino majorities in selected localities. Not by the way that nativist ideology isn't the prime mover behind Official English - I just think it's useful to highlight this seamy public choice underside.

The third phase of the case anticipates the main nativist objection to the assertion that Latinos have a sufficient economic incentive to learn English. If that's the case, they say, why do they live in enclave communities and why have they not dispersed across the continent like their European immigrant predecessors? The answer is that the same economics that give immigrants the incentive to learn English also make it rational for them to live in enclaves. Quite apart from family and cultural ties, the economic

opportunity set in the enclave will be better for anybody whose English is less than fluent and idiomatic. Dispersion takes generations. And its rate will depend on the quantum of economic opportunity on offer a fuera del barrio. So the real question is whether some sticking point might cause Latino dispersion to proceed more slowly than that of previous immigrant generations. If there is such a friction, it must be ethnic and racial discrimination.

Which means this analysis has to confront the economic theory of discrimination. This literature begins with Becker's famous story of inevitable free market correction. It goes on to confront the reality of persistent discrimination in American history, thereby facing a choice between two discomfiting alternatives. Either you admit that white Americans are persistently racist, or you abandon a pure neoclassical microeconomic model and describe the practice in terms of imperfections. As a race critical theorist would predict, the economists have pursued the latter path.

The resulting literature can be ranged according to its distance from the free market ideal. Interestingly, it is the law and economics writers who most doggedly keep lines open to Becker's market correction scenario and the concomitant possibility of a policy justification for the repeal of Title VII. Real economists, in contrast, take seriously the possibility that even given rational, unprejudiced whites. They assume that free markets never work perfectly and that we live in a second-best world ridden with information asymmetries. There, all other things [*976] being equal, there will be a tendency to hire one's own racial or ethnic type because sameness gives you a better read on character. This means that discriminatory results can occur even when the employer invests heavily in candidate information. And the results can persist and cascade into racist schema perpetuated across generations in a free market. The cycle breaks only when the stock of qualified whites is exhausted, something that our massive educational infrastructure would appear to be designed to assure to be unlikely to happen anytime soon, particularly in light of the current attack on affirmative action.

The final phase of the economic case addresses the Title VII status of English Only in the workplace. This starts out with a standard Epsteinian cost case against Title VII protection and notes that the Epsteinian costs are pretty modest. More importantly, it goes on to draw on labor economics to show that these costs easily can fall on the protected minority itself. So the policy question is whether Latinos would or would not be willing to bear these costs. We think that question answers itself.

Muchas gracias. (Audience claps).