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A FUNCTIONAL HIERARCHY BETWEEN SPOKEN AND WRITTEN LANGUAGE
IN THE APPLICATION OF THE LAW

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It is difficult to make an adequate assessment of the mutual relationship of spoken and written language without considering some functional justifications for the existence of written language alongside of and apart from spoken language. There are certain situations for which one or the other will best serve the communicative needs of the community and its members. In this treatise, by using examples from Law, I will discredit the ideology which asserts inferior status to written utterances as opposed to their spoken counterparts.

Formerly, noted linguists have not held that written language be viewed as a system in its own right. During the last half of the nineteenth century and the first few decades of the twentieth century there was an absolute feeling for the autonomy of spoken language. Saussure's (1916: 45) statement in Course in General Linguistics typifies his fellow linguists and his predecessors; "language and writing are two distinct systems of signs, the second exists for the sole purpose of representing the first." Even Bloomfield (1933:86) asserts that "writing is not language but merely a way of recording language by means of visible marks." Sapir also relates written language to an index so that the "written forms" serve only as "secondary symbols of the spoken ones." (Sapir 1921:19) Charles Hockett was likewise opposed to the written forms as independent, suggesting that "speech and writing are merely two different manifestations of something fundamentally the same." (Hockett 1958:4) This entire era of American linguistics reflects an overwhelming acceptance of the superior status of spoken utterances.

Acknowledging the existence of a "written norm" as well as a "spoken norm (whose existence has never been doubted)" is important in cultural communities where admittedly the users switch from one medium to the other. Obviously when the means supplied by one is switched to the other, each has its functional justification. Recognizing the functions performed by each will provide the basis for the hierarchical evaluation of their mutual relationship.

Prague linguist Josef Vachek (1959:10) names some functional terms in the hierarchy as "surveyability" and "preservability" and as an example:

Let us imagine a spoken utterance presenting a lecture which takes exactly one hour to deliver: a written utterance corresponding to it is a short paper comprising some 7 to 8 pages. The information supplied by the lecture and by the paper is virtually identical. There is, however, one important difference in the way in which the concerned information may be obtained from the two sources. In listening to the lecture, the person obtaining the information is bound to follow the speaker step by step, and under normal conditions it is

virtually impossible for that person to check any of the previous points of the speaker's arguments by having their wordings presented again by the speaker. Likewise it is impossible to 'skip' some of the passages to come and to get hold of the speaker's conclusions before he has worked out his way to them through a jungle of arguments and counter-arguments. Whether the listening person likes it or not, he is bound to follow the speaker's rate of developing the theme; one might also say that he is the speaker's fellow prisoner within the dimension of time. Clearly the reading person, unlike the listening person, is fairly independent of the dimension of time. The conclusion that inevitably follows is that, as far as quickness and distinctness are concerned, written utterances really rank much higher than their spoken counterparts. (Vachek 1959:10)

The important fact here is that texts can be preserved and re-read whereas spoken utterances are immediate and readily available for use in communication. Another fact which exists of these two norms is that the language user will always find it necessary to use one of the two norms in extralinguistic situations and the one used will be much more adequate than the other, and perhaps the only way to use the medium for that certain situation. Again an example; while riding bicycles a couple talk about their financial status and how they will divide the incoming money among the bills that are due. They surely have no recourse at that particular time to use a pencil and paper to calculate the bill with the amount due nor to write a note to the phone company who has sent them the same bill for the past two months. The couple are consigned in this situation to verbalizing. Without the written norm, the same couple could not be billed for their phone bill. A written norm is needed so Congress can keep account of meetings and bills passed. We all need to sign our name on some written document sometime in our life. Our educational system is based on an ability to read and write. The spoken norm would not adequately serve the advanced cultural community without writing and thus cannot really be considered inferior. Vachek calls it a "kind of superstructure built up on the basis provided by its unmarked counterpart: which cannot be quite satisfactorily handled by the corresponding unmarked (spoken) form." (1959:13) We can see then that the hierarchical relationship is not one of subordination or superordination but coordination "in terms of more general or more specialized applicability." (1959:13)

The following definitions of Vachek give the normative characteristics of each mode in the language dichotomy based on function. The spoken norm of language is:

a system of phonically manifestable language elements whose function is to react to a given stimulus (which, as a rule, is an urgent one) in a dynamic way, i.e. in a ready and immediate manner, duly expressing not only the purely communicative but also the emotional aspect of the approach of the reacting language user.

and the written norm is defined as:

a system of graphically manifestable language elements whose

function is to react to a given stimulus (which, as a rule, is not an urgent one) in a static way, i.e. in a preservable and easily surveyable manner, concentrating particularly on the purely communicative aspect of the approach of the reacting language user.

From these definitions we can observe the expressive ability that spoken language has to convey emotion. This is a functional feature of speaking that writing only has a secondary means of expressing, namely by descriptive phrases to correspond with the primary means found in the spoken norm. Spoken utterances may intensify stress or speed up the rate of speech while written utterances must do something like: "She asked bitterly" or "He cried out decidedly in a voice of supreme authority" to convey similar messages. Where the expression of the emotional component part is not important to the communication the written utterance becomes less wordy (which seems to be a goal of writing).

Since these norms are only valid when actually serving communication needs in the community I will use the application of the Law, through an examination of the Parol Evidence Rule and the Statute of Frauds, to show that the hierarchic relation of speaking and writing is "in terms of more general or more specialized" and not in terms of inferior or superior status.

The word "parol" means word of mouth or reference specifically to speech. The evidence of the parol is the writing. "There is a rule of substantive law which states that whenever contractual intent is sought to be ascertained from among several expressions of the parties, an earlier tentative expression will be rejected in favor of a later expression that is final. More simply stated, the contract made by the parties supersedes tentative terms discussed in earlier negotiations. Consequently, in determining the content of the contract, the earlier tentative agreements and negotiations are irrelevant." (Contracts, 2nd ed, Calamari & Perillo) The key to this rule of law is the contract that the parties intend to bind themselves to. The law clearly rejects the oral agreements without their being written into a contract. Not only must there be that writing but it necessarily needs to be final and complete. When the "last expression is not in writing the jury determines whether the parties intended the second expression to supersede the first." (Calamari & Perillo p.100) The intention of the parties stems from their oral interactions, which, in the absence of fraud, duress, and mutual mistake are never brought to trial. It is when fraud, deceit and contradiction enter oral agreements that the parol is required to be evidenced by a writing and until it is decided that there is a contract the Parol Evidence Rule does not apply.

In terms of the more general use, a parol which is unevicenced will get the job done for the parties or in other words they may agree upon anything; however, in the future of that agreement, should a disagreement arise, the proof of the parol is in the same medium--one person's word against another's. The means of taking that statement or agreement into the future as it was agreed upon in the past is to contract it in writing. Because the parol itself is ephemeral it would be hard to remem-

ber exact statements made in the past without their being preserved in some manner. A possibility for preserving the statements would be through a sound recording which could be witnessed but I foresee no way to eliminate fraud without a writing to verify the sound recording or parol. Whether or not sound recordings are viable means for eliminating fraud is not the only reason to consider such a recording but that it could serve the same purpose as the writing: to make a precise agreement and release it from the actual moment it was agreed upon (for future reference). I suppose that originally written language came to be because of the necessity for being released from the dimensions of time and place in communications. Written language also "usually possesses a wider vocabulary range, is more premeditated and precise, and is governed by stricter rules of grammar and style." (Rosenthal 1977:46)

A contract is also required in the Statute of Frauds but, unlike the Parol Evidence Rule, must be signed by the party to be charged. Simply stated, the Statute of Frauds says that for certain kinds of contracts, there must be a writing to enforce the contract that must be signed by at least one party (the one to be charged for its performance or sale). The three kinds of contracts are: 1) agreements for the sale of land or of interests in land, 2) agreements for the sale of goods over \$500 and 3) contracts that are not to be performed within one year's time.

For this established rule dealing with fraud the writing requirement in large part effectively prevents perjury. Any agreement that is reduced to writing becomes clear and promotes certainty. False testimonies evolve from inability to recall exact wordings also from decaying morals. Rabel (1947) says that the required formality of a writing "promotes deliberation, seriousness,...and shows that the act was a genuine act of volition."

The relationship between the Parol Evidence Rule and the Statute of Frauds is in the integration of the writing or contract and whether the writing is complete and final as agreed upon by the parties. If the writing is final and complete it cannot be varied, contradicted or supplemented to show that it is inaccurate. That both rules give an absolute autonomous status to the written norm because of its function in the circumstances associated with the rules proves a hierarchy of the language dichotomy (where only function dictates autonomy).

Now, to conclude this study I can point out that, first of all, in the application of the Parol Evidence Rule and the Statute of Frauds, communicative needs dictate the strict use of the more marked medium (writing) because it behaves (functions) so as to preserve and easily survey past agreements which have come under disagreement by one of the parties. Secondly, if functional justifications exist for the use of one medium in place of another then neither is inferior nor superior but only lacking in ability to function well where the other functions better. And lastly, in any extralinguistic situation where one medium may seem to usurp itself over the other it should be considered as safe evidence of the autonomous status of each of the norms in the language dichotomy.

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