No. 96-36304
DC# CV-94-01204-JCC

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA WALTERS, et al.,
Plaintiffs/Appellees

v.

JANET RENO, et al.,
Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

# APPELLANTS' REPLY BRIEF

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I. 274C Procedures Satisfy Due Process.

Immigration document fraud, to which named-plaintiffs admitted, is both a criminal and civil violation. 8 C.F.R. § 270.3; 8 U.S.C. § 1324c; Defendants' Opening Brief ("DB") at 42 (admissions). The challenged 274C forms explain the document fraud charge, the monetary penalty, and how to request a hearing within 60 days. Excerpts of Record ("ER") at 329-31. The forms satisfy due process.

Plaintiffs concede that the NIF states a final order's direct consequences, a money penalty, and that respondents' rights are stated in the accompanying NOR/W. Plaintiffs' Response Brief ("PB") at 4, 17. They admit that the NOR/W notifies respondents of collateral immigration consequences of 274C orders: they will be "deportable." PB 4, 17-18; DB 19-20; 8 U.S.C. §§ 1251(a)(3)(C), 1152(a)(6)(F). Plaintiffs seek

greater emphasis of the immigration consequences in Spanish and modified English. Such revision is not constitutionally required.

Plaintiffs ignore the court's failure to view the evidence in the light most favorable to defendants and to cite record evidence. DB 9-15. Plaintiffs agree that they must establish that no material disputes exist (PB 11) but continue to rely on allegations rather than undisputed facts.

A. Collateral Consequences

The court incorrectly found that 274C forms do not communicate a final order's consequences because they do not accentuate possible collateral immigration consequences. ER 483-84. Due process does not require notice of collateral consequences, like the immigration ramifications here. DB 17-20.

Plaintiffs argue that the immigration consequences are direct, not collateral. PB 20-21. The only immediate and direct consequence is that the respondent must cease and desist and pay a civil money penalty. 8 U.S.C. § 1324c(3); 8 C.F.R. § 270.3. If removal were a direct consequence, INS could remove the alien based on a final order alone, which cannot be done. The 274C order is not a self-executing deportation order.[1] A deportation charge is initiated by a different notice and is heard by a different tribunal than a civil or criminal document fraud charge--an immigration judge (with appeal to the BIA) versus an

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[1] Someone who is "deportable" is not necessarily going to be "deported;" it depends on, inter alia, whether he is charged or able to obtain a waiver. See Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 721 (9th Cir. 1986).

administrative law judge ("ALJ") (with appeal to OCAHO) or a federal district judge (with appeal to court of appeals). See DB 4, n.2. The distinction between direct and collateral consequences turns on whether the consequence is "definite, immediate, and largely automatic," United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990), not whether the same agency is involved. DB 19; e.g., Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989) (deportation collateral because not part of criminal prosecution/plea). Removal proceedings are conducted before a different tribunal, in any event. Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988).

Affirming the district court would have the inappropriate effect of creating novel due process rights that cannot be reconciled with precedent. DB 19. The Court would find (1) a right to be notified in one proceeding about something that may or may not happen in the future in different proceedings, (2) a right to be notified of collateral immigration consequences to violating the law, and (3) actual notice of collateral consequences insufficient, and emphasized notice mandatory, even though no notice was required before. Despite greater procedural protections in criminal proceedings, (Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986)), plaintiffs seek to create a constitutional right to detailed advice about the immigration consequences of a civil document fraud finding when there is no corresponding right to notice of consequences of a criminal conviction for document fraud and other offenses. DB 18-19

(citing inter alia, United States v. Arzate-Nunez, 18 F.3d 730, 737 (9th Cir. 1994)(INS notice that alien would be subject to criminal penalties constitutional even though "precise penalties" not accurately explained); United States v. Chavez-Huerto, 972 F.2d 1087 (9th Cir. 1992)). Plaintiffs cite no alternative analogous authority.

Nonetheless, the collateral immigration consequences are stated in the NOR/W:

> If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for a violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act.

PB 4; ER 331; see also 57 Fed. Reg. 33862-01 (July 31, 1992); ER 863-869. The court accepted plaintiffs' faulty theory that 274C forms violate due process because they do not indicate that the immigration consequences are "severe." PB 21. Yet the NOR/W informs that deportability will result from a 274C order. ER 331.[2] This is sufficient. Instead of "deportable," plaintiffs claim the Constitution requires that respondents be informed they "can be deported." ER 1238. They also claim that, despite availability of waivers, respondents must be told they may "never [be] allowed to return to the United States, even if you are married to a U.S. citizen or permanent resident or have lived in

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[2] In Padilla-Agustin v. INS, 21 F.3d 970 (9th Cir. 1994), overruled on other grounds, Stone v. INS, ___U.S.___, 115 S. Ct. 1537 (1995), forms were found to mislead about the need for specifying grounds of appeal. 274C forms, however, provide accurate information.

this country for many years." Id.[3] These suggestions are not mandated by due process. ER 1242-43, 1248-50, 1294; Barney v. Rogers, 83 F.3d 318, 320-21 (9th Cir. 1996) (INS advance parole form advised that alien would be "subject to exclusion proceedings"; no "detailed explanation of exclusion, deportation, and the consequences of accepting the advance parole" required).

Plaintiffs also suggested that the collateral consequences must be in bold, huge type. ER 1238. Such formatting issues are not constitutional matters and are appropriately left to agency discretion. ER 1242-43, 1248-50, 1294. Plaintiffs complain, but the court did not find, that the forms are unconstitutional because the NIF ("Notice of Intent to *Fine*") does not mention the immigration consequences, even though the accompanying NOR/W ("Notice of Rights") does. PB 17. Failure to examine the rights form provided, however, stems from the respondent's neglect of the duty to inquire. Bell Atlantic Corp v. Bolger, 2 F.3d 1304, 1317 (3d Cir. 1993).

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[3] Similarly, the court's criticism of INS agents stems from misunderstanding the collateral consequences and erroneous conclusions about information provided. PB 18 n.8.; see DB 19-21; ER 484. Plaintiffs' selective citations are unreliable. ER 1030-31 (facts "disputed"); DB 11-12 (discussing evidence); see infra Part I.D. One agent correctly stated that paying a fine would resolve the issue at hand, i.e. the document fraud charges, and told Walters--in Spanish--that a document fraud order would also make her deportable and excludable. ER 239, 250-51; DB 55 (Walters' waived the 60-day period to request a 274C hearing because "I knew I did it"). Another agent correctly testified that aliens with final orders would be deportable and excludable. ER 51, 762. No evidence exists that another agent, deposed almost a year after he handled 274C cases, communicated any misunderstanding to a respondent. ER 1066-67.

B. "Legalistic" Language

The court found that 274C forms used "legalistic" language thereby violating due process. ER 483, 486; DB 21-22. No witness testified that the forms confused him or he did not understand that he could request a hearing on the 274C allegation if he wanted to contest. DB 13 n.9; ER 339-40. Plaintiffs merely demand changes to the 274C program based on quibbling over phraseology about which no affected person has complained or been prejudiced.

That different forms can be imagined is irrelevant. The procedures provide adequate notice and an opportunity to be heard. DB 15-17; e.g., Walters v. National Assoc. Radiation Survivors ("Survivors"), 473 U.S. 305, 330 (1985). The notice was reasonably calculated to apprise affected individuals as a whole and thus satisfied due process. Id.

The challenged forms may be served on any citizen or alien who makes or uses counterfeit documents, not just aliens who speak Spanish.[4] Plaintiffs' argument that the class includes 274C respondents who claim to be inexperienced or uneducated[5]

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[4] There is no evidence that the majority of respondents speak only Spanish. One's "native language" is not the same as his only language. ER 1017-18. Plaintiffs rely on testimony about language abilities of respondents in Dallas to generalize about the whole nation. PB 15 n.3. There, advisals are provided in oral and written Spanish. ER 341-43.

[5] Plaintiffs' phrasing betrays the deficiency of their depiction, e.g., that the class "includes" individuals with certain characteristics does not prove the court's unsupported finding that "most" or "many" have such characteristics. PB 14; ER 473.

does not establish that this is generally true; plaintiffs provided insufficient evidence. ER 1215; see DB 10 n.6. These respondents were able to elude apprehension after overstaying or illegally entering, procure false identification documents, and use these English documents to obtain employment or benefits. ER 389-92. Cf. Barney, 83 F.3d at 320-21 (finding INS form adequate; noting that alien was able to determine that advance parole was necessary).

INS was not required to design 274C forms for plaintiffs' hypothetical majority: uneducated persons allegedly unable to understand the opportunity to make "a written request for a hearing before an [ALJ]" on the 274C charge and that failure to do so "within 60 days...will result in the issuance of an unappealable Final Order." ER 331. No named-plaintiff testified he disputed the fraud allegation but that the terminology on the 274C forms caused him to fail to request a hearing. Moreover, the court erroneously accepted plaintiffs' assertion that notice is defective because some agents allegedly do not understand the form's terminology. ER 484. Even if this were not genuinely disputed (DB 11-12; supra n.3), it is immaterial. ER 1030-1036. Constitutionality turns on whether notice and the opportunity to dispute a charge is given, not whether agents can define every term to plaintiffs' counsel's satisfaction.

Plaintiffs also asserted that their proposed forms were "examined and approved by a linguistics expert." ER 1271.[6] Plaintiffs provide no authority that the government must consult linguists before issuing notice forms. Nonetheless, INS considered comprehensibility, and the regulations setting forth the NIF's contents were promulgated using notice and comment procedures. ER 1173-74, 57 Fed. Reg. 33864 (July 31, 1992); ER 863-69. The court failed to give "substantial weight" to the agency's considered judgment about what constitutes adequate procedure. Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

The court did not cite the linguist's opinion as a basis for its decision; moreover, a "linguistics expert" is unhelpful on legal issues. Aguilar v. International Longshoremen's Union Local No. 10, 966 F.2d 443, 447 (9th Cir. 1992); G.F. Co. v. Pan Ocean Ship., 23 F.3d 1498, 1507 n.6 (9th Cir. 1994); PB 15.[7] Also, Gumperz' opinion is based on hasty generalizations; e.g., he assumes respondents are uneducated (ER 588) and believes final orders result in "irrevocable deportation" (ER 590). DB 20-21; ER 1215; see also ER 195-98 (lay person noted that NOR/W clearly indicates immigration consequences).

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[6] As defendants explained, plaintiffs' proposal was flawed. E.R. 1242-64, 1292-1303.

[7] Gumperz was never certified as an expert. As argued below, defendants would have objected to his testimony at trial. ER 1293 n.2. Moreover, adopting Gumperz' approach would undermine all government notice. He believes that actual "communication" is difficult to accomplish, and that poor people are alienated from the language used in official public settings. See Addendum at 2, 5, 8-10.

C. English-Language Forms Sufficient

The court erroneously found that due process mandates written Spanish translation of 274C charging documents. See DB at 22-26.

Based on the court's rationale, future 274C recipients speaking Chinese, French, Russian, or other languages, may claim a due process right to written or oral notice in their native language. DB 15-29; ER 516-519 (alien origins); ER 1234, 1242, 1251-52, 1295 (after summary judgment, plaintiffs again proposed native language notice requirement); see ER 487 (erroneously stating that courts have "frequently held" that language accommodation is required). The enormous burden on the American taxpayer of requiring native language notice is unsupported. Carmona v. Sheffield, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971), aff'd, 475 F.2d 738 (9th Cir. 1973).

Instead, the constitutionally sound approach requires individuals who receive government notices in English and do not understand to inquire further and seek translation. DB 23-25 (citing, inter alia, Soberal-Perez v. Heckler, 717 F.2d 36, 42-43 (2d Cir. 1983)).

This duty of diligence is not eliminated because 274C recipients have the option to waive the sixty-day period to request a hearing. PB at 27. Plaintiffs presented no evidence that individuals who executed the waiver were forced to do so, or were prevented from postponing their decision. DB 55. Waivers were accepted in only 17% of 274C cases. ER 1055a-b.

Before a waiver is accepted, the individual's rights are explained in his native language if requested. ER 331; see, e.g., 237-38, 91 (Walters), 209 (Meziab).

Plaintiffs claim that English notice alone is unconstitutional. PB 25-26. While written notice in English is reasonable, Soberal-Perez, 717 F.2d at 43, plaintiffs themselves fail to acknowledge the "specific factual settings" (PB 26) in which 274C forms are served. The unrebutted evidence shows 274C forms are served by Spanish-speaking agents, who supplemented the English forms with written and/oral Spanish explanations if requested, answered questions, and allowed 274C respondents time to consider options. DB 25-26; ER 336-38, 396. That INS in its discretion responds to particular situations, such as in Dallas, by providing a Spanish NOR/W is no basis for mandating Spanish forms nationwide. Multilingual notice, even if desirable to some or not burdensome to others, is not required by due process.

D. Non-274C Form Use Does Not Violate Due Process.

The court's conclusion that 274C forms fail to provide adequate notice is erroneous and ignores evidence. DB 29, 41-45; IIRIRA §304 (repealing bilingual OSC provision). The court failed to support the hypothesis that service of the 274C forms "contemporaneously with the deportation OSC" leaves "many" aliens with the false impression that the 274C forms are inconsequential. DB 12. Neither plaintiffs nor the court identified one witness who testified to such an impression. Id. Plaintiffs simply cite the court to assert that service of other

forms "at or near the same time" as 274C forms "creates confusion and misunderstanding." PB 22.

The finding that 274C respondents are "often" served with an OSC is contrary to evidence. 274C forms are served on the same day as an OSC in only a minority of cases. ER 362, 484; DB 12. Plaintiffs do not defend the court's finding but allege that "almost all" 274C respondents receive "deportation-related forms," including warrant, conditions of release, address form, and mailing instructions sheet. PB 22; ER 609-13. The court never referred to these documents but theorized incorrectly that 274C forms are often served "simultaneously with the OSC and Request for Disposition" forms. ER 466.

Also unsupported is the court's finding that many request deportation hearings and believe that this hearing will address their 274C charges. The evidence showed that the majority of 274C respondents contested neither illegal document fraud nor illegal presence in the United States. ER 362-64. Failure to contest the 274C charges could have been due to acknowledgement of guilt, desire to leave the country and illegally reenter, lack of defense, or mere inaction.

Accordingly, the inference that plaintiffs sought, and the court drew, is based on an improper premise. The court erred in concluding that many class members requested deportation hearings and not 274C hearings thereby "foreclos[ing] any serious argument that they have been adequately apprised of their rights." PB 24-25. Even if this theory were based on undisputed evidence, it

does not automatically follow that plaintiffs did not understand their rights. That some aliens charged with document fraud "wished to remain in the United States" does not mean that they also did not realize that they had been caught using false documents and had no defense despite having notice of how to contest the allegation. DB 12-15, 42, 55; ER 91 (in the words of Walters: "I knew I did it").

Plaintiffs' new arguments concerning voluntary return by 274C respondents are inconsistent with the claim that most class members contested their deportation. PB 22-23. Additionally, plaintiffs' claims about aliens' deliberations abroad are sheer speculation. ER 484.[8]

Plaintiffs criticize the OSC and Request for Disposition for failure to state that 274C proceedings are separate. PB 23-24. These forms cannot be faulted for silence about "requesting a 274C hearing" because they are used in hundreds of thousands of cases in which respondents are not in 274C proceedings. Because of the bilingual format of these non-274C forms, they cannot reasonably be confused for Spanish-versions of the 274C forms thereby making English 274C forms inconsequential. DB 13 n.8.

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[8] Plaintiffs cite one agent to falsely generalize that it is "standard practice" to bus respondents to Mexico. Nonetheless, it is not disputed that the INS honors requests from aliens to voluntarily return when they admit their illegal presence and does not prevent them from doing so because they were also found using counterfeit documents. As defendants noted, plaintiffs' complaint makes no claim about aliens who voluntarily return. Certified Record ("CR") 124 at 23.

E. Oral Notice

Plaintiffs do not contest that oral notice alone satisfies due process. See PB 30-31. Accordingly, when both oral and written notice is provided, one cannot find a due process violation based on the forms alone. DB 26. The court acknowledged this corollary when it conceded that plaintiffs might have received adequate notice if, for example, they were "given an additional, easily understood explanation" of their rights. ER 499, 511. The court erred by finding an across-the-board due process violation and entering an injunction without bothering to consider what oral information was provided. ER 511. The court erroneously held that constitutional sufficiency of each respondent's notice must be litigated before an ALJ. ER 511. Entering an injunction first, and testing for adequacy of notice later, shows the court has its role thoroughly confused.

Plaintiffs sidestep the issue of what was said by INS agents and individual plaintiffs in each case, offering no meaningful defense of the court's backwards analysis. They argue instead that the lack of a national policy requiring specific oral explanations or translations and the purported inability of some agents to "explain the 274C process" means that all class members were given constitutionally defective notice *per se*. But see DB 30-31. This contradicts the court's order. Nevertheless, because plaintiffs do not show that these "deficiencies" prejudiced any individual respondent, they are improperly asking

the court to manage the agency rather than redress actual injuries.

Plaintiffs assert that "unless the forms themselves provide constitutionally sufficient notice, there would be constant litigation in future individual cases...." PB 31 n.18. This assumes incorrectly that class actions are preferred over individual litigation, and that the preference is so strong that agencies may not serve notice in a way that would interfere with the ability to conduct future challenges as class actions, even if oral notice would otherwise satisfy due process. The type of notice given should determine whether Rule 23 applies to legal challenges, not vice versa.

Plaintiffs also misrepresent the record on oral notice. PB 30-31. First, we do dispute the claim that agents do not respond to 274C respondents' questions. DB 11-12; ER supra n.3. Plaintiffs' citation (ER 1025-26) does not include a single instance where an agent refused to respond to questions. Second, that some agents do not volunteer additional information not contained in 274C forms does not mean they do not translate the forms, provide clarification, or answer questions that go beyond the forms. Third, lack of a formal policy regarding oral explanations and translations (PB 30 (citing ER 705, 1025-26, 1178-79)) does not establish that no oral explanations or translations were offered. Evidence shows they were. ER 1025-28. Fourth, that some agents are not "fluent" in Spanish is irrelevant because English is sufficient, agents may use written

Spanish information or interpreters, and none of the named-plaintiffs suffered prejudice due to alleged inability to communicate with processing agents. ER 1022. Fifth, no named-plaintiff asked for an explanation beyond what was on the forms that an agent could not give. ER 1030-31.

Noting that "the possibility that an individual will receive an oral advisal depends entirely on the particular practices of individual agents" (PB 30), plaintiffs effectively concede that a due process violation could not be found examining the forms alone.

F. No Prejudice

Plaintiffs vacillate about whether prejudice is required to prevail on a procedural due process claim. PB 36, 46. The law, however, is unequivocal. DB 29, 40-45. Only "[i]f the prejudice to the alien is sufficiently great" does a procedural inadequacy violate due process. Barraza Rivera v. INS, 913 F.2d 1443, 1447 (9th Cir. 1990). Plaintiffs' authority does not support the new claim that prejudice is merely "a factor" for injunctive relief. PB 46. This Court has "clearly held that the alien has the burden of proving prejudice...." United States v. Leon-Leon, 35 F.3d 1428, 1432 (9th Cir. 1994). Plaintiffs presume prejudice generally and indicate no undisputed evidence showing prejudice to Santana Alvarez and Adames. DB 29, 41-45; see infra Part III.A.

1. Santana-Alvarez

The INS obtained his false identification cards and charged him with falsely making an I-9. ER 167. He did not contest the allegation and signed a NOR/W interpreted into Spanish. ER 160, 257-58. The court found prejudice because, sixteen months after he received a final order, an ALJ found 274C inapplicable to falsely made I-9s. ER 478. United States v. Remileh, 5 OCAHO 724, 2-3 (February 7, 1995). On September 30, 1996, IIRIRA §212 amended 274C to overrule Remileh retroactively. The court erred in finding prejudice because Santana Alvarez has no plausible defense. ER 155, 158-59, 163-64; see also DB 43.[9]

2. Adames

The court erroneously resolved disputed facts relating to Adames' prejudice in plaintiffs' favor. DB 43-45; see PB 37 (acknowledging "this dispute"). In 1991, Adames falsely attested on an I-9 that she was authorized for employment and had shown genuine documents to her employer, National Linen (which took over Jack Brown cleaners for whom she had made a false I-9 in

[9] In a class action, injury must be shown to named-plaintiffs but, in any event, plaintiffs' claimed prejudice to three declarants is unreliable. PB 38 n.25; DB 29-38. Defendants moved to strike Valdez-Andrade's declaration for failure to appear; the court found this moot upon entering summary judgment. CR 90; ER 495. Valero-de Gonzales received both a Spanish and English NOR/W and has no plausible defense to both document fraud counts. ER 620, 625, 1212-14, 1218-19. Altamira de Garcia received oral and likely written Spanish explanations but failed to request a 274C hearing after misplacing the forms. ER 454, 757, 1216-17, 1220-25, 1228-31. If she had a 274C hearing, she did not plan to claim she did not commit fraud. ER 1226-27.

August 1990). ER 147-50.[10] On May 26, 1993, Adames signed a Spanish-language "Request For Disposition" admitting that she was illegally present and requesting voluntary return rather than a hearing before an immigration judge. ER 140-41, 1207-09. She did not request a hearing before an ALJ on the charges that she both used forged identification cards and made a false I-9. ER 1204. The 274C forms were explained in Spanish and the agent gave her a written Spanish-language NOR/W. ER 225-28. The "only reason" she signed the forms was because she knew she "had broken the law." ER 138; see DB 45 n.19.

Adames suffered no cognizable injury because she habitually fails to read information she is provided, even when forms are in her native language. ER 133, 140-41, 146. Given Adames' disregard for documents she signed, the court erred finding prejudice.

3. Prosecutorial Discretion

Plaintiffs claim that prejudice can be established by the remote possibility that charges might have been dropped due to prosecutorial discretion had respondents requested hearings. PB 39 (citing ER 1076A (identifying four instances of discretion)). This slight possibility for grace is no basis for finding the prejudice required for a due process violation. "'An agency's

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[10] Adames' subsequent self-serving statement that she did not submit false documents conflicts with this admission. ER 125, 132. That the I-9 does not identify Adames' counterfeit documents does not exonerate her for falsely making an I-9, does not prove she never presented them, and does not refute that she used them.

decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion'" and "is not subject to judicial review." California v. United States, 104 F.3d 1086, 1094 (9th Cir. 1997)(citation omitted).

G. Court's Balancing Flawed

The court's application of Mathews was erroneous. DB 26-29. First, 274C procedures do not create an unreasonable risk of erroneous deprivation of the notice and opportunity to contest the 274C charges. See supra Part I; DB 27-28.

Second, the court erred by failing to specify the private interest and implying that respondents have a right not to be deported. DB 27. Plaintiffs merely echo the court's holding that the private interest is "great" while attempting to revise the court's order by saying that plaintiffs have an interest in "being properly informed." PB 11, 13. The court did not hold this and, instead suggested that the private interest was a right to remain. ER 480-81.

No such right exists and, in any event, the immigration consequences here are collateral. See DB 27. The relevant private interest is the opportunity to request a 274C hearing when charged with document fraud and in not being erroneously found to have committed the acts charged. Id. Plaintiffs appear to agree that the private interest relates to notice of the opportunity to request a hearing. See PB 12, 13. Despite this concession, plaintiffs argue that 274C waivers of relief are

limited and, thus, the relevant interest is a "right" to be free from "automatic deportation." PB 12. This argument is incorrect and disingenuous. Respondents are not automatically deported when final orders issue. A collateral consequence of a 274C order is that an alien will be deportable. Local 512, 795 F.2d at 721. Plaintiffs are aware, and the NOR/W advises them, that if a final 274C order issues, they are deportable, not deported. ER 331.

Of the thousands of 274C cases at issue, even before the injunction, plaintiffs identified no one who was actually deported as a collateral result. It is uncontested that, of the named-plaintiffs, only one was deported and, in addition to the 274C violation, he overstayed his visa. ER 1205-06. Notably, that person was a native French speaker fluent in English and whose wife was with him at the INS office when he waived the 60-day period to request a hearing. ER 1210-11. She testified that her husband often failed to read important forms and, when she read the forms, she understood he could be deported. ER 208, 210-11. Thus, revision of the forms would not have benefitted the only named-plaintiff who was deported.

Third, the court found that the government's burden was a one-time redrafting expense, where the burden is in fact extraordinary. ER 489. The heavy administrative, financial, and enforcement burden on the government includes: (1) retroactively and prospectively providing Spanish-language notice forms to all respondents; (2) reopening and relitigating otherwise final

orders; (3) conducting up to four hearings per class member (where the result of many hearings will be that the alien received adequate notice in the first instance and had no defense); (4) the great burden to INS and to the American public of being unable effectively to enforce the 274C program while the injunction is in effect; (5) the effect of erroneous legal precedent which will require translation of government forms into many languages; (6) the cost of the "improper intrusion by a federal court into the workings of a coordinate branch of the Government" (INS v. Legalization Assistance Project, 114 S. Ct. 422, 424 (1993) (O'Connor, Circuit Justice) (LEAP)) entailed by the requirement of court approval of future forms; and (7) the financial burden of revising the forms and related training. Under Mathews, the court was required to give "great weight" to these governmental burdens, Survivors, 473 U.S. at 326, but did not. ER 489-90; DB 28.

Plaintiffs are unable to refute the disproportionately great burdens involved and merely repeat the court's finding that the cost of revising the forms is insignificant.[11] PB 29.

II. Class Certification Improper.

A. Rule 23's Purpose Violated

Fed. R. Civ. P. 23's principal purpose is to litigate common questions of law and fact at once, promoting judicial "efficiency

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[11] That some offices used Spanish-language forms does not mean that there is no burden associated with doing so. PB 29. There are also significant differences between an agency choosing to take action and a court so ordering. See, e.g., LEAP, 114 S. Ct. at 424.

and economy." General Tel. v. Falcon, 457 U.S. 147, 159 (1982). Here, the court acknowledged that the putative class members' claims share no common factual basis. Consequently, to resolve the gravamen of this case, i.e., whether the plaintiffs' due process rights were violated, the court created a complex system for determining whether each recipient is a class member and whether she received "constitutionally adequate notice despite having received the section 274C notice forms." ER 511, 499. The court's system involves up to four individual hearings for each alien. DB 30-32. This violates the purpose of Rule 23. DB 32-33.

Plaintiffs' argument that the court did not intend each class member to prove the sufficiency of her notice at future hearings does not withstand scrutiny. PB 35. The court explicitly ordered that, when an alien attests that he "did not understand the procedure to request a civil document fraud hearing. . . defendants [must] demonstrate by a preponderance of the evidence in a hearing before an [ALJ] that the individual received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective." ER 511 (emphasis added).

The court also erred by holding that only one common issue would justify certification of the class. DB 32-34. Plaintiffs do not defend this holding but assert that not "all questions of law and fact need . . . [to] be common," and that there are many

common issues in this case. PB 32, 33 (emphasis added).[12] Defendants never argued, however, that all questions of law and fact must be common. Instead, the court abused its discretion in holding that class certification was warranted where only one legal issue, and no factual issues, were shared by the plaintiffs. DB 32-33.

Even if one common legal issue were sufficient, class certification should be limited to resolving that issue.[13] Plaintiffs apparently concede that there was only one common issue. PB 35 (district "court resolved the threshold issue common to all class members: the adequacy of the standardized forms"); see PB 33, 36 (noting the existence of one common issue). Thus, the court abused its discretion by finding that there was only one common legal issue while certifying the class on all other issues.

Resolution of the one common legal issue in this case does not resolve the gravamen of plaintiffs' complaint, whether plaintiffs' due process rights were violated. As the court recognized, before finding a due process violation the

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[12] The "numerous" common issues claimed by plaintiffs are, in fact, only one issue restated several ways: constitutional sufficiency of the challenged forms. PB 32-33.

[13] The illogical result of finding only one common legal issue and yet certifying the class on all uncommon issues is apparent in the court's order. The INS must now hold up to four individualized hearings for each alien to resolve various factual disputes in each case. DB 31-32. This does not promote judicial economy.

circumstances surrounding each plaintiff's waiver or failure to request a hearing must be considered.

B. Certification Improper Under Rule 23(b)(2).

Plaintiffs improperly shift the burden of proof by arguing that the alternative to holding up to four individualized hearings for each alien as mandated by the court would be the filing of "thousands of individual actions raising the identical issue regarding the forms' validity. Defendants cannot explain why that would be preferable to class certification." PB 33-34 (emphasis added). This argument is misplaced. First, plaintiffs, not defendants, must fulfill Rule 23 requirements. In Re Dalkon Shield, 693 F.2d 847, 854 (9th Cir. 1982).

Second, under the court's order, thousands of individual hearings must be held despite class certification. It is disingenuous to argue that, but for the court's order, this case would involve the resolution of thousands of individual cases. That is exactly what the court's order calls for, which is the best evidence that the plaintiffs failed to satisfy the requirements of Rule 23(a) and (b).

C. Inadequate Class Representatives

Plaintiffs contend that the "fact that [the named plaintiffs] may have unique defenses on the merits has no bearing on their adequacy to litigate the threshold procedural issues common to the class." PB 36 (emphasis added). Plaintiffs are unable to cite any authority for this erroneous contention. This

Court should decline to adopt such a radical change in class certification law.

As explained in defendants' brief, the named-plaintiffs confessed their guilt of the 274C charges, pursuant to grants of immunity from criminal prosecution. Their claims will thus be subject to serious credibility attacks and unique defenses, unlike those of unnamed class members. DB 37-38; CR 86 at 28-34. Plaintiffs' brief provides no argument to the contrary.

Plaintiffs do not challenge that the district court failed to address the adequacy issue. Contrary to the court's holding, a Rule 23 analysis may require a review of the merits of the underlying case. DB 37-38 (citing, inter alia, Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992) (evidence may "relate to the underlying merits of the case")).

III. Injunction Improperly Based On Finding Of Two Instances Of Possible Prejudice.

A. Error To Grant Injunctive Relief

Plaintiffs do not dispute defendants' discussion of the standard of review for a permanent injunction. PB 36; see DB 38-40. The parties disagree, however, about the first component, success on the merits. Regarding the second component, inadequate legal remedies, plaintiffs do not contest that the court failed to make this finding, but they improperly reverse the burden of proof. PB 36.

On the third component, substantial and immediate irreparable injury, plaintiffs claim that the court correctly found prejudice to Santana Alvarez and Adames and relied on

prosecutorial discretion. PB 36-37. The court erred in so finding. See supra Part I.F.; DB 29, 41-45; see also Lewis v. Casey, 116 S. Ct. 2174, 2183 (1996).

The court abused its discretion on the fourth component, balancing the hardships. Plaintiffs claim that the injunction merely gives "effect to the statute's requirement of notice and opportunity for a hearing" and thus serves the public interest. PB 40. Plaintiffs' authorities would not survive Lewis. Moreover, the court abused its discretion by disregarding the public interest in enforcing the 274C program and finding more weighty the interest in enhancing the procedural rights of two persons. DB 45-46; see supra Part I.G. The court's balancing cannot be sustained under the close scrutiny warranted for a systemwide injunction of a governmental program. DB 39.

B. Injunction Is Abuse of Discretion.

On the fifth component, scope of relief, "two instances [of actual injury are] a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." Lewis, 116 S. Ct. at 4587. Plaintiffs assert that "the injunction in this case was carefully tailored, and its provisions are necessary to remedy the violations that were established." PB 41. On the contrary, the injunction is not tailored and does not redress actual injuries, or prejudice, proven by undisputed evidence to named-plaintiffs. DB 46-53.

1. Publicity Campaign

First, there is no evidence supporting the requirement to provide Spanish and English notice to every news organizations in Central and South America. DB 47-48. Second, defendants were ordered to brief the terms of an injunction; the government did not concede that any relief was appropriate and it explicitly reserved appeal rights. ER 1242, 1263, 1292, 1303. Third, notice via the newswire in the United States was discussed only as an alternative to plaintiffs' costly return-receipt proposal which would make final orders unenforceable if class members did not sign the receipts, regardless of lack of prejudice. ER 1257-60, 1299-1302.

2. Parole

Notwithstanding plaintiffs' one-sentence comment, Mendez v. INS, 563 F.2d 956 (9th Cir. 1977), does not justify the excessive parole requirement imposed. DB 48-50. The court erred by finding that IIRIRA §602 does not undermine this requirement. The new law grants only the Attorney General discretion to make individualized parole decisions for "urgent humanitarian reasons or significant public benefit." The court's parole requirement does not satisfy this standard. That INS contemplated ways to handle individual 274C hearing requests from abroad does not refute that the injunction is excessive. DB 520-33. The order will cause unwarranted logistical burdens by mandating widespread parole or alternatives regardless of any lack of prejudice. Id.

3. Prohibition On Deportation

The court's ban on deportation during the elaborate notice and multiple-hearing process constitutes reversible error. DB 50-52, 30-32. First, IIRIRA §242(g), which is effective immediately, deprives the court of jurisdiction to enjoin deportation.[14] Plaintiffs profess that this case does not challenge deportation yet the injunction clearly restricts removal and plaintiffs' primary goal (and a primary effect) is to thwart the collateral deportation consequences of being found to have committed document fraud. DB 50-52.

Second, the deportation restriction applies "even where offenses other than the 274C order are the basis for deportation...." PB 49. This is overbroad. It permits class members who did not previously apply for relief from deportation to seek relief now. Additionally, they obtain an indefinite stay without showing irreparable injury, likelihood of success, and favorable balance of hardships; indeed, they need not even offer a plausible defense to the fraud charge to obtain such a stay.

4. Reopening Procedure

The injunction constitutes an abuse of discretion because it imposes sizeable administrative and financial burdens before any showing of prejudice. DB 52-53. Aliens with final orders may have their cases reopened simply by signing a form stating that

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[14] On the effective date issue, plaintiffs' Seventh Circuit case is not binding. Additionally, it incorrectly renders the exception language of IIRIRA §309(a) meaningless and ignores the plain language and congressional intent that 242(g) apply universally to pending cases.

they did not understand the 274C procedures. ER 510. Contrary to plaintiffs' assertion, defendants argued that any injunction must be narrowly tailored such that aliens seeking to reopen their cases must state some plausible defense to the charge initially. Otherwise, class members who received adequate notice may receive stays or parole simply by saying that they did not understand. This is an abuse of discretion.

Moreover, plaintiffs incorrectly rely on in absentia cases for the proposition that no prejudice should be required. PB 41-43. These cases focus on the statutory requirements chosen by Congress when an alien requests a deportation hearing but fails to appear. INA §242B, amended by IIRIRA §304 (renumbered as INA §240(b)(5)(C)(i)). The court, however, is not empowered to dispense with the requirements of Article III standing or to eliminate the prejudice component of due process analysis. Villegas-Valenzuela, 103 F.3d 805 (9th Cir. 1996).[15] Also, the in absentia provision does not allow reopening unless the alien demonstrates that failure to appear was caused by exceptional circumstances, like a relative's death, regardless of a claim of eligibility to deportation relief. INA §§240(b)(5)(C)(i), 240(e)(1). In absentia law is not analogous and, moreover,

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[15] "Standing is not dispensed in gross." Lewis, 116 S. Ct. at 2183 n.6. Even in a class action, plaintiffs have standing only to seek redress for a specific injury suffered--not hypothetical injuries. Id. at 2179 ("distinction between the [judicial and political branches] would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly").

imposes an individualized reopening requirement more stringent than the prejudice requirement.

The court's decision evades the rule that the proper scope of an injunction must be limited to redressing actual injury. See Lewis, 116 S. Ct. at 2184. It also errs in imposing tremendous burdens where, viewing the evidence in the proper light, many aliens likely believed that requesting a hearing would be futile since INS had obtained their false documents and admissions. DB 14-15, 55.[16] The court erred by delegating the constitutional determination to ALJs and by usurping this Court's authority over appeals from ALJ determinations.

IV. Summary Judgment for Defendants

The court erred in failing to reach the issues presented only in the government's summary judgment motion. DB 53-59; ER 458, 493-95, 507. The court stated that "because the court has granted or denied substantially all the relief requested by plaintiffs, there is no reason to rule on the alternate grounds for that relief" requested by the government. ER 507. The court held it was sufficient to enter final judgment on the entire action. Id. It was not.

For example, the government moved for summary judgment on the complaint's allegation that INS coerces waivers. ER 8, 9, 11, 23. Plaintiffs produced no coercion evidence, and

[16] The contention that INS should have revised the forms, limiting class size, after the court denied the government's motion to dismiss misunderstands that the court was required to assume plaintiffs' claims to be true on a Rule 12 motion. See PB 44.

demonstrated no prejudice.[17] The court should have entered judgment on that claim.

The complaint alleged that 274C forms must be translated into every major language. ER 9, 26. Plaintiffs "abandoned" the argument during briefing, without amending the complaint, but then resurrected it during injunction briefing. See ER 1234, 1242, 1251-52, 1295. The government is entitled to judgment on this issue.

Plaintiffs conducted massive nationwide discovery. Their failure to produce supporting evidence entitles defendants to summary judgment not only on the issues raised in both parties' motions, but on those raised only in the government's motion. Summary judgment is not a discretionary remedy; if the plaintiffs lack evidence, it must be granted. Jones v. Johnson, 26 F.3d 727 (7th Cir. 1994), aff'd, 115 S. Ct. 2151 (1995). The material evidence is undisputed and the law supports defendants. This court may and should direct the entry of summary judgment on these issues. Nazay v. Miller, 949 F.2d 1323 (3d Cir. 1991); Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1143 (11th Cir. 1990).

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[17] Defendants did not concede below that conflicting evidence exists on the coercion issue. PB 52. Defendants argued that, even if conflicting evidence existed, summary judgment should be granted because plaintiffs failed to demonstrate prejudice. ER 979. Earlier in the brief, defendants noted that plaintiffs produced no evidence of coercion. CR 98 at 17-20. Plaintiffs still fail to show such evidence. PB 52-53.

## CONCLUSION

The Court should reverse the district court's order certifying the class and granting partial summary judgment to plaintiffs.[18] The permanent injunction should be vacated and summary judgment granted to defendants.

Respectfully submitted,

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[18] Plaintiffs seek attorneys fees under the Equal Access to Justice Act but defendants oppose any award of costs or fees and request that any ruling on this await final consideration of the merits by the Court, and supplemental briefing, if necessary, by both parties. 28 U.S.C. 2412(d)(1)(B); 9th Cir. R. 39-1.6, 39-1.7.

**CERTIFICATE OF COMPLIANCE WITH BRIEF FORMAT**

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that the answering brief is Monospaced, has 10.5 or less characters per inch and contains 6,985 words.

ELIZABETH A. WELSH
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Department of Justice
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Dated: March 4, 1997

**STATEMENT OF RELATED CASES**

The following Ninth Circuit cases involve issues relating to 8 U.S.C. § 1324c:

Noriega v. INS, No. 96-70513

Kumar v. INS, No. 96-70300

Aguilera-Valencia v. INS, No. 95-70905

Bravo-Lopez v. INS, No. 95-70110

Cruz-Garcia v. INS, No. 94-70464

Corona-Alvarez v. INS, No. 94-70218

DATED: March 4, 1997

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Companion to this volume
*Language and social identity*, edited by John J. Gumperz

# Discourse strategies

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ʈ, ɖ retroflex consonants

In language examples where some phonetic symbols are employed proper nouns are not capitalized.

Prosodic notation

Prosodic notation is only included in example texts where this is essential for full understanding; otherwise it is explained in the discussion.

/ minor, nonfinal phrase boundary marker
/ major, final phrase boundary marker
ˌ low fall tone
ˋ high fall tone
ˏ low rise tone
ˊ high rise tone
ˬ fall rise tone
ˆ rise fall tone
ˉ sustained tone
ˌ low secondary stress
ˈ high secondary stress
ꜛ pitch register shift, upwards
ꜜ pitch register shift, lowered
acc accelerated tempo
dec decelerated tempo
ˑ fortis enunciation
ˑ lenis enunciation

[ conversational overlap
. . speech pause
. . . long speech pause
( ) unintelligible word

Tone and stress marks are doubled to indicate extra loudness.

# 1

# Introduction

Communication is a social activity requiring the coordinated efforts of two or more individuals. Mere talk to produce sentences, no matter how well formed or elegant the outcome, does not by itself constitute communication. Only when a move has elicited a response can we say communication is taking place. To participate in such verbal exchanges, that is, to create and sustain conversational involvement, we require knowledge and abilities which go considerably beyond the grammatical competence we need to decode short isolated messages. We do not and cannot automatically respond to everything we hear. In the course of our daily activities we are exposed to a multitude of signals, many more than we could possibly have time to react to. Before even deciding to take part in an interaction, we need to be able to infer, if only in the most general terms, what the interaction is about and what is expected of us. For example, we must be able to agree on whether we are just chatting to pass the time, exchanging anecdotes or experiences, or whether the intent is to explore the details of particular issues. Once involved in a conversation, both speaker and hearer must actively respond to what transpires by signalling involvement, either directly through words or indirectly through gestures or similar nonverbal signals. The response, moreover, should relate to what we think the speaker intends, rather than to the literal meanings of the words used.

Consider the following conversation, recorded in a small office:

(1) A: Are you gonna be here for ten minutes?
B: Go ahead and take your break. Take longer if you want to.
A: I'll just be outside on the porch.
Call me if you need me.
B: O.K., don't worry.

The exchange is typical of the many brief interactive routines that fill our day and which for the most part pass without special notice. Speakers' moves and addressees' responses follow one another automatically. They tend to be produced without much conscious reflection and alternate with rhythmic synchronization to avoid awkward pauses. Yet if we ask what it is about the passage that leads us to perceive it as a normal everyday occurrence, we soon discover that the episode as a whole consists of more than just a collection of utterances. In other words, neither the grammatical form nor the meaning of individual words or sentences taken in isolation give any indication that they belong together or show how they continue to fit into a single theme.

Speaker A begins with a question which, as our knowledge of English tells us, requires a yes or no answer. Yet B's reply takes the form of a suggestion which does not overtly acknowledge A's question. The relationship between the two utterances becomes evident only if we assume that B implicitly or indirectly signals assent by the way in which she formulates her suggestion. But this raises further problems as to the nature of the knowledge involved in A's and B's ability to see beyond surface content and to understand such indirect messages. Since there are no overt linguistic cues, it seems reasonable to assume that both A and B rely on a shared understanding that the interaction takes place in an office and on their expectations of what normally goes on in offices. That is, it is taken for granted that both participants are office workers, that it is customary to take brief breaks in the course of a working day, and that staff members should cooperate in seeing that someone is present at all times. Such background assumptions then enable B to hypothesize that A is most probably asking her question because she wants to take her break and is checking to make sure that her absence will not inconvenience B. A's reply in the third utterance which implies that she does indeed intend to go out for a while, confirms this interpretation. B's final "O.K., don't worry" can then be understood as a reassurance that A's absence will not cause any problem. Conversationalists thus rely on indirect inferences which build on background assumptions about context, interactive goals and interpersonal relations to derive frames in terms of which they can interpret what is going on.

For reasons that will become clear in the course of this book, I believe that understanding presupposes conversational involvement.



A general theory of discourse strategies must therefore begin by specifying the linguistic and socio-cultural knowledge that needs to be shared if conversational involvement is to be maintained, and then go on to deal with what it is about the nature of conversational inference that makes for cultural, subcultural and situational specificity of interpretation.

Conversational analysis is a growing field of inquiry which during the last decade has been enriched by contributions from a number of disciplinary perspectives. For many years now linguists and other social scientists, mindful of the limitations of positivist–empiricist approaches to the study of human behavior, have been aware of the need for a deeper understanding of the functioning of verbal signs in human cooperative processes. Linguists, whose grammatical formalisms continue to have some success in clarifying the cognitive processes involved in word and sentence decoding, are nevertheless aware of the limitations of existing grammatical theories and have begun to look for new approaches to the study of conversational processes. Sociologists and psychologists have become centrally concerned with the analysis of communicative processes involved in human learning, social cooperation and underlying social evolution.

Research stimulated by such concerns provides new data and new analytical perspectives which must ultimately be incorporated into a general theory of pragmatics. To cite just a few examples, linguistic anthropologists employing ethnographic methods to survey what they call rules of speaking as they apply to speech events, have shown that language usage, norms for what counts as appropriate speech behavior, as well as the very definitions of such events vary from culture to culture and context to context. Findings are supported by micro-studies of non-verbal communication which examine the interplay of verbal and nonverbal signs in signalling context and constraining interpretive preferences. Among linguistic semanticists there are many who argue that the established grammarians' practice of concentrating on the referential meaning or truth value of isolated propositions is subject to serious theoretical objections. Semantic analysis, they contend, should properly concentrate on the study of speech acts, seen as units of human action. Other linguists have begun to focus on grammatical and semantic signals of textual cohesion and on the role of interpretive frames, scripts or schemata in understanding discourse (Fillmore 1977, Schank & Abelson

1977, Spiro, Bruce & Brewer 1980). Perhaps most directly relevant to the studies in this volume is the work of sociologists, who, building on the critical writings of Harold Garfinkel (1967), are creating a new tradition of conversational analysis which concentrates directly on verbal strategies of speaker/listener coordination as revealed in turn taking and other practices of conversational management.

Yet, important as these contributions are, we are still far from a general theory of verbal communication which integrates what we know about grammar, culture and interactive conventions into a single overall framework of concepts and analytical procedures. Each of the traditions cited tends to concentrate on certain parts of the total signalling process, while tacitly relying on findings and concepts reflecting other disciplinary perspectives when dealing with different facets of communicative signs. Thus, linguists build on the macro-sociologists' notion of group, status, role and social function in their discussions of social norms of language usage. Sociologists, on the other hand, employ the theoretical linguists' sentence level categories of referential semantics and syntax in their discussions of interactive strategy.

The main objects of study in most existing forms of conversational analysis are communicative signs as such and their patterning in texts, i.e. either in written prose passages or in transcripts of spoken dialogue. Almost all conversational data derive from verbal interaction in socially and linguistically homogeneous groups. There is a tendency to take for granted that conversational involvement exists, that interlocutors are cooperating, and that interpretive conventions are shared. The experience of modern industrial society with its history of communication breakdowns, of increasingly intricate constitutional and legal disputes and its record of educational failure, suggests that such assumptions may not fit the facts of modern urban life. We know that understanding presupposes the ability to attract and sustain others' attention. Yet so far we have no empirical methods for analyzing what is required in the way of shared linguistic and cultural knowledge to create and sustain conversational involvement.

This book attempts to deal with such issues by concentrating on the participants' ongoing process of interpretation in conversation and on what it is that enables them to perceive and interpret particular constellations of cues in reacting to others and pursuing their communicative ends. There is no question that the effective employment of communicative strategies presupposes grammatical competence and knowledge of the culture. But this does not mean that we can rely solely on existing grammars and ethnographies to explain how interlocutors make situated interpretations.



Returning for a moment to our conversational example, we could argue that the background assumptions we list in our discussion are part of the givens of American culture. But not all Americans are familiar with office behavior, and existing cultural analyses do not cover the details of office routine. Even if we did have exhaustive descriptions and the relevant knowledge were shared, we still need to ask what it is about the situation at hand that enables participants to retrieve relevant items of information. Moreover, the actual words A uses and the way she stresses them are of crucial importance in evoking the office routine frame. Had she used expressions such as "Do you intend to stay here?" or "Do you plan to go out?" or had she stressed the initial word "are" rather than "be here," the response might have been different and the course of the interaction would have been changed greatly. Such matters of idiom and sentence stress are, as we will show in our discussion, not ordinarily incorporated in grammatical descriptions. The study of conversational inference thus requires assumptions and procedures which are different from those used in either ethnography or grammatical analysis.

Seen from the perspective of the individual disciplines, analyzing inferential processes presents what must seem like almost insuperable problems. Yet conversational exchanges do have certain dialogic properties, which differentiate them from sentences or written texts and which enable us to avoid, or at least bypass, some of the difficulties involved in the study of isolated messages. Two such properties which are illustrated in our example are: (a) that interpretations are jointly negotiated by speaker and hearer and judgements either confirmed or changed by the reactions they evoke – they need not be inferred from a single utterance; and (b) that conversations in themselves often contain internal evidence of what the outcome is, i.e. of whether or not participants share interpretive conventions or succeed in achieving their communicative ends.

If episodes are selected to contain such information, therefore, a-

single passage can be subjected to multiple forms of analysis. Examination of participants' success in establishing common themes, maintaining thematic continuity or negotiating topic change at the level of content yields empirical evidence about what is achieved. The timing of speakership moves and listenership responses can be examined through rhythmic or nonverbal cues to check for evidence of breakdowns in conversational coordination. Once outcomes are known, linguistic analysis can be employed along with direct interviews of participants and comparative data from other similar episodes to reconstruct what it is about the signalling cues employed and participants' underlying knowledge that led to the achieved effect.

Because it makes no assumptions about sharedness of rules or evaluative norms, the interpretive approach to conversation is particularly revealing in modern urbanized societies where social boundaries are diffuse, where intensive communication with speakers of differing backgrounds is the rule rather than the exception, and signalling conventions may vary from situation to situation. Much of the work reported on in this book concentrates on encounters involving participants who, while speaking the same language, nevertheless show significant differences in background knowledge and must overcome or take account of the communicative symbols which signal these differences to maintain conversational engagement. In addition, encounters involving style or code switching are analyzed to demonstrate how known differences in social values and grammar and lexicon are exploited to convey new information.

This interest in linguistic and cultural diversity is in part the result of my earlier field work on social and regional dialects and on bilingualism and small rural communities in India, Norway, Austria and the United States (Gumperz 1971a). It was a concern with universals of intergroup contact that first led me to turn to interethnic encounters in urban settings. But the more I learned about the nature and functioning of conversational strategies, the more I became convinced that socio-cultural differences and their linguistic reflections are more than just causes of misunderstanding or grounds for pejorative stereotyping and conscious discrimination. Language differences play an important, positive role in signalling information as well as in creating and maintaining the subtle boundaries of power, status, role and occupational specialization that make up the



fabric of our social life. Assumptions about value differences associated with these boundaries in fact form the very basis for the indirect communicative strategies employed in key gatekeeping encounters, such as employment interviews, counselling sessions, labor negotiations and committee meetings, which have come to be crucial in determining the quality of an individual's life in urban society.

With the disappearance of small, egalitarian face to face societies, diversity of background and communicative conventions come to take on important signalling functions in everyday interaction. Any sociolinguistic theory that attempts to deal with problems of mobility, power and social control cannot assume uniformity of signalling devices as a precondition for successful communication. Simple dichotomous comparisons between supposedly homogeneous and supposedly diverse groups therefore do not do justice to the complexities of communication in situations of constant social change such as we live in. We need to be able to deal with degrees of differentiation and, through intensive case studies of key encounters, learn to explore how such differentiation affects individuals' ability to sustain social interaction and have their goals and motives understood. It is in this area of urban affairs that sociolinguistic analysis can yield new insights into the workings of social process. By careful examination of the signalling mechanisms that conversationalists react to, one can isolate cues and symbolic conventions through which distance is maintained or frames of interpretation are created. One can show how these conventions relate to individual or group background. To the extent that it achieves this goal, research on conversational inference can make important contributions not only to sociolinguistic theory as such but also to general theories of social interaction and social evolution.

Most of the chapters in this volume combine reviews of existing theory with illustrative analyses of conversational sequences or case studies of particular events. Chapter 2 begins with a critical examination of developments in linguistics, linguistic anthropology and sociolinguistics that underlie recent sociolinguistic approaches to language, and then goes on to a detailed examination of a short speech exchange, which points out the limitations of existing notions of language usage. Chapters 3 and 4 concentrate on code switching in multilingual communities, where diversity is both used to signal group membership and exploited for communicative ends. Chapter

5 deals with the role of prosody in discourse interpretation and with variations in prosodic conventions and their communicative input. Chapter 6 discusses the notions of contextualization, contextualization cues and contextualization conventions and reviews relevant literature on nonverbal communication and conversational synchrony to show how subtle, subconsciously perceived verbal cues can affect interpretation. A number of brief exchanges are analyzed, which illustrate how conversational analysis can serve to establish direct explanatory links between interpretive processes and participants' history and ethnic backgrounds. In chapter 7 current anthropological, linguistic, sociological and psycholinguistic approaches to conversational analysis are discussed in some detail. The more general notion of conversational inference is introduced and its application to actual speech situations illustrated by means of a number of additional brief examples. Chapter 8 presents an intensive analysis of longer passages extracted from a counselling interview and illustrates the miscommunication problems that can arise when speakers who know English well rely on different contextualization conventions to interpret what they hear. Chapter 9 presents an analysis of a public event where misinterpretation led to serious legal difficulties. These last two chapters suggest how sociolinguistic analysis can contribute to an understanding of recurrent problems in key areas of public affairs. A brief postscript in chapter 10 reviews the theoretical bases of the analytical principles reflected in the book and discusses some further implications of the approach.

# 2

# The sociolinguistics of interpersonal communication

## The background of modern sociolinguistics

Sociolinguistics is commonly regarded as a new field of inquiry which investigates the language usage of particular human groups and relies on data sources and analytical paradigms quite distinct from those employed by linguists. Yet the two subfields have common intellectual roots. Throughout the nineteenth and for much of the present century, language study was an integral part of the wider search into the cultural origins of human populations. This inquiry was in part motivated by abstract scientific concerns, but in part also by the desire to legitimize the national ideologies of the newly emerging nation states of Central and Eastern Europe. Because of the lack of direct documentary sources reflecting earlier forms of culture and the great gap in the published literature on local speech varieties, scholars began to seek new ways of recovering what the German Romantics had called *Versunkenes Volksgut*, the 'sunken folk cultures' of past eras. Along with the quest for new unpublished manuscripts, the search for historical materials on which to base studies of cultural evolution also stimulated direct investigation of unwritten folk speech throughout the world.

Although the development of linguistic tools for comparative reconstruction was the overt goal of nineteenth-century language scholarship, its most important achievement from the social scientist's point of view is the discovery of grammatical structure as the underlying dynamic of all verbal communication. Pioneers of linguistic sciences like Erasmus Rask and Jakob Grimm had already demonstrated that, to capture the regularities of language evolution, one cannot rely on comparison of words as meaningful wholes. One must analyze patterning both at the level of form and at the level of content.

# 10

# Postscript

In attempting to develop interpretive, sociolinguistic approaches to the analysis of verbal strategies, this book has touched on a number of recurrent themes. The objects of study are automatic, context and time bound inferential processes, not readily subject to conscious recall, embedded in oral exchanges which until the advent of modern electronic technology were not accessible to detailed investigation. In order to clarify precisely what it is that is being investigated concrete examples of situated talk have been transcribed and analyzed in such a way as to reveal the working of phonetic, prosodic, formulaic and other contextualization cues in generating the perceptions of discourse coherence on which interpretation must rest. In this Postscript I will review some of the theoretical issues raised by these examples and attempt to show how, when seen in interactional perspective, they can be integrated to lay the foundations for a unified program of research on human understanding.

The study began with a brief historical outline of developments in linguistics that led to the recognition that linguistic processes are basically cognitive in nature. The notion of cognitive processing, which argues that human understanding rests on meaning assessments in which physical reality is selectively perceived, transformed and reintegrated with reference to pre-existing background knowledge, is by now generally accepted. First illustrated in Saussure's concepts of opposition and relationship and in Sapir's phonemic principle, it has been generalized to apply to grammatical, interpretive and cultural phenomena of all kinds. But still very much a matter of dispute are the questions of what form the background knowledge, in terms of which we react to what we see and hear, takes; to what extent it is shared; how it enters into situated meaning assessments, and how the relevant cognitive processes are to be represented.



In the context of nineteenth-century ideology, which saw human society as an aggregate of separate groups, each speaking its own language or dialect and following its own distinctive, historically based cultural tradition, it seemed reasonable to think of languages and cultures as unitary, functionally integrated and internally homogeneous systems of abstract rules. It was assumed that such rule systems, although formally distinct from specific acts, nevertheless determined the standards in terms of which the interpretability and appropriateness of such acts can be assessed. The functionalist view of integrated, supra-individual social structures that stand apart from individual behavior in the same way that Durkheimian social facts are separate from individual beliefs, and thus pre-exist interaction, has come under serious attack by social theorists as incapable of accounting for the facts of life in modern urban societies. Yet related views of structure continue to dominate much current research on language. With Chomskian generative grammar, attention has come to focus on individuals' grammatical competence, but in determining what that competence is, notions of grammaticality which assume uniformity of linguistic rule systems continue to set the standards of evaluation in terms of which the raw data for grammatical analysis is selected. The resulting theories of grammar deal with cognitive processes at a level of abstraction which cannot, and is not intended to, account for the specifics of message interpretation.

Philosophers of language and discourse analysts, who during the last decades have come to be concerned with the semantics of ordinary language, have in fact come to agree that context and participants' socio-cultural presuppositions play a key role in interpretive processes. It is assumed that individuals resort to their knowledge of the world, as well as to lexical and grammatical knowledge, in making sense of what is intended.

Much has been written in recent years about the semantics of discourse coherence, and considerable attention is being devoted to developing formal models of the knowledge structures that enter into interpretation. But discourse analysts concentrate primarily on written texts. The linguistic issues involved tend to be viewed largely as matters of lexical semantics. Analysis begins with particu-

lar context bound utterances or utterance sequences. Questions asked are: "How can we account for our ability to understand the material at hand as we do," "What presuppositions about the world are needed to validate our interpretations," and "How can we represent the process by which such presuppositions are transformed into meaning assessment in formal terms." This approach has been important in pointing to the limitations of sentence based linguistic theory and in clarifying basic semantic considerations relevant to discourse analysis. But the issues are formulated in a way which fails to account for the interactive character of conversational exchanges.

It is one of the main arguments of this book that the conversationalist's problem is not simply one of making sense of a given chunk of discourse. What is to be interpreted must first be created through interaction, before interpretation can begin, and to that end speakers must enlist others' cooperation and actively seek to create conversational involvement. In chapters 4, 5, and 6 a number of examples were given to show that this cannot simply be a matter of prior extralinguistic presuppositions. We induce others to participate in conversational encounters by evoking expectations about what is to come and symbolically alluding to shared values and obligations. While such expectations are ultimately tied to schematic knowledge, they are generated as a function of how these schemata are conveyed in interaction, i.e. by participants engaging in culturally given activities and enacting specific types of social relationships in the pursuit of tacitly shared communicative goals.

The effectiveness of the strategies that speakers adopt in their efforts to create involvement and to cooperate in the joint development of specific themes depends on their control over a range of communicative options and on their knowledge of the signalling potential that these options have in alluding to shared history, values and mutual obligations. This means that the ability to use linguistic variables, to shift among locally current codes or styles, to select suitable phonetic variants, or prosodic or formulaic options, must form an integral part of a speaker's communicative competence. Linguistic variability is thus not simply data to be abstracted from situated usage and aggregated along community lines; it becomes an essential component of the socio-culturally given resources that speakers depend on in their dealing with others, and any theory of conversational inference must account for its functioning.



The above considerations suggest a view of inferential process which is quite different from that current in discourse analysis. If interpretation presupposes conversational cooperation and if such cooperation must be achieved through tacit understandings conveyed in talk, then theories of interpretation cannot rest on distinctions between literal and nonliteral meanings or direct and indirect speech acts. Knowledge of the world and socio-cultural presuppositions must not be regarded as merely adding additional subtleties to or clarifying what we learn from the propositional content of utterances. We must draw a basic distinction between meaning, i.e. context free semantic information obtained through analysis, in which linguistic data are treated as texts, which can be coded in words and listed in dictionaries, on the one hand, and interpretation, i.e. the situated assessment of intent, on the other (Van Valin 1980). Interpretation always depends on information conveyed through multiple levels or channels of signalling, and involves inferences based on linguistic features that from the perspective of text based analysis count as marginal, or semantically insignificant.

Conversational inference is best seen not as a simple unitary evaluation of intent, but as involving a complex series or chain of judgements focusing on both content and on relational assessments of how utterance strings are to be integrated into what we know about our culture and about the immediate situation. We can visualize this process as consisting of a series of stages which are hierarchically ordered in such a way that more general higher level relational assessments serve as part of the input to more specific ones. Knowledge of the basic contextualization conventions and perceptions of contextualization cues play a role at every stage in the process.

The initial assessment in a conversational exchange yields hypotheses about activities or activity types being proposed or enacted. This has both semantic and formal linguistic consequences. It sets up expectations about what the likely communicative outcomes are, what topics can be brought up, what can be expressed in words and thus – to use Brown & Levinson's (1978) phrase – be put on record, and what must be implied by building on tacit understandings. It also suggests styles of speaking, and may, depending on circumstances, specify such matters as what count as expected signals of information flow, how the stream of talk is to be segmented into information units, how interclausal relationships are to be indicated

and how emphasis and expressiveness are to be conveyed, so as to generate the implicatures by which intent is inferred.

At the lower level, decisions are made about more immediate communicative or discourse tasks such as narrating, describing, explaining, requesting, which together constitute specific activities. Whereas activity assessments are culturally specific in the sense that they involve locally sanctioned interpersonal relations, discourse tasks are universals of human interaction. Yet their realization through contextualization conventions is a matter of historically established communicative convention. Investigation showing how relational signs function to signal activities and discourse tasks, how interpretations are agreed upon and altered in the course of an interaction by differentially foregrounding, subordinating or concatenating various information carrying elements, is a major task of interactional sociolinguistics.

The mechanisms by which relational information is signalled differ from lexicalized signs in one important respect. Like the nonverbal signs discussed in chapter 6, they are inherently ambiguous, i.e. subject to multiple interpretations. In conversation such ambiguities are negotiated in the course of the interaction, through the manner in which second speakers respond to what they hear and through the reception that their countermoves receive. Conversational inference is thus not a matter of assigning truth values to instances of talk. An inference is adequate if it is (a) reasonable given the circumstances at hand, (b) confirmed by information conveyed at the various levels of signalling, and (c) implicitly accepted in the course of conversational negotiation.

The notion of contextualization convention enables us to treat what on the surface look like quite separate linguistic phenomena – code and style switching, prosody, phonetic and morphological variation, choice of syntactic or lexical option – under the same heading by showing that they have similar relational signalling functions. It further leads to elicitation procedures that yield replicable information on cultural presuppositions and suggest how such presuppositions are stored and retrieved in the course of an encounter. The information about intent obtained through such procedures is of course limited to what I have called communicative intent. More specific insights about participants' ultimate aims and personal motives cannot be recovered. But the aim of sociolinguistic analysis



is to specify the conditions of possible communication not to determine ultimate meanings.

Communicative competence can be defined in interactional terms as 'the knowledge of linguistic and related communicative conventions that speakers must have to create and sustain conversational cooperation,' and thus involves both grammar and contextualization. While the ability to produce grammatical sentences is common to all who count as speakers of a language or dialect, knowledge of contextualization convention varies along different dimensions. Chapters 3 and 4 argue that this type of variation does not show a one to one relationship to ethnic groups or language and dialect boundaries as established through historical reconstruction, but that discourse level conventions reflect prolonged interactive experience by individuals cooperating in institutionalized settings in the pursuit of shared goals in friendship, occupational and similar networks of relationships. Once established, such conventions come to serve as communicative resources which, by channelling inferences along certain lines, facilitate communication and enable individuals to build on shared understandings which eliminate the need for lengthy explanations. Knowledge of how such conventions work often becomes a precondition for effective participation in longer verbal encounters and for enlisting others' cooperation in activities at home, at work and in public affairs. The knowledge is of a kind that cannot be easily acquired through reading or formal schooling. Face to face contact in situations which allow for maximum feedback is necessary. Potential learners thus face a real dilemma. They must establish long lasting, intensive personal relationships in order to learn, yet their very lack of the necessary strategies for setting up conditions that make possible learning makes it difficult for them to achieve this. In real life situations, learning of discourse strategies is most successful when outside conditions exist which force interlocutors to disregard breakdowns and stay in contact, or give the learner the benefit of the doubt. This is the case in mother-child interactions or in apprenticeship situations at work. Ethnic and class solidarity are among such outside factors.

It is evident that public encounters in modern urban societies are hardly favorable to informal experiential learning. Here contact with others of different ethnic backgrounds tends to be characteristic of public affairs, while friendship circles are limited by similarity of

background. Public situations, moreover, most frequently require evaluation of ability or intent to cooperate and, given the nature of the tensions of urban life, rarely provide the conditions where breakdowns can be disregarded. As a result, the ability to get things done in face to face public settings is often a matter of shared background. Outsiders who enter the urban scene may learn a new language or dialect well at the level of sentence grammar, and this knowledge may be sufficient for the instrumental contacts that fill up much of the working day. But situations of persuasion, where speakers are evaluated on their ability to explain, or to provide adequate descriptions which do not assume shared knowledge, or to produce complex narratives, are often difficult to manage. Here breakdowns lead to stereotyping and pejorative evaluations and may perpetuate social divisions.

To be sure, not all problems of interethnic contact are communicative in nature. Economic factors, differences in goals and aspirations, as well as other historical and cultural factors may be at issue. But we have reason to suspect that a significant number of breakdowns may be due to inferences based on undetected differences in contextualization strategies, which are after all the symbolic tip of the iceberg reflecting the forces of history. The existence of communicative differences must of course be demonstrated. It cannot be presupposed or inferred from grammars or the usual ethnographic descriptions. Here conversational analysis becomes a diagnostic tool to determine whether the linguistic prerequisites of possible communication exist.

In *Language and Social Identity* (Gumperz 1982), the effects of ethnic and communicative differences in rapidly urbanizing social settings are explored in more detail and more specific applications of interactional sociolinguistic analysis will be proposed.

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