

# Language Rights and Immigrant Languages

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## 1.0 Introduction

The ways in which language protection, and more broadly cultural protection, are formulated in the modern world order offer little protection to the languages of immigrants. On the theoretical level, two approaches are currently dominating linguistic and cultural protection: the legalistic human rights approach and a linguistic ecology approach. These apply imperfectly if at all to the immigrant situation, with the result that immigrant languages are consistently at the bottom of political and scientific concerns. In today's talk I will first explore the nature of immigration and the reasons for this gap in our focus. In the second part I will look at practical results for immigrant populations in France and the United States. Finally, I will try to imagine a new place for immigrant languages in both realms, the political and the scientific.

1.1 First we must define the term immigrant. Typically we think of a person who has moved from one country to another. However, frequently even those who have moved from one region to another within a country pose serious language rights issues, even in countries that consider themselves largely monolingual. For instance, in the United States Puerto Ricans who move to the mainland serve as the justification for many language rights granted to others who have moved from other countries. Similarly, the *harkis*, Algerians who fought with France against the independence movement and who moved to metropolitan France at the conclusion of the Algerian War provide a justification for the right to use Arabic that other immigrants from Arab-speaking countries would have a harder time claiming.

Another category of internal immigrants are those of the majority language who are deliberately encouraged to move into regions dominated by minority language speakers, to alter the demography of minority regions. France has repeatedly encouraged resettlement of Alsace with French speakers, and sent to Corsica Acadians in the 18<sup>th</sup> century and French-speaking *pieds noirs* in the 20<sup>th</sup> century. In the early 19<sup>th</sup> century the US withheld statehood from Michigan until it had an Anglophone majority, and a century later did the same to New Mexico.

Other immigrants, external this time, might claim, with solid justification, that they were invited and encouraged to move to one of the countries we are considering: the Braceros in the US, as well as many others before and after. France too has encouraged immigration from Poland for the coal mines of the North, and North Africans for work in the automobile industry, and there are many others examples of this practice.

Thus all general discussion of the rights of immigrants, in the context of this conference the right to use their native language in official settings, must first come to grips with the definition of “immigrant” and the difficulty of distinguishing legally between different classes of immigrants. We cannot assume that all speakers of minority languages, whose languages are national languages in other countries, have moved to the fifty states of the United States (excluding territories) or to metropolitan France (excluding the DOM-TOM) under circumstances that imply acceptance of the dominant language, and desire to assimilate.

1.2 Nonetheless, this is precisely the implication of virtually all human rights legislation, national and international, concerning language. To understand this, we need to take a quick diversion into the history of human rights as a means of solving internal and

external conflict. Human rights are a relatively modern notion, arising in the late 16<sup>th</sup> century, and language rights are even newer still, with limited appearance in the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> centuries, before a dramatic expansion in the 20<sup>th</sup> century. The language rights of immigrants, finally, are essentially the creation of the late 20<sup>th</sup> century, when they are recognized at all. For instance, the Charter for Regional or Minority Languages developed by the Council of Europe, and already ratified by a number of countries, specifically excludes the languages of immigrants from the types of protection offered indigenous languages.

Rights are today seen in terms of claims or powers. A claim is a freedom from having something done, for example a demand that alleged victims can place upon society to insure their freedom of activity in a certain domain. These are often characterized as passive rights, or negative rights: the right not to be discriminated against, for example. A power is the freedom to do something, to take positive steps towards a certain vision of moral justice. These are sometimes called active rights or positive rights.

In the history of human rights, claims are more commonly accepted than powers, and this will have a profound effect on the application of human rights to immigrants. It is much cheaper and easier to get governments to prohibit discrimination than it is to get them to pay for the creation of new services. Claims for tolerance can leave in place a social hierarchy which demands for powers threaten to overthrow.

The earliest human rights were more a matter of tolerance, as in the Edict of Nantes (1598) which tolerated Protestants in a fundamentally Catholic nation. 17th-century philosophers expanded the notion of tolerance to include mutual respect, a

reciprocity resulting from a new way of conceiving the state. Political structures were no longer seen as a matter of divine authority and providence, but rather as dependent on human reason and free will under a social contract between the individual and the state. Under this conception the State is both the guarantor of individual freedom of action, and the biggest threat to that freedom. In recognition of that threat both the French and American statements of rights in the 18<sup>th</sup> century sought to restrict governmental powers to the minimum necessary to allow individuals to seek life, liberty and the pursuit of happiness.

Another formulation is possible, in which the state is given more obligations - education, feeding the hungry, providing shelter, clothing the poor, and – most significantly for our purposes – maintaining cultural identity. The basic material and spiritual needs of human existence become a concern of the State, the State is no longer liberal, but rather authoritarian, or even totalitarian.<sup>1</sup> The proliferation of those needs ends only with death, as Hobbes recognized some 350 years ago.<sup>2</sup> We are a greedy species.

It is the pursuit of that role of the state that has led to a number of national laws and international treaties concerning linguistic and cultural rights. This movement started with the Austrian constitution of 1867 and moved on to the minority treaties following the First World War, in which protections for linguistic and cultural minorities were imposed on the newly created or newly reconfigured countries of Eastern Europe. Following World War II the UN Charter recognized protection from discrimination based on language as a fundamental human right. Eventually such statements expanded to the

wide range of services and accommodations for linguistic minorities expressed in the European Charter for Regional or Minority Languages (1992).

This expansion reflects a change in the motivation for protecting and promoting minority languages. The initial phases of human rights activity in this area were motivated by a desire to stabilize relations between ethnic groups, so that the countries involved would in turn be more stable. More recently, the dominant arguments for cultural rights have depended on notions of linguistic ecology, in which the maintenance of minority languages depends on the equation of language with biological species, and diversity of languages with biodiversity. In the last ten years, since the catastrophic explosion of ethnic violence in the former Yugoslavia, such equations have come under some attack<sup>3</sup>.

1.3 Virtually all of the treaties, conventions and declarations dealing with linguistic rights specifically deny any rights for the languages of immigrants. Kloss (1971:254) outlined four typical arguments behind this:

(a) the tacit compact theory holds that immigrants, by seeking to move to a new country, agree to adapt to the majority language of the new country;

(b) the take-and-give theory states that most immigrants will be better off economically in the new country, and therefore should give themselves over completely to the majority culture of the new country;

(c) the antighettoization theory contends that immigrants who maintain their previous culture are isolating themselves and their children from the mainstream of national life, while at the same time they are unable to keep up with cultural life of their country of origin;

(d) the national unity theory worries that immigrant groups that maintain their language will become a disruptive force in national politics, and therefore will make the host countries unstable.

Each of these theories has problems. The tacit compact theory ignores the fact that in the US immigrants were originally given the means to maintain their original languages, for instance in non-English monolingual schools or in bilingual schools funded by the state. Only with the wave of anti-immigrant hysteria of the period 1890-1920 did the state withdraw that support. The take-and-give theory supposes that the gains are all on the side of the immigrants, and that the new host country has not benefited at least as much if not more by the exchange. Ghettoization is at least as much a result of restrictive practices on the part of the new host country as it is matter of self-isolation, and modern means of communication make isolation from the original country less of a problem. The national unity theory is also most likely a result of mistreatment by the host country, rather than a natural predisposition to disruption based on linguistic difference.

Thus we see that the arguments most frequently forwarded to deny immigrants broad use of their native languages in the new country are largely unfounded. Nonetheless, protections for non-native minority languages are extremely limited. The UN convention on the rights of all migrant workers and their families (1990) protects the language rights of immigrants only in two areas: in the criminal justice system (Articles 16 and 18) and in the right to be educated in the language of the host country (Article 45)<sup>4</sup>. Specifically, this convention requires that at the time of arrest non-citizens be informed of the charges against them in a language they understand. In any preliminary

hearings they may request the aid of an interpreter. Article 45 insists that the state will provide education to the children of migrant workers, and will facilitate their integration into the classroom by providing some special help in learning the language of the host country. This does not support instruction in their native language.

The European Charter for Regional or Minority Languages, put forth in 1992, has not been ratified in France because of opposition from the Conseil Constitutionnel. It specifically excludes immigrant languages from its purview. When France was considering ratification, in 1998 and 1999, two reports were prepared, one by the mayor of Quimper Bernard Poignant, the other by the director of the Délégation Générale à la Langue Française, Bernard Cerquiglini. In the Cerquiglini report, the problems involved in excluding immigrant languages are addressed directly: “dès la seconde génération, les enfants nés de l’immigration sont citoyens français ; beaucoup conservent, à côté du français de l’intégration civique, la pratique linguistique de leur famille.”

The Charter thought it had avoided this question by invoking a distinction between languages “traditionally” spoken in a signatory country, and those languages that are the product of recent immigration. However, in the case of France, colonial history has caused special problems. Typically one might interpret ‘traditionally’ to mean the languages that have been spoken in the hexagon for at least several hundred years: this would limit the Charter or equivalent legislation to French, Breton, Flemish, German, Basque, Catalan, and Italian/Corsican, plus however one wants to divide or consider the other Romance varieties within the territory of metropolitan France: Normand, Picard, Poitevin, Gallo, among the langues d’oïl and Gascon, Languedocien, and Provençal among the langues d’oc, plus Francoprovençal.

French territory, and therefore French citizenship, has extended far beyond the continental holdings plus Corsica. When colonized people from former French territories come to France, their language is still considered as “traditionally spoken in France”. The most common example of such a situation comes from the Arabic or Tamazight (Berber) speakers from North Africa. Other examples are the installation of Hmong speakers, French citizens, in Guyana and Armenians who came to France at the time of the Armenian holocaust in 1915-1916.

Another crucial distinction in the Charter is the notion of territorial languages. Limiting minority or regional languages to those with an identifiable territory works against immigrant languages to the extent that immigrants might be dispersed throughout the country. For instance, the Yiddish speaking community does not have and never has had a particular territory it could call its own. In the end, Cerquiglini recommended that 24 linguistic minorities of metropolitan France be protected under the terms of the Charter, along with some 50 languages of the DOM-TOM<sup>5</sup>.

Another limitation to the range of protected languages is based on a vague notion of endangerment. Only those languages which are not state languages in another country are included. For this reason the languages of most immigrant populations in France are excluded - Chinese, Portuguese, Polish, Russian, Wolof, to name a few - even though there are large communities of French citizens who speak these languages.

Many small communities of other languages from throughout the world, notably from former African colonies (Bambara, Baule, etc.), are excluded as well, even though some of these languages are certainly threatened. This is not to single out France for criticism, simply a recognition that one of the consequences of imperialism is large-scale

immigration from conquered regions, equally true for the United States, the United Kingdom, and Russia, among others.

Other human rights efforts for linguistic minorities, specifically including immigrant communities, have been ongoing. In November 2001 the General Conference of the United Nations adopted the UNESCO Declaration on Cultural Diversity. This document, explicitly connecting the notions of cultural diversity and biodiversity, promotes cultural pluralism in societies, as a means of ensuring the full participation of all citizens in democratic society. Among the action plans, a number relate to the importance of the preservation of languages, by both indigenous and immigrant communities. For instance, article 5 encourages “Safeguarding the linguistic heritage of humanity and giving support to expression, creation and dissemination in the greatest possible number of languages”. Article 6 promotes “Encouraging linguistic diversity – while respecting the mother tongue – at all levels of education, wherever possible, and fostering the learning of several languages from the youngest age.” Article 7 supports “Promoting through education an awareness of the positive value of cultural diversity and improving to this end both curriculum design and teacher education.” All of these have potential impact on immigrants, through the languages used in government services and in education. It remains to be seen, of course, whether this promise will be realized.

Ultimately, then, human rights law has proposed an ever more demanding list of services which the state should provide to help linguistic minorities, including, sometimes, immigrant minorities. The responsibility of the state to provide the means for cultural protection for non-citizens, or for immigrant citizens, is not widely recognized. Only a handful of states have signed and ratified the relevant treaties. For instance, the

UN Convention on the Rights of Migrants has been signed by only one European country, Bosnia-Herzegovina. The US and France have not signed it.

## 2.0 National Practices

While the US and France have not signed these documents, frequently they support such efforts to the same extent as those who have. For this reason, it is worthwhile now to look at actual performance.

Quickly the historical and institutional differences between the two countries reveal themselves. In France, most changes are effected nationwide by ministerial initiative, eventually approved by legislative support. In the United States there are fifty different laws for many of these issues, as the legal domains fall within the purview of state law rather than federal law. What uniformity there is is usually achieved by decisions of the federal court system: first the 94 district courts, then the 12 circuits of the U.S. Courts of Appeal, and finally the U. S. Supreme Court.

Indicative of this institutional distinction between France and the United States is the status of the primary language of the two countries. Since 1539 France has required that all legal activity be conducted in French; this was reaffirmed by the law of 2 Thermidor An II (July 20, 1794) and most recently by an amendment to the French constitution, declaring French the language of the Republic. It was this clause that the Conseil Constitutionnel invoked to reject the Charter for Regional or Minority Languages in 1999.

In the US, English is still not the official language of the country, despite numerous attempts over the past 25 years. 23 states have passed some type of law – constitutional amendment, statute or ballot initiative – concerning the official language.

In some states this is purely symbolic, but a few – Arizona, Alaska, Georgia, Colorado – have passed laws with more serious consequences. In Arizona and Alaska the laws have been declared unconstitutional by state or federal courts of appeal.

Now let us take a quick look at some of the areas frequently found in documents concerning linguistic human rights, and look at how immigrant languages are affected.

## 2.1 France

The mandatory use of French in the legal system began before there even existed grammars and dictionaries of French for native speakers. In fact, the normalization of the diverse compilations of customary law in the late 15<sup>th</sup> and throughout the 16<sup>th</sup> century played an important role in the creation of a norm of the French language (see Kibbee 2003a). This nationwide unification of the criminal and civil justice systems was furthered by reforms of 1667 and 1670, and completed by the creation of the legal codes under Napoléon.

The law of 2 Thermidor An II<sup>6</sup> (July 20 1794) required that all governmental activity be conducted in French, a statute that was confirmed in 1859 by a legal case involving Corsican, *Giorgio c. Masapino*<sup>7</sup>. The primary conflicts in France have not involved the languages of immigrants as much as the languages of annexed territory.

### 2.1.1 Criminal justice

In the criminal justice system, the right of the accused to understand the charges against them and the testimony presented against them was a primary motivation of the acts reforming the justice system in the 15<sup>th</sup> and 16<sup>th</sup> century, including the famous *Ordonnance de Villers-Cotterêts*. This principle was specifically applied to foreigners in France in the legal reform of 1670. Subjects of the king who were speakers of regional

languages did not benefit from the same right to an interpreter much to their disappointment<sup>8</sup>.

Today, in France, the law in force dates to June 15, 2000, and relates to the presumption of innocence. It guarantees that all people held by the police will be informed of their rights in a language they understand. Nonetheless, the practical difficulties are widely recognized. The police are obliged to find an “*interprète assermenté*” in the language in question. If an interpreter cannot be found within one hour, the police are legally obliged to release the suspects. At one AM on a Saturday night the chances of finding an interpreter for Uzbek is so slim that the police frequently don’t even bother to make an arrest for minor crimes, if the perpetrator does not speak a common European language. Dray (2001:14-16) proposed a number of measures to correct abuses of the system, but the failure of the government to recognize in an official manner the wide variety of languages spoken by immigrants in France fundamentally handicaps the criminal justice system.

### 2.1.2 Education

Education is the area in which the language and culture of immigrants is best recognized. The debates about how to assimilate and integrate citizens into the country date to the invasion and acquisition of new territories, primarily in the 17<sup>th</sup> and 18<sup>th</sup> centuries. All of the issues relating to bilingual education, language maintenance, and mastery of the language of the host country have been addressed in much the same terms since France seized Alsace in the Thirty Years War, and subsequently the cities of the *décapole*, culminating in the capitulation of Strasbourg, in 1681. At the time, though, the goal of education was the mastery of Latin, and the state played little role in education. At the

revolution the goal of education became the mastery of French and the language of instruction had to be French (law of November 16-17, 1794 (26-27 Brumaire An III)).

The same principles used to inculcate the language of the Republic to the many residents of the hexagon who did not speak French have been extended in post-revolutionary immigrations to immigrant populations. The ban, often ignored, on using languages other than French in the classrooms of the Republic (except obviously in foreign language classes) has certainly had a negative impact on the success of immigrant populations, and on the maintenance of immigrant languages.

In France several structures are in place to work with immigrants on language questions. The *classes d'initiation au français* (CLIN, at the elementary school level) and the *classes d'accueil pour non-francophones* (at the middle school and high school level; originally CLAD “classes d'adaptation”) work to teach new arrivals French as quickly as possible. The CLIN started as an experimental program in 1968, and became a formal part of the French school system in 1970 (circulaire 70-37 du 13 janvier 1970), along with the CRI (*cours de rattrapage intégrés*). The former provides adapted instruction of all subjects in a simplified French for small groups of non-francophone students, the latter some additional French language courses for students. In 2002 there were 13,000 students enrolled in CLIN programs, and 14,000 in CLA programs. Nonetheless, more than 3500 students who qualified had no special help in acquiring French.<sup>9</sup>

The program *Enseignement des langues et cultures d'origine* provides the opportunity to study the language and culture of their countries of origin to both new arrivals and heritage students (2<sup>nd</sup> and 3<sup>rd</sup> generation immigrants). The ELCO program

began in 1973. It is financed through bilateral agreements with the countries of origin and taught by nationals of that country. At present there are ELCO programs for Turkish, Algerian Arabic, Moroccan Arabic, Tunisian Arabic, Portuguese, Spanish and Italian. All of these programs are supported by the Centres de Formation et d'Information pour la Scolarisation des Enfants de Migrants (CEFISEM), founded in 1975 and recently renamed Centres Académiques pour la Scolarisation des Nouveaux Arrivants et des enfants du Voyage (CASNAV).

The right to an education is guaranteed, with the goal that each child “develop as a person and raise his level of skills, in order to enter social and professional life, and to exercise the rights of the citizen”.<sup>10</sup> Immigrant languages certainly play a role in personal development, but have little impact in the other areas and are promoted, or not promoted, accordingly by the French government. As of 1999 some 80,000 students were taking advantage of the ELCO opportunities. It’s hard to determine what percentage this represents, as it could include second and third generation students as well as the new arrivals<sup>11</sup>. Even supposing the ELCO program were limited to first generation immigrants, it would certainly be less than 10% of the possible students, probably much less.

### 2.1.3 Administrative Services

Administrative services would include such aspects as the provision of information about Social Security benefits, or driving licenses, in immigrant languages. So far as I can tell, none of the thousands of forms that drive the French bureaucracy are available in languages other than French, presumably because such documents would not have legal force, given the constitutional amendment declaring French the language of the Republic.

The obligatory use of French has been promoted equally by the law relating to the use of the French language (4 August 1994), better known as the Loi Toubon, after the name of the Minister of Culture who proposed it. This law forbids the use of foreign terms, primarily by government officials, the use of languages other than French as the language of internal communication in corporations, the use of languages other than French in contracts, and the use of other languages in advertising.

This law is aimed primarily at English, but certainly could be used against immigrant languages. The Québécois laws on which it is based have been applied to the use of Hebrew in public signs. In France, the law is enforced through the efforts of five private organizations, and so far as I can determine from court records and parliamentary reports, it has never been invoked against an immigrant community or its language.

#### 2.1.4 Voting

There are no special provisions made to accommodate voters who might not be literate in French. The rules for citizenship provide for automatic approval, whatever the level of knowledge of French, to certain categories of persons. The relevant group for the purposes of voting would be those aged over 55 years of age, having resided in France for a certain number of years.

An interesting challenge to voting rights has come from an internal migration, the Corsicans. Some Corsican independence movements have called for the right of the Corsican diaspora on the mainland to vote in Corsican elections. This would dilute the importance of the immigration of many French-speaking citizens to Corsica. As this would officially recognize the existence of a Corsican people, distinct from the French people, no French official has been willing to open this Pandora's box.

### 2.1.5 Private Sector

While the provisions in the Loi Toubon that apply to advertising and public signs are primarily aimed at the use of English in these domains, they could conceivably apply to immigrant languages as well. The Loi Toubon has run into direct contradiction to European Union directives, which require, for example, that labels of food products cannot be limited to a single language. For the European Commission such rules are tantamount to an illegal trade barrier between the member states. In August 2002 France agreed to allow multilingual labeling, as long as one of the languages was French. While this insistence on French remains strictly speaking against EU law, the Commission has not pursued the matter further. As EU countries such as Italy, Spain and Portugal have large immigrant populations in France, restricting the sale of items labeled or advertised solely in those languages could have an effect on the maintenance of those immigrant languages. However, to date this has not been the focus of enforcement efforts.

### 2.1.6 France Conclusions

We have only had the opportunity to look at a few areas of potential interest for immigrant languages in France, but the picture is not terribly encouraging. Based on a four-hundred-year-old principle that French is the only legally admissible language in administration and in the justice system, which now carries the weight of a constitutional provision, the use of immigrant languages in the public sphere is extremely limited. Even in the private sphere, restrictions are present in principle, even if they have not been enforced against immigrant languages. The only area in which accommodations have been made to immigrant languages comes in the realm of education, but even there the primary focus is on the assimilation of new arrivals, rather than the maintenance of their

language of origin. It will be interesting to see, as France pursues ever so cautiously a policy of decentralization, the effect this will have on language issues in general, and on immigrant languages in particular.

## 2.2 United States

Although the US proclaims itself a country of immigrants, the picture is not much rosier on this side of the Atlantic. English is not the official language of the United States, but as mentioned earlier, is the official language of a number of states. (For up-to-date information on the current status of official English legislation, consult James Crawford's website <http://ourworld.compuserve.com/homepages/JWCRAWFORD/>.) Typical of the differences between the two countries, French policy has largely evolved from a single principle, while American national policy has developed through a hodgepodge of judicial and legislative reactions to local problems.

### 2.2.1 Criminal Justice

In the criminal justice system, immigrants and their languages are affected by a number of rulings, procedures and practices. As in France, criminal defendants have the right to an interpreter throughout the legal process, and must be told of their rights in a language that they understand. The right to an interpreter was an unofficial practice for many years, but only codified in the 1970s following the court case *U.S. ex rel. Negrón v. New York* (434 F.2d 386, 2nd Circuit, 1970). Negrón had been convicted of murder but prior to and during his trial he had no access to full interpretation, instead receiving short summaries of testimony against him. The decision in his favor led to the Court Interpreters Act of 1978, itself an extension of rule 28(b) of the Federal Rules of Criminal Procedure. All are based on the 6<sup>th</sup> amendment's guarantee of the right to confront

witnesses and to have the effective assistance of legal counsel, and the fifth and fourteenth amendments' guarantee of due process. The Court Interpreters Act of 1978 requires that interpreters be provided for witnesses and defendants in criminal cases before federal courts, and in general the federal example has been followed by lower jurisdictions. However, this leaves out civil cases and even in criminal cases leaves the decision about the necessity of using an interpreter to the discretion of the judge.

The qualifications of the interpreter are frequently an issue. The federal government provides for certification of interpreters in only three languages, Spanish, Haitian Creole, and Navajo. Spanish interpretation constitutes the overwhelming demand, but Berk-Seligson cites demand for 54 other languages at the Federal District Court level in her study of one year (1986) (Berk-Seligson 1990:5). When certified court interpreters are not available, appeals have frequently been based on the use of unqualified persons, such as the use of a Nigerian taxi-driver in *Manuel v. State of Maryland* (1990), or perhaps even more questionably, the use of a police officer in *State v. Mitjans* (Minnesota, 1986).

Even when a qualified interpreter is available, dialectal differences between the standard language and the language of the immigrants can cause problems<sup>12</sup>, Furthermore, all the court records are kept only in English, so the bad translation of a witness' foreign language testimony cannot be challenged on appeal. The result is that the immigrants' languages are devalued with respect to the host language, and devalued again with respect to the standard of their language of origin, and finally excluded from discussion at higher levels of judicial appeal.

Another aspect of the justice system is the selection of jurors. Criminal defendants are guaranteed a trial by a jury of their peers, but in many instances immigrant jurors are excluded, either because they do not speak English, or because they speak a non-English language in which testimony will be given. In the US New Mexico is the only state which permits a non-English speaker to participate in a jury, providing an interpreter for the benefit of a juror<sup>13</sup>. Article VII, §3 states that

The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution; and the provisions of this section and of Section One of this article shall never be amended except upon a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county of the state, shall vote for such amendment.

Generally speaking, jurors are excused from duty if they speak a non-English language in which testimony will be given, on the basis that they will be working from a different record than will those jurors who are dependent on an interpreter.<sup>14</sup> In all cases English is the only official record of the testimony.

### 2.2.2 Education

In the realm of education, variety is the rule. Since the founding of the United States, immigrant groups frequently established schools in their own languages. Even when the state took over much of the responsibility for primary and secondary education, schools in immigrant languages or bilingual schools in both English and the immigrant language were common. In 1900 more than 600,000 American children (4% of the school-age population) were receiving instruction partly or exclusively in German (Crawford 1992: ). The tide began to turn in the ever-growing tide of xenophobia which started with the economic depressions of the 1890s and culminated in the anti-German hysteria of the World War I era<sup>15</sup>. As a result, in a number of states instruction in a language other than

English was limited by statute to students who had reached the age of 14, the reasoning being that by that point “American values” were sufficiently instilled in the student to risk knowledge of a foreign language. These laws were struck down by the Supreme Court in *Meyer v. Nebraska* (1923), even though the court was convinced that such protections were in fact useful<sup>16</sup>.

The failure of schools to address the needs of limited-English-proficient students finally came to the attention of the US congress in the late 1960s, with the passage of the Bilingual Education Act (1968). The courts followed with *Lau v. Nichols* (1974). In this case the court found that providing equal access to education was not enough, if that education was incomprehensible to the students, in this case the Chinese-American students in the San Francisco public schools<sup>17</sup>. In general the policies supported in the regular renewals of federal funding for the Bilingual Education Act have oscillated between support for language maintenance programs and transitional bilingual education programs that concentrate on leading students to rapid mastery of English, but President George W. Bush’s incredibly misnamed “No Child Left Behind” bill effectively dismantled federal support for bilingual education in 2002.

Some of the most important cases in the early history of bilingual education have come from here in Texas, where until the 1970s Latino children were routinely funneled into “Mexican schools” or special education programs.<sup>18</sup> The most recent development in this saga has been the movement, funded by California multimillionaire Ron Unz, to have bilingual education eliminated by state ballot initiatives. Unz has successfully pushed these laws in California (1998), Arizona (2000) and Massachusetts (2002), failing only in Colorado (2002). In the face of these repeated attacks, many states or local school

districts have continued to support significant and successful instruction in both English and the immigrant's language. In my home town of Urbana Illinois, children from some forty different language communities receive both first language and ESL training.

### 2.2.3 Administrative Services

On August 11, 2000 President Clinton signed Executive Order 13166 Improving Access To Services For Persons With Limited English Proficiency (LEP). It requires every Federal agency to examine the services it provides and to develop and implement a system by which LEP persons can meaningfully access those services. In spite of repeated challenges (H.R. 300 currently before the House of Representatives would eliminate all funding related to implementation of this order), President Bush has upheld it. Many states offer services in a number of languages.

At the national level, the provision of services in other languages is the focus of repeated attempts to add an English Language Amendment to the constitution. This is currently before the House of Representatives as H.R. 997, the so-called "English Language Unity Act". Its aims are "to declare English as the official language of the United States, to establish a uniform English language rule for naturalization, and to avoid mis-constructions of the English language texts of the laws of the United States". Among the provisions is section 163 (a), which requires that "the official functions of the Government of the United States shall be conducted in English". These have been proposed without success every session since 1981.

State legislatures have passed many such laws. For instance, in the state of Georgia a statute passed in 1996 reads:

The English language is designated as the official language of the State of Georgia. The official language shall be the language used for each public record, as defined in Code Section 50-18-70,

and each public meeting, as defined in Code Section 50-14-1, and for official Acts of the State of Georgia, including those governmental documents, records, meetings, actions, or policies which are enforceable with the full weight and authority of the State of Georgia.

Thus we see that federal services work on one set of rules, and state services on fifty different sets of rules. As the federal government unloads more and more administration of services onto the states, immigrant communities will be less and less well served. The one unifying element in state behavior was, until recently, Title VI of the Civil Rights Act of 1964.

However, the right of private individuals to sue for enforcement has recently been curtailed. Under Title VI of the Civil Rights Act of 1964, citizens have had the right to bar the federal government from using tax dollars to support policies that discriminate against people on the basis of race, national origin or sex. The proof of discrimination was discriminatory effect, regardless of the intent of the law. Federal courts have enforced their findings by threatening to withhold federal tax dollars for the offending state. A recent case in Alabama has changed the basis for such decisions.

Alabamans had passed their driver's license examination in at least fourteen languages, until 1990, when the legislature amended the state constitution to make English the official language of Alabama. This limitation was challenged in *Sandoval v. Hagan*, filed in 1996 and decided in 1998, in which Martha Sandoval submitted a class action law suit, contending that the state of Alabama was discriminating against all non-English-speaking residents of Alabama by not offering the test in a language they could understand. Citing *Meyer v. Nebraska's* assertion that "the protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue", the district court ruled that Alabama's English-only law was unconstitutional, a decision reaffirmed by the Eleventh Circuit in 1999.

The state appealed the decision to the Supreme Court. In a 5-4 decision (*Alexander v. Sandoval*), the Court held that discriminatory effect was not sufficient. Discriminatory intent had to be proven. This is a much higher standard, almost impossible to meet. This precedent has many potential repercussions for the rights of immigrants.

#### 2.2.4 Voting

Voting allows citizens to participate in the democratic process, and elect representatives who will speak to their issues. For years literacy tests and other devices were used to keep immigrant populations from voting. The Congress eventually recognized this fact and since the 1970s, ballots and other voting materials must, in certain demographic situations, be made available in languages other than English. The Voting Rights Act of 1965 prohibited literacy tests in the south, where they were used to keep African-Americans from voting. It was noted then that Puerto Ricans living in New York were disenfranchised because the literacy tests there were given only in English. The renewal of the VRA in 1970 thus stipulated that literacy tests would be banned nationwide.

In the 1975 renewal, the Congress took a more positive approach, prohibiting English-only elections and prescribing other remedial devices. This was in reaction to a suit filed in Illinois, the *Puerto-Rican Organization for Political Action v. Kusper* (1972). Judge Sprecher's decision in 1973 declared that "the right to vote encompasses the right to an effective vote... a Spanish-speaking Puerto-Rican is entitled to assistance in the language he can read or understand". Since Puerto Rico is a U.S. territory, Puerto Ricans are internal migrants in the US, but the law has always been interpreted as applying to all non-English-speaking citizens, whatever their country of origin. In the current

gubernatorial recall election in California, ballots will be prepared in seven languages (English, Spanish, Chinese, Vietnamese, Japanese, Korean and Tagalog).

Bilingual ballots are required only under certain conditions. 5% of the voting-age population of a jurisdiction must be from a single minority group. Within that jurisdiction the English language literacy rate must be below the national average, or else the preceding presidential election must have attracted less than 50% of the potential voters.

While conservative groups, and even National Public Radio commentator Daniel Schorr, have complained about the expense of providing such a service, in fact the costs are minimal. In San Francisco bilingual ballots cost the city 16/10000 of one percent of the city's annual budget (Crawford 1992:262).

Another voting rights issue is the redrawing of political boundaries to insure minority representation, an issue that has received considerable attention here in Texas in recent months. If immigrant populations are subdivided among many jurisdictions, they will not be represented by someone who speaks their language. In the city of Chicago there is a legislative district shaped like the claws of a crab so that Latino voters will have a Latino representative in the US Congress (Luis Gutierrez). Texas is not new to these arguments, as a number of the legal precedents in reapportionment for immigrant communities come from Texas, including *U.S. v. Uvalde Consolidated Independent School District* and *Caserta v. Village of Dickinson*, both from 1980.

Both in voting and in representation the democratic process was historically closed to immigrants, even after they had become citizens. Since the 1970s some

progress has been made to allow immigrant languages into the American political process, but this progress is constantly threatened, particularly at the state and local level.

#### 2.2.5 Private Sector

In the private sector, several issues have dominated discussion. Most prominent is the debate over English-only rules in the workplace. The other three areas are accent discrimination<sup>19</sup>, the language of warning labels<sup>20</sup>, consumer fraud<sup>21</sup>, and the language of public signs<sup>22</sup>. Space permits me to develop only the first issue in this paper.

Language groups are not, in and of themselves, protected classes in US law. That is, discrimination is prohibited on the basis of race, color, religion, sex or national origin, but not on the basis of language. Therefore discrimination on the basis of language has to be pursued on the basis of national origin. Title VII of the Civil Rights Act of 1964 applies to employers with more than 15 employees. It forbids employers to fire, refuse to hire, or “otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment”. Further guidelines developed by the Equal Employment Opportunity Commission target rules requiring that English be the only language used in the workplace, and requires that they be applied only at certain times, and only when the employer can prove that it is a business necessity<sup>23</sup>.

In one of the early cases, *Garcia v. Gloor*, a Spanish-speaking lumber company employee in Brownsville, Texas was fired for speaking his native language with another Spanish-speaking employee. He had been hired precisely because he was bilingual, and could speak Spanish with Spanish-speaking customers. However, the use of Spanish between employees was strictly forbidden. The court sided with the company, as it has most frequently. However, there are exceptions. Just this summer casino workers in

Colorado won a 1.5 million dollar settlement (*EEOC v. Anchor Coin Inc.*). Complaints before the EEOC have grown from 32 in 1996 to 228 in 2002, although there is a slight downward trend since the Bush administration took office (peak of 253 in 2000; see Ogletree, *et al* 2003).

The enforcement of English-only laws is one of the most destructive practices in the marginalization of immigrant languages. The dismantlement of Title VII protections is a constant refrain from organizations representing business interests, and appears regularly in English-only legislation. The ruling in *Alexander v. Sandoval*, mentioned above, which requires proof of discriminatory intent as opposed to the easier standard of disparate impact, will certainly affect future judgments on the use of immigrant languages in the workplace.

#### 2.2.6 U.S. Conclusions

In the United States, there is a constant struggle between recognizing immigration as a vital part of the country's history and future, and a desire to create a homogenous country unified both ideologically and ethnoculturally. Given the nature of the American political and judicial institutions, the legislative side has produced no unity of policy or practice. Unity is achieved only through court rulings. However, both the legislative and judicial institutions are structured in such a way that immigrant populations and therefore immigrant languages are at a severe disadvantage.

Solutions favorable to immigrants and their languages are unlikely in the legislative arena because elected officials react only to those who can or are likely to influence their election. This population group is overwhelmingly white, overwhelming born in the United States, and overwhelmingly monolingual.

The federal judiciary, which is not elected but rather appointed for life, has the opportunity to demonstrate courage and reason where legislative bodies, state and federal, frequently succumb to the temptations of anti-immigrant demagoguery. Without federal court rulings, many states would undoubtedly furnish no protection whatsoever for the use of immigrant languages. Unfortunately, recent Supreme Court rulings threaten the promise of civil rights protections. Such precedents are exceedingly difficult to reverse<sup>24</sup>.

A fundamental problem for both the legislatures and the judiciary is the ignorance of basic facts concerning languages. Their perception of languages and their conception of what constitute paradigmatic cases of immigrant language use are a major hurdle to overcome. In the next section we shall consider the impact of these factors, and what might offer hope for change.

### 3.0 Immigrant languages in the scientific and political realms

We opened this discussion with the problem of defining “immigrant” in a political and legal way. One might distinguish:

1. internal vs. external immigrants;
2. guest workers vs. refugees;
3. political refugees vs. economic refugees.

Many other categories are imaginable. All will have an impact on the ease with which immigrants will adapt to their new linguistic surroundings.

Similarly, there are many categories of immigrant languages. We might classify them by such criteria as:

1. the degree of difference between the language of origin and the language of the host country;
2. the degree of standardization / grammatization of the language of origin;
3. the relationship between the standardized language of the host country and the variety of that language which the immigrants might come into contact with;
4. the relationship of the standardized language of origin (if there is one) and the variety of that language which the immigrants bring with them.

This is by no means an exhaustive list, but it does point out the importance of linguistic variation and linguistic contact.

State programs in the United States and France assume a paradigmatic immigration situation in which literate speakers of the standard variety of an official language moves to a host country where they encounter literate speakers of the standard variety of the official language of the host country. In such a circumstance one might be able to understand the impatience on the part of politicians and their electors for a rapid assimilation, even if in fact it is not so easy even under those conditions<sup>25</sup>.

The reality, of course, is quite different. Rarely do the immigrants have this type of knowledge, and they usually encounter host country residents with these language skills in the official language of the host country only in official circumstances. For the most part they are learning English or French from those living around them, usually the immediately preceding immigrant population and the next poorest and ill-educated after themselves. Rarely are their schools as well-equipped or as well-staffed as those of the children of the politicians who are casting judgment upon them. Therefore, in the justice

system, certified interpreters will be speaking with defendants who speak a very different variety of the language in question. In education, language maintenance programs designed to help students retain their skills in the language of their countries of origin, are in fact teaching them a language that their parents and grandparents do not speak. Transitional bilingual education programs that assume that a student is starting from a standardized language lead to disappointing results. Well-intentioned teachers who start with a contrastive analysis of Castilian Spanish and standard American English will not find that much use in teaching immigrant children who speak Salvadoran Spanish and are learning Spanglish on the streets and African American Vernacular English from their favorite rappers.

Much more realistic are language policies based on real linguistic data. For instance, language programs that encourage students to analyze their own language, before applying grammatical categories to the standard language they are trying to learn<sup>26</sup>, or the appropriate use of the Ebonics program.

The sociolinguist, being the person most aware of real language practices, has much to offer in educating policy makers and those who would implement those policies. By describing the realities of the languages in play, and replacing the myths of the ideal paradigm, we can better address issues of inequality.

At the same time the policy makers have to take up the challenge to attack inequity in a much more aggressive way. The “rights” approach to helping immigrants has had little effect. The standard for proof of discrimination has been set so high, the loopholes are so broad, that we must now insist on results and not on good intentions. Unequal results must be interpreted as a consequence of unequal treatment. A realistic

description of linguistic practice and a legal obligation to produce results hold more promise for a future in which immigrants and their languages can thrive.

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<sup>1</sup> See Mourgeon, pp. 27-30.

<sup>2</sup> Hobbes, *Leviathan* (1661), Ch. 11: BY MANNERS, I mean [...] those qualities of mankind that concern their living together in peace and unity. To which end we are to consider that the felicity of this life consisteth not in the repose of a mind satisfied. For there is no such *finis ultimus* (utmost aim) nor *summum bonum* (greatest good) as is spoken of in the books of the old moral philosophers. Nor can a man any more live whose desires are at an end than he whose senses and imaginations are at a stand. Felicity is a continual progress of the desire from one object to another, the attaining of the former being still but the way to the latter.

<sup>3</sup> See Kibbee 2003b for further discussion.

<sup>4</sup> **Article 16**

5. Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them...

8. Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

**Article 18**

3. In the determination of any criminal charges against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

(a) To be informed promptly and in detail in a language they understand of the nature and cause of the charge against them;...

(f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court;

**Article 45**

2. States of employment shall pursue a policy, where appropriate in collaboration with the states of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.

3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, states of origin shall collaborate whenever appropriate.

4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the states of origin.

<sup>5</sup> The languages of metropolitan France that are listed are: dialecte allemand d'Alsace et de Moselle; basque; breton; catalan; corse; flamand occidental; francoprovençal; occitan (gascon, languedocien, provençal, auvergnat-limousin, alpin-dauphinois); langues d'oïl : franc-comtois, wallon, picard, normand, gallo, poitevin-saintongeais, bourguignon-morvandiau, lorrain; berbère; arabe dialectal; yiddish; romani chib; arménien occidental.

<sup>6</sup> Art. 1. - À compter du jour de la publication de la présente loi, nul acte public ne pourra, dans quelque partie que ce soit du territoire de la République, être écrit qu'en langue française.

Art. 2. - Après le mois qui suivra la publication de la présente loi, il ne pourra être enregistré aucun acte, même sous seing privé, s'il n'est écrit en langue française.

Art. 3. - Tout fonctionnaire ou officier public, tout agent du Gouvernement qui, à dater du jour de la publication de la présente loi, dressera, écrira ou souscrira, dans l'exercice de ses fonctions, des procès-verbaux, jugements, contrats ou autres actes généralement quelconques conçus en idiomes ou langues autres que la française, sera traduit devant le tribunal de police correctionnelle de sa résidence, condamné à six mois d'emprisonnement, et destitué.

Art. 4. - La même peine aura lieu contre tout receveur du droit d'enregistrement qui, après le mois de la publication de la présente loi, enregistrera des actes, même sous seing privé, écrits en idiomes ou

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langues autres que la française” (AP 93:367-368; see also *Moniteur universel* n° 304, 4 thermidor/July 22, 1794)

<sup>7</sup> August 4, 1859 Exceptions had been made to allow legal activity to continue in Corsican until legal professionals had had time to learn French (law of 19 Ventose An XIII (March 10, 1805)). More than fifty years later, this transition had still not occurred, and the mainland courts had no more patience. In *Giorgio c. Masapino*, the Cour de Cassation declared null and void a “exploit d’ajournement” written in Italian in Corsica. This ruling is important because it reimposed the conditions of the act of 2 Thermidor II. The decision was that the suspensions were indeed temporary. The Court declared that it was inadmissible that Corsica be treated any differently from any other region of France: “Il n’y a aucune distinction à faire entre la Corse et les autres portions du territoire français”. (D.P. 1859.1.453).

<sup>8</sup> Bornier 1716, II:157 recounts the debate over this point.

<sup>9</sup> Figures provided in a Radio France Internationale report “Scolarisation des “nouveaux arrivants”: les structures manquent en France”. <http://www.rfi.fr/fichiers/MFI/Education/522.asp>

<sup>10</sup> “développer sa personnalité, d’élever son niveau de formation initiale et continue, de s’insérer dans la vie sociale et professionnelle, d’exercer sa citoyenneté” (décret du 6 décembre 1989).

<sup>11</sup> Noiriel (2002:42) estimates that 20% of children born in France today have an immigrant parent or grandparent.

<sup>12</sup> See for example *State v. Gomez*.

<sup>13</sup> The law goes back to at least the territorial statutes of 1859 (Compiled Laws, 496). The issue was addressed at some length in *Territory v. Romine* (1881); the current provision is included in Article VII, § 3 and has been recently reaffirmed by *State v. Rico* (2002)

<sup>14</sup> The famous case in this instance is *U.S. v. Perez* 658 F 2<sup>nd</sup> 654 (1981). It included the following exchange:

Dorothy Kim (Juror no. 8): Your honor is it proper to ask the interpreter a question. I’m uncertain about the word La Vado [*sic*]. You say that is a bar.

The Court: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me...

Dorothy Kim: I understand it to be a restroom. I could better believe they would meet in a restroom than a public bar if he is undercover.

The Court: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn’t understand and we’ll place the ...

Dorothy Kim: I understand the word La Vado [*sic*] – I thought it meant restroom. She translates it as bar.

Ms. Ianziti: In the first place, the jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.

Dorothy Kim: You’re an idiot. (*Id.* at 662)

<sup>15</sup> For a summary of legal actions taken to restrict the use of immigrant languages during this period see Scharf 1999.

<sup>16</sup> “To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.” *Meyer v. Nebraska* 262 U.S. at 398.

<sup>17</sup> At the appeals court level Shirley Hunstedler argued:

The state does not cause children to start school speaking only Chinese. Neither does the state cause children to have black skin rather than white, nor cause a person charged with a crime to be indigent rather than rich. State action depends upon state responses to differences otherwise created.

These Chinese children are not separated from their English-speaking classmates by state-erected walls of brick and mortar, but the language barrier, which the state helps to maintain, insulates these children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segregated Blacks in *Brown v. Board of Education*; these children cannot communicate at all with their classmates or teachers...Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk.

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<sup>18</sup> In 1981 U. S. District Judge William Wayne Justice found that the State of Texas had “vilified the language, culture and heritage of [Hispanic] children with grievous results” and mandated bilingual education in elementary and secondary schools (K-12) (*US v. Texas*).

<sup>19</sup> See the seminal article by Mari Matsuda (1991).

<sup>20</sup> See Dillard (1994) and Maciejewski (1994).

<sup>21</sup> See Bender (1996) and Lim (2003).

<sup>22</sup> This is a more explosive issue in Quebec than in the US, but U.S. cases are not unknown. The most frequently cited case is *Asian American Business Group v. City of Pomona* (1988). For a recent discussion see Rodriguez 2001. In Quebec, Bill 22 (1974), Bill 101 (1977) and Bill 178 (1988) have addressed this issue, and complaints from the Anglophone community have reached all the way to the UN Human Rights Commission (Ballantyne, Davidson and McIntyre v. Canada, March 31, 1993 (CCPR/C/47/D/359/1989 and 385/1989/Rev.1)).

<sup>23</sup> EEOC Guidelines on Discrimination Because of National Origin, 29 C. F. R. §§1606.1, 1606.7 (1987):

(a) A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunity on the basis of national origin which could result in a discriminatory working environment. Therefore the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity. (Cited in Crawford 1992:270-271)

<sup>24</sup> An example of the abuse of precedent even in the face of obvious error is the use of the 1849 Massachusetts decision *Roberts v. City of Boston* to support racial segregation in the public schools for more than a century afterwards. For a fascinating account of the legal process invoked in the long struggle for desegregation, see Irons 2003. Unfortunately, in this area as in the case of language protections, the promise of the 1960s has been undermined by rulings of the federal judiciary since the mid 1990s.

<sup>25</sup> (Monolingual) authorities have always underestimated the time required to master another language. In 1685 the *prêtre royal* wondered why the inhabitants of Strasbourg were not yet fluent in French, four years after the capitulation of the city: *Il y a déjà quatre ans que la ville de Strasbourg est sous la domination du Roi, qui est un temps assez long pour se préparer à l’usage de la langue française*” (cited in Lévy 1929:295).

<sup>26</sup> Such a program was described by Thierry Pagnier at the conference on the “parlers jeunes”, held at the Institut National des Langues Et Civilisations Orientales (Paris) in June 2003.

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