

## MINORITY LANGUAGE RIGHTS: HISTORICAL AND COMPARATIVE PERSPECTIVES

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### *I. Introduction*

Language is an instrument of communication that brings us together. Language is an element of identity that distinguishes us from one another. Language education is a means of leveling the playing field and giving all an equal opportunity. Language education is a way of destroying non-official languages and non-standard language varieties and inevitably disfavors native speakers of those other languages and language varieties. Such are the paradoxes that every government must confront, from the largest to the smallest. Today, these questions of community and nation are being influenced by international organizations and treaties, transforming practice in spite of national traditions and a lack of enforcement powers. Enforcement of such provisions remains primarily national and internal in the wealthy countries and international and external for the poorer countries, such as the new members of the European Union.

With some 6,000 languages distributed in 192 member states of the United Nations, every country has minority language issues. Achieving harmony and peace among peoples of different languages and cultures has depended on making all peoples feel that they are part of a given political entity, that their existence is not threatened. Failure to achieve those goals has exacted a heavy price, contributing directly to the First and Second World Wars as well as to numerous more localized conflicts. As a result, after each of these world wars the international community has attempted to address minority

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rights. President Woodrow Wilson of the United States declared, at the Peace Conference following World War I, “[n]othing. . . is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities.”<sup>1</sup>

In the following remarks, I shall first analyze definitions of minorities and minority languages and then look at the origins of the Western tradition of human rights in general and linguistic rights in particular. Then we shall examine how different national traditions have given institutional recognition to linguistic minorities. Finally, we shall look at one example of the types of problems that remain even if minorities are recognized and granted some protection.

## *II. Linguistic Minorities*

Defining a linguistic minority might seem easy, but is in fact far from it, and the application of laws to protect linguistic minorities is even more difficult. Most recently, the Venice Commission gave up defining minorities claiming that such a definition “could even lead to a weakening of the minority rights regime.”<sup>2</sup> The most

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<sup>1</sup> PABLO DE AZCÁRATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES. AN EXPERIMENT 167-168 (1945).

<sup>2</sup> European Commission for Democracy Through Law (Venice Commission), Report on Non-Citizens and Minority Rights (Jan. 2007), available at [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)001-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)001-e.asp) (last visited Mar. 12, 2008). The 2007 report from the Venice Commission focuses on the question of citizenship and the granting of minority rights, but includes a lengthy discussion of the problem with arriving at an international legally binding definition of “minority.” The fear is that such a definition would “be likely to reflect only the smallest common denominator.” *Id.* A certain measure of conformity with respect to the policies desired is achieved through such instruments as the Framework Convention on the Protection of National Minorities (FCNM), but this text has many loopholes that permit states to avoid doing anything. Just to take the example of education, the FCNM requires states to permit national minorities to set up private educational establishments, to permit persons belonging to a national minority to learn their minority language, and, if the minority has “substantial numbers,” states are encouraged to provide “adequate opportunities” for minorities to be taught the minority language or to receive instruction in that language. Framework Convention for the Protection of National Minorities and Explanatory Report (Feb. 1995), available at [http://www.coe.int/T/e/human\\_rights/](http://www.coe.int/T/e/human_rights/)

commonly cited definition<sup>3</sup> of a linguistic minority is found in Francesco Capotorti's UN report of 1977:

A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State, possess ethnic, religious or

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Minorities/2.\_FRAMEWORK\_CONVENTION\_(MONITORING)/1.\_Texts/H(1995)010%20E%20FCNM%20and%20Explanatory%20Report.asp (last visited Mar. 12, 2008). Now for the loopholes: national minorities can set up private educational establishments but the national government can still control the curricula. There is no definition of “substantial numbers” that require such action. The state alone has the right to determine what makes opportunities “adequate.” Even if the state accepts this obligation, it can simply offer courses about the minority language, and not instruction in all subjects in the minority language. Furthermore, all of this is only undertaken “as far as possible and within the framework of their (the states’) education systems.” *Id.* To the extent that definitions might limit the escape routes for states who want to appear accommodating without actually doing anything, definitions are perhaps not as dispensable as the Venice Commission decided. *Id.*

<sup>3</sup> The definition of minorities has been described as an “insurmountable task.” Felix Ermacora, *The Protection of Minorities Before the United Nations*, 182 RECUEIL DES COURS 247, 269 (1983-IV). It has a long history before Capotorti, even within the United Nations. Ermacora sees the problem as a confusion of scientific and political requirements for such a definition. The Sub-Commission charged with this task in 1950 had three categories: (1) non-dominant groups that have and wish to preserve stable traditions or characteristics markedly different from those of the rest of the population; (2) they need to be numerous enough to preserve such traditions or characteristics; (3) they must be loyal to the state of which they are nationals. *Id.* at 269-270. The first category requires further elaboration on what the Sub-Commission means by “stable” and “markedly.” The second is a judgment of feasibility. No one has determined, even within the context of language endangerment studies of recent years, the minimum number of speakers necessary for survival. The third criterion excludes groups seeking separation from the state, a major concern for many of the UN’s member states. *Id.* In 1951 the British member of the Sub-Commission added wording excluding two more types of minorities – dominant minorities (seemingly already covered in (1) above and “those seeking complete identity of treatment with the rest of the population.” *Id.* at 270. The latter was thought to be purely a discrimination case already covered by the Charter of the United Nations and the International Covenant on Human Rights. *Id.* Because of a political impasse between Soviet bloc countries and Western European countries, the Sub-Commission abandoned efforts to arrive at a definition of minorities in 1955. *Id.* at 270-271. The U.N. Economic and Social Council gave Professor Capotorti the job of defining “minority” in 1971. *Id.* at 275.

linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>4</sup>

This is a very complex definition that needs to be examined in detail. First, the word “group” denotes a collectivity. This is important because a number of States claimed that they gave equal protection to all individuals, and therefore did not need to offer special protections to groups.<sup>5</sup> That does not explicitly require that the group be either self-defined or defined by the State in which it resides. In the European Charter for Regional or Minority Languages, States were given the power, within certain guidelines, to decide which groups they would recognize as minorities. However, these guidelines were often ignored.<sup>6</sup>

The second characteristic of a linguistic minority is numerical: there are fewer people in the minority group than in the majority. Yet this is also not so clear. A linguistic community can be a minority in a smaller political entity, but a majority in the nation-state. This was the conundrum faced by the United Nations Human Rights Committee (UNHRC) when it considered the case of *McIntyre v. Canada* in 1981. The UNHRC deftly avoided the issue.<sup>7</sup> Capotorti’s definition falls clearly on the side of the state as a whole, without considering the state’s subdivisions; a decision that opens

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<sup>4</sup> FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES*, ¶ 21, U.N. Doc. E/CN.4/Sub.2/384/Add.1-7, U.N. Sales No. E.78.XIV.I (1977).

<sup>5</sup> Brazil, for example, protested that “the mere existence of different groups in a territory under the jurisdiction of a single state did not make them minorities in the legal sense. A minority resulted from conflicts of some length between nations, or from the transfer of a territory from the jurisdiction of one state to that of another.” Therefore if a group had never been a “nation,” it could not be a minority within a new state, or similarly, if a group had not been part of one state annexed by another, it could not claim such guarantees. FERNAND DE VARENNES, *LANGUAGE, MINORITIES AND HUMAN RIGHTS* 136 (1996).

<sup>6</sup> Eur. Consult. Ass., *European Charter for Regional or Minority Languages*, Doc. No. 148 [hereinafter *European Charter*].

<sup>7</sup> *McIntyre v. Canada*, Communication No. 359/1989 U.N. Doc. CCPR/C/47/D/359/1989 (1993).

the doors to discrimination at the local level. This problem has been apparent in the American context, where English speakers have used anti-discrimination statutes and precedents to argue that English speakers are victims in certain circumstances. For example, in *McNeil v. Aguilos*,<sup>8</sup> a nurse at Bellevue Hospital in New York filed a complaint against her Filipino colleagues, alleging discrimination against herself as a speaker of English. Ms. McNeil was unsuccessful in her effort for reasons outside the scope of this issue, but similar arguments for the protection of majority English-speakers are used to defend the imposition of English-only rules in the workplace in other cases.<sup>9</sup>

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<sup>8</sup> *McNeil v. Aguilos*, 831 F. Supp. 1079, 1081 (S.D.N.Y. 1993).

<sup>9</sup> *Id.* at 1083-1088. Typically employers have argued that English-only rules in the workplace are necessary either for safety or for morale. The fear is that employees using other languages might be talking about their co-workers. *See also Garcia v. Gloor*, 618 F.2d 264, 267 (5<sup>th</sup> Cir. 1980), in which the business owner cited politeness towards customers, the need to improve workers' command of English, and the ability of supervisors to understand what workers were doing as reasons to impose an English-only rule in his lumberyard. *Id.* Some ten years later, the Ninth Circuit in *Garcia v. Spun Steak* held that English-only rules do not constitute discriminatory impact, in that such rules do not adversely affect the "terms, conditions and privileges of employment":

The plaintiff may not merely assert that the policy has harmed members of the group to which he or she belongs. Instead, the plaintiff must prove the existence of adverse effects of the policy, must prove that the impact of the policy is on terms, conditions, or privileges of employment of the protected class, must prove that the adverse effects are significant, and must prove that the employee population in general is not affected by the policy to the same degree.

*Garcia v. Spun Steak*, 998 F.2d 1480, 1486 (9<sup>th</sup> Cir. 1993). Title VII does not protect the expression of one's cultural heritage at work. Privilege is something granted by the employer, and the court decided that denying the privilege of speaking in one's native language is an inconvenience not an impediment to the bilingual employee. Finally, the court concluded that English-only rules do not, by themselves, create a hostile work environment for a linguistic minority. *Id.* In this context, minority is not the same as the notion of "protected class" in U.S. law. A protected class does not have to be numerically inferior to its non-protected counterpart, as women are a protected class, though more numerous in the latest U.S. census than men (2002 census data: 144 million women, 138 million men). RENEE E. SPRAGGINS, *WOMEN AND MEN IN THE UNITED STATES: MARCH 2002 POPULATION CHARACTERISTICS* (2003), <http://www.census.gov/prod/2003pubs/>

Furthermore, the numerical criterion poses further problems. In some countries, there is no majority language, in the sense of being the mother tongue of more than fifty percent of the population. For example, in Côte d'Ivoire, there are seventy-eight distinct languages listed in the *Ethnologue* survey, none coming close to a majority.<sup>10</sup> Every language in that country is thus, potentially, a minority language. The “dominant”/“non-dominant” distinction might permit Baoulé and Dioula to be eliminated from the list of minority languages, but many still remain.

The majority-minority distinction sets an upper limit on the percent of speakers who can be considered as speaking a minority language, but practical reasons may also dictate a lower limit. A very small group may not be viable for the kinds of protections considered within minority rights law. Often, American minority language protection requires a certain lower limit, such as a rule requiring at least five percent of the voting district speak a language in order for that language to qualify for a bilingual ballot.<sup>11</sup> Offering a full palette of services for the maintenance and protection of smaller

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<sup>10</sup> RAYMOND G. GORDON, JR., *ETHNOLOGUE: LANGUAGES OF THE WORLD*, (Gordon ed., SIL International 15th ed. 2005) (1951), *available at* [http://www.ethnologue.com/show\\_country.asp?name=CI](http://www.ethnologue.com/show_country.asp?name=CI). Ethnologue is a project of SIL International, formerly known as the Summer Institute of Linguistics, a Christian organization devoted to the translation of the Bible into many languages. *Id.*

<sup>11</sup> The Voting Rights Act (Public Law 102-344) specifies in section 203 that [a] state or political subdivision must provide language assistance to voters if more than 5 percent of the voting age citizens are members of a single-language minority group who do not ‘speak or understand English adequately enough to participate in the electoral process’ and if the rate of those citizens who have not completed the fifth grade is higher than the national rate of voting age citizens who have not completed the fifth grade.... A political subdivision is also covered if there are more than 10,000 ... voting age citizens [in the district meeting the same qualifications.]

Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (providing a list of covered areas, as determined by the 2000 census). President George W. Bush signed the renewal of this act on July 27, 2007.

minorities is judged too expensive and impractical, although nothing in international instruments justifies such a position.

The third characteristic requires that the minority be in a non-dominant position. This is an argument for the Québec government in cases involving discrimination against Anglophones.<sup>12</sup> The Anglophone community in Québec, although numerically a minority, enjoyed, until quite recently, considerable economic advantage over the Francophone majority.<sup>13</sup> What would the objective criteria of dominance be? It might be economic data like per capita income, although such data might be hard to obtain, particularly in countries such as France that forbid the use of racial, ethnic, or religious categories in the national census.<sup>14</sup> Even if this information were available, does relative economic advantage of a group mean that it is not the object of discrimination? Political power and social attitudes might bring about discriminatory effects for groups that enjoy otherwise economic privilege.

Capotorti's fourth characteristic concerns citizenship. Is citizenship a necessary component of belonging to a minority within a given state? Article 27 of the International Covenant on Civil and Political Rights does not require citizenship, as expressed in a General Comment by the United Nations Human Rights Committee in 1994.<sup>15</sup> Indeed, in the debates leading to the International

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<sup>12</sup> *McIntyre v. Canada*, *supra* note 7.

<sup>13</sup> Jac-Andre Boulet & Calvin Veltman, *Socio-economic achievements of Montreal language groups in 1971*, 18 CAN. REV. SOC. & ANTHROPOLOGY 239-48 (1981) (analyzing the data of the 1971 census in Canada, demonstrating that those residents of Montreal who spoke English at home had significantly higher socio-economic achievement, as measured by the Blishen index of socio-economic status).

<sup>14</sup> See Patrick Simon & Martin Clément, *Comment décrire la diversité des origines en France? Une enquête exploratoire sur les perceptions des salaires et des étudiants [How should the diverse origins of people living in France be described? An exploratory survey of employees' and students' perceptions]*, 425 POPULATION & SOCIÉTÉS [POPULATION & SOCIETIES] 1 (2006) (It is impossible to determine if French nationals who are of North African origin earn less than those with longer roots in France because the census data does not include relevant ethnic categorization).

<sup>15</sup> "Just as they [members of minority groups] need not be nationals or

Covenant, several states tried to insert wording that would have required citizenship for consideration as a minority, and each such effort was rebuffed.<sup>16</sup> Citizenship has not always been required for certain privileges and protections, even for voting in the United States. For instance, in 19<sup>th</sup>-century Wisconsin, male German immigrants who had declared the intent to become citizens could vote and sometimes used that power to ensure that German-language teaching was performed, even though an 1854 state law, with subsequent re-enactments, required that teaching of core subjects be conducted in English.<sup>17</sup>

#### *A. Membership in a Linguistic Minority*

The last two categories cited by Capotorti define what it means to be a member of a minority. First, one must possess certain characteristics, and second, one must demonstrate allegiance to the minority identity exemplified by those traits. Who decides what the characteristics of membership will be, and what constitutes allegiance to that identity? One might recall the Biblical story of the Gileadites and the Ephraimites, when the Gileadites asked the Ephraimites to pronounce the word “shibboleth”; when the Ephraimites were unable to pronounce the voiceless postalveolar fricative /š/, they were identified as the enemy and slain.<sup>18</sup> While the consequences are usually not so grave as life and death, both the group and the State must determine whether people are members of a given minority. Does a person need to speak Spanish well, or even at all, to respond as “Hispanic or Latino” on the United States Census form? No, because the question concerns ethnic origin, not

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citizens, they need not be permanent residents.” DE VARENNES, *supra* note 5, at 144 (quoting General Comment No. 23 (50) (art. 27), adopted by the U.N. Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.5, at para. 5.1 and 5.2 (April 6, 1994)).

<sup>16</sup> DE VARENNES, *supra* note 5, at 138.

<sup>17</sup> Susan J. Kuyper, *The Americanization of German Immigrants: Language, Religion and Schools in Nineteenth Century Rural Wisconsin* 120 (1980) (unpublished Ph.D. thesis, University of Wisconsin-Madison) (on file with Memorial Library, University of Wisconsin-Madison).

<sup>18</sup> Judges 12:5-6.



linguistic ability. The 2006 American Community Survey of the United States Census found that 12.2 percent of Americans spoke Spanish in the home,<sup>19</sup> but 14.8 percent considered themselves of Hispanic or Latino origin.<sup>20</sup>

The criteria used within the Latino community and those used, for instance, by school agencies or the U.S. Census, might well be completely different. As we shall discuss below, for many years children in the Southwest were segregated not only on racial lines, but also on ethnic origin lines, with the creation of so-called “Mexican Schools” alongside “white schools” and schools for African-Americans. Children perceived to be of Latino origin were assigned to the “Mexican Schools,” regardless of their parents’ desires and their linguistic abilities.

In the 1930 census, personnel were instructed to classify as “Mexican” all people who were born in Mexico or whose parents were born in Mexico. The other categories available were “White,” “Indian,” “Negro,” and “other race.”<sup>21</sup> In 1950 a new technique was developed, creating a list of 7500 Spanish surnames and classifying the population according to the respondent’s family name. One problem was that Portuguese or Italian names might be confused for Spanish names, but bigger problems lie elsewhere. Approximately 14 percent of the sample tested<sup>22</sup> were misclassified by the census list of names. Another 9 percent were misclassified because of the discrepancy between name and ethnic origin: in families in which a father with a non-Spanish name was married to a Spanish-origin

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<sup>19</sup> U.S. Census Bureau, S1601. *Languages Spoken at Home*, [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=\\_\\_ACS\\_2006\\_EST\\_G00\\_S1601&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=__ACS_2006_EST_G00_S1601&-ds_name=ACS_2006_EST_G00_) (last visited Jan. 11, 2008).

<sup>20</sup> U.S. Census Bureau, S0501. *Selected Characteristics of the Native and Foreign-Born Populations*, [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=ACS\\_2006\\_EST\\_G00\\_S0501&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-redoLog=false](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2006_EST_G00_S0501&-ds_name=ACS_2006_EST_G00_&-redoLog=false) (last visited Jan. 11, 2008).

<sup>21</sup> After objections to this classification, only language was considered in the 1940 census. William W. Winnie, *The Spanish Surname Criterion for Identifying Hispanos in the Southwestern United States: A Preliminary Evaluation*, 38 SOC. FORCES 363, 363 (1960).

<sup>22</sup> *Id.* at 364.

mother, the father's non-Spanish name might be used by the rest of the household but the family might still consider itself of Latino origin through the mother.<sup>23</sup>

Bilingualism, or language shift, can also affect the statistics even within the list of those classified by language. Winnie found that 15 percent of those with a Spanish surname reported English as their mother tongue, while 12 percent of those with non-Spanish surname had Spanish as a mother tongue or declared themselves perfectly bilingual.<sup>24</sup> Winnie concludes that "the surname criterion no longer seeks to measure the same population as the mother tongue classification in the Southwest."<sup>25</sup> The discrepancy may be even greater today, as scientific studies point to a more rapid transition of the Latino or Hispanic population to the use of English in the United States than of previous immigrants, contrary to the claims of demagogues among anti-immigration forces.<sup>26</sup>

Membership in a linguistic minority is therefore different from membership in an ethnic or national origin minority, although the two are commonly conflated in the United States because language is not a criterion for a protected class, but national origin and race are. Language is not an immutable characteristic; language shift can happen for many different reasons and any conception of human freedom has to permit this shift to occur. Furthermore,

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<sup>23</sup> *Id.* at 365.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 366.

<sup>26</sup> See Teresa Labov, *English Acquisition by Immigrants to the United States at the Beginning of the Twentieth Century*, 73 AM. SPEECH 368 (1998) (confirming the findings of Veltman 1983); Kristin Espinosa & Douglas Massey, *Determinants of English Proficiency Among Mexican Migrants to the United States*, 31 INT'L MIGRATION REV. 28 (1997) (looking specifically at Mexican immigration and discussing that Spanish-speaking immigrants were learning faster, on average, than immigrant populations at the turn of the 20<sup>th</sup> century, becoming English-dominant in 2.5 generations rather than the three generations of previous immigrants); Thomas Espenshade & Haishan Fu, *An Analysis of English-Language Proficiency Among U.S. Immigrants*, 62 AM. SOC. REV. 288 (1997) (expanding such studies to other geographical provenances, including East Asia and the Middle East, and concluding that "fears that America's newcomers are failing to learn English appear to be greatly exaggerated").

language variation is universal, so any characteristic that defines a group by language, and has to do so by specific linguistic characteristics, will find such definitions unsatisfying for the determination of membership. Membership in a linguistic minority can be voluntary, as suggested in Caportorti's definition, which also includes both possession of certain traits and the expression of allegiance to the minority identity.

### *B. The Defense of Linguistic Minorities*

Once one has defined, as well as possible, what a linguistic minority is and how one determines membership in a linguistic minority, the next question is why linguistic minorities should be protected. While democracy has become a nearly universally embraced political value, majority rule, the fundamental principle of democracy, makes possible the oppression of minorities. In fact, this is a frequent occurrence, leading to the principles of human and civil rights, whose historical development will be outlined below. Democracy does not mean freedom, at least not for the minority. The French priest Henri-Dominique Lacordaire summed it up well when he said:

Entre le fort et le faible, entre le riche et le pauvre, entre le maître et le serviteur, c'est la liberté qui opprime, et la loi qui affranchit. Le droit est l'épée des grands, le devoir le bouclier des petits.<sup>27</sup>

'Between the strong and the weak, between the rich and the poor, between the master and the servant, freedom is the agent of oppression, and law the agent of freedom. Law is the sword of powerful, and duty the shield of the lowly.'

The protection of linguistic minorities can be seen as a balance between the requirements of national unity and the need for

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<sup>27</sup> HENRI DOMINIQUE LACORDAIRE, OEUVRES DU R. P. HENRI-DOMINIQUE LACORDAIRE 339, 494 (1871), available at <http://www.gautrais.com/Entre-le-fort-et-le-faible> (discussing Lacordaire's devotion to priesthood and the Catholic social thinking).

cultural protection of subsets of the population. There are financial, political, and moral components to this balancing act, which is why the issues are never settled conclusively. Cultural protection is produced by guaranteeing a minority some degree of education in or of its language, freedom of naming, both of their children and of local toponymy, access to mass media in the minority language, and access to legal and administrative functions of government in the minority language. The rights concerning education, onomastics, and mass media, implemented in many different fashions in many different countries, provide the opportunity for linguistic minorities to reproduce themselves, that is, to maintain the existence of the community.

The judicial language rights typically guarantee interpretation and translation for criminal defendants. These are individual rights provided to any person who does not speak the language of the court, whether a casual tourist or a member of a national minority. These rights ensure the fairness of the proceedings and are not aimed specifically toward the maintenance of the community.

Other rights pertaining to the judicial system are community-related, such as the right to serve on a jury regardless of language background. Does the rejection of limited English-proficient jurors prevent defendants from the right to a jury of one's peers? Several western states, in the years following the Gadsden Purchase of 1852, routinely allowed non-English-speakers to serve on juries, providing interpreters so that they could follow the proceeding. However, this practice died out early in the 20<sup>th</sup> century.<sup>28</sup> Racial discrimination in jury selection has been unconstitutional since 1879.<sup>29</sup> This is based

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<sup>28</sup> *Town of Trinidad v. Simpson*, 5 Colo. 65 (Colo. 1879). Although the court ruled that interpreters must be allowed, it also concluded that "whenever it is practicable to secure a full panel of English speaking jurors, a wise discretion would excuse from jury duty persons ignorant of that language." *Id.* at 71. See generally Colin A. Kisor, *Using Interpreters to Assist Jurors: A Plea for Consistency*, 22 CHICANO-LATINO L. REV. 37 (2001).

<sup>29</sup> *Strauder v. State of West Virginia*, 100 U.S. 303, 309 (1879). The court, in *Strauder*, asked "how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" *Id.*

on the Fourteenth Amendment.<sup>30</sup> This, of course did not put an end to racial discrimination in jury selection.<sup>31</sup> *Hernandez v. Texas*<sup>32</sup> extended such protections to national origin minorities, recognizing Mexican-Americans as a “clearly identifiable class” and ruling their systematic exclusion from jury pools unconstitutional. The Court majority in *Castañeda v. Partida*<sup>33</sup> concluded that even when Mexican-Americans are a majority in the county and hold important positions in the county government, discrimination can still exist against this group. Brown argues that article 510 of New York’s state judiciary law,<sup>34</sup> requiring that jurors speak English proficiently, is unconstitutional because it excludes close to 50 percent of the Hispanic population in New York City. She asks “[i]f, as Guzman holds, it is incumbent upon the State to provide an interpreter for deaf jurors, why does not the same obligation exist for Hispanics and other non-English speaking cognizable groups of citizens?”<sup>35</sup>

The use of the language of linguistic minorities in local, regional, or national administration is important to the maintenance

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<sup>30</sup> U.S. CONST. amend. XIV, §1. “No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

<sup>31</sup> *Smith v. Texas* used statistics to demonstrate the persistence of discrimination even though no laws prevented the selection of African-Americans as jurors. *Smith v. Texas*, 311 U.S. 128, 129 (1940). *Avery v. Georgia* used similar methods to show that facially neutral methods of jury selection must be tested against statistical probability. *Avery v. Georgia*, 345 U.S. 559, 561-562 (1953).

<sup>32</sup> *Hernandez v. State of Texas*, 347 U.S. 475, 478-482 (1954). See also Clare Sheridan, *Mexican-Americans and the Paradox of Whiteness in Jury Selection*, 21 LAW & HIST. REV 109, 109-144 (2003) (discussing the history of discrimination in jury selection against Mexican-Americans).

<sup>33</sup> *Castaneda v. Partida*, 430 U.S. 482, 490-501 (1977).

<sup>34</sup> Cynthia Brown, *A Challenge to the English-Language Requirement of the Juror Qualification Provision of New York’s Judiciary Law*, 39 N.Y.U. L. Rev. 479 (1998) (explaining that Section 4 of the article); see also N.Y. Judiciary Law, art. 510, § 4 (stating that a juror must: “[b]e able to understand and communicate in the English language”).

<sup>35</sup> *Id.* at 504. The Rehabilitation Act of 1973 and the Americans with Disabilities Act prohibit the exclusion of deaf jurors.

of minority languages because the ability of minority language speakers to use their language in multiple functions is a key predictor of survival. Children have less reason to seriously study their minority language if it serves only for private communication, and the language itself is unlikely to survive if it does not develop the vocabulary to express a wide variety of activities. The use of language in administration also reinforces the sense of belonging to not only the minority groups but also the national state.

Before these steps can be taken, aside from the question of translation and interpretation for defendants and witnesses, the recognition of the group as a group is required. A declaration of non-discrimination towards individuals because of linguistic considerations is not enough to allow the minority to flourish. Some accommodation of group rights is necessary, although this is anathema to a number of countries, most notably France, as we shall see below.

The maintenance of a language and its associated culture is a means to reduce the possibility of inter-ethnic conflict by promoting a sense of equality and fairness, or it might be a way to encourage a sense of difference that leads to greater conflict. Both scenarios have played out over history. The fundamental principle is one of self-determination. The right of individuals to determine their own fate, joined in a Lockean social contract, is seen as the means to promote participation in the business of a state, and an identification with the larger state, while maintaining a minority identity. The larger state and the minority group will constantly renegotiate how minority culture and language can be preserved, through political processes.<sup>36</sup>

Another argument in favor of the maintenance of minority languages is more recently minted and founded in the rhetoric of environmentalism. Since the early 1980s linguists have grown more concerned over the idea of “endangered languages” and “linguistic

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<sup>36</sup> Kamal Sameer Shehadi, *Great Powers, International Institutions, and the Creation of National States: A Comparative Study of the Management of Self-determination Conflicts by the Concert of Europe, the League of Nations, and the United Nations*, at 22-28 (1995) (unpublished Ph.D., Columbia University) (on file with author) (summarizing the theory of self-determination).

ecology,” freely borrowing terminology from the environmental movement. In 1992, *Language*, the prestigious journal of the Linguistic Society of America, devoted a special issue to the topic of endangered languages, and many books and articles have been written concerning the survival of the world’s languages.

The analogy to ecology considers each language a unique way of interpreting the world, a conception most famously promoted by Benjamin Lee Whorf and often referred to as the Sapir-Whorf hypothesis.<sup>37</sup> The extinction of a language is seen as the equivalent of the extinction of a species, and linguistic diversity is equated with biological diversity. There are distinct risks to this type of argument: the equation “language = species” encourages a false perception of languages as impermeable systems and ultimately a purist conception of what constitutes a specific language. However, languages regularly assimilate ideas from other cultures, most frequently in vocabulary but also ultimately in phonology and syntax, as we shall see in the Breton example described below in section 6.0. Language contact and linguistic change are natural developments, not abnormal mutations.

The weakest argument proffered by linguists in this regard is the contention that linguistic diversity is good for linguists.<sup>38</sup> While this is undoubtedly true, we can understand better what is universal in language and what is particular, as well as the full range of human linguistic production, through the study of more languages, scientific expediency is not a good basis for encouraging language maintenance. The fate of the speakers is more important than the fate of the scientific community of linguists.

What is the conception of human rights that justifies the extraordinary efforts, by national states and international

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<sup>37</sup> BENJAMIN LEE WHORF, *LANGUAGE, THOUGHT AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF* (1956) (discussing that Whorf wrote convincingly about the interpretation of the world presented by the language of the Hopi, and the differences imposed by grammatical structure, contrasting these with the grammatical structures of Indo-European languages).

<sup>38</sup> See Ken Hale, *Language endangerment and the human value of linguistic diversity*, 68 *LANGUAGE* 35, 35-42 (1992).

organizations, as well as by linguists and non-governmental organizations, to encourage both protection against discrimination and the maintenance of linguistic communities? To understand this, we shall now turn to the history of human rights in the Western tradition, and the gradual formalization of these protections.

### *III. The History of Human Rights in the West*

The origin of the concept of human rights in the Western tradition started with a different kind of political concern, the separation of Church and State. The distinction between the clerical and civil legal systems redefined natural law from “principles that rule the cosmos” to “natural rights inherent in all individual persons.” Gratian, the father of Canon Law, laid out in his *Decretum* the principle of “equal liberty of all persons.”<sup>39</sup>

A direct effect of the establishment of a separate legal bureaucracy for the state was the unification of national laws. In England, this meant the substitution of English Common Law for the Law of Wessex and the Danelaw. In France, the result was the codification and unification of the numerous local legal codes, known as *coutumiers*, as well as the increasing promulgation of royal law.

Another result of the belief in natural rights inherent to each person was a significant change in the methodology of arriving at verdicts. Where trial by physical ordeal was commonplace in northern Europe in the early Middle Ages,<sup>40</sup> the change in the conception of the person required a more logical test of the validity of accusations. As a result, an inquest system developed, with testimony taken from witnesses who swore to tell the truth. They had to sign their depositions to attest to their veracity. But how

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<sup>39</sup> See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* 58 (John Witte, Jr. ed., 1997).

<sup>40</sup> ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* (1986) (providing a full description of the types of trial by ordeal. The earliest references to trial by ordeal appear in Salic Law, *ca.* 510 C.E. Trial by ordeal was banned by the Fourth Lateran Council in 1215, though it persisted afterward).



could they attest to that veracity if the depositions were not recorded in a language they understood?

The expansion of royal law and royal territory meant the inclusion, as subjects of the king, of people who would not speak the king's language. The reforms of the king's justice therefore frequently included commentaries on the comprehensibility of the law to the participants in a legal action, for instance France's Ordonnances of Is-sur-.<sup>41</sup> The accused had to be able to understand the proceedings and the witnesses had to be able to understand the written record. The Ordonnances of Is-sur-Tille, specifically aimed at one province, Provence, require that all court records be maintained in French or in the native language of the participants.

Another, more famous decree, just four years later, the Ordonnances of Villers-Cotterêts,<sup>42</sup> took into account a different

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<sup>41</sup> L'ordonnance d'Is-sur-Tille, d'octobre 1535 [The ordinance of Is-on-Bast, October 1535] (Pour obvier aux abbus qui sont ci devant advenus au moyen de ce que les juges de nostre dict pays de Prouvence ont fait les procès criminels dudict pays en latin, ordonnons, affin que les tesmoings entendent mieux leurs dépositions et les criminels les procès faits contre eux, que doresnavant tous les procès criminels et les enquestes seront faitz en françoys ou a tout le moins en vulgaire dudict pays. [To put an end to the abuses which have occurred because the judges in our province of Provence have conducted criminal trials in that region in Latin, we order, so that witnesses can better understand their depositions and criminals can understand the case being made against them, that henceforth all criminal trials and inquests will be performed in French, or at the least, in the vernacular language of that region]) (on file with author).

<sup>42</sup> L'ordonnance de Villers-Cotterêts 15 août 1539 [The ordinance of Villers-Cotterêts August 15, 1539] (Article 110. Et afin qu'il n'y ait cause de douter sur l'intelligence desdits arrêts, nous voulons et ordonnons qu'ils soient faits et écrits si clairement, qu'il n'y ait ni puisse avoir aucune ambiguité ou incertitude, ne lieu à demander interprétation. [So that there is no reason to doubt the interpretation of the said decisions, we wish and order that they be drawn up and written so clearly, that there is not and cannot be any ambiguity or uncertainty, nor place to require interpretation]; Article 111. Et pour ce que telles choses sont souvent advenues sur l'intelligence des mots latins contenus esdits arrests, nous voulons doresnavant que tous arrests ensemble toutes autres procedures, soient de nos cours souveraines et autres subalternes et inférieures, soient de registres, enquestes, contrats, commissions, sentances, testaments, et autres quelconques, actes et exploicts, de justice, ou qui en dépendent, soient prononcés, enregistrés et délivrés aux parties en langage maternel françois et non autrement. [And because such things have

political reality. The structure of the king's justice appealed to higher courts. Because the higher courts could not understand regional languages, there was no uniformity. Therefore this *ordonnance* required that all legal texts be recorded solely in French. It was a dramatic turn used to reject attempts to recognize minority languages and has succeeded up until the present day, almost five hundred years later.

At the time of Villers-Cotterêts, the focus of human rights' discussions in Western Europe focused on religion. The religious schisms within Christianity in the 16<sup>th</sup> and 17<sup>th</sup> centuries and the political conflicts that resulted from them showed the terrible cost of insisting on uniformity. Religious tolerance, as expressed in the Edict of Nantes<sup>43</sup> was an admission of failure on all sides in their quest to impose their beliefs on the others.<sup>44</sup>

When 17<sup>th</sup>-century philosophers such as Spinoza and Locke<sup>45</sup>

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often happened through the interpretation of Latin words contained in the said decisions, we wish henceforth that all decisions, along with all other procedures of the courts or emanating from them, both in our royal courts and other lower courts, whether they be registers, inquests, contracts, commissions, sentences, wills, or any other official acts or notices, be pronounced, recorded, and delivered to the legal parties in their maternal French language, and not in any other]).

<sup>43</sup> L'Édit de Nantes 1598 [Edict of Nantes, 1598] (Article 6: Et pour ne laisser aucune occasion de troubles et différends entre nos sujets, avons permis et permettons à ceux de ladite religion prétendue réformée vivre et demeurer par toutes les villes et lieux de cestui notre royaume et pays de notre obéissance, sans être enquis, vexés, molestés ni astreints à faire chose pour le fait de la religion contre leur conscience. [So that there can be no occasion for unrest and disputes between our subjects, we have permitted and permit those of the so-called reformed church to live and reside without being subject to investigation, persecuted or harassed, or being compelled to do anything relating to religion against their conscience, in all the towns and places of our kingdom and those regions under our jurisdiction]).

<sup>44</sup> See generally Jürgen Habermas, *De la tolérance religieuse aux droits culturels* [From Religious Tolerance to Cultural Rights], 13 *CITÉS* 151, 151-170 (2003); a somewhat different English version is available in Jürgen Habermas, *Religious Tolerance – The Pacemaker for Cultural Rights*, 73 *PHILOSOPHY* 5, 5-18 (2004).

<sup>45</sup> See John Locke, *A Letter Concerning Toleration* (1689), available at <http://www.constitution.org/jl/tolerati.htm> (stating, as translated by William Popple, “[t]he toleration of those that differ from others in matters of religion is so

took up the question of rights, true reciprocity between people of different religions was envisioned, and what followed was the universality of certain freedoms. This reciprocity, and the universality of its application, was the result of 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. From this conception, the State is seen as both the guarantor of individual freedom of action, and the biggest threat to that freedom. This development culminates in the statement found in the French Declaration of the Rights of Man and of the Citizen that the goal of political structures is the “preservation of the natural and imprescriptible rights of man.”<sup>46</sup> With increasing emphasis placed on the individual, these rights would appear in the French Declaration and in the United States Bill of Rights.<sup>47</sup>

Under this formulation the state is minimalist so as not to interfere with the freedom of individuals, except where there is a conflict between these freedoms. Another formulation is possible, in which the state is given more obligations: educating the masses, feeding the hungry, providing shelter, clothing the poor, and, most significantly for our purposes, maintaining cultural identity.

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agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light.”); *see* SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES, REPORT, 2002-2003, H.L. 95-1 (noting that the so-called Act of Toleration in England (1689) only tolerated Christians who accepted the doctrine of the Trinity, and protected them only from fines imposed by earlier laws, which were nonetheless unrepealed and still in force. The Act of Toleration was supplemented in 1698 by a law on blasphemy. The report recommends repeal of the Blasphemy Laws. Prime Minister Gordon Brown proposed the repeal to Parliament in January of 2008, with the support of the Church of England.).

<sup>46</sup> “Le but de toute association politique est la conserbation des drouts naturels et emprescriptibles de l’Homme.” [“The Aim of all political association is the preservation of the natural and imprescriptible rights of man.”] Declaration of the Rights of Man and of the Citizens, Aug. 26, 1789.

<sup>47</sup> *See* SUSAN DUNN, *SISTER REVOLUTIONS: FRENCH LIGHTNING, AMERICAN LIGHT 1* (1999) (discussing the comparison of the French Déclaration to the US Bill of Rights).

International intervention in imposing tolerance and reciprocal rights appeared in the Treaty of Vienna, which was designed to reestablish peace after the Napoleonic Wars. In its "Eight Articles," the Congress of Vienna required that the newly-created United Netherlands respect freedom of religion and guaranteed equality of rights of all citizens, an equality that could conceivably include linguistic minorities although it was not so specified. Similar measures were inserted in international agreements establishing Greece, Romania, Bulgaria, Serbia and Montenegro.

Linguistic tolerance, a respect for cultural identity, is a relative newcomer to the Western canon of human rights. The first explicit recognition of linguistic rights came in the Austrian Constitution of 1867. Article 19 of the 1867 constitution guarantees that "all ethnic groups within the state have equal rights, and every ethnic group has an inalienable right to defend and care for its nationality and language."

#### *IV. International Guarantees of Linguistic Rights*

The Austrian Constitution was an internal document; international protection for minorities became increasingly popular from the start of World War I. At the very beginning of the war, the British Prime Minister Herbert Henry Asquith declared that "we are fighting to vindicate the principle [. . .] that small nationalities are not to be crushed, in defiance of international good faith by the arbitrary will of a strong and overmastering power."<sup>48</sup> At the end of World War I, international guarantees were offered for minority populations. New states had been created, such as Czechoslovakia, or re-created, such as Poland, and many other national boundaries were redrawn. The result was that people who had been majority population members as part of one state, now found themselves a minority population in a different state. Some examples are the Hungarians in Czechoslovakia and Romania, and Germans in Western Poland and scattered enclaves throughout Eastern Europe.

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<sup>48</sup> *Id.*

To protect those peoples, the Principal Allied and Associated Powers required each of the countries in Eastern Europe to sign a Minority Treaty. The first of these was with Poland on June 28, 1919; it would serve as a model for the rest.<sup>49</sup>

Article 2 of the treaty guaranteed equal freedoms and protections for all “without distinction of birth, nationality, language, race or religion.”<sup>50</sup> All residents of Poland became equal citizens of Poland, except for those Germans who had been installed in Polish territory after 1908 as part of a Prussianization effort on the part of Germany. Article 7 guaranteed that:

No restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the Press or in publications of any kind, or in public meetings. Notwithstanding any establishment by the Polish Government of an official language, adequate facilities shall be given to Polish nationals of non-Polish speech for the use of their language, either orally or in writing, before the courts.<sup>51</sup>

Article 8 guaranteed national minorities the right to use whatever language they pleased in the schools and article 9 promised the creation of state schools in minority languages when the demographics of the area justified such schools.<sup>52</sup> Article 12 specified that the League of Nations would be the guarantor of the treaty; any minority or any individual could complain to the League of Nations and the decision of the League would be binding upon the Polish government.<sup>53</sup> Austria, Czechoslovakia, Yugoslavia, Greece, Romania, Bulgaria, Hungary, and Turkey signed similar treaties within four years. Estonia, Latvia, Lithuania, Finland, and Albania also agreed to some form of minority protection, although not necessarily under League of Nations control. In an all too typically

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<sup>49</sup> Minorities Treaty Between the Principal Allied and Associated Powers and Poland, June 28, 1919, 225 Consol. T.S. 412.

<sup>50</sup> *Id.* at art. 2.

<sup>51</sup> *Id.* art. 7.

<sup>52</sup> *Id.* art 8-9.

<sup>53</sup> *Id.* art. 12.

hypocritical manner, the Great Powers that imposed these treaties did not fulfill the conditions of the Minority Treaties in dealing with their own national minorities.

At the Assembly of the League of Nations in 1922, Professor Gilbert Murray proposed the creation of a Permanent Committee that would receive petitions from complainants and established the conditions under which a petition would be judged receivable. The conditions stipulated that the petition must aim to protect the minority and must not propose separation from the state.

It did not take long for the problems with this system to become apparent. The League of Nations was virtually powerless to constrain the governments of these states to abide by negative rulings by the Council of the League of Nations or by the Permanent Court of International Justice. To take Poland as an example, several issues developed almost immediately. In western Poland, the Polish government moved quickly to expel Germans installed as part of the "Prussianization" campaign, a move that provoked an appeal by the Germanic League for the Protection of Minorities in Poland. The League of Nations generally ruled in favor of the Germanic League, but was unable to stop the expulsions.

In Upper Silesia, the German communities wanted the right to establish schools. This right was granted by the Polish government after German petitions were sent to the League of Nations in 1923 and 1924. However, the government was disappointed by the number of Polish families that chose to send their children to the German schools. Regulations were imposed on who could attend the German schools, violating the treaty obligations which gave parents the right to choose the language of their children's schooling. The German National Association of Upper Silesia appealed to the League because 7114 applications had been rejected by the Polish government. The League's representative ordered that 6512 students be admitted to German schools, an order that the Polish government refused to accept, setting off a stream of time-consuming appeals by both sides.<sup>54</sup>

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<sup>54</sup> L.P. MAIR, *THE PROTECTION OF MINORITIES* 92 (1928). *See also* PABLO DE

These are just two examples among hundreds of petitions that went to the League during the period 1922-1935.<sup>55</sup> The failure of the League to force change on the part of states undermined confidence in the procedure and in the League of Nations. The failure to protect German minorities in Eastern Europe was exploited by the National Socialists in Germany and served as a convenient excuse for Hitler's expansionist nightmare.<sup>56</sup>

Thus the tensions between minority and majority populations were a crucial factor in unleashing two terrible world wars that left tens of millions dead. Since the Second World War, therefore, a number of international instruments have required signatory nations to respect the rights of many types of minorities, including linguistic minorities. In the second half of the 20<sup>th</sup> century these treaties became ever more demanding of individual states, moving from negative rights, the protection of linguistic minorities from discrimination, to positive rights, requiring the states to aid in the maintenance of viable linguistic communities.

The third stated purpose of the United Nations, articulated in the U.N. Charter of 1945, is the promotion of respect for human rights and fundamental freedoms "without distinction as to race, sex, language, or religion."<sup>57</sup> Article 2 of the Universal Declaration of Human Rights provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>58</sup>

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AZCÁRATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES. AN EXPERIMENT, *supra* note 1, at 137-160.

<sup>55</sup> ROBINSON, *supra* note 49, at 128. *See generally* Esther Seeman, *The Administration of the Minorities Treaties by the League of Nations*, (1969) (unpublished Ph.D. dissertation, University of Minnesota) (on file with University of Minnesota Library).

<sup>56</sup> *See* Heinz Kloss, *The American Bilingual Tradition*, 10 *DIE UNTERRICHTSPRAXIS* 179 (1977) (explaining that Hitler sent a young sociolinguist named Heinz Kloss to the United States in the mid-1930s to investigate the mistreatment of German speakers in this country. The result was a classic in this history of minority rights).

<sup>57</sup> U.N. Charter art. 1, para. 3.

<sup>58</sup> Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d

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Almost 20 years later, the General Assembly passed two resolutions with implications for linguistic rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The first of these guaranteed the right of criminal defendants to be informed in a language they understand of charges against them and to be assisted by an interpreter, if necessary.<sup>59</sup> Article 27 prohibits laws or practices that prevent linguistic minorities from using their language.<sup>60</sup> The second guarantees that parents may choose appropriate schooling for their children, although the focus is on religious difference rather than linguistic.<sup>61</sup>

In Europe, the Council of Europe, the European Union, and the Organization for Security and Cooperation in Europe (OSCE) have approved international instruments promoting the rights of linguistic minorities. The Parliamentary Assembly of the Council of Europe issued the Declaration of Galway in 1975 and the Declaration of Bordeaux in 1978, followed by Recommendation 928, concerning

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Sess., art. 2, U.N. Doc. A/810 (1948).

<sup>59</sup> See International Covenant on Civil and Political Rights G.A. Res. 2200 (XXI), art. 14 ¶ 3, U.N. Doc. A/6316 (Dec. 16, 1966). “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; To have the free assistance of an interpreter if he cannot understand or speak the language used in court.” *Id.*

<sup>60</sup> *Id.* art. 27 (discussing those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language).

<sup>61</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 13 ¶ 3, U.N. Doc. A/6316 (Dec. 16, 1966). See PATRICK THORNBERRY & MARIA AMOR MARTIN ESTEBANEZ, *MINORITY RIGHTS IN EUROPE* 16 (2004) (noting the work of the International Labor Organization on the worldwide stage, particularly The Convention Concerning Indigenous and Tribal Peoples in Independent Countries, which requires that wherever practicable, children should be taught to read and write in their own language, and that measures should be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 28, §§1, 3, Sep. 5, 1991, ILO No. 169).



“Educational and Cultural Problems of Minority Languages and Dialects in Europe.” In the European Union, rights for linguistic minorities were championed by the Italian deputy Gaetano Arfé in two resolutions,<sup>62</sup> and continued through resolutions by Belgian deputy Willy Kuipers<sup>63</sup> and Irish deputy Mark Killilea.<sup>64</sup> Resolutions are non-binding in the European Parliament, but the Arfé resolution did lead to the creation of the European Bureau for Lesser-Used Languages, a semi-independent agency, 80 percent funded by the EU, that promotes the concerns of minority language communities.

By far the most important document produced by the international agencies in Europe is the Charter for Regional or Minority Languages,<sup>65</sup> a Council of Europe document supported by the European Parliament resolution of Mark Killilea. The Charter asks signatory countries to identify the minority languages they will protect and then to choose from a menu of over one hundred options at least thirty-five that the country will provide for that minority. The protections include instruction in the medium of the minority language at various levels of the educational system, the use of minority languages in the justice system and in the provision of administrative services, and the use of minority languages in mass media. It was further bolstered by the Framework Convention for the Protection of National Minorities.

A third European institution, the OSCE,<sup>66</sup> has also created a High Commissioner for National Minorities and made a number of

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<sup>62</sup> Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities, Oct. 16, 1981, 1981 O.J. (C 287) 106; Resolution in Favour of Minority Languages and Cultures, Feb. 11, 1983, 1983 O.J. (C 68) 103.

<sup>63</sup> Resolution on the Languages and Cultures of Regional and Ethnic Minorities in the European Community, Oct 30, 1987, 1987 O.J. (C 318) 160.

<sup>64</sup> Resolution on Linguistic and Cultural Minorities in the European Community, Feb. 9, 1994, 1994 O.J. (C 61) 110.

<sup>65</sup> EUROPEAN CHARTER, *supra* note 6.

<sup>66</sup> The OSCE has 56 member nations in Europe, Central Asia and North America. See OSCE Facts and Figures, available at <http://www.OSCE.org> (follow “Facts and figures” hyperlink).

recommendations for the protection of minority rights.<sup>67</sup> According to Packer and Siemienski,<sup>68</sup> the rush of recommendations and resolutions is inspired by the ethnic strife in the former Yugoslavia, which demonstrated the dangers of majority rule.

On the world stage, in the United Nations, a series of resolutions and declarations concern the protection of the rights of persons belonging to national, ethnic, religious, and linguistic minorities. A resolution in 1992 led to a 1994 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. In 2007, the United Nations adopted a Declaration on the Rights of Indigenous People, which includes the right to education in their mother tongue, whether or not they are living in an indigenous 'homeland,'<sup>69</sup> the right to establish their own media in their own languages as well as to right to have non-discriminatory access to all forms of non-indigenous media.<sup>70</sup>

Further action on language rights has been pursued through the United Nations Educational, Scientific, and Cultural

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<sup>67</sup> See Org. for Security and Cooperation in Europe [OSCE], *The Hague Recommendations Regarding the Education Rights of National Minorities* (Oct. 1996), available at [http://www.osce.org/documents/hcnm/1006/10/2700\\_en.pdf](http://www.osce.org/documents/hcnm/1006/10/2700_en.pdf); *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (Feb. 1998), available at [http://www.osce.org/documents/hcnm/1998/02/2699\\_en.pdf](http://www.osce.org/documents/hcnm/1998/02/2699_en.pdf); *The Land Recommendations on the Effective Participation of National Minorities in Public Life* (June 1999), available at [http://www.osce.org/documents/hcnm/1999/09/2698\\_en.pdf](http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf); *Guidelines to Assist National Minority Participation in the Electoral Process* (Jan. 2001), available at [http://www1.osce.org/documents/hcnm/2001/01/240\\_en.pdf](http://www1.osce.org/documents/hcnm/2001/01/240_en.pdf); *The Guidelines on the Use Minority Languages in the Recommendations on Policing in Multi-Ethnic Societies* (Feb. 2006), available at [http://www.osce.org/documents/hcnm/2006/02/17982\\_en.pdf](http://www.osce.org/documents/hcnm/2006/02/17982_en.pdf).

<sup>68</sup> John Packer & Guillaume Siemienski, *The Language of Equity: The Origin and Development of The Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, 6 INT'L J. ON MINORITY & GROUP RTS. 329, 329-30 (1998-1999).

<sup>69</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Sept. 13, 2007, art. 14, U.N. Doc. A/Res/61/295 (Oct. 2, 2007).

<sup>70</sup> *Id.* art. 16(1). See also Article 16(2) cl. 1: "States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity."

Organization (UNESCO). UNESCO issued a “Universal Declaration on Cultural Diversity” in 2001, including an action plan “[s]afeguarding the linguistic heritage of humanity and giving support to expression, creation and dissemination in the greatest possible number of languages.”<sup>71</sup> It further encourages linguistic diversity at all levels of education and promotes the learning of several languages “from the earliest age.”<sup>72</sup> In 2003, UNESCO passed a “Convention for the Safeguarding of the Intangible Cultural Heritage” which includes provisions to develop a fund for the collection and preservation of oral literature in many different languages.

#### *V. Specific National Approaches to Minority Language Rights*

In the context of this broad international agreement on the importance of supporting the maintenance of linguistic minority communities, the reactions of individual states are quite diverse. In the remainder of this discussion, we shall look at several states’ approaches to the common issues:

- Education using the medium of minority languages
- The use of minority languages in administration and justice
- The use of minority languages in mass media

A fundamental distinction made by most states, many theoreticians of minority language rights,<sup>73</sup> and by the international treaties separates indigenous from immigrant minority language groups. Some native groups are considered indigenous, a term that is difficult

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<sup>71</sup> See UNESCO Universal Declaration on Cultural Diversity, UNESCO Doc. 31C/Res 25, Annex 1 (Nov. 2, 2001), available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 95-96 (1995).

to define without reproducing the paternalism of the colonial enterprise. Thornberry identifies four components of a definition of “indigenous”: (a) association with a particular place; (b) prior habitation; (c) original or first inhabitants; (d) distinctiveness of the society.<sup>74</sup> Most definitions roughly follow these criteria. Under these terms would the Basques in France and Spain be indigenous? Or, as some have claimed, should indigenous only apply to the Americas, Oceania, and Australia? How do indigenous populations differ from any colonized and oppressed ethnic group? The problem area is (c), which, combined with (d), serves to perpetuate, without using the terms, the nineteenth century distinctions of “primitive” and “civilized”? Sometimes the reference is made almost explicit, using the term “tribal,” which carries its own heavy baggage.

While distinctions between native and immigrant and, within the “native” category between indigenous groups and others may seem obvious and reasonable, we have seen in the European Charter for Regional or Minority Languages that the definition of “immigrant linguistic minority” can, in fact, be quite problematic. How long does an immigrant population have to be present in a country for it to be considered indigenous?

#### *A. The United States of America*

Having defined the issues, let us now take a look at specific case studies. A complicating factor in the United States is the division between the authority of the federal government and the authority of the individual states. Thus, for instance, a few states have adopted policies very favorable to linguistic minorities, most notably New Mexico, while others have given them little consideration. Federal constitutional amendments and subsequent judicial decisions have been a primary means of imposing national standards for treatment of minorities. Ultimately the constitutional amendments<sup>75</sup> passed after the Civil War, designed to help integrate

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<sup>74</sup> THORNBERRY, *supra* note 61, at 37-39.

<sup>75</sup> U.S. CONST. amend. XIV. The Fourteenth Amendment, guaranteeing due process and equal protection under the law, was ratified in 1868; U.S. CONST.

newly freed slaves into American society, informed a series of judicial decisions in the decades following the end of the Second World War in 1945. These decisions served to change attitudes towards minorities through the popularization of the concept of civil rights both for African-Americans and for linguistic minorities.

The United States is often defined as a “nation of immigrants,” but it has at least two broad categories of indigenous linguistic minorities that inhabited United States territory before the arrival of the dominant Anglo-Saxon culture, each of which has been subjected to severe mistreatment. The indigenous minorities are the Native American nations and people speaking other European languages who were incorporated into the United States through war and treaty (The Louisiana Purchase (1803),<sup>76</sup> Florida (1819),<sup>77</sup> Texas (1845),<sup>78</sup> New Mexico, Arizona, and California (1848),<sup>79</sup> Alaska

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amend. XV. The Fifteenth Amendment providing equal voting rights was ratified in 1870.

<sup>76</sup> The Louisiana Purchase treaty was concluded April 30, 1803. Article 3 of the treaty guarantees that the inhabitants of the ceded territory “...shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.” Treaty Between the United States of America and the French Republic, U.S.-Fr., art. III, April 30, 1803, 8 Stat. 200. The European-American population of the territory at the time of the first U.S. Census after acquisition, in 1810, was about 97,000, of which the majority was French-speaking. U.S. Census Bureau Facts for Features & Special Editions, Special Edition Louisiana Purchase Bicentennial, [http://www.census.gov/PressRelease/www/releases/archives/facts\\_for\\_features\\_special\\_editions/001619.html](http://www.census.gov/PressRelease/www/releases/archives/facts_for_features_special_editions/001619.html) (last visited April 2, 2008). In 2000, the U.S. Census estimated 1.5 million people of French origin in this region. *Id.*

<sup>77</sup> Most of what we now call Florida was annexed through the Adams-Onís Treaty in 1819. Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, U.S.-Spain, February 22, 1819, 8 Stat. 252. “West Florida”, including the southernmost counties of Alabama and Mississippi, along with several parishes of Louisiana, was incorporated earlier into the United States in 1810. See PHILIP COOLIDGE BROOKS, *DIPLOMACY AND THE BORDERLANDS THE ADAMS-ONÍS TREATY OF 1819*, 191-92 (1939).

<sup>78</sup> Texas, an independent republic during the years 1836-1845, was annexed by the United States by an act of Congress, March 1, 1845, triggering the Mexican-American War. Jose Roberto Juarez, Jr., *The American Tradition of Language*

(1867),<sup>80</sup> Hawaii (1898),<sup>81</sup> Puerto Rico (1898),<sup>82</sup> the US Virgin

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*Rights: The Forgotten Right to Government in a "Known Tongue"*, 13 LAW & INEQ. 443, 468 (1995). Prior to 1821, Texas, then part of Mexico, was inhabited by Native Americans and Spanish-speakers. *Id.* at 472. English-speaking settlers who moved in subsequently were expected to learn Spanish, but were less and less willing to do so as their numbers grew. *Id.* at 474-76. During this period of the Republic of Texas, bilingualism was the law if not the practice in public administration. *Id.* at 477-79. Following annexation, these practices continued, aided by a wave of German immigration that maintained pressure for bilingualism. *Id.* at 527-29.

<sup>79</sup> In the Adams-Onís Treaty, the United States relinquished all claims to Mexican territory, which at that time included the southwest quadrant of what is now the United States. *See* Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252. The annexation of Texas violated that agreement, leading to the Mexican-American War. *See* ROBERT W. JOHANNSEN, TO THE HALLS OF THE MONTEZUMAS 7 (1985). The "Mexican cession" at the end of the Mexican-American War was ratified by the Treaty of Guadalupe Hidalgo. *See* Treaty of Peace, Friendship, Limits, and Settlement, Feb. 22, 1848, U.S.-Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe-Hidalgo]. It included the territory of the modern states of Utah, Nevada, and California, as well as portions of Arizona, New Mexico, Colorado, and Wyoming. *See id.* Mexicans living in that region were given the choice of becoming citizens of the United States or retaining their Mexican citizenship. *See id.* art. VIII. Article 9 provided that Mexicans "shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the mean time, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." *Id.* art. IX. Language rights were not mentioned in the treaty, but California's first constitution guaranteed that all "laws, decrees, regulations, and provisions" would be issued in English and Spanish. CAL. CONST. art. XI, § 21. The Gadsden Purchase added in 1854 a stretch of land from the Rio Grande to the Gila River in southern New Mexico and Arizona, permitting the construction of a southern route for a transcontinental railroad. *See* RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN:" A HISTORY OF THE AMERICAN WEST 83-84 (1991).

<sup>80</sup> B.D. Lain, *The Decline of Russian America's Colonial Society*, W. HIST. Q. 143 (1976) (The treaty with Russia for the sale of Alaska was concluded March 30, 1867. Article 3 of the treaty stipulates that:

the inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of the uncivilized native tribes,

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shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes in that country.

Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russians to the United States of America, art. 3, May 28, 1867, 15 Stat. 539.). *See also* KLOSS, *supra* note 56, at 257-8. (As in the treaties with Mexico, language is not mentioned. The Russian population of the territory at the time of the purchase was very small, perhaps around 800, with another 1600-2000 ‘creoles,’ of mixed Russian and Native heritage. In spite of a US regulation for education, requiring that all instruction be given in English, the Russian government maintained Russian schools in Alaska even after the sale, with the last one closing in 1916.).

<sup>81</sup> American businessmen forced the “Bayonet Constitution” upon the Hawaiian kingdom in 1887, a constitution that limited power to wealthy foreigners and the Hawaiian elite. Article 59 limited voting to Hawaiian, American and Europeans who owned taxable property valued at a minimum of \$3000 or who had an income of \$600 in the previous year, and could read a newspaper printed in Hawaiian, English or another European language. KINGDOM OF HAWAII [Constitution of 1887] art. 59. The combination of financial and linguistic criteria effectively disenfranchised the sizable, perhaps majority population of Asians.

The McKinley Tariff of 1890 hurt sugar plantation owners on the islands, as it restricted their access to US markets. To improve their economic position, American plantation owners sought annexation of the island, so that it would not be affected by the tariff. Queen Liliuokalani, the last monarch of Hawaii, was deposed in 1893 and a Republic of Hawaii, headed by Sanford B. Dole, was created and recognized by the United States government. The United States formally annexed Hawaii by a joint resolution of Congress in 1898. 55 Res. 55, 55th Cong. (1898), 30 Stat. 750.

The Organic Law of 1900, Section 44, required debates in the legislature to be held in English. KLOSS, *supra* note 56, at 268. Already during the Republic, English had been declared the sole language of education in Hawaii. *Id.* at 270. The current constitution of the state of Hawaii declares that “English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be require for public acts and transactions only as provided by law.” HI CONST. art. 15, § 4.

<sup>82</sup> *See* KLOSS, *supra* note 56, at 295-97 (noting that Puerto Rico was annexed by the United States through the 1898 Treaty of Paris, bringing an end to the Spanish-American War. This treaty also brought Cuba, the Philippines Guam and some other territory under U.S. control. Puerto Rico had been invaded earlier that year. Article 9 of the treaty grants full rights to “Spanish subjects, natives of the Peninsula,” but declares that the rights of “native inhabitants of the territories” will be determined later by the U.S. Congress. Language is not

Islands (1917)<sup>83</sup> and a number of Pacific island territories (1867-1947)).

Each of these indigenous minorities and each of these regions have its own history. Here the discussion is limited to two examples, one “indigenous” in the traditional sense, the other simply meeting the qualification of prior habitation, though itself immigrant or a mixture of immigrant and indigenous.

The Native Americans, although technically belonging to sovereign nations, were obliged by many treaties to accept educational institutions by missionary groups. In 1819 the Congress set up a “Civilization Fund” to support the establishment of schools to teach Native Americans in English.<sup>84</sup> The Fund was overseen by

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mentioned in the treaty. The Organic Act of 1900 gave Spanish and English equal status, as did a similar measure in 1917. The law of February 21, 1902 provided for the use of both languages in administration and the courts.).

<sup>83</sup> The Virgin Islands were purchased from Denmark for \$25 million in a treaty concluded March 31, 1917, five times the price agreed to in 1900, but never ratified by the Danish parliament. The African-American population of the islands had spoken a Dutch-based creole known as Negerhollands, but it was already moribund at the time of US annexation and is now extinct. There is currently an English-based creole in the Virgin Islands, spoken by about 50,000 people (*Ethnologue*, Virgin Islands Creole English). No language other than English has had any official status in the US Virgin Islands since annexation, although an influx of Puerto Ricans has led to some bilingual schooling for the Spanish-speaking population. KLOSS, *supra* note 56, at 88.

<sup>84</sup> Civilization Fund Act of 1819, 3 Stat. 516.

...for the purpose of providing against the further decline and final extinction of the Indian tribes, adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic, and performing such other duties as may be enjoyed, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties. *Id.*



the Office of Indian Affairs. Typical is a treaty with the Shawnee, signed in 1854, providing that:

[T]here shall first be set apart to the Missionary Society of the Methodist Episcopal Church South, to include the improvements of the Indian manual-labor school, three sections of land; to the Friends' Shawnee labor-school, including the improvements there, three hundred and twenty acres of land; and to the American Baptist Missionary Union, to include the improvements where the superintendent of their school now resides, one hundred and sixty acres of land.<sup>85</sup>

Although many missionary groups recognized the superior results obtained when part of the instruction was in the children's native language, the policies of the Bureau of Indian Affairs, particularly after the Civil War, required instruction in English.<sup>86</sup> Schools conducted in Native languages were deemed "detrimental to civilization." The failure of the reservation schools was fully documented in the Meriam Report but changes in policy were slow to materialize.

It was only following the Civil Rights Movement of the 1960s that Native American languages began to be valued in their own right. The first Indian Education Act was passed in 1972, promoting bilingual education of Native children. More recently, the Native American Languages Acts of 1990 and 1992<sup>87</sup> have recognized the rights of Native peoples "to continue separate identities,"<sup>88</sup> including instruction in Native languages and the

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<sup>85</sup> Treaty with the Shawnee art. 2, May 10, 1854, 19 Stat. 1053.

<sup>86</sup> See FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920*, ch. 6 (2001); Allison M. Dussias, *Waging War With Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901 (1999); and JON ALLAN REYHNER & JEANNE EDER, *AMERICAN INDIAN EDUCATION, A HISTORY* (2004).

<sup>87</sup> Native American Languages Act of 1990, Pub. L. No. 101-477, 104 Stat. 1152, 1153; Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434.

<sup>88</sup> Native American Languages Act of 1990, Pub. L. No. 101-477, § 102(2) 104 Stat. 1152, 1154.

development of instructional materials.<sup>89</sup> In 2006 the Esther Martinez Act provided funding for “survival schools,” meant to keep Native languages from dying out.<sup>90</sup> These bills have moved towards a more community-based approach, emphasizing intergenerational language transfer, an issue that we shall revisit when discussing Breton in Section 6.0, below.

An example of the second category of indigenous minorities incorporated into the United States is the Spanish-speaking population in the Southwest who, following the Mexican-American War and Gadsden Purchase, suddenly found themselves in an Anglophone world, forced to learn English. Throughout much of the Southwest three-way segregated schools were established: one school for ‘white’ European Americans, one school of African American children, and one school for Mexican-American children. The schools for African-Americans and Mexican-Americans were poorly funded compared to the ‘white’ schools. Some of the Mexican Americans were the descendants of the original non-Native settlers in the region; others were more recent immigrants from Mexico.

To protest segregation and inferior schools, the Mexican-Americans founded the League of United Latin American Citizens in 1929 and began a series of legal challenges to the segregated school system. The first of these, *Independent School District v.*

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<sup>89</sup> The Native American Languages Act of 1990 allowed exceptions to teacher certification programs and the use of Native American languages as a medium of instruction, not just a subject of instruction. Furthermore it encouraged universities to recognize proficiency in Native American languages, just as it would a foreign language, for entrance or degree requirements. The Native American Languages Act of 1992 encouraged grants to bring together older and younger Native Americans for intergenerational transfer of language skills. Its grants encouraged the development of teaching materials, the use of mass media and the collection of oral histories.

<sup>90</sup> Esther Martinez Native American Languages Preservation Act of 2006, Pub. L. No. 109-394, 120 Stat. 2705 (1970). The Esther Martinez Native American Languages Preservation Act of 2006 provides for preschool classes in Native American languages, instruction in those languages to the parents of children enrolled in such a program, and the creation of “Native American language survival schools” for older children. *Id.*

*Salvatierra*<sup>91</sup> unsuccessfully challenged the system in Del Rio, Texas. However, in a 1946 case, *Mendez v. Westminster*,<sup>92</sup> the court ruled that “[a] paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.”

The situation of the Mexican-Americans was partly indigenous, prior settlers of territory ceded to the United States, and partly immigrant, large-scale immigration during and following World War I, as immigration restrictions placed on European immigrants in 1924 did not apply to Latin American immigrants. In practice, the treatment of indigenous non-English-speaking populations in the United States has generally been conflated with the treatment of immigrant minorities. Certainly, Native Americans must have been surprised to hear their languages categorized as “foreign languages,” as was often the case in Bureau of Indian Affairs documents.

Immigrant minorities have had a long history of bilingual schooling, both public and private. Between 1854 and 1877 six Midwestern states approved measures permitting schools to teach in languages other than English, most of them in German.<sup>93</sup> With the massive immigration from Eastern and Southern Europe, starting around 1880, immigrant groups were viewed less favorably, and restrictions on bilingual education became more common. The 1872 Illinois law permitting instruction in languages other than English was challenged in court in 1881.<sup>94</sup> Although the court ruled in favor of the school board, other states began to repeal this permission.<sup>95</sup>

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<sup>91</sup> *Indep. Sch. Dist. et.al. v. Salatierra et. al.*, 33 S.W.2d 790 (Tex. Ct. App. 1930).

<sup>92</sup> *Mendez v. Westminster School Dist.*, 64 F. Supp. 544, 549 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9<sup>th</sup> Cir. 1947).

<sup>93</sup> KLOSS, *supra* note 56, at 107. The states are Wisconsin, Illinois, Iowa, Kansas, Minnesota, and Indiana. *Id.* In Cincinnati, German schools were dominant, peaking at enrollment of more than 18,000 at the turn of the 20th century. CAROLYN TOTH, *GERMAN-ENGLISH BILINGUAL SCHOOLS IN AMERICA: THE CINCINNATI TRADITION IN HISTORICAL CONTEXT* (1990).

<sup>94</sup> *Powell v. Board of Education*, 97 Ill. 375 (Ill. 1881).

<sup>95</sup> Kansas, for instance, repealed this permission in 1874. KLOSS, *supra* note

The justification for such action was the belief that “American values” could be expressed only in the “American language.” Fanned by organizations such as the American Protective Association,<sup>96</sup> anti-bilingual-education sentiment reached its peak during the anti-German hysteria of World War I.<sup>97</sup> Interestingly, Henry Bowers in Clinton, Iowa founded the American Protective Association in 1887. Its main thrust was anti-Catholic, but since many of the Catholics were also speakers of languages other than English, the two themes often merged. By 1919, 37 states passed laws forbidding the teaching of foreign languages to children under the age of 14. American language education still has not recovered from that blow.

Such laws were challenged in court, and ultimately the Supreme Court reluctantly admitted that they were unconstitutional. The landmark case is *Meyer v. Nebraska*.<sup>98</sup> A Bible school teacher was arrested for teaching a religious lesson in German to a ten-year-old. The Supreme Court agreed with the state of Nebraska that teaching foreign languages at an early age might hinder immigrants “from becoming citizens of the most useful type” and could “imperil public safety.”<sup>99</sup> However the justices ruled that “[t]he protection of the constitution extends to those who speak other languages. . .”<sup>100</sup> This ruling then served as the basis for similar cases involving Japanese and Chinese schools in Hawaii.<sup>101</sup>

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56, at 107.

<sup>96</sup> See, generally, JOHN HIGHAM, *STRANGERS IN THE LAND, PATTERNS OF AMERICAN NATIVISM 1860-1925* 80-7 (2<sup>nd</sup> ed. 1998).

<sup>97</sup> In Montana a mob stormed the high school in Lewiston, seized German textbooks and burned them while singing patriotic hymns. A young German immigrant was lynched in Collinsville, Illinois in April 1918. The California State Board of Education stated that German was “a language that disseminates the ideals of autocracy, brutality and hatred.” Louisiana banned the teaching of German at any level, even in universities. WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927* 45-47 (1994).

<sup>98</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>99</sup> *Id.* at 401.

<sup>100</sup> *Id.* See generally ROSS, *supra* note 97.

<sup>101</sup> See generally *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Mo Hock Ke*

In the civil rights era of the 1960s and 1970s, the crucial case in shaping American educational policy for linguistic minorities was *Lau v. Nichols*.<sup>102</sup> This case concerned about 1800 Chinese-American students in San Francisco. Justice Douglas famously ruled that “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”<sup>103</sup> This case would give rise to the “Lau guidelines”<sup>104</sup> that would determine when school districts are required to provide some kind of bilingual education. Subsequently a number of re-enactments of the Bilingual Education Act<sup>105</sup> would promote a variety of approaches to educating limited-English-proficient children, until the Bush administration replaced the Office of Bilingual Education with the “Office of English Language Acquisition,” thus formally excluding education in the medium of the child’s native language and all maintenance of such languages.

These cases concern education; first the right to language education in one’s native language, the second the right to an equal education, whatever the language, the third the right to an education in a language one understands as a fundamental principle of equality. The pattern is typical of the American system of protection of linguistic minorities. Often the first requirement is established by a court decision, and subsequently legislation is produced to establish enforcement procedures for the decision.

The same pattern is followed in minority language rights in administration and justice. A federal court ruling concerning a piece

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Lok Po v. Stainback, 336 U.S. 368 (1949).

<sup>102</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>103</sup> *Id.* at 566.

<sup>104</sup> U.S. DEP’T. OF HEALTH, EDUC. & WELFARE, OFFICE OF CIVIL RIGHTS, TASK FORCE FINDINGS SPECIFYING REMEDIES AVAILABLE FOR ELIMINATING PAST EDUCATION PRACTICES RULES UNLAWFUL UNDER LAU V. NICHOLS (1975).

<sup>105</sup> See generally Rachel Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249 (describing changes in the Bilingual Education Act into the mid 1980s). See also GUADALUPE SAN MIGUEL, *CONTESTED POLICY: THE RISE AND FALL OF FEDERAL BILINGUAL EDUCATION IN THE UNITED STATES 1960-2001* (2004) (for a description of the changes in the Bilingual Education Act in the 1990s).

of state legislation results in the unification of national practice and national legislation. In the criminal justice system, the landmark case was *U.S. ex rel. Negrón v. New York*.<sup>106</sup> A Puerto Rican farm worker was convicted of murder in a trial during which access to an interpreter was spotty. The United States Court of Appeals found that the absence of an interpreter for a non-English-speaker bespoke a “callousness to the crippling language handicap of a newcomer to its [the United States’] shores.”<sup>107</sup> Subsequently the federal government established a national court interpreter system, and the states have followed national standards.<sup>108</sup>

In voting rights for language minorities, first barriers to voter registration, literacy tests, and then barriers to participation, monolingual ballots and election officials, have been eliminated or lessened through a similar process. One of the primary barriers for immigrants in voter registration is the requirement that voters be citizens. In the early years of the Republic, length of residency and intent to become a citizen were criteria used to permit some immigrants to vote. At the turn of the 20<sup>th</sup> century, states began rescinding this openness to immigrant voting and, by 1928, non-citizens could not vote in any state.<sup>109</sup> Only very recently has the tide begun to shift ever so slightly, with permanent resident non-

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<sup>106</sup> *U.S. ex rel. Negron v. State of N.Y.*, 434 F.2d. 386 (1970).

<sup>107</sup> *Id.* at 390.

<sup>108</sup> Court Interpreter Act, 28 USC §1827 (1978). *See generally* SUSAN BERKSELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* (1990).

<sup>109</sup> *See Stewart v. Foster*, 2 Binn. 110, 122 (1809) (discussing the voting rights of non-citizens and stating “[i]t is the wise policy of every community to collect support from all on whom it may be reasonable to impose it; and it is but reasonable that all on whom it is imposed should have a voice to some extent in the mode and object of the application.”). *See generally* ILL. CONST. of 1818, art. 2 § 27 (giving a vote to all white male inhabitants above the age of twenty-one years, having resided in the State six months); *Spragins v. Houghton*, 3 Ill. 377, 377 (1840) (confirming the right to vote of all white male inhabitants over the age of twenty-one years, having resided in the state six months). *But see* Leon Aylsworth, *The Passing of Alien Suffrage*, 25 AM. J. POL. SCI. REV. 114,114-6 (1931) (describing the gradual withdrawal of the privilege to vote, starting with Illinois in 1848 ending with Arkansas in 1936 and illustrating that the 1928 election was the first presidential election with no participation by non-citizen voters).

citizens permitted to vote in Takoma Park, Maryland and similarly for school board elections in Chicago.<sup>110</sup>

A second barrier is the literacy test. Many citizens were kept from voting by a literacy requirement for voter registration. In the South this was used to prevent African-Americans from voting. In the North, it was used to keep immigrants who had become naturalized citizens from voting. The northern version of this type of discrimination was banned following another court case, *Katzenbach v. Morgan*,<sup>111</sup> a test of the Voting Rights Act of 1965. The state of New York claimed that an English literacy test was a means “to provide an incentive for non-English-speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise.”<sup>112</sup> The United States Supreme Court found that this was an inefficient method to encourage the learning of the English language and that there was no proven relationship between knowledge of the English language and the intelligent use of the right to vote.<sup>113</sup>

A third barrier concerns the ability to understand the ballot and how to use it in the electoral process. Again, a court case has set the standard that legislation has subsequently enshrined. The court case was *Puerto Rican Organization for Political Action (PROPA) v. Kuser*,<sup>114</sup> which required the Chicago Board of Election Commissioners to provide voting assistance for Puerto Ricans who were not proficient in English. The court required the city of Chicago to print bilingual ballots, bilingual directions for the use of voting machines, Spanish-language signs describing assistance available, and to provide bilingual election officials who could furnish such assistance. Subsequently the 1975 reauthorization of the Voting Rights Act included guidelines establishing when bilingual ballots and electoral assistance is required.<sup>115</sup> The popular

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<sup>110</sup> See RON HAYDUK, DEMOCRACY FOR ALL 82, 104 (2006).

<sup>111</sup> *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

<sup>112</sup> *Id.* at 654.

<sup>113</sup> *Id.*

<sup>114</sup> *Puerto Rican Organization for Political Action v. Kuser*, 350 F. Supp. 606, 607, 611-12 (N.D. Ill. 1972).

<sup>115</sup> Voting Rights Act Pub. L. No. 89-110, 79 Stat. 437 (1965).

perception is that this is a terrible expense, but in fact the costs are minimal. It is the symbolic affront to the majority that has made these provisions a matter for intense demagoguery.

There are many other types of minority language rights that we could examine in the context of the United States. For the purposes of the present article, however, the examples provided allow us to understand one approach to linguistic minority rights. Unlike the United Nations documents, the United States Constitution does not recognize linguistic minorities as a protected class. Therefore linguistic rights are accorded insofar as the linguistic minority corresponds to a racial or national origin minority, two categories recognized within United States law. A second distinctive element of the American system reflects the thinking of the founding fathers of the country: as the US was created in response to what the colonists perceived as the abuse of power by the British monarchy, there is a strong prejudice for as little government intervention as possible. Therefore language rights have not been developed as an organized whole, but rather as last-resort responses to particular situations. This is why federal court decisions play such an important role. The court intervenes when standard practice fails to live up to constitutional expectations. Once the federal court has stepped in, the national standard is established and consecrated in federal and state legislation. The result is a lack of coherency in language policy although many of the principles of the international treaties and conventions are, in the end, respected, even if little mention is made of those texts in American jurisprudence and legislation.

### *B. France*

France has a very different approach from the United States, although many similarities in the disdain for minority languages through the country's history, and ultimately, a similar provision of linguistic rights in spite of national policy. As mentioned above, the French government does not permit the differentiation of the citizenry according to origin in official practice, including the census. The modern French republic does not recognize the idea of



intermediate group identity between the individual and the State.

During the *ancien régime*, the period of the monarchy before the French Revolution in 1789, language became an issue as the power of king increased, and the territory he ruled expanded. In the first centuries of the French monarchy, the king controlled directly a relatively small territory and issued few if any pieces of legislation that concerned the entire country. Justice was seigneurial, and varied from one region to another. Starting in the 13<sup>th</sup> century the kings issued more and more national legislation and established officers of the king's law in all corners of the kingdom. However local law, most often unwritten, continued to be the primary system of justice. Starting in 1454 the king required that local laws be written down, and in the king's language. The use of Latin and of local languages as opposed to the northern French variety that was becoming standard was thus a first source of conflict.

Territorial expansion was the second source of linguistic conflict in France. France gained control over Brittany in 1532. In the 17<sup>th</sup> century, royal authority was extended in the south to the Pyrenees, imposing French on Basque and Catalan speakers and to the east into regions of German and Flemish speakers. In 1768 France gained control over Corsica. In each of these areas French was imposed as the language of law and administration. Even though the state did not provide for education during this period, there was pressure to establish French-language schools, even a plan, similar to United States policy for Native Americans, to forcibly remove children from their parents in Alsace so that they would grow up in a French-speaking environment.

After the French Revolution there was a brief period of multilingualism in France. Provisions were made to translate the new laws into a variety of languages.<sup>116</sup> However, qualified translators were hard to find. Furthermore, as the Assembly grappled with the question of public education, the desire grew for the imposition of a single language throughout the country. Finally, as the revolts against the Revolution originated in areas where French

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<sup>116</sup> AUGUSTE BRUN, *LA LANGUE FRANÇAISE EN PROVENCE DE LOUIS XIV AU FELIBRIGE* 98 (SLATKINE REPRINTS 1972) (1927).

was not spoken, public perception was that speaking a language other than French was ‘counter-revolutionary.’<sup>117</sup> The result was that the primary goal of education was decreed to be the mastery of the French language, and the use of other languages in the classroom was banned. In June of 1794 Henri Grégoire issued a report “Report on the necessity and means to annihilate the patois and to universalise the use of the French language.”<sup>118</sup> Nonetheless, an exception was made for Corsica, and renewed under Napoleon. This exception would remain in force until struck down by a court ruling in 1859.<sup>119</sup>

The effect of these decisions was mitigated by the inability of the First Republic to fund and organize public schooling. Under Napoleon the control of the schools reverted to the Church. The Church, more interested in saving souls than in teaching French, turned a blind eye towards the use of minority languages in the primary school classrooms in areas where minorities dominated. Governmental frustration with the lack of progress in imposing the national language led to a system of national examinations and national inspection of the schools. However it was not until a series of laws in the 1880s, known as the lois Ferry, required the creation of free, non-religious schools and mandatory attendance that knowledge of the French language came to be almost universal in many areas in the periphery of the country. Punishment for using minority languages in the classroom or even on the playground was quite common.

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<sup>117</sup> In the words of Bertrand Barère de Vieuxac (January 27, 1794): “Le fédéralisme et la superstition parlent bas-breton; l’émigration et la haine de la République parlent allemand; la contre-révolution parle italien, et le fanatisme parle le basque. Cassons ces instruments de dommage et d’erreur. [Breton is the language of federalism and superstition; German the language of emigration and hatred for the Republic; Italian the language of counter-revolution and Basque the language of fanaticism. Let us destroy these tools of destruction and of error]. Archives Parlementaires de 1787 à 1860: Recueil Complet des Debats Législatifs et Politiques des Chambres Françaises, 83, 715 (Jan. 27, 1794).

<sup>118</sup> Henri Grégoire, Report on the necessity and means to annihilate the patois and to universalise the use of the French language, June 4, 1794.

<sup>119</sup> Cour de cassation [highest court of ordinary jurisdiction] Paris, April 1859, D.P. I, No. 19 1859 (on file with author).

Nonetheless, regional movements promoting local minority languages were gaining strength. A number of associations were created in first half of the 19<sup>th</sup> century to support the revival of minority languages.<sup>120</sup> The Church, particularly strong in Brittany, regularly used sympathy for local languages as a tool in the battle against the secular state. This motivated La Villemarqué's re-edition of the Breton dictionary originally published by Le Gonidec in 1821, and the publication of new catechisms in Breton.<sup>121</sup> Priests also played an important role in the revival of Occitan, the language of the South of France. In 1900 these groups would join forces through the creation of the *Groupe régionaliste*, a confederation of minority language associations.<sup>122</sup> When, after the First World War, the Minorities Treaties were imposed on the newly-formed countries in Eastern Europe, French minority groups complained that those countries were being required to protect minorities in a manner that the French government refused to provide to its own citizens.<sup>123</sup> However, governmental resistance to such complaints was steadfast.<sup>124</sup>

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<sup>120</sup> For Breton, the Académie Celtique was founded in 1805, the Association Bretonne in 1829; for Flemish, the Comité flamand de France in 1853; for Provençal, the Félibrige in 1854.

<sup>121</sup> La Villemarqué's efforts had little effect because the population was largely illiterate and the priests refused his spelling system. STEFAN MOAL, *Purism in Breton: 'rather death than taint,' in PURISM. SECOND HELPING. PAPERS FROM THE CONFERENCE ON 'PURISM IN THE AGE OF GLOBALISATION'* 73, 73-98 (Dónall ó Riagáin & Thomas Stolz eds., 2001). For more on Breton orthography, see below section VI.

<sup>122</sup> Anne-Marie Thiesse, *L'invention du régionalisme à la Belle Époque*, LE MOUVEMENT SOCIAL, Jul. - Sep., 1992, at 11, 17.

<sup>123</sup> In 1919, the Marquis de l'Estourbeillon, president of the Union Régionaliste Breton, presented a petition for "le droit des langues et la liberté des peuples" (the right to language and the freedom of peoples) to the Versailles Peace Conference. HERVE ABALAIN, *HISTOIRE DE LA LANGUE BRETONNE* 59 (Jean-Paul Gisserot ed., Plouedern) (1995). The Third Assembly of the League of Nations encouraged States that were not signatory to the minorities treaties to treat their minorities with the same standards, but to little avail. STEVEN WHEATLEY, *DEMOCRACY, MINORITIES AND INTERNATIONAL LAW* 8, 9 (2005).

<sup>124</sup> Anatole de Monzie, Minister of Publication Instruction, responded to such requests with a firm hand (August 14, 1925):

L'école laïque, pas plus que l'Église concordataire, ne saurait

The first breakthrough for minority language education came in 1941, when the Vichy government allowed instruction in local languages, as long as the courses were voluntary and held after school hours.<sup>125</sup> The teachers' union opposed the move, calling it a "dangerous innovation," but it was approved. After the Second World War, a proposal for teaching minority languages was put forward on May 16, 1947 and finally approved in 1951.<sup>126</sup> It

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abriter des parlars concurrents d'une langue française dont le culte jaloux n'aura jamais assez d'autels. Il m'est permis de faire observer, en outre, qu'il reste encore trop d'illettrés parmi nous pour que nous puissions distraire en faveur des plus respectables parlars régionaux ou locaux une portion de l'effort nécessaire à la propagation du bon français. "Celui-là seul est vraiment français du coeur à l'âme et de la tête aux pieds qui sait, parle et lit la langue française". Jusqu'à ce que cette définition de Musset soit applicable à l'unanimité des citoyens adultes, l'enseignement des patois devra être considéré comme un luxe et je vous prie de croire que notre époque n'est guère favorable aux dépenses de luxe pour le compte de la collectivité. [Secular schools, no more than the Church following the Concordat, cannot provide shelter for languages that might compete with the French language, the jealous adoration of which will never have enough altars. Moreover, it is my obligation to state that there are still too many illiterates among us for us to divert any portion of the effort required to propagate good French to the more respectable regional or local languages. "Only he who knows, speaks and reads the French language is truly French, in heart and soul, from his head to his toes." Until Musset's definition is applicable to all adult citizens, the teaching of patois will have to be considered a luxury, and I'm sure you understand that our times are not favorable for spending tax money on luxury items.]

ANDRÉ CHERVEL, *L'ENSEIGNEMENT DU FRANÇAIS À L'ÉCOLE PRIMAIRE. TEXTES OFFICIELS CONCERNANT L'ENSEIGNEMENT PRIMAIRE DE LA RÉVOLUTION À NOS JOURS. TOME 2: 1880-1939* 336-337 (Éditions Economica, Paris: Institut national de recherche pédagogique) (1995).

<sup>125</sup> Arrêté relatif à l'introduction des langues dialectales dans les écoles primaires, Dec. 24, 1941, *Journal Officiel de l'État Français* [Official Gazette of Vichy France], Dec. 24, 1941, at 5562.

<sup>126</sup> "Loi relative à l'enseignement des langues et dialectes locaux," is commonly known as the "loi Deixonne" after the deputy who proposed it. Law No. 51-46 of January 11, 1951, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], January 13, 1951, at 483.

allowed schools to offer one hour per week of instruction in the local language and established university institutes where teachers could be trained to teach the local language and its culture. The approved languages in the original law were Occitan, Basque, Breton, and Catalan. Alsatian was added the following year.

Gradually the number of hours of instruction permitted has increased, as well as the number of languages. Paradoxically, as the number of speakers of minority languages has diminished, the government has been more willing to accept those languages as part of the cultural heritage of the country.<sup>127</sup> The French reaction to the Charter for Regional or Minority Languages reflects the government's belief that only French can be used as an administrative language, while at the same time accommodating linguistic minorities in many other ways. In the original vote on the Charter in the Council of Europe, France abstained.

That same year France approved a constitutional amendment stating that "[t]he language of the Republic is French."<sup>128</sup> The increasing power of European institutions, and the increasing use of English as the *lingua franca* of the EU, was the inspiration for this constitutional amendment.

The constitutional amendment of 1992 would then be the basis for rulings against the use of regional languages. In 1996, the Constitutional Council declared unconstitutional a law permitting the use of Polynesian languages in the legal system in New Caledonia, a French territory in the South Pacific.<sup>129</sup> In September of the same

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<sup>127</sup> In the most recent figures concerning enrollment in regional language programs (2004), more than 31,000 students were enrolled in bilingual education programs in six languages (Alsatian, Basque, Breton, Catalan, Corsican and Occitan). Another 7,000 were enrolled in immersion programs. *See generally* Culture et Communication de la République Française, Délégation générale à la langue française et aux langues de France [General Delegation for the French Language and the Languages of France], *Emploi de la langue française. Rapport 2005* [*Use of the French Language 2005 Report*] [hereinafter *French Language 2005*], available at [http://www.culture.gouv.fr/culture/dglf/rapport/2005/rapport\\_parlement\\_2005.pdf](http://www.culture.gouv.fr/culture/dglf/rapport/2005/rapport_parlement_2005.pdf).

<sup>128</sup> La Constitution 1958 CONST. art. 2.

<sup>129</sup> The language issue arose concerning title VII of the proposed law which

year, the State Council gave an opinion on the Charter: while the educational and media provisions could be accommodated, the use of languages other than French in administration and in the justice system was unacceptable.<sup>130</sup>

The Jospin government embraced the Charter and in 1997 appointed Bernard Poignant, the mayor of Quimper, the Breton speaking region, to conduct a survey of minority language usage. In his report of 1998, Mayor Poignant recommended that the government appoint an expert to determine how the Charter could be implemented within the French constitutional framework. This report, prepared by the linguist Bernard Cerquiglini and released May 12, 1999, emphasized the flexibility of the Charter in encouraging ratification by the state. He recommended that France emphasize the cultural importance of the linguistic communities while downplaying their territoriality: for him, the languages of France are part of the national heritage, for the entire country, and furthermore, with the mobility of citizens in modern France, speakers of the minority languages cannot be limited to any one region.

Therefore Cerquiglini's list of languages that France might specify for various types of protection includes seventy-five languages, of which fourteen are based in the European territory of France and the other sixty-one in the Territoires and Départements d'Outre-Mer. Included in the European-French languages are three languages of 20<sup>th</sup>-century immigrants: Berber, Arabic, and Armenian. Among the languages of the DOM and TOM are the French-based creoles of the Caribbean, now widely distributed in European France.

A month after Cerquiglini's report, the Constitutional Council rejected even these watered-down recommendations for the

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allowed the use of Tahitian or other Polynesian languages in governmental affairs. See Conseil constitutionnel [CC] [constitutional council] decision no. 96-373DC, April 9, 1996, available at <http://www.conseil-constitutionnel.fr/langues/anglais/a96373dc.pdf>.

<sup>130</sup> Conseil d'Etat, Section de l'intérieur [CE Sect.] [highest administrative court, section of the interior] decision no. 359 461, Sept. 24, 1996, available at <http://www.conseil-etat.fr/avis90/359461.pdf>.

protection of minority languages.<sup>131</sup> The Council rejected the notion that the French state could recognize territorial divisions with specific rights within those territories. This was found to be in contradiction with the principles of the unity of the French people and the indivisibility of the Republic. Furthermore, the right to use a language other than French in official and legal matters was firmly rejected. At the same time, the Council recognized approvingly that many of the cultural protections in education and the mass media were already in place. Therefore the requirements of the Charter were unnecessary in those domains.

The recognition of territorial languages became a major factor in the 2002 presidential election, centering on treatment of Corsica. As mentioned above, Corsica was acquired from the Republic of Genoa in 1768. It benefited from a special status, allowing the use of the Corsican language in administration and justice, as well as the educational system, until a ruling by the Cour de Cassation on August 4, 1859. This ruling, *Giorgi c. Masaspino*, declared that any exceptions made earlier were temporary, and expired when those holding office at that time stepped down.<sup>132</sup>

The renewal of tensions in Corsica can be traced to the immigration of *pieds noirs*, French citizens fleeing Algeria at the conclusion of the Algerian War. Corsicans resented the preparation of land for this displaced population and considered the demographic changes resulting from this repopulation a danger to the dominance of Corsican language and culture on the island. Autonomist groups were reinvigorated and political violence increased markedly. Upon his election to the presidency in 1981 François Mitterand declared his support for the preservation of Corsican culture. In 1982, the Assemblée de Corse was created,<sup>133</sup> transferring limited executive

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<sup>131</sup> Conseil constitutionnel [CC] [constitutional council] decision no. 96-412DC, June 15, 1999, available at <http://www.conseil-constitutionnel.fr/langues/anglais/a99412dc.pdf>.

<sup>132</sup> “Il n’y a aucune distinction à faire entre la Corse et les autres portions du territoire français” [No distinction may be made between Corsica and other parts of French territory]. Cour de cassation [highest court of ordinary jurisdiction] Paris, April 1859, D.P. I, No. 19 1859, 452, 453.

<sup>133</sup> Law 82-214, March 2, 1982, *Loi portant statut particulier de la region de*

powers from the national government to the region.

Encouraged by this opening, some Corsican deputies in the National Assembly pushed for mandatory instruction in Corsican in the public schools, while others would settle for optional instruction in the language. The Minister of Education rejected this proposal in 1983. A number of other proposals for Corsica were debated, with some increase in local autonomy in a 1991 law.<sup>134</sup> The assassination of the French prefect in 1998 led to a state of crisis that Prime Minister Lionel Jospin attempted to calm through a proposal for a new status for Corsica. Through the “Matignon process” negotiations led to a new law approved December 18, 2001. A month later the Constitutional Council declared this law unconstitutional.<sup>135</sup>

In the meantime another political drama unfolded. In 2000 Jean-Pierre Chevènement, then Minister of the Interior, resigned from the Jospin government in protest against the Corsican initiative. With two Socialists thus running against each other in the 2002 presidential elections, extreme right-wing candidate Jean-Marie Le Pen snuck past both into the run-off elections, paving the way for an easy victory for center-right candidate Jacques Chirac. Thus the battle over how to deal with linguistic minorities played a pivotal role in the national elections.

In a final analysis, France has adopted many of the measures foreseen in international treaties concerning linguistic minorities, but has steadfastly refused to permit the use of languages other than French in administration and justice. As we have seen, this is not an issue that splits easily along party lines. Right-wing politicians can be in favor of local difference, as seen by the support in the Vichy government for minority language education, and so can left-wing

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*Corse.*

<sup>134</sup> Law no. 91-428 of 13 May 1991, *Loi portant statut de la collectivité territoriale de Corse*. See also ANNE JUDGE, LINGUISTIC POLICIES AND THE SURVIVAL OF REGIONAL LANGUAGES IN FRANCE AND BRITAIN 138-140 (2007) (giving credit to this policy for the maintenance of regional languages).

<sup>135</sup> See Decision 2001-454 DC, *Law relating to Corsica*, Jan. 17 2002, available at <http://www.conseil-constitutionnel.fr/decision/2002/2001454/2001454dc.htm>.



politicians, as seen in Jospin's efforts to negotiate a special status for Corsica. Similarly right-wing politicians can be firmly opposed to regional difference and so can left-wing politicians. At stake is a perception of the nature of French-ness. Is the key to French-ness the speaking of the French language? The state has repeatedly supported this position and has steadily increased the means at its disposal to reinforce this equation: state education, military conscription, and an unbending commitment to the use of French in legal and administrative institutions. However, once this type of French-ness was achieved, almost all citizens born in France now speak French as a first language, the government is willing to promote minority languages as a common cultural heritage, but not as the particular heritage of a distinct region or group.

### *C. Spain*

A very different approach has taken shape in Spain, where regional autonomous zones maintain minority languages. This was not always the case, but quasi-autonomy remained conceivable throughout Spanish history and sometimes was realized. In the following remarks, I shall confine myself to Catalonia which, along with the Basque Country, has enjoyed the most success in maintaining its minority language.

#### *1. Catalonia*

Catalonia, on the northeastern edge of the Iberian Peninsula, was a buffer state between the Frankish kingdom and the Moorish conquerors. During the Middle Ages, it was an important power in the Western Mediterranean and developed a wide-ranging commercial network. With the unification of the kingdoms of Aragon and of Castile in 1516, Catalonia was forced to accept the rule of the Spanish king, but retained many rights. A revolt in 1640 gave Catalonia nineteen years of freedom before the Treaty of the Pyrenees established French control over northern Catalonia and Castilian control of the rest. The War of the Spanish Succession led to the decree of Nueva Planta, which replaced the earlier Catalan

constitutions, closed the Catalan universities, and excluded the Catalan language from official domains.<sup>136</sup>

Catalan nationalism revived in the last quarter of the nineteenth century. The establishment of a constitutional monarchy gave hope to the Catalan community. The Spanish Civil Code, enacted in 1889, gave Catalonia a special status. A nationalist assembly, the Lliga Catalana, proclaimed in 1892 that Catalan would be the sole official language in Catalonia, a decree it had no authority to enforce. In 1901 the Lliga Regionalista was formed, advocating autonomy for Catalonia. An Institute for Catalan Studies was founded in 1907, with the goal of establishing a standard language. The Mancomunitat, established in 1914, united the four Catalan-speaking provinces to exercise a weak self-government. During the dictatorship of Primo de Rivera the use of Catalan was banned in the schools, restored under the Generalitat, reintroduced in 1932 under the Second Republic, but crushed upon the victory of Francisco Franco in 1939. The use of Catalan in the schools began to be reintroduced into the Spanish school system during the last years of the Franco regime. After the death of Franco in 1975 a new statute of autonomy was approved in 1979. The subsequent decade saw repeated legal skirmishes concerning the extent of autonomy, with 314 cases brought before the Constitutional Council.<sup>137</sup>

On September 15, 2001 the Spanish government ratified the European Charter for Regional or Minority Languages. In 2006, a new statute of autonomy was drafted for Catalonia, including article 6 establishing the official language of Catalonia:

The first language of Catalonia is Catalan. As such, Catalan is the everyday and preferred language of public administration and public media of mass communication in Catalonia, as well as the language normally used as the medium of instruction in teaching.

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<sup>136</sup> Decreto de Nueva Planta de la Real Audiencia del Principado de Cataluna de 16 de Enero de 1716 [Decree of Nueva Planta of January 16, 1716] (ruling that the territory of Cataluna and the use of the language of Catalan be ruled by the laws of Castile under King Phillip V).

<sup>137</sup> MICHAEL KEATING, *NATIONS AGAINST THE STATE: THE NEW POLITICS OF NATIONALISM IN QUEBEC, CATALONIA, AND SCOTLAND* 150 (2001).

Catalan is the official language of Catalonia, as is Castilian which is the official language of the Spanish state. Everyone has the right to use both official languages, and citizens of Catalonia have the right and the duty to know them.<sup>138</sup>

Article 33 goes on to establish the right to linguistic choice, between Catalan and Castilian.<sup>139</sup> All legal and administrative services can be demanded in the language requested by the citizen. This obligates all public officials to know both Catalan and Castilian.

Catalonia has become increasingly insistent on the use of Catalan in the European Union. The European Union requires most documents to be translated into all the official state languages of the member states, it does not require translation into languages with official status at the regional level. The common argument in favor of European Union recognition of Catalan is that there are more Catalan speakers in the European Union than there are Danish speakers. In December 1990, Resolution A3-169/90 of the European Parliament proposed the use of Spanish regional languages in some European Union contexts.<sup>140</sup> In 2006 the Kingdom of Spain reached an “administrative arrangement” with the Council of the European Union, permitting the use of languages that have official status in part of Spain in some European Union contexts. For instance, a Spanish citizen can send a request to the EU in Catalan, or any other language recognized by the Spanish constitution, but it will first be

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<sup>138</sup> My thanks to Marita Romine for her assistance in the translation: “1. La lengua propia de Cataluña es el catalán. Como tal, el catalán es la lengua de uso normal y preferente de las Administraciones públicas y de los medios de comunicación públicos de Cataluña, y es también la lengua normalmente utilizada como vehicular y de aprendizaje en la enseñanza. 2. El catalán es la lengua oficial de Cataluña. También lo es el castellano, que es la lengua oficial del Estado español. Todas las personas tienen derecho a utilizar las dos lenguas oficiales y los ciudadanos de Cataluña el derecho y el deber de conocerlas.” Statute of Autonomy of Cataluña, art. 6 § 1-2 (approved by Spanish Parliament Mar. 30, 2006 and by the Catalan people by referendum June 18, 2006).

<sup>139</sup> *Id.* at art. 33.

<sup>140</sup> Resolution of the European Parliament on Languages in the Community and the Situation in Catalan, 1991 OJEC (C 19).

translated into Castilian by the Spanish government. Spanish representatives to the Council may make speeches in one of the constitutionally recognized regional languages, as long as permission is requested at least fourteen days in advance.<sup>141</sup>

Thus Spain, although frequently governed by regimes with a centralizing tendency equal to that of France, has consistently reverted to the recognition of regional difference within a unified Spanish-speaking state. The power of those regions has increased under the influence of European institutions, to the point of breaking through the barriers against the use of regional languages in European Union activities.

#### *VI. What Happens After Protection?*

If protection is granted and a minority language is provided the means for survival or even prosperity, the disputes are not over. If the language is going to be used in an official context, or in the schools, or both, an official form of the language must be recognized. In some cases this is not so difficult, for instance when the minority language in one country is a majority language in another, where an official form has been developed. However, even this optimal situation can present problems. The dialect of the minority is not necessarily close to the dialect that has been made official in the majority situation. In the United States efforts to revive French in Louisiana included provisions by the French government to send teachers to the Louisiana Francophone community. However, after 200 years of separation from the mother country, Louisiana French is very different from standard European French. The language being taught was really a third language for the students, after Louisiana French and American English. A similar situation pertains in France for Alsatian and Lorraine varieties of German.

More common is the situation of indigenous languages within the territory of the State. This could be Native American languages in the U.S., or Breton in France. In the following, I shall consider

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<sup>141</sup> Administrative arrangement between the Kingdom of Spain and the Council of the European Union, 2006 O.J. (C 40) 2.

the situation of Breton in France, where the problems of standardization and dissemination are well documented. The issues can be lexical, phonological, morphological, or syntactic. Particularly thorny are debates over the use of borrowings from the majority language, seen as impure, although purity is as dubious a concept with language as it is with “race,” and dialectal differences within the minority language. Orthographic disputes might pit concern for the proper representation of the sounds of a language against more etymological spellings that bring out the connections between related words.

All three of these problems arise within Breton long before anyone conceived of minority linguistic rights. In fact concern over borrowings is evident in the creation of purely Breton equivalents for Latin words. Even during the period when Brittany was not under Frankish control, Latin borrowings were common though not the rule.<sup>142</sup> Efforts to preserve inherent forms of a language against borrowings often include the preparation of dictionaries of accepted terms, and Breton is no exception. Already in the 18th century Louis Le Pelletier prepared the *Dictionnaire étymologique de la langue bretonne*,<sup>143</sup> with the goal of protecting Breton against French borrowings.<sup>144</sup> The first known orthographic reform proposed for Breton dates to 1659, with the work of Julien Maunoir, who wanted to create a standard language for the purposes of evangelization at the time of the Catholic counter-reformation. He chose the Léon

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<sup>142</sup> For example, the word for ‘bridge’ in the Celtic languages that fed into Breton was ‘briva’, but already in the earliest texts, from the 9<sup>th</sup> century C.E., the Latin *pont* is used. Breton ‘dor’ competed with ‘porth’, a bretonized form of the Latin *porta* (English ‘door’). During the Middle Ages, the borrowings multiplied, both from Latin, the learned language of all of Western Europe, and from French, as the Duchy of Brittany was increasingly under French control, even if nominally independent until 1532. Fleuriot estimates that 5/6 of the grammatical terms used in medieval Breton texts are borrowed from French or Latin. Léon Fleuriot, *Les réformes du Breton*, in 2 LANGUAGE REFORM: HISTORY AND FUTURE 31-32 (István Fodor & Claude Hagège eds., 1983).

<sup>143</sup> Published posthumously in 1752, the manuscript was completed in 1716. MOAL, *supra* note 121, at 79.

<sup>144</sup> Fleuriot, *supra* note 142, at 34.

dialect as the basis for his system.<sup>145</sup>

Creating a standard meant bringing into agreement four generally recognized dialects of Breton: those from the regions of Cornouaille, Léon, Trégor, and Vannes.<sup>146</sup> In the early 20<sup>th</sup> century intellectuals from the first three agreed on a common spelling, referred to as the KLT spelling, K = Kerneo, Cornouaille in Breton. In 1936, Xavier de Langlais, who spoke Vannetais but wrote in KLT, suggested some adjustments that would permit all four dialects to be written by a single orthography.<sup>147</sup> De Langlais was scorned, but another influential writer, Roparz Hémon, tried again in 1941 with a writing system known as *peurunwan*. Although battles over orthography have persisted, all the schools teaching Breton now use Hémon's spelling system, leading to its dominance.<sup>148</sup>

The opposition of 'natural' transmission of Breton, from native-speaker parents to their children, and 'artificial' transmission, from non-native-speakers to their children, continues to divide the Breton-speaking community. The former has dwindled to almost nothing while the latter has grown quickly.<sup>149</sup> Schooling in Breton started under the Vichy government during the Nazi occupation, and returned with the Loi Deixonne in 1951.<sup>150</sup> In 1977 the *Diwan* movement, a Breton immersion program organized privately began, and state and church schools have expanded the opportunities to

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<sup>145</sup> Two 18th-century dictionaries were written for the Vannetais dialect. In the 19th century three dialectal forms competed for dominance, with Cornouaillais left out of the equation. MOAL, *supra* note 121, at 77-79.

<sup>146</sup> The first three are contiguous in northern and western Brittany, and thus more similar to each other. The Vannetais dialect is located on the southern coast of the peninsula, nearer its base, and differs markedly from the first three.

<sup>147</sup> One proposal suggested amalgamating KLT <z> with Vannetais <h>, so that KLT *breiz* and Vannetais *breih* 'Brittany', would be written <Breizh>, which has become the symbol for Brittany on automobile stickers (Bzh).

<sup>148</sup> MOAL, *supra* note 121, at 92.

<sup>149</sup> See Francois Heran, Alexandra Filhon & Christine Deprez, *La dynamique des langues en France au fin du XXe siècle*, 37 POPULATIONS & SOCIÉTÉS 1, 1-4 (2002) (stating before 1940 seventy percent of Breton parent spoke the Breton language to their children. By the mid-1980s only one percent did so. Similar figures pertain for Alsatian and Corsican).

<sup>150</sup> *Id.*

learn Breton, and to receive instruction in other subjects through the medium of Breton.<sup>151</sup> This requires textbooks, and different textbooks have chosen different dialects, or an artificially constructed dialect that corresponds to none of the historical dialects.<sup>152</sup> The Diwan movement is largely composed of people who are native speakers of French that want to transmit their non-native Breton to their children. These *néo-bretonnants*, ‘new Breton speakers,’ will soon, if they do not already, outnumber those for whom Breton is a true native language. Therefore Breton might be saved by non-native-speakers, speaking a version of the language that traditional speakers have trouble understanding. Almost all Breton speakers are now also speakers of French, with many of them being native speakers of French.

The longevity of such a revival process has yet to be proven. The linguistic and political divisions between various factions of Breton nationalists continue to fester but enrollment in Breton classes is growing. According to a government report, the total number of students studying Breton in state schools has grown from 17,581 in 1998-1999 to 31,005 in 2003-2004.<sup>153</sup>

### VII. Conclusions

In each of the three countries we have studied that the temptation for the majority to try to assimilate the minority has been very strong. The evolution of opinion concerning human and civil rights, inspired to varying measures by international agreements, has provided a different model for accommodating minority language populations and maintaining peace and stability within and between

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<sup>151</sup> See MARYON McDONALD, *WE ARE NOT FRENCH!: LANGUAGE, CULTURE AND IDENTITY IN BRITTANY* (1990) (discussing the development of the Diwan program).

<sup>152</sup> These have been characterized as “xenolects,” which are defined as “slightly foreignized [sic] varieties spoken natively which are not creoles because they have not undergone significant restructuring.” Mari C. Jones, *At What Price Language Maintenance?: Standardization in Modern Breton*, *FRENCH STUDIES. A QUARTERLY REVIEW* 435 (1995).

<sup>153</sup> *French Language 2005*, *supra* note 127, at 79.

countries. In two of the countries these models have been adopted too late, or almost too late, depending on one's level of optimism. In the United States the crushing of indigenous and immigrant languages was largely accomplished before court rulings required meaningful education and equal services for people, whatever their native language. In France, flexibility in education and mass media came only after the Abbé Grégoire's dream of annihilating regional languages had been realized; France remains staunchly opposed to the use of these languages in administration. Although the United States has a federalist organizational structure and France is more highly centralized, in both of these countries the extension of central power over other regions has largely been accomplished by conquest, with the result that each considered the spread of the national language a matter of destiny for its modern territory. Spain, in contrast, was formed by a federation of kingdoms that from the start had to recognize the particularities of its regions. Even if the subsequent regimes have frequently attempted to impose uniformity, the tradition born at the founding of the Spanish state has always re-emerged. Now that tradition is even shaping the way the international community views linguistic minorities, and changing the practices of the European Union.

Each country's approach to minority languages has been shaped and continues to be shaped by a national conception of what constitutes "American-ness," or "French-ness," or "Spanish-ness." These are evolving concepts. American-ness for the Know-Nothings of the 1840s, for the Americanization movement of Henry Ford at the turn of the 20<sup>th</sup> century, and for Samuel Huntington today at Harvard means that the ideals of liberty and democracy can only be expressed in the English language by Protestants of Anglo-Saxon origin. For others, the unifying concept of American-ness is the appreciation of our diversity, and of the freedom to be different. The United States has never passed a law or constitutional amendment making English the official language of the country,<sup>154</sup> despite numerous attempts over the past twenty-five years. The same

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<sup>154</sup> Many individual states (23/50) have passed such measures, but their effect has been tempered by federal judicial decisions.



constitutional principles that some claim can only be expressed through English have prevented English from enjoying such a status and helped to balance minority needs and majority privileges.

In France, French-ness was first defined by loyalty to the king, and then by loyalty to the Republic. The exclusive use of French has been a matter of convenience for the legal system, and a question of equality through uniformity since the Revolution. While the United States has embraced the recognition of “protected classes,” though not linguistic, France has consistently rejected any notion of communities that stand between the State and the individual, a rejection of systems of personal justice that prevailed before the Revolution. The insistence on a single identity, citizen of France, shapes policy towards linguistic minorities. Efforts to maintain minority language are justified as protection of a shared national patrimony.

In Spain, multiple identities have been legally recognized, off and on, throughout the history of the country. In a period when the protection of one’s identity is perceived as necessary to peace, strong regional identities, in addition to the national identity, have been reinforced through the structure of the State. The necessity of recognizing local difference as a means to maintain peace and tranquility has been especially obvious in Spain, where unsatisfied Basque nationalists have often pursued their demands through violence. Therefore, Spanish-ness has room for Basque-ness, and Catalan-ness.

Despite the differing national traditions, international pressures from the United Nations and the various European institutions have created a climate in which countries are more accommodating to their linguistic minorities. Even if enforcement of provisions supporting linguistic minorities remains difficult if not impossible, as during the time of the League of Nations, the treaties, conventions, declarations, and charters of these international bodies have shaped opinions in such a way that minority languages now have a chance. A European identity has made regional identities less threatening to the nation-state, and more globally languages are being recognized as valuable. In Europe the Erasmus program

promotes educational exchanges and in the United States study abroad programs are thriving as never before. While some of this can be attributed to a recognition, following the attacks of September 11, 2001, that ignorance of other cultures is dangerous to our security, the influence of international institutions should not be underestimated.

Minority “problems” are thus coming to be seen in a different light, one that offers more hope to the survival of minority languages. This is not to say that disputes no longer remain: ongoing negotiations between the conflicting appeals to different identities will forever be part of our political landscape. The national and international frameworks we have outlined are means to pursue such negotiations in peace and protect us from the horrifying destruction that has all too often resulted from such conflicts.