

Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System

*Daniel J. Rearick**

INTRODUCTION

When non-English speakers need legal assistance in America, they face a frightening and incomprehensible “babble of voices” that will determine matters fundamental to their lives, liberty, and property.¹ Their struggle begins long before they enter a courtroom. In their day-to-day lives, non-English speakers face discrimination based on their primary language, their race or ethnicity, and their alienage. Statistically, they are unlikely to be regularly voting citizens, so their elected representatives have little incentive to speak out on their behalf. When language minorities find themselves in need of legal help, they must search for an advocate who can explain their rights and legal options to them in a way they can understand—either a lawyer who speaks their language or a lawyer who has the resources to use an interpreter in everyday communications with clients. Even in a serious criminal trial, the government may not provide an interpreter for essential pre-trial attorney-client meetings. Once at trial, non-English speakers may not be able to understand the proceedings or have a conversation about key facts and strategy. They become uninformed observers, possibly understanding less about their own trial than anyone else in the courtroom. When an outcome is reached, there might not be someone present to explain it—why they are going to prison, why they are being evicted from their homes, or why they have lost custody of their children.

Non-English-speaking minorities in the United States are vulnerable. To comprehend the true impact of the barriers they face when they attempt to protect their rights via legal means, one must also understand the political process’s general disregard for their needs. The unique intersection of race, language, and citizenship that defines the lives of linguistic mi-

* J.D., Harvard Law School, 2004; B.A., University of North Carolina at Chapel Hill, 2000. I would like to thank Professor Martha Minow for helping me sharpen my thinking on this topic and Ben Fitzpatrick and Anna Cross for heading up a great team of editors. Gracias también a los chicos del Hogar Don Bosco que me enseñaron a hablar español y a mi hermano David y a mi cuñada Carolina Vásquez Gutiérrez Rearick.

¹ *Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970).

norities is unpopular in American society and underprotected by American laws. This confluence of factors exposes language minorities, such as Spanish-speaking Latinos, to severe discrimination and simultaneously creates barriers to both participatory democracy and the courts. Rather than receiving the heightened legal protection they need, non-English speakers face limited access to the political and judicial systems necessary to enforce their rights.

Linguistic minorities face similar individual and systemic discrimination and disadvantage based on their race or ethnicity as has been experienced by African Americans and other minorities.² As a result, those Latinos, Chinese, Filipinos, and others who do not speak fluent English are likely to be less educated and to receive less compensation for their work than their English-speaking peers. This hinders their participation at the ballot box because low income and educational attainment are two factors strongly correlated with low voting rates. Furthermore, because many linguistic minorities are not citizens, they lack the right to vote and are thus disempowered from advancing their rights through the political system. Those non-English speakers who do possess the right to vote are less likely to exercise it because campaigns are largely run in English and are not directed toward non-English-speaking constituencies. Thus, they suffer from proportionally lower political clout and fewer representatives in government.³

These forms of disenfranchisement and disadvantage are compounded by many Americans' fear or dislike of non-English speakers and recent immigrants. In the United States, linguistic minorities face discrimination not just because they do not speak English, but because they *do* speak another language, which many Americans are not comfortable hearing. Thus, language minorities in the United States face both routine acts of discrimination and well-organized political opposition.

This Note addresses the critical need to improve non-English speakers' access both (1) to legal advice and representation in a language they understand, and (2) to meaningful courtroom justice. However, before moving to discuss linguistic minorities' *enforcement* of their rights through judicial action, this Note will describe some of the ways in which linguistic minorities are disadvantaged in the *recognition and acceptance* of their rights through participatory democracy.⁴ The disadvantages that La-

² This statement is not meant to imply that there can be meaningful generalization of the experiences of discrimination across racial or ethnic lines. For instance, it would be absurd to compare the lives of contemporary Latinos with African Americans' experience of slavery, Jim Crow laws, and the sheer time frame and magnitude of continuing discrimination.

³ One exception to this phenomenon occurs at the local government level in urban areas where minorities are often a strong majority of both the population and the body of represented officials.

⁴ The dichotomy between establishment and enforcement does not map perfectly onto the divide between the province of the legislature and judiciary, particularly if one consid-

tinians and other non-English speakers face in the democratic process should inform both the potential constitutional arguments for rights to judicial access as well as the appropriate response from the legal profession that serves these communities.⁵ In order to glean lessons for legal educators and practitioners, the medical profession's more concerted efforts to serve non-English communities will be examined. A coordinated response by law schools, bar associations and individual attorneys, which must include more accessible language training, will be necessary to reform the legal profession and produce greater numbers of non-English-speaking attorneys. Independent of legal reforms, this transformation of the legal profession would be a significant advancement toward serving language communities whose interests are inadequately addressed by the majority political will.

I. THE SPANISH-SPEAKING BOOM AND ANGLO-AMERICA'S RESPONSE

Spanish-speaking America is a relatively new phenomenon. As recently as 1980, only 6% of the population of the United States was Hispanic.⁶ There are now almost thirty-nine million Hispanic Americans, which accounts for 13.4% of the total population of the United States.⁷ While every state has some Hispanic population, the distribution varies widely. At one extreme, 42% of the population of New Mexico is Hispanic; in California and Arizona, Hispanics represent 32% of the total population.⁸ More than one-quarter of the populations of New Mexico, Texas, and California speak Spanish at home, and in seven other states, more than

ers the judicial branch jointly responsible for creating new rights. However, if we think of the judicial role as merely enforcing legislation and the Constitution, this divide makes sense.

⁵ Obviously, many Latinos do speak English and thus do not face the immense barriers described in this Note. Nevertheless, as discussed later, the rights of linguistic minorities are extraordinarily relevant to the Latino community as a whole. For clarity's sake, the use of the term "Latino" refers to non-English-speaking Latinos.

⁶ *Resident Population—Selected Characteristics, 1790 to 1999, and Projections, 2000 to 2050*, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2000 (U.S. Census Bureau 2001).

Serious thought has been given to whether the term "Hispanic" or "Latino" should be utilized in this Note. "Latino" will be used to refer to *latinoamericanos* now residing in the United States. However, in order to avoid inaccuracies, the term "Hispanic" will be used when referring to information gathered from statistics or other sources that use this term. In some sense, "Hispanic" may generally be more accurate in this Note, which concerns itself with all Spanish-speaking communities, including small but not insignificant Spanish and other communities that would not fit within the ambit of *latinoamericano*.

⁷ Press Release, U.S. Census Bureau, Hispanic Population Reaches All-Time High of 38.8 Million, New Census Bureau Estimates Show (June 18, 2003), available at <http://www.census.gov/Press-Release/www/2003/cb03-100.html>.

⁸ Demographic and Economic Profiles of Selected Racial and Hispanic Origin Populations, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2001 at 40 (U.S. Census Bureau 2001) [hereinafter Demographic and Economic Profiles]. Arizona's population is also 25% Hispanic and Nevada's is 20% Hispanic.

one person in ten primarily speaks Spanish.⁹ The total number of Americans whose first language is something other than English has also risen sharply.¹⁰ Nearly one in five residents of the United States does not speak English in the home, up almost 50% during the 1990s.¹¹ As of 2000, more than one-quarter of the population of seven states speak a language other than English in their home.¹² That same year, over twenty-one million, or 8% of the total population, admitted some difficulty speaking English.¹³ These numbers do not tell the whole story because some states have seen much more dramatic increases than others.¹⁴ In the 1990s, six states experienced a rise of more than 100% in the number of residents who spoke a language other than English.¹⁵

Thus far, English-speaking America has plugged its ears to the crescendoing chorus of languages like Spanish, Mandarin, and Tagalog heard on its streets. During the past decade, the political will to freeze out non-English speakers has grown considerably. Many Americans, fearful that they will be subjected to Hispanic language and culture in their everyday lives, have mobilized to establish English as the official language of the United States in order to prevent government functions and services from being offered in Spanish.¹⁶ This continuing effort to erase even those pro-

⁹ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICAN COMMUNITY SURVEY: SPEAKING SPANISH AT HOME (2003), at <http://www.census.gov/acs/www/Products/Ranking/2002/R06T040.htm>.

¹⁰ This fact is distinct from the influx in people of Hispanic ethnicity. Nevertheless, though classification as "Hispanic" is not a perfect proxy for "Spanish-speaking," the statistical correlation is high. For a discussion of the difficulties of defining the label "Hispanic," see Lisette E. Simon, Comment, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497, 508-12 (1994).

¹¹ Forty-seven million, or 18% of the U.S. population, indicated on the 2000 Census that they spoke a language other than English in the home. This represented an increase of fifteen million since 1990. The number of non-English speakers rose 38% in the 1980s and 47% in the 1990s. HYON B. SHIN & ROSALIND BRUNO, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, Series C2KBR-29, at 2 (U.S. Census Bureau 2003).

¹² *Id.* at 5. These states are California, New Mexico, Texas, New York, Hawaii, Arizona and New Jersey.

¹³ *Id.* at 4. Moreover, 11.9 million individuals lived in "linguistically isolated households," where no individual over age fourteen could speak English "very well." *Id.* at 10.

¹⁴ As of 1997, 25% of Californians and 20% of New Yorkers were foreign-born. NAT'L CTR. FOR STATE COURTS, REPORT ON TRENDS IN STATE COURTS 52 (1998), available at <http://www.ncsc.dni.us/is/97-98-final.pdf> (citing U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THE FOREIGN-BORN POPULATION OF THE UNITED STATES (1997), at <http://www.census.gov/population/www/socdemo/foreign.html>).

¹⁵ These states were Nevada, Georgia, North Carolina, Utah, Arkansas and Oregon. SHIN & BRUNO, *supra* note 11, at 5 tbl.2.

¹⁶ Understanding the American history of xenophobia is essential to addressing problems of language rights in the United States. By 1988, forty-eight out of fifty states had considered legislation to establish English as the state's official language. Thomas Ricento, *Language Policy in the United States*, in LANGUAGE POLICIES IN ENGLISH-DOMINANT COUNTRIES 122, 150 (Michael Herriman & Barbara Burnaby eds., 1996). Many groups have also campaigned to make English the official language; one such group, U.S. English, raised and spent \$28 million between 1983 and 1990 on pro-English propaganda. *Id.* at 139. An internal memo written by co-founder Dr. John Tanton encapsulates the fears of many pro-English Americans, with not-so-subtle hints of racism: "Will the present major-

grams that currently serve Spanish-speaking communities threatens to further disempower non-English speakers at a time when the need for such services is on the rise.

By 2050, it is expected that one-quarter of Americans will be Hispanic.¹⁷ This predicted boom raises serious questions about the role non-English-speaking citizens will play in American society and the rights that will protect them. Currently, 23% of the Hispanic population in America lives below the poverty line.¹⁸ Only 57% have graduated from high school, and just 11% have graduated from college.¹⁹ Because statistics tend to be recorded on the basis of Hispanic ethnicity rather than on language ability, it is likely that those who cannot speak English are even poorer and less educated. Men and women who speak little or no English appear to earn significantly less than fluent English speakers with comparable education and skill.²⁰ Even though a significant number of new immigrants from Central and South America already hold high school or college degrees, they often find work performing manual labor that does

ity peaceably hand over its political power to a group that is simply more fertile? . . . As whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion?" *Id.* at 150 n.42. Such fears are not very new to America and are not limited to the ignorant, as evidenced by Benjamin Franklin's writings about the German influx into Pennsylvania. Franklin asks rhetorically:

Why should [the Germans] be suffered to swarm into our Settlements, and by herding together establish their Language and Manners to the Exclusion of ours? Why should Pennsylvania, founded by the English, become a Colony of *Aliens*, who will shortly be so numerous as to Germanise (sic) us instead of our Anglifying (sic) them, and will never adopt our Language or Customs, any more than they can acquire our Complexion.

Id. at 130. Another way of phrasing the majority concern is the Sapir-Whorf hypothesis, which describes the theory that shared values can only be expressed in the majority language. Douglas A. Kibbee, *Legal and Linguistic Perspectives on Language Legislation*, in LANGUAGE LEGISLATION AND LINGUISTIC RIGHTS: SELECTED PROCEEDINGS OF THE LANGUAGE LEGISLATION AND LINGUISTIC RIGHTS CONFERENCE, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, MARCH 1996, at 1, 3 (Douglas A. Kibbee ed., 1998).

¹⁷ *Resident Population, by Hispanic Origin Status, 1980 to 1998, and Projections, 1999 to 2050*, in STATISTICAL ABSTRACT OF THE UNITED STATES 19 (U.S. Census Bureau 1999).

¹⁸ U.S. CENSUS BUREAU, DEMOGRAPHIC AND ECONOMIC PROFILES, *supra* note 8, at 40.

¹⁹ *Id.* One source of the low levels of Hispanic educational attainment in America has been a reluctance to either (1) spend the resources necessary to teach non-English-speaking children sufficient English to succeed in school, or (2) allow public schools to teach the children in their own language. For the sole example of the U.S. Supreme Court's recognition of this problem as one of equal protection, see *Lau v. Nichols*, 414 U.S. 563 (1974) (finding that simply providing the same facilities and books to 1800 Chinese-speaking students in San Francisco failed to meet equal protection, since these resources would be of no use to them if they were not first taught to speak English).

²⁰ Among men in Massachusetts with comparable education and skills, those who speak little English earn an average of 33% less than those who speak English fluently. For women, the gap was 24% between those who speak English well and those who cannot. Cindy Rodríguez & Bill Dedman, *Speaking English a State Issue, New Immigrants Clamor for Classes*, BOSTON GLOBE, May 27, 2002, at A1.

not require English language proficiency.²¹ Although many states have begun offering free or low-cost courses in English, they are often insufficient to meet demand.²² While the second and the third generations usually learn fluent English, they will still have to cope with the poverty, lack of education, and marginalization that are the legacy of the previous generations' language exclusion.²³

II. NOWHERE TO TURN: HOW THE INTERSECTION OF RACE, LANGUAGE, AND CITIZENSHIP DENIES NON-ENGLISH-SPEAKING MINORITIES ACCESS TO PARTICIPATORY DEMOCRACY

The issue of inadequate access to education, employment, housing, and basic services is underacknowledged largely because of language and citizenship barriers to the political system and essential services. For a variety of reasons tied to language and citizenship, less than 30% of Hispanics of voting age voted in the 2000 elections.²⁴ Within that group, the voter participation levels are in all likelihood lower for non-English speakers and those with the least education and wealth. In part as a result of their underrepresentation in voting, Latinos are significantly underrepresented in both the federal and state governments. Given that Latino voting rates are the lowest of any ethnic group and that few Latinos occupy positions of power, it is hardly surprising that the broad social and economic issues that confront Latinos in the United States remain largely under-addressed.

A. *Latino Vote Dilution*

Latinos have been vastly underrepresented in recent national elections in comparison to their percentage of the overall population. When one compares white voting to Hispanic voting, the power differentials between the two voting patterns are startling. Non-Hispanic whites represented 73% of the voting-age population but 81% of total votes cast in the 2000 elections.²⁵ In contrast, while Hispanics made up 11% of the

²¹ This again slows the process of integration, since the work does not require English skills, nor does it allow time to study English. *Id.* See also Cristina B. Bolling, *N.C. Saw Top U.S. Immigrant Growth*, CHARLOTTE OBSERVER, Dec. 31, 2003, available at <http://www.charlotte.com/mld/charlotte/news/7603670.htm>.

²² See Rodríguez & Dedman, *supra* note 20.

²³ Contrary to popular belief, today's immigrants appear to be learning English faster than in past generations. While the number of non-English speakers in the United States is expected to continue to rise, the level of bilingualism is expected to rise at an even more rapid rate. In fact, approximately 70% of the children of Hispanic immigrants speak only or primarily English. CALVIN J. VELTMAN, *THE FUTURE OF THE SPANISH LANGUAGE IN THE UNITED STATES* 44 (Carol Oppenheimer & Stina Santiestevan eds., 1988), *microformed on* Educ. Res. Info. Ctr. (ERIC) No. ED295485 (ERIC Document Reprod. Serv.).

²⁴ See *infra* Part II.A.

²⁵ AMIE JAMIESON ET AL., *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER*

voting-age population, they cast only 5% of the votes in the election.²⁶ So how do Hispanics go from comprising over one in eight Americans, but only one in twenty voters?

The dilution of the Hispanic vote results from a confluence of factors, some of which are closely linked to their Hispanic identities, while others result from nothing more than unfortunate demographics. First, approximately 39% of the voting age Hispanic population of the United States cannot vote because they are non-citizens.²⁷ Looking to the future, if the influx of immigrants remains constant, the *number* of non-citizens will presumably hold steady and the *percentage* of Latino non-citizens will slowly decrease. Nevertheless, citizenship is likely to be a factor that decreases the Latino vote for decades to come. Other demographic factors also conspire against Hispanic voting clout. Women are more likely to vote than men, 61% versus 58%,²⁸ but the majority of recent immigrants are men.²⁹ In the 2000 election, voter participation was highest among voters aged sixty-five to seventy-four, 72% of whom voted.³⁰ Thus the elderly are more likely to vote, but the Hispanic population remains overwhelmingly young.³¹

Finally, education and wealth are the demographic factors most correlated with voter participation. In 2000, those with a bachelor's degree were twice as likely to vote (75%) than those who had not finished high school (38%).³² Moreover, 72% of people whose families earned over \$50,000 per year voted, compared with only 38% of those earning under \$10,000.³³ Thus, low turnout might be expected from Latinos, where only 11% have graduated from college and 23% live in poverty.³⁴

These statistics raise interesting questions about easing the requirements for citizenship and whether Voting Rights Act apportionment should take account of actual voter participation. In total, only 27.5% of voting-age Hispanics voted in the November 2000 elections.³⁵ In contrast, 53.5%

2000, at 5 (citing U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P20-542 (2002)).

²⁶ *Id.*

²⁷ *Id.* at 3. It is likely that this number includes close to the majority of the non-English-speaking portion of the Hispanic population because recent immigrants would be least likely to speak English.

²⁸ JAMIESON, *supra* note 25, at 7.

²⁹ *Id.* at 4.

³⁰ *Id.*

³¹ Thirty-five percent of Hispanics in the United States are under eighteen years of age, compared to 25.7% for the general population. Betsy Guzmán, *The Hispanic Population: 2000*, in CURRENT POPULATION REPORTS 7 (U.S. Census Bureau 2002).

³² *Id.* at 5.

³³ *Id.*

³⁴ *See supra* Part I.

³⁵ Guzmán, *supra* note 31, at 5. Only 20% of Hispanics report that they voted in the 1998 election, as opposed to 43% of whites and 40% of blacks. The percentage of Hispanics who vote has decreased more quickly than in the general population between 1972 and 2000, dropping from 37.5% to 27.5%. Low Hispanic voter participation continues

of African Americans voted, and 60.4% of whites voted.³⁶ Another explanation of the low Hispanic voter turnout is that the American political dialogue simply has failed to address a Spanish-speaking audience.³⁷ Consequently, potential Hispanic voters often have remained unaware of their political options and uninformed of their rights.

B. Latino Underrepresentation in Government

Though the American population is now over 13% Hispanic, there are currently no Hispanic senators, and Hispanics still constitute only 5% of the House of Representatives.³⁸ Although the number of Hispanic representatives now stands at a record twenty-two, up from nineteen after the 2000 election, the gains can be attributed almost entirely to redistricting rather than to an increase in voter participation or shifting voting patterns.³⁹ Before the 2002 election, African American representatives in the United States House of Representatives outnumbered Hispanic representatives by a two-to-one margin, even though in overall population numbers, Hispanics outnumbered African Americans.⁴⁰ This under-representation makes it less likely that the issues of concern to many Hispanics, such as immigration, health care, education, and an increase in the minimum wage, will be addressed by Congress.⁴¹

Hispanics have not fared any better in state governments or in the judiciary. Before the 2002 election, there were no Hispanic governors in the United States. Bill Richardson is now the governor of New Mexico, but the state is somewhat of an outlier given that Hispanics constitute a sizable minority of the state's population.⁴² Hispanics remain underrepresented in state governments where they constitute large segments of the

despite positive reform in the area of voting rights, such as the Voting Rights Act of 1975, which required bilingual ballots in districts where at least 5% of the population belongs to a single language minority. For a critique of this voting rights reform, see Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479 (1993).

³⁶ Only 2.2% of whites and 5.7% of blacks living in the United States are not citizens. Guzmán, *supra* note 31, at 5.

³⁷ See de la Garza & DeSipio, *supra* note 35, at 1481.

³⁸ The twenty-two Representatives mark the highest number in U.S. history. Nedra Pickler, *Record Number of Hispanics in the House, Women in the Senate*, NAPA VALLEY REG., Jan. 7, 2003, available at http://www.napanews.com/templates/index.cfm?template=story_full&id=ABD0F02E-7B15-44D1-AC27-D40EC52272A9.

³⁹ Tom Squitieri, *Redistricting Falls Short of Hispanics Hopes*, USA TODAY, Aug. 26, 2002, available at <http://www.naleo.org/USATODAY013.html>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Hispanics account for 42% of New Mexicans. In fact, Richardson's opponent, Republican John Sanchez, was also Hispanic. Eric Green, *Record Number of Hispanics Elected to the U.S. House of Representatives*, WASH. FILE (U.S. Dep't of State), Nov. 12, 2002, at <http://usinfo.state.gov/usa/diversity/a111202.htm>.

population, such as California.⁴³ Moreover, studies done in California have shown that simply having a Hispanic surname can significantly hurt a judge's electability.⁴⁴ In the realm of appointed federal judgeships, Latinos occupied only twenty-seven of 800 positions in the mid-1990s.⁴⁵ It seems likely that through both voting demographics and conscious ethnic discrimination, Hispanics remain largely on the fringes of the institutions of political and judicial power in the United States.

III. THE NON-ENGLISH SPEAKER'S EXPERIENCE OF THE AMERICAN JUDICIAL SYSTEM

An examination of the Latino population of the United States demonstrates how non-English speakers are often cut out of the political process, and thus why this group is in particular need of access to legal assistance and recourse through the judicial system. Yet this type of access is often sharply limited by the inability to speak fluent English. This Part will first outline the state of the law of language rights in the courtroom and describe some of the oft-overlooked barriers between lawyers and their non-English-speaking clients. Next, three critical reforms bolstering constitutional and statutory rights in the courtroom are presented along with an examination of how similar problems have been addressed in other legal systems. It is important to recognize, however, that any legal solution will require the legal profession to actively seek out means of providing higher quality services to those who do not speak proficient English.

A. *Disadvantaged from Start to Finish: An Overview of the Barriers Faced by Non-English Speakers in the American Judicial System*

When non-English-speaking Latinos and other Americans are discriminated against or denied government services, their best option may be to vindicate their rights through the judicial system, since they have

⁴³ Yvonne Lee, *Rising Minorities Find Political Clout Elusive* (Mar. 30, 2001), at <http://www.cnn.com/2001/ALLPOLITICS/03/30/minority.power>.

⁴⁴ However, identification as Hispanic might become a positive asset if Hispanic voter turnout continues to rise in states where the population is most significant, such as California. Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 659–61 (2002) (finding that justices with Hispanic names received 1.58 percentage points less of the vote than those who did not); see also Gary C. Byrne & Kristian Puschel, *But Who Should I Vote For For County Coroner?*, 36 J. POL. 778, 782 (1974) (finding that in elections for obscure positions in which voters were unlikely to recognize any of the candidates, those with Hispanic surnames suffered an 11% disadvantage).

⁴⁵ Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1197 (1997) (reviewing LOUISE A. FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996)).

been largely excluded from the political dialogue. In theory, the courts should be a good place to start because the Constitution guarantees equal protection under the law and the right not to be deprived of life, liberty, or property without due process of law.⁴⁶ In practice, however, the right to due process is not guaranteed to those Latinos who cannot speak the language of the courts. A Spanish-speaking citizen who needs access to the courts will face an uphill battle in finding a lawyer with whom she can effectively communicate through an interpreter, and an even more difficult challenge in finding a lawyer who understands Spanish.

In a criminal case, the language barrier might have already detrimentally affected the rights of the accused, beginning with the defendant's first contact with the police. Police officers may be more likely to arrest non-English-speaking suspects because non-English speakers are not able to answer the officers' questions or explain why seemingly suspicious activity is not illegal. Most officers also give orders in English and cannot adequately explain in other languages the Fifth Amendment right to be silent and the Sixth Amendment right to counsel.⁴⁷ Once in court, criminal defendants will be provided an interpreter when possible, but will often have had little or no access to an interpreter in order to prepare their case with their lawyer prior to trial. If a non-English speaker is in state court on a civil claim, his chances of having an interpreter will vary by state, but he will almost surely have no constitutional or statutory right to an interpreter. In federal courts, non-English speakers only have a right to an interpreter when they are defending a suit brought against them by the United States government.⁴⁸ The bulk of legislation and case law has dealt with language issues once the trial has commenced, providing insufficient help too late to level the playing field for non-English speakers. Finally, non-English speakers often face the problem that they are unable to appeal even severe misinterpretations at trial; trial records

⁴⁶ U.S. CONST. amends. V, XIV. The right to be tried by a jury of one's peers is also implicated by discrimination against Spanish-speaking jurors. Because the official language is always English, Spanish-speaking jurors are often peremptorily challenged in cases where there may be testimony in Spanish because they might listen to the Spanish rather than the *official* interpreter. See *Hernandez v. New York*, 500 U.S. 352 (1991).

⁴⁷ See Kibbee, *supra* note 16, at 9. For an analysis of the application of Fifth Amendment rights to non-English-speaking defendants and some of the reasons why a non-English speaker might unknowingly waive his rights, see Kate Storey, *The Linguistic Rights of Non-English Speaking Suspects, Witnesses, Victims and Defendants*, in LANGUAGE LEGISLATION AND LINGUISTIC RIGHTS, *supra* note 16, at 24, 27-29.

⁴⁸ Further, courts have often been unsympathetic to the language-related problems Hispanic Americans have raised. For example, in *Ramirez v. Plough, Inc.*, 863 P.2d 167 (Cal. 1993), the California Supreme Court refused to require drug manufacturers to place warning labels on their products in languages other than English, finding that the decision concerning what information should be provided in which languages should be addressed by the legislature, not the courts. In *Garcia v. Spun Steak Company*, 998 F.2d 1480 (9th Cir. 1993), the Supreme Court denied *certiorari* to petitioners who were fired from their jobs because of a rule requiring them to speak only English on company property. 512 U.S. 1228 (1996). See also Ricento, *supra* note 16, at 151.

are usually kept only in English, and some record of the original statement is necessary in order to prove an incorrect interpretation. Thus, throughout the judicial process, Latinos and non-English speakers more generally are disadvantaged in American courts.

*B. The Law's Focus on In-Court Interpreters—
Only One Part of the Solution*

1. Use of Interpreters in Federal Courts

In *Negrón v. New York*,⁴⁹ the Second Circuit held that the Sixth Amendment right to confront adverse witnesses guarantees criminal defendants the right to use an interpreter in court proceedings against them.⁵⁰ The *Negrón* Court recognized that to a non-English speaker, “the trial must have been a babble of voices.”⁵¹ The court also found that Negrón’s trial lacked the basic fairness required by the Due Process Clause of the Fourteenth Amendment.⁵² The court concluded that “[n]ot only for the sake of effective cross-examination, however, but as a matter of simple humanness, Negrón deserved more than to sit in total incomprehension as the trial proceeded.”⁵³

Several years after *Negrón*, Congress passed the Court Interpreters Act of 1978.⁵⁴ The Act represented the first legislative move toward protecting the rights of language minorities in federal courts, but Congress refused to extend the right to an interpreter beyond the scope of the *Negrón* holding.⁵⁵ Under the Court Interpreters Act, criminal defendants have the right to an interpreter at trial,⁵⁶ but in civil cases that right exists only when the defendant is being sued by the government.⁵⁷ This creates an “anomalous situation where a non-English-speaking plaintiff suing the United States on a legitimate claim would not be entitled to a court inter-

⁴⁹ 434 F.2d 386 (2d Cir. 1970).

⁵⁰ The problem in *Negrón* occurred because an interpreter was called on to translate Negrón’s testimony, as well as that of two other Spanish-speaking witnesses, but none of the testimony of the other twelve English-speaking witnesses was translated into Spanish so that Negrón could understand it. Thus, the court decided that providing interpreters only when the court needed to understand was insufficient and that the defendant had a right of access to an interpreter so that he could understand his own criminal trial. Emblematic of the judicial system’s difficulty handling Latinos, among others, is that the case title fails to place an accent over the “o” in Negrón’s name.

⁵¹ *Id.* at 388.

⁵² *Id.* at 389.

⁵³ *Id.* at 390.

⁵⁴ Pub. L. No. 95-539, 92 Stat. 2040 (codified as amended at 28 U.S.C. § 1827 (1994 & Supp. 2003)).

⁵⁵ See Kibbee, *supra* note 16, at 10.

⁵⁶ 28 U.S.C. § 1827(b)(1). The Act also provides for certification of interpreters. *Id.* § 1827(a)–(b).

⁵⁷ See Kibbee, *supra* note 16, at 11.

preter under this Act while a defendant in a civil suit would be.”⁵⁸ Moreover, neither plaintiffs nor defendants have any right to an interpreter in suits between private parties, though these trials may involve issues as fundamental as the custody of one’s children, eviction from one’s home, or vindication of one’s First Amendment rights. Even in cases where an interpreter is appointed, there is little or no opportunity for most non-English speakers to appeal based on inaccurate trial interpreting because the official court record is kept only in English.⁵⁹ Although the Court Interpreters Act represented a huge step forward in the federal courts, fundamental language access issues remain.

The Court Interpreters Act also provides for training and evaluation of interpreters for the federal courts.⁶⁰ Currently, there are federal interpreter certification programs for Spanish, Haitian Creole, and Navaho.⁶¹ Not surprisingly though, in practice court interpretation in the United States is overwhelmingly between Spanish and English. In federal district courts in 1986, interpreters were used 43,166 times for Spanish-English interpreting and only 3311 times for all other languages combined.⁶² After the Latino population boom of the 1990s, the issue presented here regarding one’s right to a court interpreter largely concerns Latino litigants seeking Spanish-speaking interpreters. However, the numbers of interpreters used for other languages are probably significantly suppressed because of the lack of qualified interpreters in those languages when they are needed; if interpreters had been available in other languages, they likely would have been used.

The right to an interpreter in the federal courts and in those states that provide a comparable right is primarily limited in two ways. First, the decision to provide an interpreter is left to the discretion of the judge, who must decide whether a party or witness “speaks only or primarily a language other than English.”⁶³ However, judges are rarely qualified to make such determinations, and it has been well documented that their

⁵⁸ Marilyn R. Frankenthaler & Herbert L. McCarter, *A Call for Legislative Action: The Case for a New Jersey Court Interpreters Act*, 3 SETON HALL LEGIS. J. 125, 128 (1978).

⁵⁹ However, with increasing use of tape and video recordings, appeals based on the quality of interpretation are becoming more frequent. See Kibbee, *supra* note 16, at 11.

⁶⁰ 28 U.S.C. § 1827(b)(1).

⁶¹ See Heather Pantoga, *Injustice in any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 629 (1999) (addressing language interpreters in the context of criminal courts in Wisconsin).

⁶² Given the diversity and prevalence of non-English language groups, it seems odd that Spanish-English interpreting would be needed more than ten times as often as for other language groups. One possible explanation is that Spanish-speaking interpreters were used more because they were more readily available, whereas litigants who needed other language interpreters simply had to do without. The other language interpreters most often used were Haitian Creole (381), Arabic (354), and French (196). SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM 5* (1990) (citing ADMIN. OFFICE U.S. COURTS, *COURT INTERPRETING SERVICES: UNITED STATES FEDERAL DISTRICT COURTS* (1986)).

⁶³ 28 U.S.C. § 1827(d)(1)(A).

decisions on such matters are often poor.⁶⁴ In some cases, judges may be inclined not to use an interpreter because of the time required to call the interpreter and the delays that interpreting creates in the proceedings.⁶⁵ Consequently, a number of scholars and practitioners have argued convincingly that litigants should always be allowed to invoke a right to an interpreter without a judicial determination of language necessity.⁶⁶ This argument is based on the idea that, unlike many rights, the right to an interpreter is one that a litigant would not exercise unless there truly was a need. It is difficult to imagine why someone who spoke proficient English would not prefer to communicate directly in court. In fact, the more prevalent problem is likely to be that some limited English speakers who should use an interpreter will fail to request one out of shame or fear of being misinterpreted.

The second and more unavoidable limitation on any court interpreter system is that there will be times when no interpreter is available, particularly to interpret a less common language. No court can be forced to provide an interpreter when there is no one in the jurisdiction who speaks the language of the party or witness. However, in order to ensure that both federal and state courts provide interpreters when they are available, the Due Process and Equal Protection Clauses of the Constitution should be interpreted to require access to an interpreter whenever reasonably possible. Later sections of this Note present the constitutional rationale requiring protection of language minorities in the judicial system and address the practical reasons for why the Supreme Court should recognize positive language rights.

2. Use of Interpreters in State Courts

The state constitutions of New Mexico and California guarantee the right to an interpreter in criminal proceedings.⁶⁷ A number of other states have statutes providing for court-appointed interpreters, but the majority of the twenty-four states that provided some access to interpreters as of 1990 have done so by way of administrative or judicial regulations.⁶⁸

⁶⁴ For some examples of the purportedly widespread problem of interpretation inaccuracy, see Timothy Dunnigan & Bruce T. Downing, *Legal Interpreting on Trial: A Case Study*, in 8 TRANSLATION AND THE LAW 93 (Marshall Morris ed., 1995). See also Pantoga, *supra* note 61, at 605–06.

⁶⁵ See Kibbee, *supra* note 16, at 11.

⁶⁶ See, e.g., Leslie V. Dery, *Disinterring the “Good” and “Bad Immigrant”: A Deconstruction of the State Court Interpreter Laws for Non-English Speaking Criminal Defendants*, 45 U. KAN. L. REV. 837, 843 (1997).

⁶⁷ N.M. Const. art. II, § 7; Cal. Const. art. I, § 14. See also BERK-SELIGSON, *supra* note 62, at 26–27; *People v. Annett*, 59 Cal. Rptr. 888 (Cal. Ct. App. 1967) (establishing the right of a non-English-speaking defendant to have an interpreter in a criminal case).

⁶⁸ BERK-SELIGSON, *supra* note 62, at 27. Berk-Seligson lists Arizona, California, Colorado, Illinois, Massachusetts, Minnesota, New Mexico, New York and Texas as providing statutory rights to an interpreter. *Id.*

Still, no court has found that there is a state or federal constitutional right to an interpreter in civil cases. *Jara v. Municipal Court*⁶⁹ held that California courts are not constitutionally required to appoint interpreters at public expense to assist indigent but represented litigants.

Few states have developed standardized interpreter certification programs like those found in federal courts; consequently, the quality of interpretation in state courts varies considerably. In North Carolina, for example, there are 175,000 Hispanics who do not speak proficient English, yet the state has no statutory, regulatory or constitutional entitlement to a foreign language interpreter.⁷⁰ North Carolina is developing a state certification plan for interpreters in criminal, juvenile, and domestic abuse cases, but does not plan to use interpreters in general civil or administrative proceedings. Currently, each district sets its own interpreting policy. This state system has resulted in underutilization of interpreters and inadequate interpreting often done by whoever is in the courtroom, including friends and family members.⁷¹ A number of states are finally starting to realize the damage that can be done by these ad hoc methods and have begun developing interpreting certification testing and standards.⁷²

C. Recognizing that the Access to Justice Encompasses More than the Trial

Focusing only on the provision of interpreters in the courtroom does not solve two key issues: (1) facilitating communication between attorney and client in order to provide legal advice and prepare for trial, and (2) preserving issues of erroneous interpretation for appeal. While the first is by far the more important to solve, in terms of empowering language minorities by providing them access to legal services and knowledge of their rights, it is exceedingly difficult in our monolingual American society. The issue of preserving a non-English trial record is more easily solved and is primarily a question of expending the necessary resources.

⁶⁹ 578 P.2d 94 (Cal. 1978). See also BERK-SELIGSON, *supra* note 62, at 28–29.

⁷⁰ Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1922–23 (2000). This number may in fact be much higher. According to Census numbers, over 300,000 Hispanics moved to or were born in North Carolina in the 1990s alone. However, in Charlotte, for example, local Hispanic leaders think the Census counted only about 50% of the actual Hispanic population in the area. Bolling, *supra* note 21.

⁷¹ See Weissman, *supra* note 70, at 1923–24. Interestingly, North Carolina law does guarantee court interpreters to the deaf in a number of cases, be they criminal, civil, or administrative. *Id.* at 1933.

⁷² See *infra* Part VI.B.

1. Recognizing the Importance of the Attorney-Client Language Barrier

In many cases, whether a non-English-speaking litigant has an interpreter at trial will be much less important to the outcome of his case than whether he has been able to communicate with counsel prior to going to court. As the California Supreme Court noted in *Jara*, the court proceedings are usually entirely in the hands of counsel; thus, it is the attorney's understanding of the case and his ability to communicate with the court that is most important.⁷³ However, in order to effectively represent a client, an attorney must meet with the client to discuss the client's goals, key facts, and trial strategy, an often difficult or impossible task for non-English-speaking litigants and their attorneys. In Negrón's case, he spoke no English and his court-appointed lawyer spoke no Spanish. His "attorney conferred with Negrón for some twenty minutes before trial at the Suffolk County jail."⁷⁴ The Court analogized Negrón's inability to communicate in English to that of a mentally impaired defendant, whose Sixth Amendment right to be present at his own trial is compromised by his inability to consult with his lawyer "with a reasonable degree of rational understanding."⁷⁵ Thus, the Court acknowledged but chose not to remedy the issue of communication between attorney and client.

Negrón's situation is not atypical. There simply are not enough Spanish-speaking lawyers to serve the Spanish-speaking population. In 1983, less than 1% of all lawyers were Hispanic.⁷⁶ By 2000, the number of Hispanic lawyers had risen significantly but still constituted only 3.9% of all lawyers in America.⁷⁷ Few English-speaking Americans have taken the time to learn another language,⁷⁸ and lawyers do not appear to be an exception.

The most obvious near-term solution for solely English-speaking attorneys is to use an interpreter, but this remedy may have detrimental effects on the attorney-client relationship. There are potential issues of misinter-

⁷³ *Jara*, 578 P.2d at 95-96. However, in this case, the California Supreme Court provided no means for non-English-speaking litigants to confer with their counsel in the first place. The court seems to assume that this responsibility is on the non-English-speaking litigant.

⁷⁴ *Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970).

⁷⁵ *Id.* at 389 (citing *Dusky v. United States*, 362 U.S. 402 (1962)).

⁷⁶ *Employed Civilians by Occupation, Sex, Race, and Hispanic Origin: 1983 and 2000*, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 380 tbl.593 (U.S. Census Bureau 2002).

⁷⁷ *Id.* In the broader category of legal services providers (including paralegals, secretaries, etc.), 6.5% of the workforce is Hispanic. *Employment by Industry: 1980 to 2000*, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, *supra* note 76, at 385 tbl.596 (U.S. Census Bureau 2002).

⁷⁸ See *Foreign Language Enrollment in Public High Schools: 1970 to 1994*, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, *supra* note 76, at 161 tbl.255 (U.S. Census Bureau 2002).

pretation, though these can be minimized through using properly trained interpreters rather than friends or family members. There are also sometimes concerns about whether attorney-client privilege will apply when an interpreter is also in the room; lawyers have to be aware of the rules in their particular jurisdiction.⁷⁹ Perhaps the most pervasive problem with relying on interpreters to communicate with clients is that most people feel less comfortable discussing their problems and personal lives in front of a room full of people.

Additionally, using an interpreter may require adjustments by lawyers. Interviewing a client or a witness through an interpreter is a skill that must be learned and practiced in order to elicit information accurately and to make the interviewee feel comfortable. It is important, for instance, for the lawyer to always look directly at the client rather than at the interpreter, and to break sentences down into clauses short enough for the interpreter to be able to translate accurately.⁸⁰ While it is usually preferable for a lawyer to be able to communicate with her client in the same language, when that is not possible, it is essential that the lawyer and client have access to a qualified interpreter. Moreover, the lawyer must be cognizant of the skills necessary to competently communicate through an interpreter.

2. *Protecting Non-English-speaking Litigants' Right To Appeal*

Even in cases where an interpreter is provided, non-English speakers often have little or no meaningful right to appeal any issue that involved their own testimony or the testimony of other non-English speakers. Since all official court records are kept only in English, there is usually no way non-English speakers can prove key issues of inadequacy of interpretation.⁸¹ A litigant whose attorney does not understand the language of the testimony does not have the ability to object to inaccurate interpretation and thus cannot preserve matters of interpretation for appeal.⁸² Without transcripts that include the original language of the speaker, criminal defendants and other litigants are left without any record of witnesses' uninterpreted testimony or their own testimony. Given that the Supreme Court has recognized both due process and equal protection rights to appeal for those who cannot pay the requisite fees,⁸³ the argument is even stronger for preserving the possibility of appeal for non-English

⁷⁹ See Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 372 (2000); Weissman, *supra* note 70, at 1959.

⁸⁰ McCaffrey, *supra* note 79, at 384–86.

⁸¹ For an example of the difficulties of proving inadequate or incorrect interpretation, see *U.S. v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985).

⁸² See Kibbee, *supra* note 16, at 11–12.

⁸³ *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

speakers. In both civil and criminal cases involving potential appeal issues of interpretation, the government's failure to record the non-English side of the proceedings prevents a higher court from hearing *any* possible appeal with regards to those issues. Those non-English speakers whose ability to appeal is foreclosed by language barriers should have the same rights as those whose rights are restricted by financial barriers.

IV. CONSTITUTIONAL ARGUMENTS CREATING RIGHTS FOR NON-ENGLISH SPEAKERS

The Supreme Court should recognize non-English speakers' constitutional right to an interpreter in all criminal and civil proceedings. Rather than make a single, unified argument, this Part presents an argumentative description of the issues that have prevented recognition of such rights under federal constitutional doctrine. In doing so, it will first present the historical and societal interests framing this issue, and then examine due process and equal protection arguments, with special consideration of the problem posed by positive rights in the United States' negative liberty constitutional model. Finally, looking outwards, South Africa and Canada provide excellent examples of constitutional democratic regimes that include both negative liberties and positive rights and demonstrate how protection of language rights can be implemented at the constitutional level.

A. *Framing the Issue: History, Constitutional Theory, and the Interests of Society*

Since the passage of the Court Interpreters Act, federal constitutional arguments have largely been ignored with regards to language rights in the courtroom. These issues remain neglected not because the problem has been solved, but because of the United States' constitutional tradition of focusing on negative liberty. This tradition leads to the belief that the obstacles faced by non-English speakers are not the types of problem that can be remedied by American constitutional doctrine. Constitutional law in the United States starts from the assumption that all are equal and that equal treatment will be sufficient to meet the needs of all. However, language minorities represent one clear group who is not similarly situated with the majority. While American courts are willing to admit that similarly situated individuals must be treated alike, they go to great lengths to avoid saying that there is an obligation to treat differently situated groups differently. This reluctance stems in part from the recognition that such an obligation usually requires recognition of positive rights on the part of the government. Unlike many other legal traditions, the United States Constitution tends to be construed as protecting citizens from the government rather than providing government protection from private actors or other forms of disadvantage. Thus, though courts may recognize that non-English

speakers face certain barriers, they recoil from admitting that the United States Constitution requires the government to counteract that disadvantage.

Non-English speakers receive less protection than they should because: (1) the law does not give weight to the particular convergence of harms that they experience, and (2) speaking a different language is a real difference, which creates real needs that can only be remedied through affirmative government action—that is, there would be significant costs involved with many necessary remedies. In addition, unlike other differences such as physical handicaps, the inability to speak English fluently is *blamed* on the non-English speaker. It is assumed that a non-English speaker can simply learn English rather than asking the government to expend its resources to accommodate her. But this raises two questions. First, can all non-English speakers learn to speak English? Second, should they be required to do so? Even if an adult immigrant might be able to become totally fluent in English in five or fifteen years,⁸⁴ should she be denied effective access to the courts in the meantime? This is an ironic stance for a country in which people are notoriously unable or unwilling to learn languages other than English. If a large enough percentage of the population spoke any single minority language, there should be no justification for denying them equal rights to use that language in public forums.⁸⁵

It is an open question whether there is any room in a constitutional analysis to consider the increasing non-English-speaking population in the United States and the resulting growing pervasiveness of harms to non-English speakers. As the group of language minorities increases in size, there are more people whose rights are being violated; accordingly, there could be a more efficient system involving nationwide court interpreting standards and training. On the other hand, one might argue that measuring the size of the group against which discrimination is taking place is not a matter for constitutional law, but rather an issue to be addressed by the democratic process.⁸⁶ Following this view, it is even more impor-

⁸⁴ See sources cited *supra* note 23.

⁸⁵ For instance, if Spanish became the dominant language of the United States (in terms of the numbers of people speaking it), it seems the main argument that could be brought against using Spanish in government would be a historical one—an argument that immigrants to the United States should be cognizant of America's traditional use of English.

⁸⁶ However, as a descriptive matter, it seems unlikely that this is how the development of constitutional law usually occurs. If one follows the common-sense arguments of Professor Robert Post, it would make sense that as Hispanics become a larger segment of society and as the issues that face them become more present in the American consciousness, people would be more likely to apply their concepts of the protections offered by the Constitution to the problems faced by Hispanics and other language minorities. This in turn would create a constitutional culture that more explicitly protects language minorities. In Post's language, it seems that "constitutional culture" (the beliefs of nonjudicial actors about the content of the constitution), which he sees as "locked in a dialectical relationship" with constitutional law, would have to be significantly affected by both (a) those who constituted the body of nonjudicial actors, and (b) how much nonjudicial actors understood about the problems facing a particular subset of the population. Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). Thus, under

tant that constitutional law protect the few over the many, who are more likely to be able to protect themselves through the democratic process. Though this reasoning is persuasive in many cases, it does not carry much weight in the case of linguistic minorities who are largely non-citizens without the right to vote, who possess few financial resources, and who are unable to communicate in the language of the majority. The size of the growing problem makes the rights in question seem less like particular exceptions and more like systemic injustices that need to be remedied for the good of society.

The collective rhetoric of xenophobic groups in the United States implies that providing government services in foreign languages would lead to a government meltdown or a linguistic and cultural overthrow of the English-speaking majority.⁸⁷ However, Americans have tolerated foreign-language services in the past without disastrous results. German was once the official language of the New Sweden colony (present-day Delaware and New Jersey), and it persisted in many areas in official government and court documents in the eighteenth century.⁸⁸ As a result of later waves of German immigration, bilingual schools operated throughout the Midwest.⁸⁹ Additionally, in Louisiana, French and English coexisted in official forums for over a century.⁹⁰ Thomas Jefferson appointed bilingual judges and ordered that Louisiana's records be kept both in French and English.⁹¹ For most of the nineteenth century, Louisiana printed its laws and other public documents in French, and its courts and legislature operated bilingually.⁹² The right to bilingual schooling, courtroom interpreters, and translation of legal documents continued until 1921.⁹³ Thus, American history demonstrates that vague fears of a "house divided" are unfounded. Many regions of the United States have shown the tolerance and foresight to use multilingual systems tailored to their citizens' needs, and current anti-immigrant sentiment should not prevent the readoption of effective solutions used in the past.

Although immigration from Spanish-speaking countries is likely to continue, the influx of new immigrants most likely will lead to a relatively stable number of non-English speakers in the United States because later generations will speak English proficiently.⁹⁴ However, because millions of Americans do not speak sufficient English to protect their rights

this view of the development of constitutional law, the recent boom in the Hispanic (and non-English-speaking) population of the United States will likely have a significant effect on constitutional law. In which direction it will push constitutional culture remains to be seen.

⁸⁷ US English is the most prominent example of these groups. *See Ricento, supra* note 16.

⁸⁸ *Id.* at 125–26.

⁸⁹ *Id.* at 126.

⁹⁰ *See id.* at 130.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See* sources cited *supra* note 23.

effectively through the legal system, there will be profound implications for generations to come. If the current wave of Spanish-speaking Americans cannot protect their rights through the American legal system, the next generation that does speak English is likely to be poorer and less trusting in the justice and efficacy of the American legal system. Although there is an immediate cost to promoting the use of court interpreters and the development of bilingual attorneys, there will be far greater social and economic costs in the future if a significant percentage of the American population is marginalized and conditioned to believe that the legal system is only an incomprehensible enemy.

B. Due Process and Fundamental Rights' Assurances of Access to the Courts

The right to an interpreter must be extended beyond criminal matters to civil actions. The right to bring or to defend against civil suit is essential to protect constitutional and other fundamental rights. Cases involving free speech, eviction from one's home or child custody are no less fundamental to life, liberty, and property than are many criminal charges. In *Mathews v. Eldridge*,⁹⁵ the Supreme Court found that "[the] right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."⁹⁶ This section examines one of the most likely routes to actualizing that right for Latinos.

Denial of access to certain fundamental rights triggers strict scrutiny under both the Due Process Clause and the Equal Protection Clause.⁹⁷ Nearly fifty years ago, the Supreme Court held that access to the judicial process is one such fundamental right.⁹⁸ In *Boddie v. Connecticut*,⁹⁹ the

⁹⁵ 424 U.S. 319 (1976).

⁹⁶ *Id.* at 333 (citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). See also *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (holding that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner").

⁹⁷ Under strict scrutiny, the challenged government policy is constitutional only if it furthers a compelling government interest and the policy's means are narrowly tailored to fulfill that interest. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). Many states could claim a compelling interest in judicial efficiency and economy to explain their failure to provide interpreters, but this explanation should not be accepted in areas where certain minimum non-English-speaking population concentrations are met because the government's response is no longer sufficiently narrowly tailored with regards to the problem.

⁹⁸ In the criminal context, see, for example, *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that a requirement that would-be appellants purchase and furnish transcripts to the appellate court was unconstitutional on both equal protection and due process grounds). The other fundamental due process right the Court has recognized within equal protection doctrine is the right to vote. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

⁹⁹ 401 U.S. 371 (1971).

Court found that due process required that indigent individuals seeking divorce be allowed into court even if they were unable to pay the \$60 filing fee because they had no other means of receiving a legal divorce. In *M.L.B. v. S.L.J.*,¹⁰⁰ a mother who would have had to pay over \$2,000 in record preparation fees in order to appeal termination of her parental rights was granted relief on both equal protection and due process grounds. The irony is that none of the parties in these cases would have had a right to an interpreter under current law. Neither case was criminal or involved defending against a civil claim brought by the government. The denial of such a right to Spanish-speaking would-be litigants often denies any access to the courts just as effectively as if they were barred from entering the courtroom door.

Moreover, the Court has *expanded* the right of judicial access beyond the mere right to step foot in the court. In *Little v. Streater*,¹⁰¹ the Court held that indigent defendants in civil paternity actions were entitled to state-subsidized blood grouping tests because the case involved fundamental parental rights. Such tests are necessary because of the importance of establishing paternity, as well as the inability to settle the matter any other way. Thus, in civil suits involving rights that the courts have termed fundamental,¹⁰² such as the right to marry and divorce and rights involving child-rearing, the constitutional argument for interpreters is straightforward. It stands to reason that these issues cannot be fairly decided if one or both parties cannot understand the proceedings and communicate with their attorney or the court.

Other common situations present equally compelling rights and real-life consequences. Non-English-speaking tenants are often evicted from their homes for reasons they cannot understand. However, the right to understand why you are losing your home has not yet been recognized. The Constitution should be interpreted such that no person in America can lose her home without meaningful access to the courts, including the right to an interpreter for a litigant who does not speak English.¹⁰³

Nevertheless, the right to an interpreter should not be limited to cases directly involving these fundamental rights; like voting or education, the ability to access the courts is a linchpin to protecting all rights. In *Plyler v. Doe*,¹⁰⁴ the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment obligates states to pay for basic public

¹⁰⁰ 519 U.S. 102 (1996).

¹⁰¹ 452 U.S. 1 (1981).

¹⁰² These rights include: (1) family-related rights such as decisions about how to raise children, (2) the right to marry and divorce, (3) the right to avoid unwanted bodily intrusion (possibly including a right to die), and (4) a number of other developing privacy and personal autonomy rights.

¹⁰³ A number of states have already taken steps to ensure the right to an interpreter in civil cases. These states include Ohio, Illinois, Kansas, Kentucky, Washington, Wyoming, Iowa, Wisconsin, and Idaho. See Weissman, *supra* note 70, at 1943 n.247.

¹⁰⁴ 457 U.S. 202 (1982).

school education for the children of undocumented aliens. The Court did *not* treat education as a fundamental right, but still considered the degree of harm that could result from its deprivation; the Court presumed that the government policy was irrational unless it furthered a “substantial goal” of the state.¹⁰⁵ The Court reasoned that denying children of illegal aliens public education effectively would “deny them the ability to live within the structure of our civic institutions.”¹⁰⁶ The Court rejected the state’s arguments that it sought to preserve limited government resources and discourage a greater influx of illegal aliens.¹⁰⁷ These arguments by the state have the same structure as the arguments utilized today for not providing court interpreters to non-English speakers—that there are insufficient resources and that it would only encourage immigrants not to speak English. Still, the real question is whether non-English speakers’ right to due process includes a right to understand court proceedings. Once established as a due process right, it cannot be denied as a matter of course simply because it would require additional state expenditures.

C. The Reluctance of Federal Law To Broaden Equal Protection and Recognize Positive Rights

There is a strong equal protection argument for a constitutional right to an interpreter in many civil cases. Clearly, non-English speakers are not receiving “equal protection of the laws”¹⁰⁸ when they cannot even understand court proceedings involving them; rather, they receive almost no protection under the law because they need to use the courts to enforce their legal rights. Under such a literal reading of the Fourteenth Amendment, Latinos and other linguistic minorities arguably have an easy case. The problem is that equal protection doctrine deals with people in terms of groups, and so the question becomes a matter of whose protection needs to be equal and with whom.¹⁰⁹ Under the equal protection doctrine enunciated by the Supreme Court, heightened scrutiny is normally reserved for certain suspect classifications, and neither language nor categorization as ethnically Hispanic presently counts. However, Latinos and other non-English speakers are archetypal “discrete and insular minorities”¹¹⁰ because, as argued above, the ordinary political process does not

¹⁰⁵ *Id.* at 224.

¹⁰⁶ *Id.* at 223.

¹⁰⁷ *Id.* at 228–29.

¹⁰⁸ U.S. CONST. amend. XIV.

¹⁰⁹ For instance, it is obvious that the poor do not receive equal protection of the laws when compared to the rich. However, American constitutional law does not recognize the rich and the poor as groups that should be compared under equal protection analysis.

¹¹⁰ For the origins of this doctrine, see *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting that judicial intervention is more appropriate in the face of “prejudice against discrete and insular minorities” that biases the political process against such disadvantaged groups). For an example of equal protection being extended to aliens be-

adequately guarantee the effective realization of their rights. Because they do not speak English, language minorities are likely to be victims of prejudice and lack sufficient power to protect their rights and interests in the political arena.¹¹¹ With less information about their rights, less political pandering to their needs, and less representation at all levels of government, Latinos are left with little protection and restricted paths for reform.¹¹² Although language skills are not entirely immutable and language minorities have not all faced the long histories of oppression that the doctrine has worried about, these characteristics are secondary to the primary concern of political powerlessness.¹¹³ The courts should not overlook the plight of Latinos and other linguistic minorities simply because they have not yet accrued the same lengthy history of injustices as traditionally disempowered groups such as women and African Americans.¹¹⁴

The law, however, does not consider group harms to Spanish speakers in the same way as it does harms to Asian Americans or African Americans, for instance. Equal protection does not apply to language groups,¹¹⁵ and although there is a high correlation between Hispanic ethnicity and

cause of their status as “discrete and insular minorities,” following *Carolene Products* footnote 4, see *Graham v. Richardson*, 403 U.S. 365 (1971). For further explanation of the famed footnote, see Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982). *But see* Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982) (arguing for a narrower interpretation of the footnote that would not suggest greater judicial remedies based solely on lack of political power).

¹¹¹ This denial of access to the political process takes many forms, including lower voter participation, less political representation, and lower levels of educational attainment.

¹¹² Unlike majority groups in America, or even more long-established and well-organized minorities, Latinos do not yet have the political organization and clout to achieve timely reform through the political process.

¹¹³ One might view immutability and historical oppression more as additional evidence of the powerlessness of a group rather than as necessary preconditions. In the case of non-English speakers, however, the obvious inability to communicate in the majority language should be sufficient to show their disempowerment. Otherwise, although individuals may come and go from the class (by learning the majority language), the same problems will continue to exist from generation to generation.

¹¹⁴ An obvious and important distinction is that there simply has not been the same long history of prejudice against Latinos in the United States (at least not on the same scale or as prominently in the public eye). Nevertheless, this distinction should not stand as a roadblock to additional protections. It would be foolish to wait until such a history develops rather than take preventive measures at its inception. Moreover, speaking different languages is as much of a barrier as long-established prejudices. Though there remains much progress to be made toward racial and gender equality, those who do not speak the English language are in an equally perilous situation in the United States. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982) (warning that lack of educational opportunities for non-English-speaking children of illegal aliens “raises the specter of a permanent caste” or “underclass” with no means of helping themselves).

¹¹⁵ Even laws that facially discriminate against a particular language group are generally not subject to heightened equal protection scrutiny. As long as there is no direct link between the language group and a protected class, such as a particular race, courts would apply rational basis review and would likely uphold such laws based on the government interest in efficiency. *See* Andrew P. Averbach, *Language Classification and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 486–87 (1994).

speaking Spanish, the law does not provide the same protections to members of an *ethnic* group as it does to those of a single *race*.¹¹⁶ Even if Spanish speakers or Latinos were considered a suspect classification, equal protection might not provide any relief from facially neutral laws that fail to provide for broad rights to an interpreter. Because such a case would likely undergo disparate impact analysis, Latinos would have to show that the failure to provide interpreters was the result of purposive discrimination.¹¹⁷ Such a showing would be nearly impossible in this context because the harmed group is claiming a government failure to act rather than the more common claim of an impermissible government action. Another way of stating the difficulty is that non-English speakers are, by virtue of the inability to speak English, differently situated in the eyes of the law. American equality law has been based on the idea that similarly situated groups must be treated the same. However, it has consistently avoided saying that the government must treat differently situated groups differently, likely because acknowledging this responsibility would trigger many positive rights and their correlative affirmative obligations on the part of government.¹¹⁸ Were constitutional equality doctrine open to this type of argument, it would be clear that non-English speakers who are otherwise similarly situated should be treated differently with respect to their relevant difference, namely their inability to speak English. In the context of access to judicial justice, to treat non-English speakers equally would be to provide them the means to overcome the language barrier, be it through interpreters or greater access to legal representation in their language.

Further, it is not clear that a claim that civil litigants have a right to an interpreter must be treated as seeking recognition of a positive obligation on the part of the state. Such a claim is not analogous to *DeShaney v. Winnebago County Department of Social Services*,¹¹⁹ where the Supreme Court found no affirmative obligation on the government to prevent alleged child abuse.¹²⁰ The difference is that in all cases involving the right

¹¹⁶ Richard Delgado argues that the law, and society more generally, often think in terms of a black-white paradigm when considering minority rights. Because the law offers greater protections to African Americans, Latinos are often discriminated against and do not receive the same level of benefits from affirmative action programs and the like. Delgado, *supra* note 45, at 1196–97.

¹¹⁷ See, e.g., *Washington v. Davis*, 426 U.S. 229, 239–41 (1976).

¹¹⁸ To apply Aristotelian equality and treat like groups alike also logically entails treating different groups differently in proportion to their relevant differences. Moreover, for Aristotle, equality and justice are synonymous such that “to be just is to be equal, to be unjust is to be unequal.” Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982) (quoting ARISTOTLE, *ETHICA EUDEMIANA* VII.9.1241b (W. Ross ed., 1925)).

¹¹⁹ 489 U.S. 189 (1989).

¹²⁰ In *DeShaney*, a boy who was beaten by his father sued social workers and other local officials who had received complaints that the boy was being abused but failed to remove him from his father’s custody. *Id.* at 195. *DeShaney* is most commonly described as a “state action” case—that is, the child loses because the social workers were not state actors. However, this is only the flip side of considering it as a question of negative rights versus

to an interpreter, the state is already implicated, and the question becomes one of process. In *DeShaney*, the Court made clear that the claim invoked substantive rather than procedural due process—that the claim was not one of denial of “appropriate procedural safeguards . . . but that [the state] was categorically obligated to protect [the boy] in these circumstances.”¹²¹ A claim of a right to an interpreter, though, is precisely one of denial of “appropriate procedural safeguards.”¹²² Although American constitutional law is generally reluctant to recognize positive rights, it is more apt to admit to positive *procedural* obligations on the part of the state. The state has no constitutional obligation to protect the “life, liberty, and property of its citizens against invasion by private actors,”¹²³ yet it does have an obligation to prevent private actors from using its courts to negatively affect those rights without the basic procedural safeguards to allow non-English-speaking litigants to understand court proceedings.

This type of affirmative obligation (or state action) problem seems to parallel the oft-criticized majority opinion in *Shelley v. Kraemer*.¹²⁴ The case stands for the proposition that courts carrying out the enforcement of harmful but otherwise legal *private* agreements constitute state action. Even if one is critical of this holding, that should not affect the court’s conclusion as applied to the constitutional rights of non-English speakers to access an interpreter. In this situation, the argument for government action is much stronger because the government’s alleged action is a failure to implement properly and fairly the established procedure for litigating civil claims—a failure that effectively prevents the entire class of non-English-speaking individuals from defending itself or utilizing the government’s judicial system. Whereas in *Shelley* private actors put proper government enforcement to ill use, failure to provide access to an interpreter takes proper private action and applies government’s coercive power in a way that is biased against one side. When a private actor sues a non-English speaker, the private actor does not necessarily commit a wrong, but the government fails to provide the necessary process in order to arrive at an accurate and just outcome.

positive obligations. In other words, if the government had a positive obligation to protect the boy, then the government is in some sense implicated by its *inaction*, rather than being limited to the specific actions that were taken by the social workers. In cases where the claim is that the state had an affirmative obligation to act, the “state action” requirement must drop out since a showing of state inaction would be all that is required.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 133 U.S. 1 (1948). In that case, the Court found state action because judicial action was necessary to enforce racially restrictive agreements.

D. Comparative Analysis

There is some evidence that the Supreme Court is increasingly willing to look to foreign jurisdictions, both for assistance in interpreting our Constitution in light of the practices and mores of other countries,¹²⁵ and as a means to evaluate the potential real-world implications of the various options with which the Court is faced.¹²⁶ This type of analysis is particularly beneficial now that the United States faces the recent explosion in its Spanish-speaking population, given that other constitutional democracies, such as South Africa and Canada, have previously grappled with similar issues in their own societies.

1. South Africa as a Positive Rights Model

Certain countries, such as South Africa, have recognized positive constitutional rights and, in particular, grant rights to language minorities to assure equal access to their judicial system.¹²⁷ The South African Constitution places an obligation on the government to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of access to adequate housing for all citizens.¹²⁸ In the first major case to test this right, squatters who were living on a public athletic field after being evicted from private property sought an order

¹²⁵ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2480–81 (2003) (overturning Texas’ sodomy statute on Fourteenth Amendment due process grounds, basing its reasoning in part on the consensus of the international community); *Atkins v. Virginia*, 536 U.S. 304, 304 n.21 (2002) (considering a wide range of domestic and international public opinion in deciding the unconstitutionality of executing the mentally retarded). *But see* Note, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2064–71 (2001) (arguing that while many constitutional courts around the world are now engaging in a “judicial dialogue,” the United States has remained an anomaly, with only Justice Breyer actively pushing for international norms to play a more central role in the Court’s jurisprudence).

¹²⁶ Justice Breyer, joined by Justice Stevens, seems to assume that in cases when one has the option to make an informed choice, one should not choose to ignore international experience and make the choice blindly. His view is that choices facing the Supreme Court do not arise in a void, and therefore the Court could learn from the past experiences of other countries. See *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (noting that “the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control,” and considering that Switzerland, Germany, and the European Union have chosen to allow constituent states to implement many of the laws enacted by the federal government themselves).

¹²⁷ Many non-American scholars have criticized the American legal requirement that in the absence of a governing statute, a court must find state action in order to apply the Constitution to private relations. German constitutional law, in contrast, requires the state to take positive action to ensure that citizens enjoy their constitutional rights. See Norman Dorsen et al., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1203 (2003). See also [1958] *Entscheidungen des Bundesverfassungsgerichts* [BverfGE] [Constitutional Court] 7, 198 (F.R.G.).

¹²⁸ S. AFR. CONST. ch. 2 (Bill of Rights), § 26 (1–2).

from the Cape High Court requiring the government to provide adequate basic housing until they could obtain permanent accommodation. On appeal by the government, the South African Constitutional Court held that even though the squatters were unlawfully living on public property, the government's plans were not reasonable under Section 26(2) of the Constitution because "no provision was made for relief to the categories of people in desperate need."¹²⁹ The court seemed well aware of the separation of powers issues at play and reiterated that under this type of constitutional analysis "the question will be whether the legislative and other measures taken by the state are reasonable," not whether the particular measures were the best that could have been adopted.¹³⁰

A similar analysis would seem appropriate if the United States Supreme Court considered whether the Due Process Clause requires legislatures to provide access to certified interpreters *whenever possible and reasonable*. The U.S. Supreme Court could follow the South African Constitutional Court's reasoning and weigh the government's limited resources and their optimal distribution in determining how to effectuate positive rights.¹³¹ Under this type of analysis, certified interpreters might only be constitutionally required in jurisdictions where at least 5% of the population spoke the given language or where they were otherwise available. When a significant percentage of the population speaks any non-English language, it stands to reason that the government's cost of finding interpreters is lower and the benefits to the community are higher. Thus, this type of positive rights balancing has a discretionary limiting principle, and provides for fundamental rights when they are at relatively lower cost to the government and higher value to the community.

With regards to language rights, the South African experience demonstrates an attempt to cope with an extremely diverse multilingual society in which no single language is spoken in the homes of more than a quarter of the population. Zulu, Xhosa, and Afrikaans represent the most dominant mother tongues, yet are spoken by only 22%, 17%, and 15% of the population respectively.¹³² Furthermore, eleven languages have na-

¹²⁹ *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC). The court ordered that running water should be installed, public toilets should be built, and the applicants' existing shelters should be waterproofed.

¹³⁰ *Id.*

¹³¹ One such example is *Soobramoney v. Minister of Health, KwaZulu-Natal*, in which the Court had to decide whether the South African Constitution's Section 27(3) guarantee not to be denied emergency medical treatment should cover treatment for chronic terminal kidney failure. The Court chose to interpret the right narrowly and not to interfere with the hospital's decision not to provide dialysis; it determined that including the treatment of chronic illnesses "would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to 'everyone' within its available resources." 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

¹³² Stanley G. M. Ridge, *Language Policy in a Democratic South Africa*, in *LANGUAGE POLICIES IN ENGLISH-DOMINANT COUNTRIES*, *supra* note 16, at 15–16.

tional official status.¹³³ The South African Constitution espouses multilingualism and multiculturalism as a national asset, and Section 9 of the Constitution establishes equality before the law and provides that no one shall be discriminated against because of language.¹³⁴ Provincial legislatures can choose which of the eleven official languages will be used for provincial purposes. In the Western Cape province, for example, residents mainly speak Afrikaans, English, and Xhosa; therefore, all three are treated as official provincial languages.¹³⁵ This approach is interesting because it challenges the often stated, but rarely explained, American notion that an entire nation must speak a single language in order to achieve unity.

Section 35 of the South Africa Constitution guarantees citizens the right “to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.”¹³⁶ In practice, Afrikaans and English are the established languages of the courtroom, and interpreters are used when a witness presents evidence in another language.¹³⁷ Even then, inadequacies of interpretation exist due to the lack of sufficient specialized training.¹³⁸ However, the South African Department of Justice has prioritized raising the standards of professional interpretation services.¹³⁹

Perhaps the most interesting aspect of the comparison between the American and South African approaches is the greater extent to which South Africa has attempted to protect fundamental language rights with considerably fewer resources. As the non-English-speaking population grows in the United States, it becomes increasingly inexplicable and, indeed, inexcusable for American courts to continue denying the basic right to an interpreter when such resources are available.

2. *Implementation of Language Rights in Canada*

The demographics of the linguistic minority population of the United States more closely resemble Canada than South Africa in that both the United States and Canada each have a single dominant language minority. There are currently 22.5 million Anglophones and 7.5 million Fran-

¹³³ *Id.* at 19. The official languages of South Africa are Zulu, Xhosa, Afrikaans, Northern Sotho, English, Tswana, Southern Sotho, Tsonga, Swati, Venda, and Ndebele.

¹³⁴ S. AFR. CONST. ch. 2 (Bill of Rights), § 9(3).

¹³⁵ Ridge, *supra* note 132, at 19. Section 30 of the South African Constitution also specifies that “Everyone has the right to use the language . . . of their choice.” S. AFR. CONST. ch. 2 (Bill of Rights), § 30. Presumably such a clause in the United States Constitution would preclude English-only laws that have thus far held up against attacks in the courts.

¹³⁶ S. AFR. CONST. ch. 2 (Bill of Rights), § 35(3)(k). Section 35(4) further grants that “[w]henever this section requires information to be given to a person, that information must be given in a language that the person understands.” *Id.* § 35(4).

¹³⁷ Ridge, *supra* note 132, at 29.

¹³⁸ *Id.*

¹³⁹ *Id.* at 20.

cophones in Canada,¹⁴⁰ and, despite American perceptions of Canada as a more bilingual country, Hispanic's composition of the American populace in fifty years will equal, if not exceed, Canadian Franophones' current level.¹⁴¹ So how does Canada address language rights and a bilingual citizenry? The Canadian Charter of Rights and Freedoms established that English and French have equal status in all federal institutions,¹⁴² including the Parliament of Canada¹⁴³ and the federal courts.¹⁴⁴ At the provincial level, the Constitution Act of 1867 guarantees the right to use English or French in the legislatures and courts of Quebec, New Brunswick, and Manitoba, and that laws enacted in these provinces must be in both languages.¹⁴⁵

As in South Africa, implementing the Canadian government's obligations under the Charter of Rights and Freedoms to protect the rights of language minorities often is limited by balancing the costs and benefits of implementation. Section 23 of the Charter, for instance, gives English- and French-speaking parents the right to have their children receive primary and secondary instruction in their native tongue.¹⁴⁶ However, Section 23(3) limits this right to areas in the province where there are sufficient numbers of children to warrant spending public funds.¹⁴⁷ As in South Africa, the Canadian Supreme Court has implemented the right on a "sliding scale" in order to ensure that "the minority group receives the full amount of protection that its numbers warrant."¹⁴⁸ Moreover, unlike the South African Constitutional Court, the court showed itself willing to interpret the rights more broadly than indicated by the language of the Charter so that minority language and culture may flourish.¹⁴⁹ Although the court noted that this type of group right "places positive obligations on government to alter or develop major institutional structures," it nevertheless found that where particularly high numbers of minority students were located, Section 23 might mandate additional rights not explicitly provided, such as the right to a completely separate school board.¹⁵⁰ Similar interpretation of the Fifth and Fourteenth Amendment Due Process Clauses would be particularly appropriate given the broad range of non-English-speaking populations across the United States. For example, due process in New York City and Boston would require that interpreters be accessi-

¹⁴⁰ Claire L'Heureux-Dube, *Bijuralism: A Supreme Court of Canada Justice's Perspective*, 62 LA. L. REV. 449, 451 (2001).

¹⁴¹ See *supra* note 17.

¹⁴² CAN. CONST. pt. 1, § 16(1). Part I of the Canadian Constitution is known as the "Charter of Rights and Freedoms."

¹⁴³ *Id.* at § 17.

¹⁴⁴ *Id.* at § 19.

¹⁴⁵ Barbara Burnaby, *Language Policies in Canada*, in LANGUAGE POLICIES IN ENGLISH-DOMINANT COUNTRIES, *supra* note 16, at 159, 169.

¹⁴⁶ CAN. CONST., pt. 1, § 23.

¹⁴⁷ *Id.* at § 23(3).

¹⁴⁸ *Mahe v. Alberta*, [1990] S.C.R. 342, 366 (Can.).

¹⁴⁹ *Id.* at 366.

¹⁵⁰ *Id.* at 365.

ble at all times for Spanish, Haitian Creole, and the many other languages which are spoken by large segments of the population. Because of the concentrated populations of these groups, the need for interpreters is acute. These interpreters should be sufficiently available at a relatively low cost to the state. Furthermore, in a state with a large Spanish-speaking population like New Mexico, due process arguably requires even greater access to the legal system, possibly including rights to bilingual counsel where available.¹⁵¹

One might distinguish the South African and Canadian positive rights from the potential right to court interpreters in American court proceedings by emphasizing the fact that the South African and Canadian rights in question are relatively explicitly outlined in their constitutions. However, it seems that if the United States Supreme Court were not so reluctant to impose positive obligations on the federal or state governments, there would be little question that the Due Process Clauses of the Fifth and Fourteenth Amendments require that, where possible, courts provide interpreters to non-English-speaking litigants. In other words, the most important obstacle to recognizing the rights of linguistic minorities is not the text of the Constitution itself; rather, it is a conservative constitutional tradition of interpretation that relies almost entirely on negative liberties. Thus far, the United States has not been as willing as other constitutional democracies to consider the benefits of a positive rights model of constitutional interpretation.

V. THREE ADDITIONAL REMEDIES NEEDED TO GUARANTEE MEANINGFUL ACCESS TO THE COURTS

The right to an interpreter should be extended to all civil cases either by the constitutional arguments outlined above or by legislation. In addition to extending the right to an interpreter in this way, three additional legal reforms would constitute important steps toward respecting the constitutional and human rights of non-English speakers in civil cases:

- (1) Extend the right to an interpreter to pre-trial attorney-client meetings;
- (2) Establish state regulatory schemes that provide training and certification for state court interpreters; and
- (3) Make bilingual courts accessible in regions with significant concentrations of Spanish-only speakers or provide access to bilingual counsel in those areas.

¹⁵¹ See *infra* Part V.D.

The first two remedies are needed immediately whereas the third reform may be seen as more efficient and practicable in the future as certain regions become predominantly Spanish-speaking.

A. *Extending the Right to an Interpreter to Pre-Trial
Attorney-Client Meetings*

With all the attention on the debate about courtroom interpreters, the importance of communication between client and attorney has been largely overlooked. The law must recognize the need to communicate with an attorney prior to and during trial. When a litigant is represented in court, pre-trial communication between a lawyer and client is likely to determine the outcome of the case. As the majority recognized in *Jara*, it is the lawyer who controls the case in the courtroom.¹⁵² Though the Court Interpreters Act of 1978 says nothing about facilitating out-of-court communication between attorney and client,¹⁵³ the lawyer would clearly not be very effective if she did not have a means of communicating at length with her client in preparation for trial. Such communication is necessary in order for an attorney to “abide by a client’s decisions concerning the objectives of representation.”¹⁵⁴

In criminal cases, where the right to an attorney is guaranteed, the right to a clear and effective means of communicating with that attorney must also be ensured.¹⁵⁵ To deny a criminal defendant an interpreter needed to communicate with his attorney is no less a denial of his constitutionally protected rights than to deny him the phone he needs to call his attorney. Even if the trial itself is not a “babble of voices,”¹⁵⁶ if a person’s legal rights have never been explained to him, the entire process is legal gibberish.

¹⁵² *Jara v. Municipal Court*, 578 P.2d 94, 96–97 (Cal. 1978).

¹⁵³ The scope of the statute is limited to “judicial proceedings instituted by the United States.” 28 U.S.C. § 1827(a) (1994).

¹⁵⁴ MODEL RULES OF PROF’L CONDUCT R. 1.2 (1983).

¹⁵⁵ One might also analyze this problem as the *Negron* court did, and conclude that the right implicated is the Sixth Amendment right to be present at one’s trial. *Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970). The *Negron* Court did not construe this right narrowly as a right only to be physically present in the courtroom; rather, it cited *United States v. Dusky*, 362 U.S. 402 (1962), for the proposition that a person who cannot comprehend the proceedings against them could not be put on trial. *Id.* at 389. The court concluded by noting that in cases where a defendant has a mental disability the court must hold a hearing to determine his competence to participate intelligently in his trial. However, the court found that a language disability is more easily curable, and thus “[t]he least we can require is that a court . . . make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial.” *Id.* at 390–91. See also *supra* note 75 and accompanying text.

¹⁵⁶ *Negron*, 434 F.2d at 388.

B. Establishing State Regulatory Schemes To Train and Certify Court Interpreters

All states should establish some system of regulation and certification of interpreters.¹⁵⁷ The right to a skilled interpreter is arguably guaranteed in the United States Constitution by the Sixth and Fourteenth Amendments, and would therefore be applied to the states.¹⁵⁸ Currently, several states including Arkansas, California, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Utah, and Washington have some state-sponsored testing for court interpreters, “although not all meet what are generally considered to be model criteria for determining interpreter qualifications.”¹⁵⁹ The National Center for State Courts has taken the lead by administering the Consortium for State Court Interpreter Certification. The Consortium currently includes thirty member states,¹⁶⁰ which include nearly two-thirds of the non-English-speaking population of the United States; these states have pooled their resources to develop standardized examinations for interpreter certification.¹⁶¹ By working together through organizations like the Consortium, even states with relatively small non-English-speaking populations should be able to minimize the overhead costs necessary to implement a court interpreter program of professional caliber.

C. Recognizing a Right to Bilingual Counsel and Courtrooms in Districts of Concentrated Spanish-Speaking Populations

The inability to communicate with an attorney severely handicaps non-English speakers in the exercise of many of their fundamental rights and in their access to legal recourse.¹⁶² As discussed above, there are strong arguments for extending strict scrutiny to legal mechanisms that adversely affect entire language classes. Due process and equal protection militate in favor of non-English speakers’ right to an attorney who speaks their language (or at least an interpreter when an attorney of that language is not available). However, even under strict scrutiny, the state has a compelling counterargument that multilingual attorneys simply are not available to serve the non-English-speaking population in most of America. One logical solution is to require states or regions that have the ability to

¹⁵⁷ See Weissman, *supra* note 70; Pantoga, *supra* note 61.

¹⁵⁸ Weissman, *supra* note 70, at 1925.

¹⁵⁹ *Id.* at 1925 n.249.

¹⁶⁰ Nat’l Ctr. State Courts, Court Interpreting Consortium Member States, at http://www.ncsconline.org/wc/publications/Res_CtInte_ConsortMemberStatesPub.pdf (last modified Aug. 1, 2003).

¹⁶¹ Nat’l Ctr. State Courts, Consortium for State Court Interpreter Certification: Frequently Asked Questions, at http://www.ncsconline.org/wc/publications/Res_CtInte_ConsortCertFAQsPub.pdf (last modified July 31, 2003).

¹⁶² See *Negron*, 434 F.2d at 388–89.

provide legal services in different languages to do so.¹⁶³ That is, when there is in fact no countervailing government interest, the state must provide an attorney who speaks the language of the defendant. As with the Voting Rights Act, the need for legal services in other languages can be measured by the total non-English-speaking population of a given state.¹⁶⁴ In a state where 10% of the population speaks Spanish, the need for Spanish-speaking attorneys is clear and likely outweighs a state's interest in containing costs. In a state where 40% of the population feels more comfortable speaking Spanish, a convincing argument could be made for establishing a bilingual judicial system. Variations on such region-specific court procedures have been implemented successfully in Canada and South Africa and have historically been available in non-English-speaking regions of the United States.¹⁶⁵

Canadian Supreme Court Justice Claire L'Heureux-Dube believes that "legal bilingualism would ultimately require bilingualism in all its practitioners."¹⁶⁶ This conclusion may hold true in Canada because, in addition to holding court proceedings in French, Canada publishes court records and decisions in the minority language. Though the United States appears to be far from confronting these types of concerns, they are important questions given that regions of the United States may someday be Spanish-language dominant. The long-term concern in Canada is to avoid "two distinct official legal cultures [forming] around two languages."¹⁶⁷ No one wants separate precedent to form in two languages, with attorneys and courts following only the language they understand. Though this problem can be largely avoided by publishing in both languages, bilingual legal practitioners may be the ultimate safeguard to avoiding the development of separate legal cultures and standards around different languages.

VI. THE LEGAL PROFESSION'S DUTY TO SERVE ALL AMERICANS

There is a shared understanding among most attorneys that membership in the legal profession entails certain duties to the American judicial system and to fellow citizens.¹⁶⁸ The American Bar Association Model Rules mandate that "[e]very lawyer has a professional responsibility to provide legal services to those who are unable to pay" and suggests that all law-

¹⁶³ To survive strict scrutiny, a law must promote a compelling government interest, and the law must be the least harmful means of achieving that interest.

¹⁶⁴ See Kibbee, *supra* note 16.

¹⁶⁵ See *supra* Parts IV.B, .D.

¹⁶⁶ L'Heureux-Dube, *supra* note 140, at 454.

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., Geoffrey C. Hazard, Jr., *After Professional Virtue*, 6 SUP. CT. REV. 213 (1989); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980).

yers provide at least fifty hours of *pro bono publico* services annually.¹⁶⁹ However, the legal profession wrongly assumes that financial constraints are the only significant restriction on access to legal services.¹⁷⁰ Increasingly, language constitutes an equally important barrier to legal services in communities with large numbers of non-English speakers and few lawyers who speak any language other than English.¹⁷¹

Non-English speakers who find an attorney willing to take their case often do not receive the same level of service as English-speaking clients. Attorneys should not be held to a lower standard of competence and client interaction simply because a language barrier exists. Indeed, Rule 1.1 of the ABA Model Rules requires “competent representation.”¹⁷²

In order for a lawyer to ascertain the facts and her client’s goals competently, she must be able to effectively communicate with the client.¹⁷³ The fact that her client speaks a different language than she does does not lessen the lawyer’s obligation to consult with her and keep her informed.¹⁷⁴ Lawyers must avoid the temptation to communicate less with those clients with whom communication is most difficult. This problem is one that is best addressed through education because lawyers unaware of this tendency are more likely to do it. In extreme circumstances, the bar should take action to punish severe or frequent abuse.¹⁷⁵ While the burden is on the attorney to find means of effective communication with his client, the state should facilitate this communication in a number of ways.

¹⁶⁹ MODEL RULES OF PROF’L CONDUCT R. 6.1 (2003). The original draft Rule 6.1 proposed by the Kutak Commission in 1980 would have established mandatory public service requirements, but the compulsory language was eventually defeated, as it was again in 2002. MODEL CODE OF PROF’L RESPONSIBILITY R. 6.1 (Discussion Draft 1980); *Model Rule 6.1: Reporter’s Explanation of Changes*, in REPORT TO THE HOUSE OF DELEGATES 401 (Am. Bar Ass’n 2001). There has been an interesting debate on the scope of lawyers’ duties to society and the possibility of enforcing mandatory pro bono requirements. See, e.g., Donald Patrick Harris, *Let’s Make Lawyers Happy: Advocating Mandatory Pro Bono*, 19 N. ILL. U. L. REV. 287 (1999); Steven Lubet & Cathryn Stewart, *A “Public Assets” Theory of Lawyers’ Pro Bono Obligations*, 145 U. PA. L. REV. 1245 (1997); Jennifer Murray, Comment, *Lawyers Do It for Free?: An Examination of Mandatory Pro Bono*, 29 TEX. TECH. L. REV. 1141 (1998); Sol Wachtler, *Symposium on Mandatory Pro Bono*, 19 HOFSTRA L. REV. 739 (1991).

¹⁷⁰ According to Rule 6.1, the responsibility is “to those unable to pay.” MODEL RULES OF PROF’L CONDUCT R. 6.1.

¹⁷¹ There also may be few competent trained interpreters, or hiring an interpreter may make the legal services prohibitively expensive.

¹⁷² MODEL RULES OF PROF’L CONDUCT R. 1.1.

¹⁷³ *Id.* R. 1.2 (“A lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”).

¹⁷⁴ *Id.* R. 1.4. Rule 1.4(2) requires that a lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and Rule 1.4(3) demands that she “keep the client reasonably informed about the status of the matter.”

¹⁷⁵ Of course, the danger is that there are already too few attorneys serving non-English-speaking clients. Overzealous enforcement of ethical standards would create an additional disincentive to take on clients who are not proficient in English.

The state could establish banks of certified interpreters and extend the right to an interpreter to some minimum pre-trial attorney contact.¹⁷⁶

A. *Learning from the Experiences of the Medical Profession*

The scarcity of scholarship on access to the legal system by Latinos in the United States is astounding.¹⁷⁷ With virtually no data on the legal profession, perhaps the best proxy is to look to the parallel language barriers in access to health care. Health care providers have performed hundreds of studies analyzing the consequences of the doctor-patient language barrier.¹⁷⁸ Like the lawyer-client relationship, the doctor-patient rapport is communication-intensive, with severe consequences if one side misapprehends the other. In studies of cross-language medical treatment, the language barrier has been shown to lead to poorer patient treatment and, consequently, poorer patient health.¹⁷⁹ An analysis of twenty-one studies showed that the better the physician-patient communication, the more likely patients' health would improve.¹⁸⁰ Spanish-speaking patients reported that they were not told about their medications' side effects, were generally less satisfied with their care, and often thought their doctors did not understand how they felt.¹⁸¹

Medical studies have found that the use of an interpreter has detrimental effects on the doctor-patient relationship.¹⁸² When patients received treatment through the interpretation of a bilingual friend or relative, the patients suffered due to the lack of the interpreters' expertise.¹⁸³ The use of ad hoc interpreting (for example, by friends or family members) often resulted in incomplete or inaccurate explanation of the facts.¹⁸⁴

¹⁷⁶ See *supra* Part III.B.2.

¹⁷⁷ There are no studies employing scientific methods to analyze the effects of the language barrier on access to quality legal services.

¹⁷⁸ See Caraway L. Timmins, *The Impact of Language Barriers on the Health Care of Latinos in the United States: A Review of the Literature and Guidelines for Practice*, 47 J. MIDWIFERY & WOMEN'S HEALTH 80, 84 (2002).

¹⁷⁹ See, e.g., B. Kirkman-Liff, *Language of Interview: Relevance for Research of Southwest Hispanics*, 81 AM. J. PUB. HEALTH 1339 (1991).

¹⁸⁰ See Moira A. Stewart, *Effective Physician-Patient Communication and Health Outcomes: A Review*, 9 CAN. MED. ASS'N J. 1423 (1995).

¹⁸¹ Rand A. David & Michelle Rhee, *The Impact of Language as a Barrier to Effective Health Care in an Underserved Urban Hispanic Community*, 65 MOUNT SINAI J. MED. 393, 395 (1998). This study was unique in that it involved a subset study solely of Hispanic patients, yielding statistically significant results that isolated the problem of language inadequacies from broader cultural misunderstandings.

¹⁸² See, e.g., *id.*

¹⁸³ Javier Vasquez, *The Problem with Interpreters: Communicating with Spanish-speaking Patients*, 42 HOSP. & CMTY. PSYCHIATRY 163 (1995).

¹⁸⁴ Ad hoc interpreters tend to make five common errors: (1) omission: completely or partially deleting a message sent by the speaker; (2) addition: the tendency to include information not expressed by the speaker; (3) condensation: the tendency to simplify and explain; (4) substitution: the tendency to replace; and (5) role exchange: the interpreter assuming the role of the interviewer, taking over the interview and asking her own ques-

Even communication through a professional interpreter was found to impede full disclosure of the relevant facts and reduce confidence in the relationship.¹⁸⁵ Language was not the only barrier discovered in the studies. Doctors require cultural competency education in order to best serve their patients. Whether the physician chooses to stand or sit and whether she chooses to chat first or get right to business affects whether a patient or client believes that she is receiving satisfactory service.¹⁸⁶ Access to health care was also hampered by other independent factors common among Latinos in America: financial constraints,¹⁸⁷ lack of transportation, lack of child care, poor education, and employment status.¹⁸⁸

The solutions considered by the medical studies can be largely applicable to the legal profession as well. The most positive outcomes resulted from one-on-one contact with a bilingual health provider. Use of bilingual staff has been shown to lead to improved therapeutic relationships, greater patient satisfaction, increased patient understanding, and avoidance of extra time expenditure.¹⁸⁹ Unfortunately, as in the legal profession, Hispanics are severely underrepresented in the medical profession, constituting only 5% of all doctors.¹⁹⁰ An alternative solution is to train doctors in the languages of their clients. Although minimal training cannot substitute for the use of interpreters,¹⁹¹ a clinician with even minimal language skills might recognize significant discrepancies made by an ad hoc interpreter.¹⁹² Depending on the circumstances, it may be less expensive to hire professional interpreters rather than to train current staff.¹⁹³ Other options include promulgating written information in the patients' language or using bilingual assistants, nurses, or pharmacists. However,

tions. *Id.*

¹⁸⁵ Timmins, *supra* note 178, at 89.

¹⁸⁶ *Id.* at 83.

¹⁸⁷ As in the legal services context, many Hispanics are unable to pay the usual high rates for medical services. An estimated 30%–37% of Hispanics in the United States have no health insurance, the highest of any ethnic group. Lynette Clemetson, *A Neighborhood Clinic Helps Fill the Gap for Latinos Without Health Care*, N.Y. TIMES, Oct. 7, 2002, at A12; see also Ed Finkel & David Burda, *The 2003 Spirit of Excellence Awards*, MOD. HEALTHCARE, Dec. 15, 2003, at 25.

¹⁸⁸ Timmins, *supra* note 178, at 87.

¹⁸⁹ *Id.* at 88.

¹⁹⁰ *Id.* Other sources quote the percentage of Latino doctors as low as 2.5%. Gil Griffin, *Coloring Their World: Doctors Hope Exposing Their Profession to Students Will Encourage More Ethnic Minorities to Go into Medicine*, SAN DIEGO UNION-TRIB., Dec. 8, 2003, at D1.

¹⁹¹ It has been demonstrated that brief language courses can lead to significant mistakes on the part of the treating doctor. D. Prince & M. Nelson, *Teaching Spanish to Emergency Medicine Residents*, 2 ACAD. EMERGENCY MED. 32 (1995). However, the physicians in this study had only received a total of forty-five hours of Spanish training. The study showed that language training can be beneficial even when only used to supplement use of interpreters, although it is not designed to replace interpreters.

¹⁹² See *supra* text of note 184.

¹⁹³ For instance, one study revealed that time spent by staff members acting as interpreters proved more costly than hiring two professional interpreters. Timmins, *supra* note 178, at 83.

as long as direct communication between doctor and patient or lawyer and client remains impossible, the quality of the service provided is likely to suffer.

The medical profession has done a better job identifying work that could be done by community members themselves in non-English-speaking communities, thereby spreading limited resources more efficiently. For example, some community health clinics have made use of “*promotores de salud*” or “health promoter” programs. The program trains community members to be lay health workers who teach others in their community the basics of preventative care.¹⁹⁴ In August 2002, President Bush announced federal funding of 1200 new community health care centers over the next five years.¹⁹⁵ However, these plans came at the same time that funding for community legal services were falling to historically low levels. Similar programs could be effective in providing “preventative” legal help with landlord/tenant issues, disability and unemployment benefits law, and consumer law. As long as community representatives are well trained and community members clearly understand that the representatives are not lawyers, such basic preventative advice could lower the burden on legal services clinics and prevent larger legal problems by explaining the issues ahead of time in the language of the community members.

Another way the medical profession has maximized its reach into non-English-speaking communities is through regularly scheduled health fairs that offer free testing, counseling, and basic health care.¹⁹⁶ Such programs have the advantage of bringing the health professionals best able to communicate with a given community’s members *to* the community, offering concentrated, efficient, and often preventative medical treatment against future serious problems. Similar programs have been used effectively to educate communities about their legal rights.¹⁹⁷ Community legal workshops could be an especially effective use of lawyers in reaching out to linguistic minorities in communities where there are not enough attorneys to represent all those involved in litigation. Rather than focusing on high-volume representation of individual clients and becoming overwhelmed by the needs of their community’s linguistic minorities, multilingual legal services organizations could better serve the community as a whole by educating non-English speakers about their rights and how best to avoid legal difficulties.

¹⁹⁴ Clemetson, *supra* note 187.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998). Many legal services agencies do not engage in community organizing or lobbying activities because of restrictions attached to federal funding. See 45 C.F.R. §§ 1600–1643 (2004).

B. Transforming the Legal Profession To Resemble the Underlying Population

1. The Role of Law Schools

The surest way to address the problem of Latino access to the American legal system is to increase the number of Spanish-speaking lawyers.¹⁹⁸ In general, it seems that the greater the percentage of the population that speaks both English and Spanish, the more likely the entire citizenry will be receptive to accommodating the needs of Latinos. Increasing the number of Spanish-speaking lawyers would increase both awareness of Latino concerns and the potential to serve Latino communities.¹⁹⁹ Yet law schools across the country have done little or nothing to promote the practice of law by non-English speakers. This is not surprising given that, for instance, less than 4% of law professors in the United States are Hispanic.²⁰⁰ This figure seems unlikely to change in the near future as only 4.5% of all law school graduates during the 1990s were Hispanic.²⁰¹ Perhaps most importantly, these numbers do not describe the percentage of graduating law students who actually speak Spanish and whether the bulk of these attorneys primarily serve Latino communities or English-speaking clients.²⁰² In surveys, minority students are three times more likely than whites to state that their goal is to serve poor communities.²⁰³ If this holds true in the legal profession, it would seem to present yet another argu-

¹⁹⁸ This assumes that bilingual attorneys understand and respect their roles as counsel to their clients and in the courtroom, where at times the attorneys will still be forced to speak only through an interpreter. Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227 (1996) (explaining the potential dangers when an attorney attempts to act as both advocate and interpreter).

¹⁹⁹ The same has proven true in the medical community. See, e.g., Nellie Kelly, *Health Care Workers Breaking the Language Barrier*, ASSOC. PRESS NEWSWIRE, May 28, 2003, WL, APWIRE File.

²⁰⁰ Richard A. White, *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 2001-2002*, at <http://www.aals.org/20012002stats.pdf> (last visited Apr. 16, 2004).

²⁰¹ *J.D. Degrees 1984-2002 (Total/Women/Minorities)*, at <http://www.abanet.org/legaled/statistics/jd.html> (last visited Apr. 16, 2004); *Minority Degrees Awarded (by ethnic group) 1980-2002*, at <http://www.abanet.org/legaled/statistics/mindegrees.html> (last visited Apr. 16, 2004). However, there is some evidence that law schools are making some effort to increase Hispanic admissions. In 2000, 2183 Hispanics received law degrees (5.7% of all new attorneys). Nat'l Ctr. for Educ. Stat., U.S. Dep't of Educ., *First-Professional Degrees Conferred by Degree-Granting Institutions, by Racial/Ethnic Group, Major Field of Study, and Sex of Student: 1999-2000*, in DIG. EDUC. STAT. 2001, at 337 tbl.278 (U.S. Dep't of Educ. 2002), available at <http://nces.ed.gov/pubs2002/2002130c.pdf>.

²⁰² Interestingly, in medicine, the fact that so many minority students have chosen to go back to serve poorer communities rather than, for instance, entering academia, has compounded the problem of low levels of minority faculty. Anne Barnard, *Race a Focus in Med-School Matches, Students Learn of Internship Assignments*, BOSTON GLOBE, Mar. 23, 2001, at B2.

²⁰³ *Id.*

ment for admitting even higher levels of students from communities that are currently underserved by the legal profession.²⁰⁴

Because non-Latino lawyers can also learn to speak Spanish and other languages, law schools should consider an applicant's current and desired language proficiency as well as incorporating language programs when designing curricula. The number of college students studying Spanish has increased substantially from a low of 362,200 in 1974 to 658,600 in 1998.²⁰⁵ Even as enrollment drops in other languages, students are realizing the value of proficiency in Spanish.²⁰⁶ Law schools, however, have not seized upon this trend, and have generally made little effort to facilitate the continued foreign language studies that would be necessary to adequately prepare law students to serve non-English-speaking communities. Although most law schools pay lip service to the value of *pro bono* activities, the language skills that are crucial to this type of work are not highly valued. It is disheartening that law school faculties have not done more to address these inadequacies given law professors' presumptively above-average awareness of the legal problems facing non-English speakers and their receptivity to progressive legal arguments for establishing affirmative legal obligations to these communities. Even if courts or legislatures established broader rights to competent legal representation for non-English speakers, these rights would be meaningless and unenforceable if there are not enough attorneys who can communicate in the language of the litigants. Further, opponents of increased language rights can point to the lack of Spanish-speaking attorneys to argue that granting such rights would be prohibitively expensive or futile given inadequate resources.

Law schools should encourage continued foreign language instruction. In the United States, there is a high demand in legal services, as well as corporate law and government, for lawyers who speak other languages. Law schools should conduct law courses in Spanish and other foreign languages, especially in the areas of immigration law and trade.²⁰⁷

²⁰⁴ It should be noted however that the stated admissions policy must be carefully tailored to comply with *Grutter v. Bollinger*, 539 U.S. 306 (2003). Under *Grutter*, admission of greater numbers of Latino students, for instance, would be permissible in order to improve the classroom experience, but schools may be prohibited from boosting their levels of minority admissions based on the potential benefits to their communities. *Id.* at 339–41. Also, this problem could be avoided if increased admissions are based on language proficiency rather than race or ethnicity, unless it can be shown that the university intended to use language proficiency as a proxy for these prohibited classifications.

²⁰⁵ The number of students taking French, in contrast, dropped from 275,300 in 1986 to 199,100 in 1998. *Higher Education Registrations in Foreign Languages: 1970 to 1998*, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, *supra* note 76, at 169 tbl.271, available at <http://www.census.gov/prod/2002pubs/01statab/educ.pdf>.

²⁰⁶ From 1970 to 1998, the percentage of American university students registered in foreign language classes dropped significantly. Numbers dropped dramatically through the early 1980s, only to rise again in the 1990s. While the number of students studying foreign languages has returned to its 1970 level, the percentage has decreased because the number of university students has risen. *Id.*

²⁰⁷ One such program is the University of Denver College of Law "Lawyering in Span-

Such courses would allow mid- to high-level language students to learn a new area of the law while also familiarizing themselves with the specialized vocabulary needed to practice in that language. Harvard Law School and others have recently begun implementing pro bono service requirements for graduation. A greater focus on foreign language competency would complement these programs; in addition to instilling a general sense of service, these skills are crucial to the practice of law in America today.

2. The Role of Legal Professional Organizations and Continuing Legal Education

Language and cultural competency education should be made available to practicing attorneys throughout their careers. One way of encouraging lawyers to acquire these skills would be to count language and cultural competency courses toward the state bar associations' required continuing legal education (CLE) credits. Forty states currently require continuing legal education courses in order to continue practicing within the jurisdiction, but few provide courses geared toward the needs of language minorities.²⁰⁸ Minnesota, for example, has implemented an "Elimination of Bias" requirement that addresses issues of multiculturalism but does not currently recognize foreign language studies.²⁰⁹ Bar associations could also exert greater political pressure to seek funding for legal services and scholarships for Latino law students. For example, the National Hispanic Medical Association has asked President Bush for greater funding for programs meant to address the shortage of Spanish-speaking doctors.²¹⁰ The National Hispanic Medical Association's proposal would include federal funding for scholarships and more financial aid for Hispanic students to become doctors in order help address the current shortfall.²¹¹ Similar initiatives by law firms and bar associations around the country could create needed long-term transformation of the profession while greater interpreter training and CLE courses fill the gap as short-term solutions.

ish" program. The program has offered courses such as "International Business Transactions in Spanish," "Counseling and Negotiating in Spanish," "Drafting Legal Documents in Spanish," and "Immigration Lawyering in Spanish." All the courses are legal courses taught in Spanish. The program claims to be the first of its kind in the United States. According to its website, some courses have also been opened to attorneys and legal professionals in the community, allowing them to earn CLE credits. Univ. of Denver College of Law, *Lawyering in Spanish* at <http://www.law.du.edu/lawinspanish/welcom.htm> (last visited Apr. 16, 2004).

²⁰⁸ Am. Bar Ass'n, Summary of MCLE State Requirements, at <http://www.abanet.org/cle/mcleview.html> (last visited Apr. 16, 2004).

²⁰⁹ Minn. Bd. of Continuing Legal Educ., Rules of the Minnesota State Board of Continuing Legal Education, at http://www.mbcle.state.mn.us/clerule_7_0.htm (last visited Apr. 16, 2004).

²¹⁰ Maria Peña, *Growing Hispanic Population Needs Doctors Who Speak the Language*, GLOBAL NEWS WIRE, Mar. 23, 2001, LEXIS, Global News Wire File.

²¹¹ *Id.*

CONCLUSION

In the context of equal education, the Supreme Court has found 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.”²¹² An analogous principle holds true for the courtroom. The right to be present in court means nothing if one of the litigants cannot understand what is being said. “Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.”²¹³ But it is not only criminal processes that jeopardize fundamental rights, and it is not only the state that brings crippling suits. Non-English-speaking litigants in civil suits should also be guaranteed rights to an interpreter, or better still, an attorney who speaks their language. In order to meet this need, law schools should actively recruit students proficient in multiple languages and should promote language education in their curricula. Bar associations can continue this work by recognizing CLE credits for language studies. The legal system should not wait for a long history of oppression to develop before addressing the growing problems of the isolated Latino minority. A multifaceted approach is necessary to compel vital changes to the law, the legal profession, and eventually to the lives of non-English-speaking Americans.

²¹² *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

²¹³ *Negron v. New York*, 434 F. 2d. 386, 390 (2d Cir. 1970).