CAN YOU HEAR ME NOW?: CONTEXTUALIZING MIRANDA RIGHTS FOR LOW ENGLISH PROFICIENT INDIVIDUALS

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ABSTRACT

This Note will explore the intersection between Low English Proficient (LEP) individuals' right to be heard during custodial interrogations and the need for contextualized Miranda rights in a multilingual and multicultural society. LEP individuals' interactions with the criminal justice system—particularly during custodial interrogations—can hinder their access to justice and equity; they often have neither an opportunity to be heard nor an opportunity to have their rights tailored to their capacities and circumstances in order to substantively understand their legal rights, which the Supreme Court held to be requirements of due process in Goldberg v. Kelly. *This Note will present the ways in which language justice and accessibility are not satisfied merely with the guarantee that legal documents or rights be adequately translated into different languages. Rather, language justice is the recognition that language drives politics and daily life, and, as such, accommodations must be made in order to ensure an equitable and just society.*

This Note is divided into five sections. Section I introduces the challenges LEP individuals experience in the United States and the ways in which the courts can help ameliorate some of those difficulties. In Section II, I discuss the process of second language acquisition and the manner in which language attainment and proficiency operate for non-native English speakers. Section III dives into the history of Miranda v. Arizona*, the significance of its holding, and the different ways courts have interpreted the ruling. In Section IV, I explain the holding in* Goldberg v. Kelly*, the majority's intersectional analysis of identity, and the ways in which marginalized individuals experience additional challenges due to their oppressed identities. Lastly, in Section V, I propose a solution to the plight of the LEP individual within the criminal justice context. I offer new curriculum ideas for police academy trainings and describe the benefits of contextualized Miranda rights for accused LEP individuals.*

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Language is powerful; language is power.[1]

—Robin Tolmach Lakoff

I. INTRODUCTION

Low English Proficient (LEP) individuals are people whose primary language is not English and "who have a limited ability to read, speak, write, or understand English."[2] Individuals in this group attempt a successive acquisition of English as a second language, whereby their first language acquisition has already taken place and has reached a "more-advanced point before the second language is introduced."[3] In the linguistic phenomenon of attaining language proficiency, whether it be a primary or secondary language, there is a notion of "gradability," insofar as all individ-

[1] Robin Tolmach Lakoff, *Language, Politics, and Power*, *in* TALKING POWER: THE POLITICS OF LANGUAGE 13 (1990).

[2] *Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals*, LEP.GOV, https://www.lep.gov/faq/faqs-rights-lep-individuals/commonly-asked-questions-and-answers-regarding-limited-english, *archived at* https://perma.cc/9AH3-7GFC (last visited Jan. 3, 2021).

[3] Elsa Lattey, *Contexts for Second Language Acquisition*, *in* CURRENT ISSUES IN SECOND LANGUAGE ACQUISITION AND DEVELOPMENT 77, 79 (Carol A. Blackshire-Belay ed., 1994).

uals know a language "in some relative way," and such gradability can reflect one's skills and fluency in that specific language.[4]

There are a variety of ways in which one's language proficiency manifests itself in society.[5] For LEP individuals, their interactions with the criminal justice system can hinder their access to justice and equity, similar to how the *Goldberg v. Kelly* plaintiffs did not have meaningful access to justice.[6] In *Goldberg*, plaintiffs' welfare benefits were terminated without a prior evidentiary hearing.[7] The State argued that its interest in preventing an increase in fiscal and administrative burdens justifiably outweighed the plaintiffs' need to understand why their welfare benefits were terminated.[8] The Court, however, rejected this argument and ultimately held that the "fundamental requisite of due process of law is the opportunity to be heard," which "must be tailored to the capacities and circumstances of those who are to be heard."[9]

LEP individuals who undergo custodial interrogations often do not have an opportunity to be heard or an opportunity to have their rights tailored to their capacities in order to substantively understand their *Miranda* rights and provide a knowing, voluntary waiver. Moreover, LEP individuals may suffer from confusion when law enforcement officials assume their level of English comprehension is equivalent to that of native or fluent English speakers. LEP individuals, just as the *Goldberg* plaintiffs, have a right to be heard and to fully understand their rights, including the opportunity to understand not just the translated words of the *Miranda* warnings during police interrogations, but also the significance of those words—a significance that is culturally relevant and reflective of the gradable phenomenon of language acquisition.

As such, LEP individuals have a right to be heard when determining whether they have waived their *Miranda* rights and, thus, have knowingly and voluntarily consented to speak with law enforcement officials despite the legal consequences.[10] Further, *Goldberg* illustrates that the substantive due process of one's right to be heard transcends the termination of welfare benefits and shifts into language theory, as language is the tool that transforms politics and power into "the sphere of the human mind and heart."[11] Language justice and accessibility are not satisfied merely with the guarantee that legal documents or rights be adequately translated into different languages. Rather, language justice is the recognition that "language drives politics and determines the success of political machinations."[12] It is "the

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[4] *Id.* at 77.
[5] *Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals*, *supra* note 2.
[6] *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).
[7] *Id.* at 259.
[8] *Id.* at 264–66.
[9] *Id.* at 266, 268–269.
[10] Miranda v. Arizona, 384 U.S. 436, 442 (1966).
[11] Lakoff, *supra* note 1.
[12] *Id.* at 12.

initiator and interpreter of power relations" because, at its source, "politics is power."[13]

For LEP individuals who are in the process of successive second language acquisition, determining the validity of a *Miranda* waiver should focus less on the officer's translation skills and more on the accused's thorough understanding of the rights they have waived. Courts incorrectly equate reading *Miranda* rights in a language that the accused understands with reading *Miranda* rights in a manner whereby the accused is conveyed the *significance* and *full substance* of those rights,[14] and the right being articulated in a manner that is "tailored to the[ir] capacities and circumstances."[15]

Addressing the limitations that second language acquisition presents for LEP individuals in society is not an easy feat. To assume that "linguistics or linguists can thwart the xenophobic tendencies" already established in the United States would be naïve.[16] As former Federal Bureau of Investigation (FBI) Director James Comey noted during his lecture at Georgetown University on February 12, 2015, history has demonstrated a "disconnect between police agencies and many citizens—predominantly in communities of color."[17] Comey envisioned law enforcement connecting with marginalized communities and providing different cultural and social resources while simultaneously upholding their professional responsibilities.[18] He discussed the "serious debates" that are "taking place about how law enforcement personnel relate to the communities they serve, about the appropriate use of force, and about real and perceived biases, both within and outside of law enforcement."[19]

Comey's hopeful view of the relationship between law enforcement and communities of color is relevant when analyzing it through the lens of LEP individuals' experiences, as Comey's hope demonstrates that there is an appetite to adopt legislation and resources that mitigate language injustice in the United States. For example, legislative measures such as standardizing police interrogations for LEP individuals demonstrate that without adequate and culturally competent translations of *Miranda* warnings, one can be de-

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[13] *Id.*

[14] United States v. Rijo-Carrion, No. 11-CR-784(RRM), 2012 U.S. Dist. LEXIS 179623 (E.D.N.Y. Dec. 19, 2012) (citing United States v. Hernandez, 93 F.3d 1493 (10th Cir. 1996)); Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989) (holding that a defendant with "limited" English proficiency nonetheless made a valid *Miranda* waiver); United States v. Santiago, 720 F. Supp. 2d 245, 252 (W.D.N.Y. 2010) (concluding that when an individual is advised of his *Miranda* rights in a language he understands, the waiver determination is easier to conclude than if a non-English speaker were read their *Miranda* warnings in English) (citing United States v. Boon San Chong, 829 F.2d 1572, 1574 (11th Cir. 1987)); *see* Perri v. Director, Dep't of Corr., 817 F.2d 448, 452 (7th Cir. 1987); United States v. Peña-Ontiveros, 547 F. Supp. 2d 323, 337 (S.D.N.Y. 2008); *see also* United States v. Munoz, 748 F. Supp. 167, 169–71 (S.D.N.Y. 1990).

[15] Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970).

[16] John Baugh, Linguistics in Pursuit of Justice xiii–xx (2018).

[17] *Id.* at 4.

[18] *Id.*

[19] *Id.*

prived of legal justice, and thus, power. Just as the Supreme Court reasoned that welfare recipients' "capacities and circumstances" must be taken into consideration when determining whether their welfare benefits can be terminated, so too must the Court consider the "capacities and circumstances" of non-native English-speakers who may agree to a waiver of their *Miranda* rights without understanding the full significance and consequences of such a waiver.

Ultimately, when determining whether an LEP individual has "knowingly" and "voluntarily" waived their *Miranda* rights, "knowing" should mean more than having a basic understanding of conversational English, especially when understanding the full significance of *Miranda* rights may require a higher level of English proficiency. Rather, a "knowing" waiver of one's *Miranda* rights must consider the nuances behind second language acquisition and proficiency; otherwise, courts risk a constitutional violation of one's substantive right to be heard.

II. Second Language Acquisition and Low English Proficiency

A. Limited English Proficiency and the Rights Recognized by the Federal Government

Limited English Proficient individuals are entitled to federally mandated language assistance and access opportunities.[20] In August of 2000, then President Bill Clinton signed Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency."[21] This executive order required each federal agency to "examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services."[22]

Executive Order 13166 recognizes that federal and state officials encounter challenges when interacting with LEP individuals and gave the federal government a mandate to take concrete steps to alleviate those challenges. For example, the Civil Rights Division of the Justice Department strives to guarantee effective, timely, and quality communication between law enforcement officials and LEP individuals and has recommended "the use of pictures and symbols to elicit descriptions of suspects" from LEP witnesses.[23] The idea behind this is that if law enforcement officers use pictures and symbols to garner descriptions of potential suspects during investigations, it can serve to bridge the communication gap between native and non-native English-speakers.[24] Although using pictures and symbols is not

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[20] *Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals*, *supra* note 2.

[21] *Id.*

[22] Exec. Order No. 13166, 65 Fed. Reg. 159, 50121 (Aug. 16. 2000).

[23] *Id.*

[24] *Id.*

required under Title VI, law enforcement agencies have found them to be helpful when engaging with individuals who may not be fluent in English.[25]

While universal signs and symbols can be tremendously helpful in "temporarily bridging communication gaps" as LEP individuals await the arrival of an interpreter or bilingual staffer, they do not fully substitute the benefits of having a live interpreter and should be used only when "they are high quality translations, offer a breadth of options, and are used appropriately and in a limited fashion."[26] Further, while there is some benefit to these pictures, an overreliance on them can prove to be just as detrimental as they are beneficial—particularly when trying to gather "complex, sensitive, or critical information" from LEP individuals.[27] A live interpreter may allow an LEP individual to interact fully and knowingly with law enforcement officers, as they would not need to rely on pictures and symbols to communicate with law enforcement.[28]

B. Second Language Acquisition and Obstacles for LEP Individuals

In order to understand the intricacies behind second language acquisition, it is important to distinguish between learning English as a foreign language and learning English as a second language.[29] Learning English as a foreign language would entail studying English in a country whose normal language is something other than English.[30] On the other hand, learning English as a second language arises when one immigrates to a predominantly English-speaking country from a non-English-speaking country and proceeds to learn English.[31] While the differences between both categories seem simple, for multilingual nations, the issue can be more complex.[32] For individuals who learn English as a foreign language, they "learn the language in the absence of its cultural, social, political and economic context."[33] Contrastingly, those learning English as a second language are exposed to all aspects of the host country's cultural, social, political, and economic values and norms.[34] As such, what becomes relevant when distinguishing between these two linguistic phenomena is the context in which the language is taught.[35]

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[25] *Id.*
[26] *Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals*, *supra* note 2.
[27] *Id.*
[28] *See* New York Police Department, NYPD Language Access Plan for Limited English Proficient (LEP) Persons 4 (2012), http://www.nyc.gov/html/nypd/downloads/pdf/public_information/lap_June_2012.pdf, *archived at* https://perma.cc/UY3J-P9L3.
[29] *See* Lattey, *supra* note 3, at 83.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Lattey, *supra* note 3, at 83.

Further, there is a fundamental difference between language acquisition and language learning.[36] In language acquisition, an individual becomes exposed to a new language in the same manner that a child learns his or her first language. In language learning, an individual is taught the new language or is teaching oneself instead.[37] These two independent manners of developing a second language manifest in the level of proficiency one eventually obtains.[38] In other words, language acquisition becomes a "subconscious process identical in all important ways to the process children utilize in acquiring their first language," while language learning "is a conscious process that results in 'knowing about' language, 'having a conscious knowledge about grammar,' and knowing the rules."[39]

For linguists, intake—or comprehension—is integral to one's ability to acquire and become proficient in a second language.[40] Here, exposure—or "simply hearing the target [or second] language"—is not enough.[41] Instead, the second language acquirer "must also utilize the primary linguistic data."[42] In the words of Stephen Krashen, a renowned linguist and political activist, "people acquire second languages only if they obtain comprehensible input [i.e., if they understand messages] and if their affective filters are low enough [in which] to allow the input."[43] An affective filter, according to Veronica Vasquez in her article, "Lowering the Affective Filter for English Language Learners Facilitates Successful Language Acquisition," is a "theoretical construct in second language acquisition that attempts to explain the emotional variables associated with the success or failure of acquiring a second language."[44] More specifically, one's affective filter serves the purpose of being an invisible psychological filter whereby one's self-esteem and motivation can either facilitate or hinder language production in a second language.

In relation to English language learners (ELLs), when an LEP individual's affective filter is high, the individual can experience stress and anxiety, feel self-conscious, and lack the ability to acquire and/or comprehend the second language.[45] Contrastingly, when an LEP individual's affective filter is low, they feel empowered to interact with their peers, do not feel intimidated or frightened, and, most importantly, feel "safe in answering questions and

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[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 83–84 (quoting STEPHEN D. KRASHEN, THE INPUT HYPOTHESIS: ISSUES AND IMPLICATIONS 4 (1985)).
[40] *Id.* at 84.
[41] Lattey, *supra* note 3, at 83.
[42] *Id.* at 84 (referencing KRASHEN, *supra* note 39).
[43] *Id.* at 84.
[44] Veronica Vasquez, *Lowering the Affective Filter for English Language Learners Facilitates Successful Language Acquisition*, COLLABORATIVE CLASSROOM: COLLABORATIVE CIRCLE BLOG, https://www.collaborativeclassroom.org/blog/lowering-the-affective-filter-for-english-language-learners-facilitates-successful-language-acquisition/, *archived at* https://perma.cc/8GN5-S3ZD.
[45] *Id.*

sharing their thinking with their peers" and authoritative figures.[46] Such a distinction becomes particularly relevant when applied to cases such as *Miranda v. Arizona*, a seminal case concerning the failure of law enforcement to inform the defendant of his rights during a custodial interrogation, because the *Miranda* decision established the requirement that custodial interrogations be free of unduly coercive psychological techniques used to elicit confessions from accused individuals.[47]As such, it becomes evident that ensuring that an LEP individual has a low affective filter during conversations with law enforcement allows LEP individuals to engage more comprehensively and less anxiously with those who are conversing with them in their second language.

C. Why Do Some Learn Faster Than Others?

A common myth is that the length of time an individual has resided in the United States directly correlates to one's English language proficiency.[48] However, studies demonstrate that other factors, such as income and education, more readily determine the rate at which one acquires English as a second language.[49] More specifically, it is the indirect benefits of such resources that influence one's second language proficiency.[50] For example, children from wealthier families "are more likely to have received schooling in [their] native language back in their home country," and are "better equipped to understand the tasks they encounter in [courses taught in English] and pick up English faster as a result."[51] Further, those who are wealthier or come from higher-income families are more likely to have "connections with the English-speaking world," and, thus, are more likely to acquire the language earlier in life.[52]

Similar conclusions have been found with adult immigrant populations as well.[53] Adult immigrants who have "received more formal education in their native language acquire English more rapidly than those with less formal education."[54] Building upon previous experiences that parallel those found in educational institutions in the United States is a critical factor in determining the ease one may have in acquiring and becoming proficient in English. Regardless of the speed with which one acquires English as a second language, non-native English-speaking immigrants quickly learn that

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[46] *Id.*
[47] Miranda v. Arizona, 384 U.S. 436, 452 (1966).
[48] *See* Lucy Tse, *The State of English-Language Learning, in* "Why Don't They Learn English?": Separating Fact from Fallacy in the U.S. Language Debate 9, 21–22 (2001).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Tse, *supra* note 48.

"learning English is a necessity, [and] not a luxury" if one wants to succeed in the United States.[55]

D. Language Accessibility and Language Justice in the Legal World

As John Baugh notes in his book *Linguistics in Pursuit of Justice*, "linguistics are rarely called upon to help balance the scales of justice," yet in nearly all interpersonal instances of injustice throughout history, there have been "one or more linguistic dimensions worthy of analytical scrutiny."[56] Linguistic behavior has become so integral to daily life that it has often been taken for granted—"or worse, dismissed as inconsequential when compared with many of the other criteria that inevitably intersect with conditions pertaining to the impartial treatment of people."[57] When analyzing the role of the law within the fight for language justice, it is critical to understand the significance of Speech Act Theory.[58] This theory demonstrates that "some statements or remarks carry more weight than others depending upon who says them, and for what purpose."[59] For example, the phrase "you are under arrest" has much more gravity when stated by a police officer than by a friend. The idea is that there are "some instances in which language, injustice, and inequality have combined to take on special significance because someone in a position of authority has made pertinent statements."[60]

More importantly, the Speech Act Theory also establishes a more nuanced understanding of statements from authoritative figures as interpreted by the listener. What gives the weight of these phrases more significance is not only the role of the speaker, but also the listener's cultural understanding of the influence that particular authoritative figure has in society. This distinction is critical when analyzing it within the context of language access, as the importance of certain authoritative figures in one's native country might be different from the influence they have in the United States.

For example, the phrase "you have the right to remain silent" can mean two different things for Chinese English-language learners in the United States.[61] While the right to silence is utilized in both Chinese criminal procedure and U.S. criminal procedure, it takes on different meanings in each respective country.[62] In China, an individual has a right to remain silent but if she wants leniency in court or a lighter criminal sentence, she confesses to the crime.[63] Contrastingly, such a suggestion from a law enforcement official

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[55] *Id.* at 25.
[56] BAUGH, *supra* note 16, at xiii.
[57] *Id.*
[58] *Id.* at 45.
[59] *Id.*
[60] *Id.*
[61] Criminal Procedure Law of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, adopted January 1, 1997), art. 118.
[62] *Id.*
[63] *Id.*

in the United States is considered coercive and unconstitutional.[64] Moreover, while in China, an individual does have the "right to refuse to answer any questions that are irrelevant to the case," there is no language in Article 118 of China's Criminal Procedural Law that protects an accused person's right to refuse to answer a question on the grounds of self-incrimination—implying that there is an incentive for an accused individual to disclose any and all information to law enforcement officials.[65]

The cultural and institutional differences present between the United States' criminal justice system and China's criminal justice system become even more salient when one examines China's Criminal Procedural law, particularly for custodial interrogations. This body of law has been heavily influenced by the nature of Confucianism and the rigidity in societal and familial relationships in China. The "persuasive" interrogation patterns and codes of imperial China have survived over a millennium in Chinese society "because of [their] inherent connection with the increased imperial hierarchical powers."[66]

As Wei Wu and Tom Vander Beken describe in *The Evolution of Criminal Interrogation Rules in China*, "Confucian codes of morality . . . such as filial piety and loyalty were enforced by legalist's . . . reward and punishment machineries."[67] In other words, members of Chinese society who "held relative power in informal positions," such as brothers and fathers, were more inclined to uphold China's social order through the "mediation of conflicts," because in so doing they maintained their own "power and prestige over their subordinates" and other family members.[68]

As such, for Chinese immigrants who are both trying to learn the English language and are more familiar with the Chinese criminal justice system than the American criminal justice system, their interactions with American law enforcement can lead to starkly different consequences because the significance of authoritative figures differs in their native country of China. Indeed, the court in *Liu v. State* held that one's cultural heritage can create challenges within the American justice system.[69] The court in *Liu* reasoned that an individual's cultural heritage must be a determinative factor in deciding the validity of a suspect's waiver of their *Miranda* rights.[70] More specifically, *Liu* held that courts must examine a defendant's background, their social and employment history in the United States, and whether the defendant has actively maintained their native culture or whether the indi-

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[64] *See generally* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 894 (2004), http://www.ncids.org/defender%20training/2008%20Spring%20Conference/CoercedConfessions.pdf, *archived at* https://perma.cc/QGQ6-F7FM.

[65] *See* Criminal Procedure Law of the People's Republic of China, *supra* note 61, art. 118.

[66] *Id.*

[67] Wei Wu & Tom Vander Beken, *The Evolution of Criminal Interrogation Rules in China*, 40 Int'l J. L. Crime & Just. 271, 280 (2012).

[68] *Id.*

[69] Liu v. State, 628 A.2d 1376, 1380–81 (Del. 1993).

[70] *Id.*

vidual has assimilated and fully integrated into American culture and society.[71]

In *Liu*, the defendant argued that his *Miranda* waiver was invalid because his Chinese heritage demanded "unquestioning cooperation with authority figures," causing him to "instinctively" abandon his *Miranda* rights.[72] However, in analyzing the totality of the circumstances, the court concluded the validity of the *Miranda* waiver did not turn on the defendant's native cultural heritage.[73] Indeed, because the defendant had "lived and worked in New York City for several years," and "obtained a taxicab license, conducted businesses and participated in small claims court proceedings," the court decided that he had substantially integrated himself into American society in such a manner that his Chinese background could not decide the issue.[74]

While the court in *Liu* ultimately found the defendant's waiver of his *Miranda* rights was valid due to his acculturation into American society, the impact of such a finding is significant. The court carved out a unique legal exception to ensure that individuals, such as those with low English proficiency, have a legal avenue for protection and redress. The legal variances that exist between Chinese criminal procedure and U.S. criminal procedure were elucidated by the court in *Liu*. This is merely one example of the many ways in which one's cultural heritage and the impact of the Speech Act Theory intersect with the application of American law. More specifically, the legal differences within certain cultures highlight the challenges that LEP individuals may experience once they immigrate to the United States. These differences further illustrate the need for LEP individuals to not only understand the literal meaning of the words being read to them in *Miranda* translations, but to also comprehend the context and significance behind them as it relates to American society and the American justice system.

III. History of *Miranda* Rights

Before the 1966 Supreme Court decision of *Miranda v. Arizona*, the Supreme Court had already begun considering the "issues concerning custodial interrogations and . . . confessions."[75] For example, the FBI frequently gave "*Miranda*-type warnings" to arrestees before they were required to do so under *Miranda*.[76] As the criminal justice system developed, so too did the Court further develop the significance of admissible confessions, particularly as they related to the "voluntariness" of the confessions.[77] Over time, the

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[71] *Id.*
[72] *Id.* at 1380.
[73] *Id.* at 1381.
[74] *Id.* at 1381.
[75] Roscoe C. Howard, Jr. & Lisa A. Rich, *A History of Miranda and Why It Remains Vital Today*, 40 Val. U. L. Rev. 685, 685 (2006).
[76] *Id.* (referencing Miranda v. Arizona, 384 U.S. 436, 484 (1966)).
[77] Howard & Rich, *supra* note 75, at 686; *see* Dickerson v. United States, 530 U.S. 428, 433–34 (2000) (noting reliance on due process analysis for admission of confessions).

Court established two constitutional bases for "requiring only voluntary confessions to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."[78] In the years leading up to *Miranda*, the Supreme Court refined the due process voluntariness test for custodial interrogations into "an inquiry that examined whether a defendant's will was overborne by the circumstances surrounding the confession."[79] Earlier case law recognized that there would never be a "talismanic" definition of "voluntariness" that could uniformly be applied to all arrests and custodial interrogations.[80]

> Rather, "voluntariness" has reflected an accommodation of the complex [set] of values implicated in the police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.[81]

The Court's emphasis on ensuring fairness when analyzing "voluntariness" demonstrates that earlier holdings should be applied to language accessibility during custodial interrogations. Custodial interrogations should not be allowed to serve as "instrument[s] of unfairness" merely because one's native language is not English.[82] In establishing one's "voluntary" waiver of their rights, courts must examine "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation," insofar as guaranteeing that the confession did not arise because of the weight of the circumstances and "the pressure against the power of resistance of the person confessing."[83]

Today, the standard set forth in *Bram v. United States* is used to determine the admissibility of a confession taken in a custodial interrogation.[84] The Court held that "[i]n criminal trials . . . wherever a question arises whether a confession is incompetent because [it is] not voluntary," the issue is controlled by the Fifth Amendment, which states that no person "shall be compelled in any criminal case to be a witness against himself."[85]

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[78] Howard & Rich, *supra* note 75, at 686 (referencing Miranda v. Arizona, 384 U.S. 436, 503 (1966)).

[79] *Id.* at 687; *see* Schneckcloth v. Bustamonte, 412 U.S. 218, 223 (1973); *see also* Spano v. New York, 360 U.S. 315, 321 n.2 (1959) (citing twenty-eight cases decided between Brown v. Mississippi, 297 U.S. 278 (1936)).

[80] *Schneckcloth*, 412 U.S. at 224.

[81] *Id.* at 224–25.

[82] *Id.* at 225.

[83] Schneckcloth v. Bustamonte, 412 U.S. 218, 225 (1973); Dickerson v. United States, 530 U.S. 428, 434 (2000) (citing Stein v. New York, 346 U.S. 156, 185 (1953)).

[84] Bram v. United States, 168 U.S. 532, 539 (1897).

[85] *Id.* at 542.

With this test, the constitutional inquiry centers less on whether "the conduct of state officers in obtaining the confession was shocking" and more on "whether the confession was free and voluntary."[86] More specifically, the confession must not have been obtained by means of threats or violence, "nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[87]

Similar to the defendants in *Miranda*, the police took the defendant in *Escobedo* into custody and interrogated him for four hours for "the purpose of gaining a confession without the notice of his right to remain silent or his right to have counsel present."[88] In *Escobedo*, the Court held that when custodial interrogations shift from investigatory to accusatory, "the accused must be permitted to consult with his lawyer."[89] As such, law enforcement needs to be able to strike the balance between the "importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice."[90] In order to ensure the rights protected under the Constitution, *Escobedo* set forth the precedent that "one's Fifth Amendment privileges against self-incrimination applied to in-custody interrogations."[91]

A. The Facts Behind the Miranda Case

Miranda v. Arizona was a consolidation of four criminal cases involving custodial interrogations.[92] All four defendants had made oral confessions during custodial interrogations and three of them had submitted written, signed confessions to the police.[93] These confessions were used at the defendants' trials, which later resulted in convictions.[94] Of the four defendants, Ernesto Miranda became the most famous, as his case was "the one which the Warren majority used to demonstrate why its holding was necessary."[95]

The four cases addressed in the Supreme Court's *Miranda* opinion all involved an arrestee's confession obtained under "circumstances that did not meet constitutional standards for the protection of the Fifth Amendment privilege."[96] The facts surrounding Miranda's case specifically (i.e., the arrest, confession, and subsequent conviction) represented the "typical case the Court hoped to address with its decision."[97]

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[86] Malloy v. Hogan, 378 U.S. 1, 7 (1964) (citing *Bram*, 168 U.S. at 542).
[87] *Id.*
[88] Howard & Rich, *supra* note 75, at 689 (referencing Escobedo v. Illinois, 378 U.S. 478, 485 (1964)).
[89] *Escobedo*, 378 U.S. at 488.
[90] *Id.*
[91] Howard & Rich, *supra* note 75, at 689 (referencing *Escobedo*, 378 U.S. at 485).
[92] Miranda v. Arizona, 384 U.S. 436, 442 (1966).
[93] *Id.* at 518.
[94] *Id.* at 491.
[95] Howard & Rich, *supra* note 75, at 689.
[96] *Id.* (referencing *Miranda*, 384 U.S. at 491).
[97] Howard & Rich, *supra* note 75, at 691.

On March 13, 1963, Ernesto Miranda was arrested in his house and brought to the police station where he was questioned about the kidnapping and sexual assault of a young woman in Phoenix, Arizona.[98] At the police station, the young woman identified Miranda, an indigent Mexican immigrant who had dropped out of high school, as her attacker.[99] After two hours of interrogation, Miranda submitted a written confession, which was later presented at his trial.[100] The trial court allowed the confession to be admitted, despite the defense attorney's objections about the confession's admissibility and the fact that Miranda had been denied his right to have an attorney present during custodial interrogations.[101] The jury later found Miranda guilty of the charged crimes and he was sentenced to a term of 20–30 years on each count.[102]

B. The Holding from Miranda and Its Significance

On appeal, the Supreme Court concluded that Miranda had not been "in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner."[103] Further, the Court held that merely signing a statement "which contained a typed-in clause stating that he had 'full-knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."[104]

The Supreme Court recognized the importance of prohibiting the prosecution from utilizing a statement, whether exculpatory or inculpatory, that was obtained during custodial interrogations, "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[105] Specifically, the Court held that the "procedural safeguards" must entail the following: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed."[106]

In a thorough and famous opinion, the Supreme Court noted that many police interrogations utilize psychological techniques to elicit confessions and statements from accused individuals.[107] First, the Court condemned the

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[98] *Miranda*, 384 U.S. at 518.

[99] *Id.* Psychological tests would later determine that Miranda suffered from mental conditions, including sexual fantasies. *Id.* at 457, 518.

[100] *Id.* at 492.

[101] *Miranda*, 384 U.S. at 492.

[102] *Id.*

[103] *Id.*

[104] *Miranda*, 384 U.S. at 492–93 (comparing Haynes v. Washington, 373 U.S. 503, 512–13 (1963) and Haley v. Ohio, 332 U.S. 596, 601 (1948)).

[105] *Miranda*, 384 U.S. at 444.

[106] *Id.*

[107] *Id.* at 452.

deprivation of outside support for arrestees.[108] Then, the Court recognized that the "aura of confidence" that law enforcement officials have during custodial interrogations may affect an arrestee's will to resist intimidation tactics.[109] When a custodial interrogation intended for pure investigative purposes turns into a psychological game of accusation, the Court stated that an arrestee might merely confirm "the preconceived story the police seek to have him describe."[110]

For individuals like Miranda—who not only had limited educational attainment, but also suffered from psychological disorders—the Supreme Court recognized the importance of procedural safeguards when under custodial interrogation. The Court was aware that the ever-changing demographics of the United States would always result in ever-changing strategies and nuanced "encroachments on individual liberties."[111] The Court knew "that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'"[112] As such, the opinion served as an attempt to ensure that the privileges of accused individuals be "as broad as the mischief against which it seeks to guard."[113]

Without the particular protections that the *Miranda* warnings provide, "[A]ll the careful safeguards erected around the giving of testimony . . . would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."[114] Indeed, the Supreme Court recognized that the very nature of custodial interrogations was to "exact a heavy toll on individual liberty and trade[ ] on the weakness of individuals."[115] According to the Court, "in other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed."[116] Therefore, procedural safeguards and precautions needed to be provided to detained individuals.

C. The Impact of Miranda Rights Within the Context of Language Justice

In *Miranda*, the Supreme Court urged law enforcement officials to assess the knowledge that arrestees or defendants possessed, "based on information as to [their] age, education, intelligence, or prior contact with authorities."[117] The Court reasoned that all these factors were salient when

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[108] *Id.* at 455.
[109] *Id.*
[110] *Id.*
[111] *Miranda*, 384 U.S. at 459.
[112] *Id.* at 459 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).
[113] *Id.* at 459–60 (quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)).
[114] *Id.* at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).
[115] *Id.* at 455.
[116] *Miranda*, 384 U.S. at 456.
[117] *Id.* at 468–69.

determining whether an arrestee knowingly and voluntarily waived their *Miranda* rights, and, more specifically, whether an arrestee fully understood the significance of their constitutional rights during a custodial interrogation.[118] As such, these warnings have become indispensable tools to ensure that all arrested individuals, regardless of background, education, or identity, understand their constitutional rights.[119]

Further, the Supreme Court stressed that the most important benefit that *Miranda* warnings provide is allowing an arrestee to know that he is "free to exercise the privilege[s] at that point in time."[120] These warnings, according to the Supreme Court, are necessary not only to make an arrestee aware of his privileges, but to also make him aware "of the consequences of forgoing [their *Miranda* rights]" because "it is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege."[121]

Guaranteeing a criminal justice system that acknowledges the cognitive and linguistic differences and challenges for LEP individuals would be in line with the Court's emphasis on ensuring a true understanding of *Miranda* rights. Indeed, the courts have recognized broadly that language and culture serve a determinative role in analyzing the validity of *Miranda* waivers.[122] According to U.S. criminal procedure, if an individual "does not understand his rights due to language or cultural difficulties, or if his culture mandates that he comply with government authorities, then a *Miranda* waiver may be suspect," and requires further legal inquiry.[123] Such an understanding indicates that courts are cognizant that language difficulties may create legal barriers, including an impairment "of a person in custody to waive [their *Miranda*] rights in a free and aware manner."[124] As such, if law enforcement officials warn an individual of their *Miranda* rights in the individual's native language, the *Miranda* waiver is more likely to be deemed valid than if they fail to provide translated *Miranda* warnings.[125]

However, translated *Miranda* rights do not always render a waiver valid, nor do language barriers automatically negate the validity of a *Mi-*

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[118] *Id.* at 469.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Floralynn Einesman, *Confessions and Culture: The Interaction of "Miranda" and Diversity*, 90 J. Crim. L. Criminology 1, 39 (1999).
[123] *Id.*
[124] United States v. Alaouie, No. 90-1970, 1991 U.S. App. LEXIS 18415, at *11 (6th Cir. Aug. 1, 1991); United States v. Heredia-Fernandez, 756 F.2d 1412, 1415 (9th Cir. 1985) (citing United States v. Gonzalez, 749 F.2d 1329, 1335-36 (9th Cir. 1984)); United States v. Martinez, 588 F.2d 1227, 1235 (9th Cir. 1978); People v. Mejia- Mendoza, 965 P.2d 777, 780 (Colo. 1998); State v. Santiago, 542 N.W.2d 466, 471 (Wis. Ct. App. 1995).
[125] *See* United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990*);* United States v. Boon San Chong, 829 F.2d 1572, 1574 (11th Cir. 1987*);* Perri v. Director, Dep't of Corr., State of Ill., 817 F.2d 448, 453 (7th Cir. 1987); Valdez v. State, 900 P.2d 363, 372–75 (Okla. Crim. App. 1995); State v. Leuthavone, 640 A.2d 515, 520 (R.I. 1994); State v. Teran, 862 P.2d 137, 139 (Wash. Ct. App. 1993).

randa waiver.[126] Instead, courts determine the validity of *Miranda* waivers on a case-by-case basis. As such, courts will evaluate "what effort the officer made to communicate, whether the defendant responded that he understood his rights or ever indicated that he did not understand them, and what the defendant displayed in English language skills."[127]

While this approach can help ameliorate some of the legal challenges non-native English speakers experience during custodial interrogations, it is still possible for individuals with language difficulties to experience the "very encroachment on individual liberties" that the Supreme Court feared.[128] For example, in *State v. Santiago*, the defendant, Carlos Santiago, was arrested for possession of a controlled substance with the intent to distribute.[129] When it became evident that Santiago spoke almost no English, the arresting police officer called for Officer John Garcia, "a Spanish-speaking police officer of Mexican-American descent," to come to the scene and communicate with Santiago.[130] Officer Garcia, a man who testified that he neither read nor wrote in Spanish, but claimed to be bilingual enough to offer Spanish-language *Miranda* rights, provided Santiago with "the *Miranda* warnings from a printed English-language card and then translated each warning into Spanish 'street language,' " since he had forgotten to bring the standardized Spanish translations of the *Miranda* rights.[131] Despite Officer Garcia's confidence in his bilingual abilities, in court, it became apparent that Officer Garcia's Spanish language proficiency were dangerously misleading. For example, Officer Garcia apparently translated "appoint an attorney" to "point an attorney" (i.e. "otorgar un abogado" versus "apuntar un abogado").[132]

Moreover, during Officer Garcia's conversation with Santiago, Officer Garcia testified that, after reading the *Miranda* rights to Santiago in both English and Spanish, he asked the defendant in Spanish whether he understood what had just been said to him, and Santiago, in English, responded, "Yes." However, given that Officer Garcia became aware that Santiago spoke almost no English and knew hardly enough English to speak it fluently (making him an LEP individual), this would have been an integral moment for Officer Garcia to determine if Santiago qualified as an LEP individual as it was not possible to know definitively whether Santiago knowingly and voluntarily waived his *Miranda* rights. Indeed, Santiago did

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[126] Floralynn Einesman, *Confessions and Culture: The Interaction of "Miranda" and Diversity*, 90 J. Crim. L. Criminology 1, 39–44 (1999).

[127] United States v. Granados, 846 F. Supp. 921, 924 (D. Kan. 1994). *See, e.g.*, United States v. Chen De Yian, 1995 U.S. Dist LEXIS 10072, at *8 (S.D.N.Y. July 18, 1995) (finding that although the defendant's primary language was Chinese, his comprehension of English was sufficient to allow him to make a valid waiver).

[128] *Id.* at 459 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)); *see* State v. Santiago, 556 N.W.2d 687 (1996); *see also* United States v. Hernandez, 93 F.3d 1493 (10th Cir. 1996)).

[129] *Santiago*, 556 N.W.2d at 689.

[130] *Id.* at 690.

[131] *Id.* at 691.

[132] *Id.*

not speak English fluently and his knowing, voluntary waiver could only follow from clear Spanish *Miranda* warnings—warnings that Santiago did not receive. The Supreme Court in *Miranda* urged law enforcement officials to assess a variety of factors in order to determine whether the arrestee fully understands the consequence of waiving her *Miranda* rights.[133] However, in *Santiago*, such an assessment did not occur and the arresting police officers failed to inquire further whether Santiago's waiver was knowing and voluntary.

Despite this, the court in *Santiago* held that the State is not required to "present evidence of the foreign-language words used by the law enforcement officer" who offered the *Miranda* warnings to an arrestee.[134] Instead, when an issue arises regarding the sufficiency of an officer's translation of the *Miranda* rights, an accused individual, in a "timely fashion," can put "the State on notice of the claim that he or she was not properly advised of or did not knowingly and intelligently waive the *Miranda* rights" because of the insufficient translated version of the *Miranda* rights provided to them.[135] This puts the burden on the defendant to ensure their constitutional rights are protected, rather than the officers.

It becomes evident that the *Santiago* holding was not consistent with the spirit of the Supreme Court's *Miranda* opinion. *Santiago* contravenes the ideals and principles set forth in *Miranda* and ignores the need for an individual assessment of the defendant's capabilities and intelligence. The *Miranda* Court purported that the value of the *Miranda* rights is less about the individual knowing that he had a specific privilege, and more about an individual understanding the significance and consequences of forgoing those privileges.[136] In contrast, the *Santiago* Court expects individuals to recognize that the *Miranda* translation given to them was insufficient and to know enough English to submit a notice—in a language in which they may not be fluent— of the insufficient *Miranda* translation. This assumes a level of English-language competency within the criminal justice system that simply may not exist for LEP individuals or ELLs.

Santiago created another obstacle for LEP individuals to overcome. LEP and ELL arrestees now have to be responsible for their fate within the criminal justice system because the burden is on arrestees to submit a notice of an insufficient *Miranda* translation, rather than the burden being on law enforcement officials to protect LEP and ELL arrestees' *Miranda* rights.

Santiago also illustrates that when police officers are careless in their translations of the *Miranda* rights, fundamental inaccuracies can occur.[137] The incorrect translation of "appoint an attorney" and "point an attorney,"

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[133] Miranda v. Arizona, 384 U.S. 436, 469 (1966) (finding that age, education, intelligence, and prior contact with authorities are relevant factors to assess when determining a defendant's cognitive understanding of his *Miranda* rights).

[134] *Santiago*, 556 N.W.2d at 696.

[135] *Id.*

[136] *Miranda*, 384 U.S. at 469.

[137] *Santiago*, 556 N.W.2d at 691.

for example, did not allow Santiago to fully understand the significance and eventual consequences of his rights were he to waive them. Mistakes like the one made in *Santiago* demonstrate that the *Miranda* rights cannot be "talismanic incantations" whereby law enforcement officials read them to an accused individual out of ritual and/or habit.[138] Instead, they must express the clear message that:

> The suspect has the right to remain silent; that anything the suspect says can be used against him or her in a court of law; that the suspect has the right to have a lawyer and to have the lawyer present if he or she gives a statement; and that if the suspect cannot afford an attorney, an attorney will be appointed for him or her both prior to and during questioning.[139]

Unlike Officer Garcia in *Santiago*, the police officer in *United States v. Rijo-Carrion* seemed to recognize the language gap that can exist for LEP individuals even when *Miranda* translations are provided for non-native English speakers.[140] In *Rijo-Carrion*, the defendant was traveling to the United States from the Dominican Republic and was told to step out of the line into a separate security screening.[141] At this point, Officer Sanchez, a fluent Spanish speaker who had spoken the language since he was a young child and had attained the highest level qualification on an exam administered as "part of the Foreign Assessment Proficiency program," was directed by his supervisor to speak with defendant.[142]

After reading "each of the *Miranda* warnings to [the] defendant in Spanish from a Spanish-language *Miranda* card," he then proceeded to contextualize some of the *Miranda* warnings for the defendant.[143] At trial, Officer Sanchez stated that "based on his experience screening passengers from a number of Spanish-speaking countries," he believed that certain passengers, "particularly those from the Dominican Republic," might have difficulty understanding the word "waive" in Spanish as taken from the Spanish *Miranda* card.[144]

Unlike the officer in *Santiago*, Officer Sanchez recognized that even when translated *Miranda* warnings are taken in its best form (i.e. standardized Spanish *Miranda* cards), there might still be inaccuracies in translations. Even standardized Spanish translation should be fully explained and contextualized.[145] In *Rijo-Carrion*, it seems that Officer Sanchez was aware of the "subtle encroachments on individual liberty" that the Supreme Court

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[138] *Id.* at 693 (quoting California v. Prysock, 453 U.S. 355, 359 (1981)).
[139] *Id.*
[140] United States v. Rijo-Carrion, 2012 U.S. Dist. LEXIS 179623, at *5 (E.D.N.Y. Dec. 19, 2012).
[141] *Id.* at 2.
[142] *Id.* at 4.
[143] *Id.* at 6.
[144] *Id.* at 5.
[145] *Id.*

in *Miranda* wanted to protect against.[146] As a result, he not only provided the official translated *Miranda* warnings to the defendant, but his personal background and experience informed his law enforcement responsibility to further explain and contextualize the *Miranda* rights in a manner that ensured the defendant, an LEP individual, understood not merely the words, but the significance of those words taken together.

Ultimately, it is evident from *Santiago* and *Rijo-Carrion* that courts are inconsistently upholding and interpreting the *Miranda* decision.[147] While some courts have held that it is crucial to use language outside the scope of *Miranda* warnings to bolster the accused's understanding of his Fifth Amendment rights,[148] other courts have held that a thorough comprehension of one's *Miranda* rights does not necessarily result in the "tactical advantage" of utilizing or invoking said right, making contextualized rights legally less relevant.[149] Such discrepancies in judicial holdings highlight the need for a standardized and regulated practice of police interrogations for LEP individuals to ensure that one's *Miranda* rights are being administered as the *Miranda* Court intended.

IV. Language Justice and the Right to Be Heard

A. Goldberg v. Kelly

In *Goldberg v. Kelly*, the Supreme Court analyzed whether "a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment."[150] At the time this case was filed, New York welfare recipients were unable to challenge the denial of their welfare benefits before a judge.[151] The State argued that written submissions provided welfare recipients a sufficient opportunity to challenge their welfare terminations.[152] However, the Supreme Court rejected this, holding that

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[146] Miranda v. Arizona, 384 U.S. 436, 459 (1966).

[147] *E.g.*, California v. Prysock, 453 U.S. 355, 366 (1981) (Stevens, J., dissenting) (arguing that *Miranda* concerned ensuring that suspects know the full breadth of their rights and, in so guaranteeing those rights, law enforcement officials may go beyond the literal text of the *Miranda* warnings in order to explain a more thorough and contextualized version of an accused's privileges during custodial interrogations).

[148] *E.g.*, United States v. Soria-Garcia, 947 F.2d 900, 902 (10th Cir. 1991) (finding that translations of *Miranda* rights are about getting the "thrust of the warning, regardless of which translation is used"); *see also* United States v. Boon San Chong, 829 F.2d 1572, 1575 (11th Cir. 1987) (citing United States v. Gonzalez, 749 F.2d 1329, 1336 (9th Cir. 1984) ("Even if [the police officer] spoke very poor Spanish and appellant spoke very poor English, the written Spanish would have conveyed to appellant a sufficient understanding of his rights.")).

[149] *E.g.*, United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990) (citing United States v. Yunis, 859 F.2d 953, 964–65 (D.C. Cir. 1988)).

[150] Goldberg v. Kelly, 397 U.S. 254, 255 (1970).

[151] *Id.* at 256–57.

[152] *Id.* at 269.

"the fundamental requisite of due process of law is the opportunity to be heard,"[153] which "must be tailored to the capacities and circumstances of those who are to be heard."[154] In other words, rights must be tailored in order to accommodate individual differences.

For the *Goldberg* Court, written submissions to decision makers did not provide a sufficient opportunity for welfare recipients to challenge the State's decision to deny their benefits.[155] The Court expressed that these written submissions were "unrealistic options for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance."[156] As a result, the Court purported that when an individual's educational attainment impacts their ability to successfully challenge a State's decision, then the State must provide alternate means for individuals to challenge such government actions in order to account for individuals' varying educational differences.[157] The Court articulated that the State must analyze whether the individual would "suffer grievous loss" if he is not afforded an opportunity to challenge government action in a manner that recognizes his educational attainment.[158] As such, the Court determined that oral presentations, instead of written submissions, would be the best way to account for varying educational attainments because oral presentations provided more flexibility for individuals to challenge a State's decision than written submissions would.[159]

For the Court, requiring that oral presentations be available to recipients would be a way to ensure that each individual had an opportunity to be heard and an opportunity to "mold his argument to the issues the decision maker appears to regard as important."[160] By creating a space for this opportunity, the Court indirectly provided the welfare recipients with a sense of autonomy and purpose whereby they could become the gatekeepers of their arguments and have the ability to share their personal reasons as to why their benefits should not be denied.[161] This process would accommodate for individuals' varying "capacities and circumstances," and allow them to be heard at their level of understanding.

The majority further opined and illustrated the nuanced ways the law serves to disproportionately affect marginalized individuals and the resources that more privileged members of society might have when seeking recourse upon the termination of a governmental entitlement.[162] The Court stated:

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[153] *Id.* at 267 (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
[154] *Id.* at 268–69.
[155] *Id.*
[156] *Goldberg*, 397 U.S. at 269.
[157] *Id.*
[158] *Id.* at 263 (referencing Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
[159] *Id.* at 269.
[160] *Id.*
[161] *Id.*
[162] *Goldberg*, 397 U.S. at 264.

> [T]he crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits (emphasis added). Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means of daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.[163]

Indeed, the Court seemed to acknowledge that there is something fundamentally different when the group being denied a right or governmental entitlement consists of people who cannot afford to have their fundamental liberties overlooked or offered to them in a manner where their limited resources prevent them from being able to successfully challenge such government action.[164] Through this legal analysis, the Court indirectly demonstrated that by being cognizant of the daily challenges that exist for marginalized individuals or communities with limited resources, the judicial system can better commit itself to the promises of the Founding Fathers: "to foster the dignity and well-being of all persons within its borders."[165] Further, the Court held that for welfare recipients, there are "forces not within the control of the poor [that] contribute to their poverty," and, as such, "welfare . . . can help bring within the reach of the poor the same opportunities that are available to others [in order] to participate meaningfully in the life of the community."[166] Through this assertion, the Court seemed to understand that an awareness of the unique challenges that certain individuals experience can continue to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity."[167]

Ultimately, the Court recognized that for many individuals, the law and the process by which the law is implemented are not black and white.[168] Individuals come with different educational attainments, different lived experiences, and different understandings of the law, which courts and other state entities must accommodate. *Goldberg* illustrates that rights must be tailored to the capacities and circumstances of those who are to be heard. If the procedural safeguards are not tailored, the State not only risks denying an individual the opportunity to meaningfully participate in and contribute to society, but also risks depriving an individual of a constitutional right they

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[163] *Id.*
[164] *Id.*
[165] *Id.* at 265.
[166] *Id.*
[167] *Id.*
[168] *Goldberg*, 397 U.S. at 268–69.

deserve, merely because the individual does not have the vocabulary to articulate their rights.[169]

B. Application of Goldberg to LEP Individuals and Their Right to Be Heard

While the *Goldberg* case discussed the rights of welfare recipients, the scope of its holding can be broadly applied to LEP individuals subject to custodial interrogations. Just as the Court in *Goldberg* understood that the "stakes [were] too high" for welfare recipients who may lose their public assistance, and "the possibility for honest error or irritable misjudgment too great," so too are the stakes too high for LEP individuals who may unknowingly waive their *Miranda* rights.[170] The *Goldberg* Court highlights that for marginalized and underserved communities and individuals, there are often "forces not within the[ir] control" that contribute to their impoverished position.[171] As such, the Court illustrated that for individuals with marginalized identities, the law cannot and should not be implemented without an intersectional analysis. For example, *Goldberg* recognized that written submissions contesting the termination of public assistance were insufficient to safeguard the rights of individuals who "lack the educational attainment necessary" to convey their argument in an impactful and resonating manner.[172] The majority understood that written submissions from individuals living in poverty or with limited education would not look like written submissions from individuals with a higher educational attainment and with the financial resources to seek the appropriate help.[173]

Similarly, merely providing *Miranda* warnings to an LEP individual in their native language *and* in English may still be insufficient to safeguard their rights against self-incrimination without giving those warnings context. Despite this, the Supreme Court seems unconcerned that a comprehensive understanding of one's *Miranda* rights is crucial for individuals who lack a higher English proficiency and may also lack familiarity with the American criminal system.[174] In *United States v. Yunis*, the D.C. Circuit Court of Appeals stated:

> [T]he focus must be on the plain meaning of the required warnings. A defendant must comprehend, for example, that he really does not have to speak; he must recognize that anything he says actually will be used by the state against him. But whether he fully appreciates the beneficial impact on his defense that silence may have—whether he fully understands the tactical advantage, in our

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[169] *Id.* at 269.
[170] *Id.* at 266.
[171] *Id.* at 265.
[172] *Id.* at 269.
[173] *Id.*
[174] United States v. Yunis, 859 F.2d 953, 964–65 (D.C. Cir. 1988); *see also* United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990).

> system of justice, of not speaking—does not affect the validity of his waiver.[175]

Indeed, the court "does not demand that the suspect comprehend the disadvantage[s] of waiving his rights, but only that the suspect understands that he enjoys certain constitutional rights which he abandons by waiving them."[176]

The legal analysis that *Yunis* established becomes particularly troubling within the context of LEP individuals because many LEP individuals have overlapping marginalized identities. For example, LEP adults are overrepresented among adults in the United States without a high school diploma.[177] As such, LEP adults with at least a high school education report "higher levels of English proficiency than those with less than a high school education."[178] According to a report by the National Center on Immigrant Integration Policy, "better-educated LEP adults may need less instruction to achieve English proficiency than LEP adults without a high school education."[179]

When these factors are taken into consideration, it becomes evident why LEP individuals need to have their *Miranda* rights tailored to their capacities and circumstances. As previously discussed in this Note, *Liu v. State* established a legal exception for people, such as LEP individuals, whose unfamiliarity with the American legal system and whose cultural heritage may unduly influence, or even mandate, their decision to relinquish their *Miranda* rights.[180] While the legal exception created in the *Liu* decision is necessary and significant in practice, this exception tends to become utilized more at the judiciary level than at the law enforcement level, because the *court* determines the validity of a waiver *after* an individual has already disclosed incriminating information to a police officer during a custodial interrogation. As a result, providing LEP individuals with the resources and appropriate accommodations to understand the substantive rights they may waive is integral to ensuring their right to be heard is upheld at the law enforcement level, and not only analyzed once the legal issue is presented before the judiciary.

Ultimately, the fight for language justice for LEP individuals subject to custodial interrogations is more complex than establishing bright-line rules for English and non-English speakers. LEP individuals' right to be heard

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[175] *Yunis*, 859 F.2d at 962.

[176] Floralynn Einesman, *Confessions and Culture: The Interaction of "Miranda" and Diversity*, 90 J. Crim. L. Criminology 1, 43 (1999).

[177] *See* Randy Capps, Michael Fix, Margie McHugh, & Serena Yi-Ying Lin, *Taking Limited English Proficient Adults into Account in the Federal Adult Education Funding Formula*, Nat'l Ctr. on Immigrant Integration Pol'y: Migration Pol'y Inst. 1, 5 (2009), https://www.migrationpolicy.org/pubs/WIA-LEP-June2009.pdf, *archived at* https://perma.cc/LZN6-DHSF (finding LEP individuals represent 24% of the total adult population without a high school degree but only 6% of the total adult population with a high school degree or more).

[178] *Id.*

[179] *Id.*

[180] Liu v. State, 628 A.2d 1376, 1380–81 (Del. 1993).

during these custodial interrogations entails tailoring legal rights in order to account for the language differences that inevitably exist for individuals who live with more than one marginalized identity. This "right to be heard," which *Goldberg* establishes, seeks to create accommodations for those who are victims to "forces not within [their] control," but who nonetheless have needs that deserve to be recognized.[181] Just as the *Goldberg* Court instituted procedures in order to tailor the plaintiffs' constitutional rights to their capacities and circumstances,[182] so too must those accommodations be made here. *Miranda* rights must be tailored to account for the varying intersecting and marginalized identities of LEP individuals. In so doing, LEP individuals may finally be granted an opportunity to participate in custodial interrogations that are cognizant of the language and cultural barriers that prevent them from fully understanding their substantive rights in a custodial interrogation.

V. Where Do We Go From Here?

It is evident that LEP individuals experience daily challenges due to their lack of English proficiency. As a result, such challenges are often exacerbated within the criminal justice context if law enforcement officials do not make the requisite accommodations. Although courts have opined on the ways in which the judiciary can address such language barriers for LEP individuals, very few decisions have transformed into standardized practices for custodial interrogations at the law enforcement level.[183] Indeed, the case-by-case analysis that the Court has historically relied upon since the *Miranda* decision "make[s] it difficult to predict how a court will evaluate a suspect's waiver."[184] For example, one court may conclude that the accused's language difficulties or cultural heritage is the most dispositive factor in analyzing the validity of his wavier, whereas another court may discount the significance of such factors entirely.[185] As a result, the Court's totality of the circumstance test can, and likely does, produce inconsistent judicial opinions that ultimately fail to provide LEP individuals with the reassurance that their legal rights will be protected during custodial interrogations.

As a result, in order to ramify these legal challenges, perhaps the solution for LEP individuals during custodial interrogations can be twofold. First, on the ground level, police academy trainings could incorporate cul-

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[181] Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

[182] *Id.* at 268–69.

[183] *See* United States v. Heredia-Fernandez, 756 F.2d 1412, 1415 (9th Cir. 1985); United States v. Alaouie, No. 90-1970 1991 U.S. App. LEXIS 18415, at *13 (E.D. Mich. Aug. 1, 1991); People v. Mejia-Mendoza, 965 P.2d 777, 780 (Colo. 1998); *Cf.* Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989); United States v. Alvarez, 54 F. Supp. 2d 713, 716–17 (W.D. Mich. 1999); United States v. Pichhadze, No. 2: 95-CR-58-01, 1995 U.S. Dist. LEXIS 19877, at *12 (D. Vt. Nov. 9, 1995).

[184] Einesman, *supra* note 176, at 45.

[185] *Id.*

tural awareness and language classes based on the neighborhoods they will be assigned to police. Secondly, before an individual is interrogated, law enforcement officials should be adequately prepared to explain and contextualize the *Miranda* rights based on individualized factors, such as a suspect's identity, language proficiency, and educational attainment, and must also have a basic understanding of the differences between U.S. criminal procedure and that of the countries that suspects in their district may hail from.

Moreover, the reason why law enforcement officials should be adequately prepared to explain and contextualize *Miranda* rights and have a basic understanding of the cultural difference between U.S. criminal procedure and that of other countries is because police department demographics often do not align with the demographics of the communities in which they police. For example, according to Jeremy Ashkenas and Haeyoun Park in their *New York Times* article, *The Race Gap in America's Police Departments*, the percentage of white police officers on the police force is "more than 30 percentage points higher than in the communities they serve."[186] While Ashkenas and Park recorded their findings based on data they acquired in 2015, the study is still instructive for the present day. When such racial and cultural discrepancies exist between police forces and their respective communities, a department's credibility within its community diminishes as well. While it is possible that the demographics within police departments across the country may have shifted slightly since Ashkenas and Park reported their findings, their basic premise still holds. Police department demographics are disproportionately white in comparison to the communities that they serve.[187] As George Washington University sociologist Ronald Weitzer stated, "[e]ven if police officers, of whatever race, enforce the law in relatively the same way, there is a huge image problem with a department that is so out of sync with the racial composition of the local population."[188]

As such, law enforcement officials should be trained or required to provide contextualized *Miranda* warnings in various languages. With these new contextualized rights, officers can ensure that LEP individuals substantively understand the legal rights they have the privilege of invoking. Contextualized rights can look like the officer in *Rijo-Carrion* further explaining the significance and impact of each right more thoroughly, or it can take the shape of supplemental materials such as pamphlets or cards whereby officers are provided with techniques to explain *Miranda* rights to LEP individuals.

Moreover, a more thorough and effective administration of *Miranda* rights should mandate that police officers become familiar with the laws of

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[186] Jeremy Ashkenas and Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. Times (Apr. 8, 2015), https://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html, *archived at* https://perma.cc/U978-JKYG.

[187] *Id.*

[188] *Id.*

foreign jurisdictions from which their community may have emigrated. Indeed, just as an individual's right to remain silent is different in Chinese criminal Procedure than U.S. criminal Procedure, law enforcement officials should be cognizant of these legal differences, particularly if they are assigned to police a community whose demographics and immigrant background include legal proceedings that differ from those in the United States. For LEP individuals to truly understand their legal rights, *Miranda* warnings cannot simply be translated into their native language. These rights need to be supplemented with clearer and more adequate translations that take into consideration an LEP individual's cultural heritage and language barriers.

Ultimately, while the *Miranda* Court acknowledged that it would be "impossible for [the judiciary] to foresee the potential alternatives for protecting the [Fifth Amendment] privilege," the lack of standardization for determining the validity of a waiver has since caused too much uncertainty for the very same group of people the *Miranda* opinion initially sought to protect.[189] Further, although the *Miranda* Court likely did not foresee that the U.S. immigrant population would nearly quadruple in number and approximately triple in terms of population percentage since the majority authored its opinion,[190] in order to account for this demographic change, the time to modify the original objective of the *Miranda* decision is now.

Goldberg demonstrates that there is a legitimate legal need to account for the cultural transformation that American society has experienced since the *Miranda* Court issued its opinion in 1969. Marginalized communities deserve to comprehend their constitutional rights and when they should invoke such rights. Without a clear standard for law enforcement officials to follow, the judiciary, as a result, becomes the only avenue left where a defendant's cultural heritage, language skills, and familiarity with the U.S. criminal justice system can even be considered as a factor in determining the validity of their *Miranda* waiver. As such, the administration of *Miranda* rights should recognize individuals' intersectional identities while simultaneously upholding the overarching goals of efficiently enforcing U.S. criminal law.[191]

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[189] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[190] *U.S Immigrant Population and Share over Time, 1850-Present*, Migration Pol'y Inst., https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time, *archived at* https://perma.cc/74MF-C6JW (last visited Jan. 7, 2021).

[191] *Miranda*, 384 U.S. at 467.