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Language Proficiency as a Matter of Law: Judicial Reasoning on *Miranda* Waivers by Speakers with Limited English Proficiency (LEP)

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Abstract
Judges wield enormous power in modern society and it is not surprising that scholars have long been interested in how judges think. The purpose of this article is to examine how US judges reason on language issues. To understand how courts decide on comprehension of constitutional rights by speakers with Limited English Proficiency (LEP), I analyzed 460 judicial opinions on appeals from LEP speakers, issued between 2000 and 2020. Two findings merit particular attention. Firstly, the analysis revealed that in 36% of the interrogations, LEP speakers were advised of their rights only in English. This means that two decades after the Executive Order 13166 (2000) *Improving Access to Services for Persons with Limited English Proficiency*, law enforcement still doesn't have adequate resources to advise LEP speakers of their constitutional rights in their primary languages. Secondly, the analysis revealed that some courts treat second language proficiency as an all-or-none phenomenon. This approach results in linguistic discrimination against LEP speakers who cannot comprehend legal language but are denied the services of an interpreter because they can answer basic questions in English. I end the discusson with recommendations for best practices in delivery of constitutional rights.

Keywords Judicial reasoning · Judicial decision-making · Language ideologies · *Miranda* warnings · Limited English Proficiency (LEP) · Language access · Language accommodations

Nowadays, many applied linguists deem the term 'limited English Proficiency' (LEP) to be deficit-oriented and ethnocentric [1]. Unfortunately, the proposed alternatives, such as 'non-English-preference' or 'multilingual learners', may work in education but are too fuzzy for legal contexts. In the present work, I adopt the term LEP for two pragmatic reasons: (a) the term LEP clearly identifies the concern that some people have insufficient English skills to comprehend legal language and meaningfully assist in their own defense; (b) the term LEP is enshrined in government documents that serve as a legal framework for language access (www.lep.gov) and, as a consequence, is widely used by law enforcement, the court of law and legal scholars [2, 3].

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1 Introduction

On December 2, 2010, two orchard workers in Merced County, California, USA, noticed a fire in the orchard. As they came closer to the smoke, they smelled burned flesh and saw a charred body on the ground. Later that day California Highway Patrol found a burning car registered to a local resident Maria Ceja. Yet Maria wasn't the victim: dental records identified her as a young woman named Ana, reported missing with her infant son Anthony. Ana's car was soon located in the orchard, with tire impressions nearby matching the partial tire tread of Maria's car. Five days later, two-month old Anthony was discovered on a porch, naked and cold but alive, and law enforcement zeroed in on Maria Ceja and her boyfriend Jose Velarde as their main suspects. After getting a tip that Maria was heard offering money to kidnap a baby, the police searched her home and found diapers, baby bottles, and infant clothing but no baby. On the calendar, the day of the murder-kidnapping, December 2nd, was marked as "Junior's B-Day."

On December 15, 2010, Maria Ceja was arrested and interviewed by the police. At the start, Detective Brawley advised Maria of her constitutional rights, known as the *Miranda* rights after the US Supreme Court ruling in *Miranda v. Arizona* (1966). The rights were delivered in English, in the presence of bilingual Detective Ruiz, followed by a three-way exchange:

Detective Brawley:	You understand these rights as I've explained them?
Maria:	Uh-huh.
Detective Brawley:	You understand? Is there anything you don't understand about that, what I've just read to you?
Maria:	*Uh, mejor en Español*. [Uh, it's better in Spanish.]
Detective Ruiz:	You understand it? *Le entendistes*? [Did you understand it?].
Maria:	*Si, entiendo poquito pero no entiendo tanto*. [Yes, I understand it a little bit, but I don't understand that much.]
Detective Ruiz:	*Okay, pero si entendiste lo que te dijo*? [Okay, but you understood what he told you?].
Maria:	*Pues que tengo derecho a permanecer callada y a un abogado, no*? [Well, that I have the right to remain silent and to an attorney, right?].
Detective Ruiz:	Uh-huh.

Detective Brawley: You understand?

Maria: Uh-huh.

(*Ceja v. Adams*, 2018).

Puzzlingly, the rights were not presented in Spanish. Instead, the detectives, content with her paraphrase, proceeded with the interview, with Ruiz as an interpreter. After producing several versions of the events, Maria admitted that she did want to buy a baby and that she saw her boyfriend strangle Ana. As the trial approached, her attorney filed a motion to suppress her confession arguing that she did not understand her rights in English and didn't waive them knowingly and intelligently. The trial court denied the motion, finding Ceja proficient in English:

> [Petitioner] has been in the U.S. for decades, speaks English, has a higher than expected (sic!) cognitive ability in Spanish, responded to questions in English and Spanish without hesitation, immediately in the normal flow of a conversation, demonstrating an understanding of both languages. Her desire to use her first language as the interrogation intensified is not abnormal, but, to the contrary, normal. The reading of the *Miranda* rights to [Petitioner] in English based on her responses, body language, repeating the gist of the rights, and coupled with the prior conversation she had with the detective solely in English in the car ride over are the acts and statements of someone who understood and comprehended what was being told to her. (cited in *Ceja v. Adams*, 2018)

California Court of Appeals affirmed the conviction (*People v. Ceja*, 2016) but the US District Court for the Eastern District of California granted the appeal, noting that Ceja had little formal education and invoked her limited English but was never advised of her rights in Spanish (*Ceja* v. *Adams*, 2018). The Ninth Circuit Court of Appeals reviewed the case de novo and decided that the waiver was valid (*Ceja* v. *Adams*, 2022). The divergent rulings, based on the same linguistic evidence, raise a pressing question: How do judges in the USA decide on waiver validity by speakers with Limited English Proficiency (LEP)?

2 *Miranda* Waiver and LEP Speakers

In the years 2018–2021, one in ten adults incarcerated in US federal correctional facilities was a speaker of English as a second language (L2) ([4], p. 5)[1]. Each prisoner began their journey through the criminal justice system with a custodial interrogation, accompanied by advisement of their constitutional rights. The advisement,

[1] I thank the Bureau of Justice statisticians for their detailed response to my inquiry. Unfortunately, at the time of this writing, there was no data on the proportions of LEP speakers incarcerated in state prisons.

known as the *Miranda* rights or warnings, is based on the landmark decision made on June 13, 1966 by the US Supreme Court:

> The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have a lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. If the individual indicates, prior or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present. (*Miranda v. Arizona*, 1966, p. 437)

If an interrogation is conducted without an attorney, the government bears the "heavy burden" to prove that the defendant waived their rights voluntarily, knowingly and intelligently (*Miranda v. Arizona*, 1966, p. 437).

Scholars estimate that approximately 80% of adult suspects waive their rights and talk to the police without a lawyer present [5–7]. Their reasons vary.[2] Some yield to the natural impulse to deny, explain or tell 'their side of the story'. Others cooperate to avoid angering the police, lessen the charge, shift the blame or find out what evidence detectives have. A few may feel repentant and there are always those who prefer to lie rather than appear uncooperative. Many waivers, in short, don't fit the *Miranda* ideal. Some are not voluntary, due to fear, police deception, or the suspects' inability to invoke their rights, and others not intelligent, due to low levels of legal literacy. My primary concern here is with waivers that may not be knowledgeable, that is, with waivers of rights not understood.

Research shows that members of vulnerable populations—that is, juveniles and people with mental health problems, developmental disabilities, cognitive deficits and IQ below 75—are likely to sign documents whose content they do not understand out of compliance, deference to authority, fear, belief that silence equals guilt, or to cover up their inability to understand and save face [7, 8]. LEP speakers also constitute a vulnerable population, albeit one whose boundaries are less clear-cut: juveniles are always juveniles but not all L2 speakers are LEPs.

In 1978, the Ninth Circuit court ruled that "if *Miranda* warnings are given in a language which the person being so instructed does not understand, a waiver of those rights would not be valid" (*United States v. Martinez*, 1978). Later on, the government recognized that understanding a language is not an either/or proposition: LEP individuals "may possess sufficient English language skills to function in one setting (e.g., social), but not in other situations (e.g., legal, courthouse, witness statements)" ([9], p. 1). Reinforcing the provisions of Title VI of the Civil Rights Act of 1964, the Executive Order 13166, signed in 2000 by President Clinton, required all agencies that receive federal funds to provide LEP individuals with Language Access, that is, "language assistance that results in accurate, timely, and effective

[2] Innocent suspects are particularly likely to waive their rights [6]. False confessions, however, are a separate area of inquiry—the focus of this article is on confessions claimed to be coerced or induced but not false.

communication at no cost to the LEP individual" ([10], p. 3). In the decades that followed, many law enforcement agencies adopted Language Access plans stating, inter alia, that *Miranda* warnings shall be provided and explained to LEP individuals in their primary languages.[3] The question is: How do they implement these plans?

The *Miranda* ruling required no specific phrasing or "talismanic incantation" to satisfy procedural safeguards (*California v. Prysock*, 1981). Instead, each jurisdiction has its own text. Analyses of 945 *Miranda* warnings revealed substantive variation in (1) length (49 to 547 words); (2) content; (3) vocabulary; (4) sentence complexity; and (5) comprehensibility (grade 2.8 to post-graduate) [11, 12]. Many law enforcement agencies also rely on their own translations of the warnings, which vary greatly in the number of languages and quality.

Unfortunately, as of this writing, only translations into Spanish have been subject to systematic research. Studies show that Spanish translations are significantly longer than English originals, sport awkward wording and mistranslations, and sometimes omit the key rights [13–15]. Concerned about poor translation quality, in 2016 the American Bar Association (ABA) voted to create a standardized Spanish warning for all law enforcement agencies.[4] Alas, the vision of a 'universally comprehensible' warning turned out to be a mirage: the proposed text was not easily understood by speakers of all varieties of Spanish [13].

What's more, even poor translations aren't always available. In Nevada, where one fifth of the population speaks Spanish, three of the five law enforcement agencies surveyed didn't have Spanish texts and one officer reported resorting to Google Translate and asking the suspect to read the translated text [13]. And while there have been no large-scale studies of *Miranda* delivery to LEP speakers, case studies show that some suspects are advised in English only or via unqualified interpreters and officers with 'survival Spanish' skills [16–22].

If the government fails to demonstrate that the waiver was made voluntarily, knowingly, and intelligently, the suspect's inculpatory statements shall be excluded from the evidence, weakening the case against them. Not surprisingly, limited English, the absence of an interpreter and mistranslation often feature as grounds for motions to suppress confessions and for post-conviction appeals from LEP speakers. To determine whether the government had satisfied its burden, the court must find that the waiver was "the product of free and deliberate choice", free from coercion, and made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" (*Moran v. Burbine*, 1986, p. 421).

The challenges facing trial and appellate courts are twofold. On the one hand, police officers and prosecution may *overestimate* the proficiency of LEP defendants who can converse on everyday topics but do not understand the legalese of the *Miranda* rights [21, 23, 24]. On the other hand, defense attorneys may *underestimate* comprehension of savvy defendants who consciously downplay their language skills

[3] See e.g. https://www.phillypolice.com/assets/directives/D7.7-LimitedEnglishLanguageProficiency.pdf.

[4] For ABA Resolution 110 see: https://www.americanbar.org/groups/diversity/commission_on_hispanic_legal_rights_responsibilities/resolution-110/.

[19, 22]. The difficulty of distinguishing between genuine and frivolous claims is amplified by scarce or indeterminate language evidence and the need to make decisions months or years after the fact. The challenges faced by the courts are well summarized by Judge Jerome Tao of the Nevada Court of Appeals:

> Questions relating to the admissibility of a confession rendered by a non-native English speaker during a custodial police interrogation are ones that the courts of this state are encountering with increasing frequency. During a single shift, a police officer in Nevada may encounter a variety of different languages and dialects, and court-certified interpreters may not always be readily available to assist the officer whenever an interrogation is necessary. At the same time, there appears to be a dearth of published precedent from the Nevada Supreme Court to guide trial courts and police officers in handling such interrogations. (*Gonzales v. State*, 2015)

What we don't know is how law enforcement and the judiciary are handling these challenges on a day-to-day basis. To date, research on *Miranda* waivers by LEP speakers has been limited to case studies [16–23], one experimental study [24], analyses of translations [13–15] and discussions of the 1990s case law [3]. To get a better sense of current practices in *Miranda* delivery, to understand how judges make decisions on LEP waivers and to inform future research, expert testimony, and police reforms, this study analyzes 460 judicial opinions on *Miranda* appeals from LEP speakers issued between 2000 and 2020. First, however, I will discuss the theoretical assumptions made in the study and its methodology.

3 Language Ideologies in the Court of Law

Sociolinguists and linguistic anthropologists have long been interested in *language ideologies*, that is, socio-historically situated and morally and politically loaded assumptions of how language works [25, 26]. Scholars of language and law have extended this research to taken-for-granted assumptions that shape language use and legal interpretation in the court of law. Studies conducted in Australia, the UK and the USA identified several language-ideological misconceptions that serve to rationalize existing power structures, reinforce biases, perpetuate inequalities and disenfranchise people with low levels of literacy and speakers of non-dominant language varieties, immigrants and refugees [2, 27–36]. Five of these ideologies that misconstrue and/or oversimplify the complexities of language use are central to understanding the treatment of LEP speakers in US courts.

The first ideology, *referential transparency*, views language as a transparent medium of communication and locates meaning in linguistic forms, regardless of interactional contexts and social and power relations in which these forms are produced [29, 32, 34, 35]. In the context of the *Miranda* waivers, this view leads to two misconceptions: (1) all *Miranda* warnings convey the same fixed meaning, regardless of the context, the manner of delivery and the listener's background and

language proficiency; (2) all individuals are free to make an informed choice, irrespective of power asymmetries between suspects and police.

The second ideology, *the reasonable person standard*, presumes that "language is best understood objectively, from the point of view of what a reasonable person would think something meant, not subjectively from the point of view of idiosyncratic speakers and hearers" ([29], p. 15). This view underlies two legal expectations: (1) judges (and juries) can use their own perception to make an informed evaluation of language evidence [33]; (2) LEP speakers understand the *Miranda* warnings in ways identical to native speakers of English.

The third ideology, known as *the monolingual bias* or *the monolingual mindset*, assumes monolingualism as the norm in the court of law [2, 27, 28, 30, 33, 35, 36]. This mindset has major consequences for language use in US courts: (1) all court participants, except for interpreters, are limited to a single language; (2) each language is limited to a single 'standard' version; (3) the reasonable person is envisioned as an educated native speaker of English; (4) bilinguals may be struck from juries based on the concern that they would follow the original testimony and disregard court interpreters' translation [2, 36]; and (5) all languages other than English are excluded from official court transcripts.

The justification for replacing the testimony in other languages with interpreters' English words comes from the fourth ideology, *the language conduit theory*, that treats interpreters as conduits that effortlessly convert statements in one language into equivalent statements in another [27, 28, 35, 37–39]. This approach has long been the mainstay of the US law: in 1912, the Seventh Circuit ruled that when a person "assent[s] to the use of an interpreter… they necessarily assume that the interpreter is trustworthy, which makes his language presumptively their own" (*Guan Lee v. United States*, 1912). A century later, the United States Court of Appeals for the Eleventh Circuit recognized the difficulties inherent in translation and set a precedent for treating a foreign-language speaker and an interpreter as separate declarants, subject to confrontation clause (*United States v. Charles*, 2013). Nevertheless, the language conduit is still the operative assumption in most courts [37–39].

Another consequence of the monolingual mindset is *an all-or-nothing view of L2 proficiency* – one either speaks English or does not [27, 28, 31, 33, 36]. This ideology informs "a common misconception among legal professionals that if such a person [LEP speaker] can converse in English at a conversational level, then they do not need an interpreter" ([33], p. 40). Conversely, LEP speakers who rely on an interpreter may be seen as deceitful [27, 28].

Recent studies show that these five ideologies contribute greatly to marginalization of LEP speakers in US courts [2, 3, 27, 28, 36]. At the same time, the different decisions on Ceja's appeal and a disagreement between the circuits on the role of the interpreter reveal that while some ideologies may be common, not all judges think alike. My aim is to identify commonalities and differences in judicial reasoning on comprehension of *Miranda* warnings by LEP speakers.

4 Research Methodology

To identify relevant cases, I searched the public digital repositories GovInfo, Casetext, Caselaw Access Project, Justia and Findlaw for court opinions involving *Miranda* and 'English', 'language barrier', 'translation', or 'interpreting', issued between 2000 and 2020. The year 2000 was selected as a starting point for two reasons. First, it is the year when Executive Order 13166 (2000) requested federally-funded agencies to create Language Access plans, a requirement that resulted in increased translation activity and recruitment of bilingual staff. After 2000, law enforcement was more likely, at least in theory, to provide accommodations to LEP speakers.

The second reason is recording. Prior to 2003, law enforcement recorded some custodial interrogations but only Alaska and Minnesota mandated recording. By 2017, it was mandated by 25 states, plus Rhode Island and Hawaii, where statewide recording was implemented without any court ruling or a statute [40] and by federal agencies and the District of Columbia. Moreover, as a result of public pressure and technological advances, police officers and state troopers are increasingly equipped with body-worn and dashboard cameras that record traffic stops and other encounters outside the police station. As a consequence, nowadays judges are more likely to have access to recordings of *Miranda* delivery than they were prior to 2000, when decisions on waiver validity were commonly based on reviews of oral testimony and written forms.

Once I identified the target number of 1,000 opinions, I read each one, discarding irrelevant cases (e.g., where English was the name of the officer), rulings involving juveniles or other language issues (e.g., court interpreting, consent to search) and opinions that did not offer sufficient information on the defendants' languages and/or the grounds for the decision. The result is a corpus of 460 decisions from 47 states, the District of Columbia, and the Virgin Islands (no relevant opinions were found from Hawaii, Montana, and West Virginia). Due to differences in state size and demographics, the distribution of opinions is uneven. The highest numbers are from California (54), New York (44), and Texas (40), followed by Massachusetts (26), Illinois and Oregon (17 each), Kansas (16), New Jersey (14), Florida, Ohio and Pennsylvania (13 each), Minnesota and Washington (12 each), and Iowa (11). Opinions from other states, the District of Columbia and the Virgin Islands number between 1 and 10.

Undoubtedly, the corpus represents only a small portion of opinions issued between 2000 and 2020. To make it more representative, I included the rulings by a variety of courts on a variety of motions and appeals, ranging from defendants' pretrial motions to suppress self-incriminating statements (e.g., *United States v. Xi*, 2018) to appeals by the State objecting to suppression of inculpatory statements by the trial court (e.g., *People v. Redgebol*, 2008) to appeals from convicted LEP speakers (e.g., *Ceja v. Adams*, 2018) and action suits against the police involving *Miranda* delivery (e.g., *Abarca v. Franchini*, 2018). Moreover, I included both published and unpublished (non-precedential) opinions because, unlike legal scholars, I am not concerned with binding legal precedents—my aim

is to find out how judges think about language proficiency and comprehension of constitutional rights.

Once I identified relevant opinions, I used Excel to code each case for the following: (1) the appellant's age, gender, first language(s) (L1), literacy, and, where available, length of exposure to English and the history of education and employment in the United States; (2) procedural details, such as the language(s) and manner of *Miranda* delivery, electronic recording and the presence of bilingual officers; (3) rationales for motions and appeals; (4) linguistic evidence proffered (e.g., signed waiver, recording); (5) grounds for judicial decisions. This data was analyzed quantitatively and qualitatively to answer five research questions (RQs):

- RQ1 What, if any, language accommodations were used in the delivery of the *Miranda* warnings to LEP speakers who later claimed that their waiver was invalid due to 'language barriers'?
- RQ2 What are the common arguments in *Miranda*-related appeals from LEP speakers and what do judges take into account to decide on waiver validity?
- RQ3 What proportion of appeals was granted and what reasons did judges use to grant or deny the appeals?
- RQ4 What do judges see as best practices in *Miranda* delivery to LEP speakers?
- RQ 5 What language-ideological assumptions do judges make in their decisions?

To reflect the fact that some cases, like that of Ceja, generated more than one opinion, while some opinions involved more than one defendant or interrogation, I created two data sets. Answers to RQ1 are based on the details of individual interrogations discussed in the opinions (n = 440) and answers to RQ2–RQ5 are based on the whole corpus (n = 460).

5 Results

5.1 RQ1 Language Accommodations in Custodial Interrogation of LEP Speakers

Interrogations analyzed in the study involved 440 defendants, aged 18 to 80, 94% of them male (n = 412). The crimes they were charged with or convicted for included murder, kidnapping, drug trafficking, rape, sexual abuse of minors, burglary, theft, fraud, conspiracy to steal trade secrets and driving while intoxicated (DWI). Half of the interrogations (n = 221) were recorded.

Language-wise, 315 defendants (72%) were speakers of Spanish, 308 as a first language (L1) and 7 as L2 (their L1s were Kaqchikel, Mam, Mixtec, Nahuatl, Quiche and Tarascan). The remaining 125 defendants (28%) were speakers of the American Sign Language (ASL), Arabic, Armenian, Bengali, Bulgarian, Cantonese, Cebuano, Chuukese, Dinka, Farsi, Filipino, Fulani, Fuzhounese, Gujarati, Haitian Creole, Hebrew, Hindi, Hmong, Hungarian, Japanese, Jamaican Creole, Keres, Khmer, Korean, Liberian English, Mandarin, Moldovan, Navajo, Portuguese, Romanian, Russian, Samoan, Serbian, Somali, Swahili, Thai, Ukrainian, Urdu, Ute,

Table 1 Language accommodations in *Miranda* delivery to LEP speakers (n = 440)

Language accommodations	Speakers of Spanish	Speakers of other languages	Total
Bilingual officers	61% (n = 193)	22% (n = 27)	50% (n = 220)
Interpreters, qualified and unqualified	5% (n = 15), 5 unqualified	17% (n = 22), 8 unqualified	8.5% (n = 37), 13 unqualified
A card in the primary language	6% (n = 18)	5% (n = 6)	5.5% (n = 24)
No accommodations	28% (n = 89)	56% (n = 70)	36% (n = 159)

Vietnamese, and Yupik. Not all of the defendants were immigrants: US-born speakers of ASL and indigenous languages, such as Keres, Navajo, or Yupik, are also entitled to language accommodations.

A quantitative analysis, summarized in Table 1, revealed that 64% of the interrogations featured language accommodations provided by bilingual officers (50%), interpreters (8.5%) or translated cards (5.5%). Not all suspects accepted accommodations: 24 Spanish speakers refused an interpreter and proceeded in English. In the remaining 36% (n = 159) of the cases, *Miranda* warnings were delivered in English only. The findings also show that law enforcement is better equipped to deliver the warnings in Spanish (72% of the interviews) than other languages (44%). Access also varies by language: speakers of Vietnamese, for instance, were accommodated in 68% (17 out of 25) and speakers of Arabic in 26% (5 out of 19) of the interrogations.

Undoubtedly, data derived from LEP appeals involving alleged violations of language access is not representative of *Miranda* delivery at large. It can, however, serve as a baseline for comparisons with data from other sources and it can certainly give us a sense of what the courts see as best practices and violations of the proper procedure for eliciting a valid *Miranda* waiver.

5.2 RQ2 How Courts Decide on the Validity of *Miranda* Waivers by LEP Speakers

On November 11, 1995, a 34-year old Cambodian immigrant Vuthy Seng, angry at his girlfriend who asked him to move out, woke her up in the middle of the night to ask what she loved most in the world. "I love my children the most," she replied. The next day she was visiting a friend, when Vuthy Seng called her with the same query. Concerned, she hurried home but it was too late. Vuthy Seng entered the living room where her kids were watching TV and shot all four in the head. The boys, aged 9, 12 and 15, later succumbed to their wounds but the teenage daughter, Sathy Men, escaped by jumping out of the window and alerted the neighbors. Vuthy Seng was apprehended by the police and advised of his rights in English and in his native Khmer by police officer Socheath Tun, also a Cambodian immigrant. At trial, Sathy Men and the neighbors provided a firsthand account of Seng's murderous spree and the jury found him guilty of three charges of murder in the first degree with extreme atrocity.

Vuthy Seng appealed his conviction citing an inadequate advice of rights. In 2002, the Supreme Judicial Court of Massachusetts found that the English warnings were adequate but the Khmer translation was not complete: the defendant was never advised that anything he said could be used against him in court and that the lawyer would be appointed if he could not afford one (*Commonwealth v. Vuthy Seng*, 2002). Reversing the conviction, the court remanded the case for a new trial. In the second trial, Seng's self-incriminating statements were suppressed but Sathy Men and the neighbors testified again and the jury found Seng guilty of the same charges.

The retrial of Vuthy Seng, whose guilt was never in question, exemplifies the tremendous costs, financial—and, in the case of Sathy Men and her mother, emotional—incurred when law enforcement disregards the importance of competent translation and explains why courts do not reverse convictions lightly.

In the present corpus, most appeals contained multiple claims, ranging from ineffective assistance of counsel to inadequacy of interpreters and excessive sentencing. The analysis here is limited to 'language barrier' claims, listed as (1) limited English or (2) inadequate translation. Not all appeals invoked these terms[5]: some simply stated that the LEP defendant did not waive their rights knowingly and intelligently, others complained about limited English *and* poor interpreting, many bolstered the argument by invoking low literacy, low IQ, or unfamiliarity with the US criminal justice system, and a few made a travesty of the proceedings by listing all possible reasons and letting the courts decide, e.g.:

> Berezyuk argues that all the statements he made to Gamache and his fellow officers should be suppressed because (1) he was subjected to custodial interrogation but he did not receive *Miranda* warnings; or, in the alternative, (2) even if he received *Miranda* warnings, he did not understand those warnings; or, in the alternative, (3) even if he did understand the *Miranda* warnings, he never affirmatively waived his rights; or, in the alternative, (4) even if he did waive his *Miranda* rights, the police improperly obtained his waiver through threats of deportation and increased punishment if he did not cooperate. (*Berezyuk v. State*, 2012)

Deliberations on waiver validity commonly begin with a six-prong test outlined by the Ninth Circuit in *United States v. Garibay* (1998): (1) did the defendant sign a written waiver?; (2) was the defendant advised of the rights in their native language?; (3) did the defendant appear to understand their rights?; (4) was the defendant assisted by an interpreter?; (5) were the rights explained individually and repeatedly?; (6) did the defendant have prior experience with the US criminal justice system?

Yet "questions relating to the admissibility of confessions by non-native English speakers are far too complex and fact-specific to pigeonhole into any single legal test, even one with six elements," argues Judge Tao of the Nevada Court of Appeals (*Gonzales v. State*, 2015). To make an informed decision, courts consider

[5] In the case of absent or unclear rationales, I assigned delivery in English to the 'limited English' category and delivery in the primary language or both languages to 'inadequate translation'.

"the totality of the circumstances surrounding the interrogation" (*Moran v. Burbine*, 1986), namely the interrogation context, the defendant's background and delivery and comprehension of the warnings. *Interrogation context* refers here to the manner and duration of the interrogation (was the defendant in custody? was the interrogation excessively long? were there threats, inducements or promises of leniency?), physical conditions (was the defendant held incommunicado? deprived of food or sleep? provided with refreshments and restroom breaks?) and the state of the defendant (was the defendant intoxicated or in poor health?). *Background factors* include age, education, literacy, intelligence, English skills, length of residence in the United States, employment and prior encounters with law enforcement. The *warnings* are scrutinized for content (did they reasonably convey the basic rights?), procedure (was the delivery recorded? was an interpreter present? was the waiver form legible?) and evidence of comprehension (did the defendant initial each warning? sign the waiver? ask any questions? invoke the right to silence or an attorney?).

To answer these questions, trial courts listen to the testimony of the defendant and police officers regarding their communication, examine written *Miranda* waiver forms and, where available, view or listen to interrogation recordings. Some evidentiary hearings also feature testimonies of language experts and/or the defendant's employers, acquaintances or relatives regarding their language skills. Appellate courts review the transcripts of pretrial hearings and trial interaction and, when possible, recorded interrogations.

In the present corpus, 57 of the 460 appeals were granted (12%), 35 of them based on video- or audio-recorded interrogations. To get a better sense of judicial reasoning, I conducted separate analyses of decisions on the warnings delivered in English (n = 260) and the warnings delivered in translation (n = 200).

5.3 RQ3a How Courts Decide on Waiver Validity When the Warnings are Delivered in English

In 1998, Francisco Barcenas was interviewed by Arkansas police on suspicion of sexual misconduct. The officers, none of whom spoke Spanish, advised him of his rights in English. When it became clear that he did not follow, they repeated the warnings several times but did not bring in an interpreter. Eventually, Barcenas made a videorecorded statement, using gestures to indicate where he touched the victim. Prior to the trial, he moved to suppress the confession but the trial court denied the motion and allowed the State to play the tape for the jury, which found the defendant guilty. When the Supreme Court of Arkansas reviewed the video, they noted Barcenas' perplexed appearance, 'broken' English, unintelligible answers, and repeated miscommunication with the officers and granted the appeal to suppress the videotaped statement. Because the showing of the video to the jury was deemed prejudicial, the court reversed the conviction and remanded the case for further proceedings (*Barcenas v. State*, 2000).

Barcenas' case exemplifies the circumstances that compel courts to grant appeals based on limited English.[6] In the present data set, 26 appeals (10%) were granted based on **the absence of an interpreter** in the context of **communication breakdowns, complaints about limited English**, and **the evidence that the suspect did not understand at least one of the rights**. Other reasons included **intentionally misleading delivery**, as in *United States v. Xi* (2018) where the agent said that *no one* would be appointed to represent the defendant if she could not afford counsel, and **rushed delivery**, where officers read the warnings quickly, in a perfunctory manner, and did not ensure the suspects understood what was read to them. In *State v. J.V.* (2019), for instance, the officer read the warnings in 30 seconds, then flipped the card to the waiver side and handed it to the defendant to sign and date, without giving him a chance to read his rights, while in *United States v. Barry* (2013), the agents gave the suspect written forms but never asked if he read and understood the waiver and the consent to search.

In 90% (n = 234) of the cases appeals were denied, with courts ruling that limited English does not automatically prevent the defendant from executing a knowing and intelligent waiver (e.g., *United States v. De La Torre*, 2009). The reasons cited in these denials are divided here into six categories, five of which are also invoked in denials of translation-related appeals.

The first category are **procedural safeguards and language accommodations**. Appeals from LEP speakers are denied, if the officers ascertained the suspect's ability to communicate in English, if the warnings were deemed adequate, if each right was presented individually, if the suspect read the *Miranda* card out loud, if the suspect had sufficient time to review the waiver, if the rights were also presented in the suspect's primary language, if the suspect was interrogated by or in the presence of a bilingual officer, and/or if the suspect refused an interpreter (e.g., *Alvarado-Gutierrez v. State*, 2017; *State v. Pham*, 2006; *United States v. Garcia*, 2011).

The second category is **evidence of understanding of the *Miranda* warnings**, divided here into performance and self-reports. *Performance* evidence includes invocation of the rights, clarification questions, confirmation checks and statements that displayed awareness of the rights and the consequences of waiver, as in *United States v. Ramirez-Castillo* (2002), where the suspect confirmed that he could stop the interview whenever he wanted before waiving his rights. Judges also pay attention to testimony, as in *Alvarado-Gutierrez v. State* (2017), where the defendant testified in court that the right to silence was 'obvious' and 'understood' and that he talked to the police voluntarily because he wanted 'to play along'. *Self-reports* comprise nods, verbal affirmations (e.g., "yes", "I understand"), initialed warnings and signed waiver forms. The caveat is that an effective waiver does not require a signature or even a verbal acknowledgment. In the absence of either, the suspect's choice to answer questions after being advised of their rights is treated as an express (implied) waiver (e.g., *United States v. Mandujano*, 2003).

Third, courts pay close attention to **evidence of English proficiency**, also divided here into self-reports and performance. *Self-reports* include verbal acknowledgments

[6] Here, the category of 'LEP appeals granted' also includes appeals by the State denied by the courts.

that the suspect speaks English, signed affidavits asserting the same and refusals of an interpreter (e.g., *Abarca v. Franchini*, 2018; *State v. Pham*, 2006). *Performance* includes appropriate, detailed and articulate answers to open-ended questions, lengthy narration, recorded phone calls, letters and statements in English, corrections of officers' spelling and speech, and participation in the pretrial hearings and trials without an interpreter. This is not to say that the use of an interpreter is considered probative. On the contrary, it may be cited to impeach the defendant's credibility, if they responded to English-language questions before they were translated or challenged the accuracy of the translation (e.g., *People v. Guerrero-Jasso*, 2018; *United States v. Garcia*, 2011).

Courts also assign significance to **the absence of negative evidence**: if the suspect did not look confused, did not complain, never requested an interpreter, and did not indicate the inability to understand their rights this too counts as evidence of understanding. This may sound surprising until we realize that by law waiver inquiries are conducted from the perspective of the police: in cases where police had no reason to believe that the defendant did not understand the warnings the courts have no basis for invalidating the waiver (e.g., *United States v. Al-Cholan*, 2010; *United States v. Hussain*, 2001; *United States v. Mendez-Yoc*, 2018; *United States v. Villa-Castaneda*, 2018). This is not to say that requests for an interpreter are always treated with respect: in some cases, where suspects asked for interpreters, the officers, unable or unwilling to provide one, decided that the suspects' English was good enough to proceed. In several cases, the decision was later affirmed by the court (e.g., *United States v. Leyva*, 2017).

Lastly, courts consider **defendants' backgrounds**. Denials of appeals often cite the length of residence in the USA (over 10 and up to 40 years), jobs requiring English, education in English-medium schools and passing of English-medium licensing exams. Particular weight is given to familiarity with the warnings from previous arrests. "Significantly, the defendant is no babe in the criminal-justice woods," stated the court in *People v. Soto* (2018), "He is a 68-year old man with 17 prior arrests and numerous felony convictions spanning over 40 years."

To illustrate how these factors come together in the totality of the circumstances, let us look at the case of Noel Lirio Gonzales, a native speaker of Tagalog (Filipino), interviewed in English. To make an informed decision on his waiver, the district court reviewed the video of his custodial interrogation and listened to recordings of his jail phone calls and the testimonies of a court-certified Tagalog interpreter, two psychologists who evaluated his competency, and several police officers, including ones who Mirandized him during a previous arrest. Acknowledging the conflicting nature of the evidence, the court nevertheless declared that Gonzales had sufficient English skills to waive his *Miranda* rights and make a statement against his own interest. Nevada Court of Appeals reviewed the written evidence de novo and affirmed the findings of the district court, citing Gonzales' high IQ, familiarity with *Miranda* warnings from the previous arrest and the transcript of his custodial interrogation which indicated that

> Gonzales understood virtually every question asked of him, his answers were on the whole clear, appropriate, and responsive to the questions asked, and he even occasionally corrected erroneous information presented to him. Some of his answers consisted of lengthy narratives in English that included complex words

and concepts such as "diversified," "camouflage," "informant," "prescription," and "discharging firearms." (*Gonzales v. State*, 2015)

At times, **defendants' credibility** is also at play. Several opinions noted that defendants facing convictions have "self-serving" motives to "minimize' understanding (e.g., *Mezo-Reyes v. Humphreys*, 2019), feign poor language skills (e.g., *Commonwealth v. Lemos*, 2008; *Gomez v. Commonwealth*, 2004; *United States v. Al-Cholan*, 2010) and exploit the language barrier as a loophole and "a ruse" to impede the prosecution (e.g., *Gomez v. California*, 2019; *United States v. Rodriguez*, 2018). Officers' credibility also comes into question, as we will see next.

5.4 RQ3b How Courts Decide on Waiver Validity of Translated or Interpreted Warnings

On October 14, 2016, Jose Antuna was stopped by Texas state troopers for violations of the traffic code. Handing the troopers his Mexican driver's license Antuna said that he speaks very little English. Trooper Wong used Google Translate to ask for consent to search in Spanish. After crystal and liquid methamphetamine were found in the car, Antuna was transported to Victoria County jail, where Deputy Rigoberto Robles advised him of his *Miranda* rights in Spanish. At the pretrial hearing, Robles testified that he had read the rights verbatim from the card but an audio recording showed that Robles mispronounced and misused the key words: instead of the right to *quedarse callado* [remain silent], he told Antuna that he had the right to *quitarse* [to take off an item of clothing] *cuidado* [precaution/care], and the right to terminate the interview at a caring moment (*cuidar* instead of *cualquier* [any]). Strikingly, Antuna confirmed understanding these nonsensical rights. When he moved to suppress his statement, the district court granted his appeal, ruling that Deputy Robles failed to adequately apprise Antuna of his constitutional rights (*United States v. Antuna*, 2017).

Antuna's case reveals that, when it comes to translation, courts are less dependent on the totality of the circumstances – one egregious error may suffice. In the present data set, 15.5% (n = 31) of the motions and appeals were granted based on the following rationales:

a. **Substantive errors that transformed the meaning of the rights**, as in the case of Antuna, or in *People v. Pham* (2011), where a bilingual cadet translated the right to silence into Vietnamese as "You are not allowed to talk".
b. **Incomplete warnings**, as in *Commonwealth v. Vuthy Seng* (2002), where the defendant was not told that anything he said could be used against him in court and that the lawyer would be appointed if he could not afford one.
c. **Substantial miscommunication**, as in *People v. Redgebol* (2008), where both the Sudanese defendant *and* his Dinka interpreter did not understand the *Miranda* rights.
d. **Unambiguous invocation of rights**, ignored by police officers, as in *United States v. Martinez-Rubio* (2019), where the suspect, asked if he wanted to waive his rights, responded "Well, no", and was nevertheless asked to sign a waiver.

Some opinions also cite **careless delivery**: in *United States v. Robles-Ramirez* (2000) officers gave the suspect Spanish forms but never checked if he could read and in *United States v. Martinez-Rubio* (2019) officers ignored the fact that the suspect signed the waiver without reading it first. Some courts also called into question **officers' credibility**, as in Antuna's case or in *United States v. Robles-Ramirez* (2000), where the agent's testimony that an illiterate defendant understood his signature as a waiver of constitutional rights was found not credible.

In the absence of egregious errors or police misconduct, 84.5% (n = 169) of the claims were rejected based on the totality of the circumstances: adequate wording, the use of procedural safeguards and language accommodations, evidence of understanding and/or the absence of negative evidence. One example of such denial is a case of Jose Bernabe, accused of the sexual assault on his minor stepdaughter. Interviewed by a bilingual officer who administered his rights in Spanish, Bernabe confirmed understanding, initialed each warning and signed the waiver of rights. Then he presented his 'side of the story': his young stepdaughter, he claimed, was really his girlfriend. His confession recorded in Spanish began with a dramatic assertion:

> *What I'm going to say might condemn me*. But I do it with the sole purpose of being honest. . . . *If one day they lock me up* over there for loving one person, it will remain on everybody's conscience. (translated in *Bernabe v. State*, 2012; emphasis mine)

Convinced that Bernabe, advised in his primary language, understood the consequences of his confession (*might condemn me*, *lock me up*), Texas Court of Appeals denied his appeal.

The analysis of the corpus also identified arguments that found no traction with the court:

a. The claim that the defendant speaks limited English was found unavailing if the rights were also presented in their primary language (e.g., *United States v. Garcia*, 2011).
b. The claim that the defendant lacks familiarity with the US legal system was usually found without merit (but see *People v. Redgebol*, 2008), and so was the claim that the defendant believed that police practices in the United States were as oppressive as in their native Vietnam, Somalia or Pakistan (e.g., *United States v. Hussain*, 2001), all the more so for defendants who had prior encounters with US law enforcement (e.g., *United States v. Sanchez*, 2013).
c. Dialect differences between the interpreter and the defendant were found immaterial, absent obvious errors (e.g., *Commonwealth v. Bins*, 2013; *State v. Mendez-Ulloa*, 2017).
d. Arguments that the translation wasn't verbatim were deemed to be without merit because discrepancies and minor mistranslations that do not change the basic meaning of the rights do not render the warnings constitutionally insufficient (e.g., *Commonwealth v. Bins*, 2013; *State v. Segura*, 2012).

e. Arguments that an interpreter's translation of the defendant's statements into English was inadmissible as hearsay were rejected on the premise that a police-appointed interpreter acts as a language conduit or the defendant's agent (e.g., *Commonwealth v. Adonsoto*, 2016).[7]
f. Objections to the fact that the rights were translated by a bilingual officer were dismissed because police interrogation is not a judicial proceeding and there is no mandate for the rights to be translated by a certified interpreter (e.g., *State v. Segura*, 2012).[8]
g. Arguments that bilingual officers are not neutral interpreters were found unavailing because the courts do not presume that public servants are inherently biased; moreover, with Spanish, it is increasingly the case that bilingual officers act as detectives and not as interpreters and interview the suspects directly in Spanish (e.g., *State v. J.P.M.-S.*, 2020).

Interpreting by bystanders has not been treated consistently and some courts upheld waiver validity even when the rights were translated by a Lufthansa employee, who spoke Hindi to the Urdu-speaking defendant (*United States v. Hussain*, 2001) or read by a Spanish-speaking employee of the nearby taqueria (*Munguia-Zarate v. State*, 2018). In the latter case, the use of a 'citizen interpreter' was condoned by the court as a matter of exigent circumstances.

Lastly, there were also cases where courts admitted that the *Miranda* advisement was deficient but deemed the admission of the defendant's statements at trial a harmless error due to the preponderance of other evidence (e.g., *People v. Hernandez*, 2020).

5.5 RQ4 What Courts See as the Best Practices in *Miranda* Delivery to LEP Speakers

Best practices in *Miranda* delivery, commended in judicial opinions, begin with **electronic recording**, whose game-changing nature is readily acknowledged by the courts:

> In our case, 20 years after the Garibay interview, we have clear tape-recorded evidence of Guerrero-Jasso's actual advisement, waivers, and subsequent statements to inform our review. We need not rely on the recollections and conclusions of possibly biased witnesses. Instead, we have the words, nuances, and any language issues available for our direct review. (*People v. Guerrero-Jasso*, 2018)

> Unlike so many other cases in which a contest of credibility takes place between a defendant, with his allegations of coercive police conduct, and a

[7] For analyses of the relevant case law and differing opinions on the language conduit theory, see [37–39].
[8] For a comparative analysis of statutes on interpreting at the arrest and interrogation stage see [41].

police officer, offering absolute denials of any impropriety, here the video speaks for itself. (*State v. Alvarado*, 2020)

In some cases, recordings may undermine the credibility of signed waivers, e.g.:

I do not find that Martinez-Rubio's signing of the *Miranda* form demonstrates.a knowing and intelligent waiver in this instance, since it is clear from the video that Martinez-Rubio did not read the form and that he signed it after being told officers had to speak with him, and they instructed him to 'sign here'. (Judge Mahoney cited in *United States v. Martinez-Rubio*, 2019)

Recordings are particularly crucial for interpreted interrogations: 65% (n = 20) of the appeals granted due to inadequate translation were based on recordings, including *United States v. Antuna* (2017), where the recording contradicted the officer's testimony that he read the rights in Spanish verbatim. To preserve such evidence, a Massachusetts court recommended that all interpreted interrogations be recorded in the state (*Commonwealth v. Adonsoto*, 2016).

Just as crucial is **advice of rights in the primary language**. Spanish waivers, for one, are more straightforward from a linguistic point of view: the title *Renuncia a los derechos* [Renouncing of the rights] disambiguates the English term *waiver*, opaque to LEP speakers [24]. Even judges who denied the appeals reproached officers for not delivering translated warnings:

The Court notes that inquiries such as this could almost effortlessly be avoided with minimal burden to law enforcement by simply offering the warning in Spanish. In this instance, officers could have offered Mandujano a written explanation of his rights (in Spanish), or read him the warning and conducted the interview in Spanish. Had officers done either of those, the Court would not be in the difficult position of attempting to divine Mandujano's level of comprehension. (*United States v. Mandujano*, 2003)

Although there was no testimony on the issue, long experience informs the court that New York City police officers have ready access to Spanish language *Miranda* forms. No explanation for the failure to use one was elicited during the hearing. (*People v. Lopez,* 2019)

The comments above show that Ceja's case wasn't the only one where the warnings were delivered in English in the presence of a Spanish-speaking officer. A clue to what may be going on comes from a case, where the officer, questioned at trial, shifted the blame to the court which requires official transcripts in English. She stuck to English, she explained, "for court purposes":

When the trial judge asked the officer what she meant by saying "for court purposes" the officer responded: "Because it's my experience that it's troublesome. Sometimes when it's in Spanish everything's got to get transcribed and I've run into that problem before." (*State v. Soto*, 2007)

Prohibitive costs of transcription aren't the only obstacle to the use of primary languages. Some officers don't have bilingual cards and others stick to English because they don't want confessions overturned due to translation flaws. Courts are aware that in some states the scarcity of competent translations and guidelines for interrogating LEP speakers is a systemic problem. In New Jersey, for instance, judges repeatedly called on the Attorney General to take charge:

> With little effort, the Attorney General could provide police stations and state police barracks throughout this State with a database or e-files containing videos of persons reading the statutory warnings in a multitude of languages. (concurring opinion by Judge Fisher in *State v. Kim*, 2010)

> [I]t is up to the Attorney General to develop appropriate guidelines to assist county prosecutors and municipal police departments on how to interrogate limited English proficient suspects to avoid the constitutional pitfalls identified in this case. (concurring opinion by Judge Fuentes in *State v. A.M.,* 2018)

The use of certified interpreters is not a popular solution: many languages don't have certification and some certified interpreters lack the legal training to translate constitutional rights. In *State v. Jenkins* (2002), translation by a certified ASL interpreter was found inadequate because the suspect didn't know ASL signs for 'judge', 'court', 'arrest' or 'confession' and the interpreter improvised and didn't ask the suspect to paraphrase in his own terms (a similar decision was reached in *State v. Hindsley*, 2000). Remote interpreting isn't always reliable either, especially in noisy settings, as seen in *United States v. Gaxiola-Guevara* (2020), where a phone interpreter didn't hear and thus didn't translate the suspect's request for an attorney.

The **best delivery practices** singled out in court opinions include: (1) ascertaining the suspect's primary language and their ability to read in that language; (2) presenting the rights individually, followed by questions about understanding and, if needed, clarifications; (3) engaging the suspects in reading the rights, i.e. asking them to read along or to read out loud; (4) asking the suspects to initial each warning to confirm understanding and to sign the waiver, and (5) asking the suspects to paraphrase or, in the case of ASL, sign the rights in their own words (e.g., *State v. Jenkins*, 2002; *United States v. Choudhry*, 2014). Officers who follow such practices are commended by the courts, e.g.:

> TFO Littlejohn again instructed Ms. Martinez-Camargo to read each right aloud and initial each right if she understood. TFO Littlejohn testified that he was trained to have the individual being advised of his/her *Miranda* rights to read the rights themselves aloud. TFO Littlejohn further explained that this practice helps ensure that individuals are actively, rather than passively, listening to and comprehending those rights. (*United States v. Martinez-Camargo*, 2017)

Judges also scrutinize printed forms, as seen in *United States v. Xi* (2018), where the court compared FBI waivers from 1997 and 2002 and criticized the 2002 revision that made the font size smaller and changed the title deceptively from the *Waiver of Rights* to *Consent*.

5.6 RQ5 Language Ideologies in Judicial Opinions on LEP Waivers of *Miranda* Rights

The analysis of 460 judicial opinions suggests that the research to date underestimates the complexity and diversity of language ideologies in US courts. The attention paid by the courts to "the totality of the circumstances surrounding the interrogation" (*Moran v. Burbine*, 1986) shows that the judiciary is aware that interrogation context, mode of delivery and suspects' backgrounds affect comprehension of the warnings. Even more importantly, the decisions, dissents and opinions that overturn previous rulings reveal that when it comes to *Miranda* and LEP speakers, judges are often at loggerheads–what we see are **competing language ideologies at play**.

The first point of contention involves **comprehensibility of the warnings**. Opinions guided by the ideology of *referential transparency* and *the reasonable person standard* treat the warnings and the waiver as simple, easily comprehensible texts:

> The *Miranda* warning, as read to defendant from a pre-printed card, is not complex and a person with a limited understanding of English may be expected to understand his *Miranda* rights. (*United States v. De La Torre*, 2009)

The inquiry in such opinions is limited to comprehensibility of individual words:

> the inquiry as to whether a defendant understood the recitation of the Fifth Amendment rights focuses not on the defendant's understanding of the U.S. criminal justice system, the democratic form of government, and/or the concept of individual rights, but rather on whether the defendant could, merely as a linguistic matter, comprehend the words spoken to him. (*United States v. Dire*, 2012)

Other courts recognize the complexity of legal language and the opacity of the term *waiver* to LEP speakers:

> There is a vast difference, however, between being able to carry on a conversation in English and being able to understand and waive constitutional rights. …The language used in courts and legal proceedings is much more complex than conversational English. (concurring opinion by Judge Wollheim, *State v. Lunacolorado*, 2010)

Decisions by such courts uphold the definition of the knowing and intelligent waiver as one made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" (*Moran v. Burbine*, 1986, p. 421), e.g.:

> The Defendant here, who has little education and has not been shown to have had any notion of the nature of his rights or the "consequences of waiving" those rights, is precisely the sort of individual that the *Miranda* rule is designed to protect. The government has not met its burden in proving that the Defendant waived his rights voluntarily and "with full awareness of the right being waived and of the consequences of waiving that right." (*United States v. LNU*, 2010)

The second area of disagreement involves **the level of English proficiency** needed to understand the warnings. Courts that espouse an *all-or-none view of L2 proficiency* equate the ability to answer basic questions with the ability to understand constitutional rights:

> A working knowledge [of English] exists if the individual has sufficient familiarity with the English language to understand and respond to the officer's questions. (*United States v. Silva-Arzeta*, 2010)

> The Court's review of the video footage and corresponding transcripts shows that Defendant was able to purposefully spell his name and provide his date of birth in English. While Defendant may not be a fluent English speaker, binding caselaw "does not require an extensive vocabulary, complex sentence structure, or fluency in English for *Miranda* warnings in English to be valid." (*United States v. Mazon*, 2020)

Other courts follow the reasoning of the Executive Order 13166 and Language Access legislation and recognize that LEP individuals may have sufficient conversational skills to perform lower-order tasks, such as giving their name or birth date, and insufficient skills to perform higher-order tasks, such as eyewitness narration or comprehension of legal language. In what is arguably the most linguistically sophisticated opinion I read to date, Judge Jerome Tao of the Nevada Court of Appeals argues compellingly that

> no single litmus test can possibly capture all of the relevant variations and iterations that could help determine the voluntariness of an interrogated suspect who speaks English as a second language, because non-native speakers who are somewhat familiar with English may possess different degrees of fluency that are not always easy to label or categorize. For example, some non-native English speakers may speak English conversationally yet not understand arcane or complex legal terms; some may speak English well but cannot read it; some may read and write English extremely well yet speak with accents that render their spoken words difficult for others to understand; some may understand the meaning of English words when they hear them without being able to generate those same words quickly during conversation; some may speak and understand English well when conversing with some people but have difficulty understanding others who speak with a strong regional accent such as a southern drawl or northeastern inflection; and some may understand extremely complex English words and concepts when formally phrased yet not understand street jargon, slang, aphorisms, pop-culture references, or other colloquialisms that, to native speakers, might be far more conceptually simple. (*Gonzales v. State*, 2015)

Courts that follow such reasoning refuse to equate the ability to answer basic questions with comprehension of *Miranda* warnings:

> It was clear to this Court, upon hearing Mr. Madrid-Quezada, that he is not proficient in the English language and could not have knowingly and intelli-

> gently waived his *Miranda* rights. … DO King admitted that his assessment of Mr. Madrid-Quezada's English proficiency was based on Mr. Madrid-Quezada answering basic questions and producing his identification when asked to do so. (*United States v. Madrid-Quesada*, 2019)

The third area of contention involves **evidence of understanding**. Waiver inquiries, as noted earlier, are conducted "from the perspective of the police" (*United States v. Al-Cholan,* 2010), with evidence viewed "in a light most favorable to the State" (*Barcenas v. State*, 2000).

The *reasonable person standard* sets a low bar for such inquiry, letting courts posit that if the warnings are comprehensible to a 'reasonable person', then the suspect "may be expected to understand his *Miranda* rights" (*United States v. De La Torre*, 2009) (for discussion about the viability of the standard, see [42]). This means that appeals can be legally denied if the courts ascertain that the warnings were adequately worded (i.e. comprehensible to an educated native speaker of English) and reasonably conveyed and that the officers had no reason to think that the suspect did not understand their rights (e.g., *United States v. Al-Cholan,* 2010; *United States v. Hussain*, 2001; *United States v. Mendez-Yoc*, 2018; *United States v. Villa-Castaneda*, 2018).

Not all judges, however, see grunts, nods, and the absence of requests for an interpreter as evidence of comprehension of constitutional rights. Some courts recognize that LEP individuals may fear the police enough to nod or say 'yes' even if they don't understand English (*United States v. Alarcon*, 2004, appeal granted), can't read Spanish (*United States v. Robles-Ramirez*, 2000, appeal granted) or when the rights as translated are self-contradictory (*People v. Pham*, 2011, appeal granted) or utterly absurd (*United States v. Antuna*, 2017, appeal granted).[9]

Last but not least, judges continue to debate the limits of *the conduit theory* and here recordings play a particularly important role. In the absence of recordings, some courts follow *the conduit theory* and accept that the warnings were meaningfully rendered by untrained bilingual officers or 'citizen interpreters', such as a taqueria employee (*Munguia-Zarate v. State*, 2018). In contrast, recordings that document substantive interpreting errors facilitate suppression of improperly elicited statements, as in *United States v. Antuna* (2017) where the court found that the bilingual officer failed to adequately apprise the defendant of his rights.

6 Discussion and Conclusions

Judges wield enormous power in modern society and it is not surprising that scholars have long been interested in how judges think. Studies to date have demonstrated that, while judicial decision-making is guided primarily by legal and ethical codes, it is also subject to extra-legal influences, including legal and political experiences,

[9] For discussion of feigned comprehension, see ([23], p. 129); for discussion of gratuitous concurrence, i.e. affirmation in the absence of understanding, see ([16], pp. 103–108).

political attitudes, demographic and personal characteristics, and intuitive ways of thinking (for an overview see [43]). The purpose of this study is to draw attention to one more factor: language ideologies that guide decision-making on linguistic issues, such as the need for an interpreter, acceptability of bilingual jurors and comprehension of constitutional rights. The first finding of the study is that **some courts still treat L2 proficiency as an all-or-none phenomenon and rely on the native speaker standard to judge comprehension of *Miranda* warnings by LEP speakers**. This ideology, argues Lupe Salinas, a bilingual judge retired from the Texas District Court, is particularly common among monolingual judges and results in linguistic discrimination against LEP speakers who can answer basic questions in English but cannot confront witnesses or comprehend complex legalese:

> There is a level of linguistic sophistication required at trial which is extremely subtle and can be easily missed by a monolingual individual unfamiliar with that language. A judge's lack of foreign language experience, especially Spanish, puts individuals in a precarious position, one in which the accused must hope that the monolingual judge understands the nuances involved where the accused has the ability to speak and understand English, but still needs an interpreter to "be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense." [36, p. 553]

The second set of findings concerns law enforcement. In the wake of Executive Order 13166 (2000), law enforcement agencies adopted Language Access plans, recruited bilingual staff, and expanded provision of language accommodations. Many Language Access plans state that *Miranda* warnings shall be provided to LEP speakers in their primary languages. It is all the more striking then that in the present corpus, in 36% of the interrogations, LEP speakers were advised of their rights only in English. The situation is particularly dire in languages other than Spanish, where warnings were delivered in English in 56% of the cases. Equally disconcerting is the finding that many motions and appeals stem from (1) incomplete or poor translations or (2) the lack of bilingual cards, which forces officers to improvise translation, sometimes with disastrous results. These findings suggest that half a century after *Miranda v. Arizona* (1966) and contrary to the assurances of many Language Access plans, **law enforcement still doesn't have adequate resources to advise LEP speakers in their primary languages**.

Further support for this conclusion comes from a recent investigation conducted by the Department of Justice (DOJ) in Denver, Colorado. The inquiry revealed numerous instances where Denver police officers failed to provide language assistance to Burmese and Rohingya-speaking immigrants or relied on children, family members and bystanders as interpreters. In the wake of the inquiry, on December 19, 2022, the DOJ announced the launch of a new nationwide effort, the Law

Enforcement Language Access Initiative, to assist law enforcement agencies in meeting their obligations to provide meaningful language assistance to LEP speakers.[10]

What the DOJ didn't assume, unfortunately, is the responsibility for creating a database of (1) professional translations of the *Miranda* warnings and consents to search in the languages of the major immigrant and indigenous groups and (2) videos of the warnings recited by native speakers of these languages and signed in ASL. The availability of a trustworthy database, accessible on the department-issued cell phones, would greatly increase the officers' confidence in the quality of the translations, enhance their ability to provide suspects with warnings in their primary languages and relieve bilingual officers of the need to improvise translations anew.

Importantly, a database with recordings of professionally translated and recited warnings is but a starting point because, contrary to popular belief, no wording can be comprehensible to all. It is a little acknowledged irony that efforts to improve comprehensibility of the warnings betray the influence of the ideologies of *referential transparency* and *the reasonable person standard* sociolinguists and legal scholars like to criticize. The logical flaw inherent in these attempts is equation of comprehensibility (to an educated native speaker) with comprehension (by an individual LEP speaker). Yet the two are not the same. A recent study found that the warnings adequately paraphrased by educated native speakers of English were either not understood or misunderstood by educated advanced L2 English speakers who misconstrued the right to have a lawyer 'present' as a right to have a lawyer in 'prison' or to talk to 'the president' [24]. Some judges also realize that comprehensibility doesn't equal comprehension and that recordings show that rights were delivered but not necessarily that they were understood:

> I do not believe we are positioned to determine whether defendant understood the officer's English recitation of the statutory warnings. The videotape of that proceeding is utterly equivocal as to whether or to what extent defendant may have understood what the officer said to him in English. (concurring opinion by Judge Fisher in *State v. Kim*, 2010)

What needs to change is not the wording but the manner of delivery. The solution, long advocated for by legal scholars and forensic linguists [5, 44, 45], recommended by courts (e.g., *State v. Jenkins*, 2002) and practiced by some police officers (e.g., *United States v. Choudhry*, 2014) is **dialogic delivery** that requires suspects to paraphrase each right in their own words (for transcripts of dialogic *Miranda* delivery see [5, 22, 45]). In the case of LEP speakers, dialogic delivery has an added advantage: it eliminates the need for proficiency guesswork. If the suspect cannot restate the rights, an interpreter should be brought in and the process repeated anew [44].

Like any innovation, be it *Miranda* warnings or electronic recording, dialogic approach has been a subject of concerns on the part of law enforcement and heightened hopes on the part of LEP advocates. In reality, it is neither a detractor to

[10] https://www.justice.gov/opa/pr/justice-department-announces-new-language-access-law-enforcement-initiative.

custodial interrogation, nor a panacea: many LEP speakers talk to the police without a lawyer present, even when they do understand their basic rights. What recorded paraphrasing can do is raise the bar for a knowledgeable waiver, lessen the need for courts to judge credibility contests and perform linguistic guesswork and reduce the time and costs spent on pre-trial hearings and post-conviction litigation. Of course, the judges might still disagree, as seen in Ceja's case: was the statement "Well, that I have the right to remain silent and to an attorney" sufficient evidence of understanding of constitutional rights?

Declarations

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