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CONFESSIONS AND CULTURE: THE INTERACTION OF *MIRANDA* AND DIVERSITY

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I think *Miranda* has been very salutary for certain people in our community . . . [*Miranda*] has had a great effect, particularly on the minority community. Just the fact they are told they have a right to remain silent, a right to have an attorney represent them, and a right not to make any statements until they have an attorney present, and there's nothing the police can do to stop it, has had an effect in some circumstances . . . . We're talking about a sense of command: a person accused of a crime having the sense she is treated as a human being as a result of this decision by the Supreme Court. I think there is a feeling of fairness that many minority people never felt before they received these [*Miranda*] rights.[1]

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[1] Judge Norma Holloway Johnson, Symposium, *Liberty and Security: A Contemporary Perspective on the "Criminal Justice Revolution" of the 1960s, in* PROCEEDINGS OF THE THIRD ANNUAL SYMPOSIUM OF THE CONSTITUTIONAL LAW RESOURCE CENTER, DRAKE UNIVERSITY LAW SCHOOL 118 (Apr. 4, 1992) [hereinafter SYMPOSIUM OF THE CONSTITUTIONAL LAW RESOURCE CENTER].

I. INTRODUCTION

A. THE ADVENT OF *MIRANDA*

In 1966, the Supreme Court issued one of its most significant rulings[2] when it decided the case of *Miranda v. Arizona*.[3] Recognizing that police officers often use sophisticated and devious techniques[4] to extract confessions[5] from vulnerable suspects,[6] the Court for the first time explicitly relied on the Fifth Amendment privilege[7] against self-incrimination[8] to provide protection for individuals subjected to custodial interrogation.[9] Extending the application of the Fifth Amendment privilege from the courtroom to the police station,[10] the Court ruled that to safeguard a suspect's privilege against self-incrimination and to dispel the compulsion in the inherently coercive environ-

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[2] The decision is not without its critics. *See, e.g.*, Paul Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM L. & CRIMINOLOGY 621 (1996); Joseph Grano, SYMPOSIUM OF THE CONSTITUTIONAL LAW RESOURCE CENTER, *supra* note 1, at 109.

[3] 384 U.S. 436 (1966).

[4] The Court acknowledged that police had moved away from physically coercive to psychologically coercive means of extracting confessions from suspects. *See id.* at 448. The Court referenced police manuals that outline various tactics police could use to obtain statements during interrogation. These tactics included removing the suspect from familiar surroundings, keeping the interrogation private, and keeping the suspect away from anyone or anything that might give him moral support or confidence. *See id.* at 449-50. Further, the interrogating officer was instructed to presume guilt, and merely interrogate as to the reasons for the commission of the crime. *See id.* at 450. Through patience and perseverance, the police officer was encouraged to fulfill his goal of attaining a confession. *See id.* at 450-51. The manuals suggested use of the "good cop/bad cop" routine as another means of attaining a confession. *See id.* at 452.

[5] *Id.* at 448-55.

[6] For example, Miranda himself was an "indigent Mexican" who was "seriously disturbed." *Id.* at 457.

[7] The Supreme Court refers to the Fifth Amendment protection against self-incrimination either as a "right" or a "privilege." Therefore, I will do the same in this article.

[8] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

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

[10] *Id.* at 461-67.

ment of custodial interrogation,[11] a police officer must warn every suspect that he has a right to silence and a right to an attorney before subjecting him to custodial questioning.[12] Unless the suspect knowingly, intelligently, and voluntarily waives these rights,[13] his statements cannot be used against him at trial.[14]

The *Miranda* decision was significant for a number of reasons. It openly recognized the inherent coercion of incommunicado police interrogation.[15] It acknowledged that police officers use sophisticated psychological ploys to encourage suspects to confess.[16] For the first time, it explicitly turned to the Fifth Amendment privilege against self-incrimination[17] rather than the Fifth/Fourteenth Amendment right to due process[18] or the Sixth Amendment right to counsel[19] to protect a suspect subjected to custodial interrogation.[20] Finally, it rejected a case-by-case approach[21] to evaluating confessions.[22] Instead the Court

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[11] *Id.* at 467.

[12] *Id.* at 444. ("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 as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

[13] *Id.* at 444.

[14] *Id.* at 479. In *Harris v. New York*, however, the Court ruled that even if a police officer violates *Miranda*, as long as the defendant's statements were made voluntarily, those statements may still be used to impeach the defendant at trial. 401 U.S. 222, 225-26 (1971).

[15] *Miranda*, 384 U.S. at 456-58.

[16] *Id.* at 448. *See supra* note 4 and accompanying text.

[17] *Id.* at 458-61.

[18] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. Beginning with *Brown v. Mississippi*, the Supreme Court began relying upon the due process clause to protect suspects from custodial interrogation. 297 U.S. 278 (1936).

[19] "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. In *Escobedo* v. *Illinois*, the Court found that denying the defendant's right to counsel undermined his ability to exercise his privilege against self-incrimination. 378 U.S. 478, 491 (1964).

[20] Justice Harlan, in his dissent, found that the due process clause was still a reliable basis for evaluating confessions. *Miranda*, 384 U.S. at 506-09 (Harlan, J., dissenting).

[21] For examples of the case-by-case approach see Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49

promulgated a standardized set of warnings that police officers were required to give suspects before subjecting them to custodial interrogation.[23]

B. CULTURAL CHANGES IN THE UNITED STATES

At the same time that the Court was shifting its perspective on the admissibility of confessions, the Legislature was shifting its perspective on immigration. In October of 1965, Congress passed the Immigration and Nationality Act of 1965,[24] which eliminated previous national origin quotas.[25] Additionally, it eliminated the "long-standing official discrimination against prospective immigrants from the so-called Asia-Pacific triangle."[26] Instead, it set a worldwide annual ceiling of 290,000 for legal immigration—170,000 per year for immigrants from the Eastern Hemisphere,[27] and 120,000 for immigrants from the Western Hemisphere.[28] The Government enacted a first-come, first-served basis to admit immigrants.[29] Applications from immediate relatives of U.S. citizens were not included in the annual ceilings.[30]

(1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944); and Brown v. Mississippi, 297 U.S. 278 (1936).

[22] *Miranda*, 384 U.S. at 468-69.

[23] *Id.* at 469-70.

[24] 8 U.S.C. § 1101 (1999). This legislation sought to achieve five basic goals: "1. to provide for family reunification; 2. to attract skilled and educated aliens; 3. to ease world population problems caused by natural disasters and political unrest; 4. to encourage international exchange programs; and 5. to prevent the entry of aliens with health problems, criminal records or the indigent." JUAN L. GONZALES, RACIAL AND ETHNIC GROUPS IN AMERICA 86 (1996).

[25] PHILIP Q. YANG, POST-1965 IMMIGRATION TO THE UNITED STATES 15 (1995). For approximately 40 years, the United States sanctioned a national origins quota system that favored white immigrants, mostly from Northern Europe. In this way, the Government sought to maintain the ethnic composition of this country. SANFORD J. UNGAR, FRESH BLOOD 100 (1995).

[26] UNGAR, *supra* note 25, at 102.

[27] Additionally, Congress set an annual maximum of 20,000 immigrants from each country in the Eastern Hemisphere. No such maximum was set for countries from the Western Hemisphere. YANG, *supra* note 25, at 15.

[28] *Id.*

[29] *Id.*

[30] *Id.*

As the United States was deluged with applications for immigration, the Government continued to reform its immigration policies. For example, in 1976, Congress extended the annual ceiling by 20,000 immigrants from Western Hemisphere countries.[31] In 1980, it reduced the annual ceiling of immigrants to 270,000[32] but established a distinct policy and category for refugees. It expanded the definition of "refugee" and set a separate worldwide annual ceiling of 50,000 for this category.[33]

During the period of 1960 to 1990, the immigration of refugees deeply affected the composition of this country's population. For instance, between 1960 and 1980, the Government admitted more than 800,000 Cuban refugees into the United States.[34] Additionally, between 1975 and 1979, more than 200,000 Vietnamese immigrated to the United States after the fall of Saigon.[35] In all, between 1975 and 1984, more than 700,000 Indochinese refugees[36] settled here.[37]

During this period, an explosion of illegal immigration also affected the growth and composition of the American population.[38] Seeking to address the issue of illegal immigration, Congress passed the Immigration Reform and Control Act in November of 1986.[39] This legislation authorized:

> amnesty and temporary resident status to all illegal aliens who had lived in the United States continuously since January 1, 1982; imposed sanctions on employers who knowingly hire illegal aliens; initiated a Special Agricultural Worker program to prevent possible labor shortages caused by employer sanctions; and increased inspection and enforcement at U.S. borders.[40]

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[31] *Id.*

[32] Commentators have noted that this ceiling became insignificant as the Government made "exceptions for various special cases and as illegal immigration became a more significant factor." UNGAR, *supra* note 25, at 102.

[33] YANG, *supra* note 25, at 16.

[34] GONZALES, *supra* note 24, at 87.

[35] *Id.*

[36] *Id.*

[37] In 1992, approximately "123,000 refugees were admitted, about half from the former Soviet Union, a quarter from Vietnam, and most of the rest from Laos, Cuba, Iraq and Ethiopia." UNGAR, *supra* note 25, at 104.

[38] *Id.* at 102.

[39] 8 U.S.C. § 1324 (1999).

[40] YANG, *supra* note 25, at 16

This legislation profoundly impacted the composition of this country's population. For example, more than 400,000 aliens applied for amnesty during the first eleven months of the program.[41] "By August of 1990, 1,300,000 aliens had applied for legalization under the provisions of this Act and only 341 were denied. Of these applications, 1,230,299 were Mexican nationals."[42] Additionally, over a half a million aliens sought legalization under the Special Agricultural Workers program.[43] "During the fiscal year of 1988, a total of 643,000 aliens were granted legal status under the provisions of this Act."[44]

In sum, immigration to this country has grown significantly since 1965. Between 1969 and 1989, in excess of 12 million people legally immigrated into the United States.[45] Moreover, the source of those immigrants has changed significantly.[46] Before 1965, Europe provided the majority of America's immigrants. Since 1965, Latin America and Asia share that distinction.[47]

Not surprisingly, this shift in the source of immigration has dramatically affected American society. By 1990, "32 million people living in the United States reported speaking a language other than English at home and more than 40 percent of them acknowledged that they did not speak English very well."[48] In addition to their native tongue, these immigrants also bring with them their culture—"their sense of self-identification and group identification, engendered by race, ethnicity, religion

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[41] GONZALES, *supra* note 24, at 87.

[42] *Id.* at 87.

[43] *Id.*

[44] *Id.*

[45] YANG, *supra* note 25, at 18. This number does not take into account the huge number of individuals who have immigrated to the United States illegally. If those numbers were included, the total figure for immigration during this period would be significantly greater. *See id.*

[46] According to INS records, from 1951 to 1960:

> 72.3 percent of newly naturalized Americans came from Europe, but for the period from 1981 to 1991, Europeans were down to 14.8 percent, and Asians represented almost half (49.5 percent) of those becoming citizens. By 1992 more than half of those naturalized were Asians, and Europeans represented barely an eighth of the total.

UNGAR, *supra* note 25, at 103.

[47] YANG, *supra* note 25, at 18.

[48] UNGAR, *supra* note 25, at 103.

and language."[49] All these cultural attributes deeply influence American society, and perceptions of interrogated individuals.

With this explosion in immigration, it was not long before the courts began to address the application of *Miranda* to those of different cultures. For if *Miranda* sought to provide protection for the vulnerable criminal suspect from the sophisticated official interrogator, who could possibly be more vulnerable than a suspect who does not speak English or who does not embrace American culture?[50]

II. APPLICABILITY OF *MIRANDA* RIGHTS

In addressing the issue of confessions and culture, it is first necessary to determine to whom *Miranda* applies. Repeatedly, the Supreme Court has explained that the *Miranda* warnings are not constitutionally mandated but, instead, are a judicially-created measure to protect the Fifth Amendment privilege against self-incrimination.[51] Because the warnings are merely a mechanism to protect the privilege against self-incrimination, it is important to examine specifically who is covered by this constitutional safeguard.

A. CITIZENS AND LAWFULLY ADMITTED ALIENS

The Court has not defined the term "person" as set forth in the Fifth Amendment.[52] There is no doubt that this constitu-

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[49] Leslie V. Dery, *Disinterring the "Good" and "Bad Immigrant": A Deconstruction of the State Court Interpreter Laws for Non-English Speaking Criminal Defendants*, 45 U. KAN. L. REV. 837, 839 (1997).

[50] For an interesting discussion of the interaction of criminal law and culture, see Miles Corwin, *Cultural Sensitivity on the Beat*, L.A. TIMES, Jan. 10, 2000, at A1.

[51] New York v. Quarles, 467 U.S. 649, 654 (1984) (citing Michigan v. Tucker, 417 U.S. 433, 444 (1974)); *see also* Oregon v. Elstad, 470 U.S. 298, 305 (1985) (quoting *Quarles*, 467 U.S. at 654). A federal statute purports to govern the admissibility of statements in federal court, and provides that failure to provide warnings is one among several factors in determining admissibility. *See* 18 U.S.C. § 3501 (1994); Davis v. United States, 512 U.S. 452, 463 (1994) (Scalia, J., concurring); United States v. Alvarez-Sanchez, 511 U.S. 350, 357 (1994); United States v. Doherty, 126 F.3d 769, 781 n.5 (6th Cir. 1997). Notwithstanding 18 U.S.C § 3501, federal courts continue to apply *Miranda*. *Doherty*, 126 F.3d at 781 n.5. This may change, however, with the Court's upcoming decision in *Dickerson v. United States*, 120 S. Ct. 578 (1999).

[52] In a case interpreting the application of the Fourteenth Amendment, however, the Supreme Court ruled that the benefits of the Fourteenth Amendment are not

tional provision protects a citizen of the United States who resides in this country.[53] It also protects a United States citizen stationed abroad.[54] It covers a lawful permanent resident of the United States who is physically present in the United States.[55] It also seems to encompass an individual who is lawfully present in the United States under parole status pursuant to 8 U.S.C. § 1182(d)(5).[56] The Fifth Amendment, however, does not protect enemy aliens outside the United States.[57]

B. UNDOCUMENTED ALIENS

The application of the Fifth Amendment is less clear as to those who are physically, but not lawfully, present in the United States. In the past, the Court has held that an undocumented

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limited to citizens but apply to "every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Extending this rationale, the Supreme Court held in *Wong Wing v. United States* that the Fifth Amendment applied to all persons within the United States, irrespective of their citizenship or alienage. 163 U.S. 228, 238 (1896).

[53] *Wong Wing*, 163 U.S. at 238.

[54] Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion); *see also* Kinsella v. Singleton, 361 U.S. 234, 242-43 (1960) (extending *Reid* to non-capital crimes).

[55] Resident aliens are "persons" under the Fifth Amendment and "are entitled to the same protections under the Clause as citizens." United States v. Balsys, 524 U.S. 666, 671 (1998); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("'[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the . . . Fifth Amendment. . . . They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.'" (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).

[56] 8 U.S.C. § 1182(d)(5) (1999). *See* United States v. (Under Seal), 794 F.2d 920, 922-23 (4th Cir. 1986) (applying right to remain silent to discretionary parolees under 8 U.S.C. § 1182(d)(5)). *But see* United States v. Lileikis, 899 F. Supp. 802, 806 (D. Mass. 1995) (declaring that "nonresident aliens [admitted under § 1182(d)(5)] like the Aranetas, whose connections to the United States were transient at best, would have only the most tenuous of claims to the Fifth Amendment privilege") (footnote omitted).

[57] Johnson v. Eisentrager, 339 U.S. 763, 783 (1950). The court defines an enemy alien as a "subject of a foreign state at war with the United States." *Id.* at 769 n.2. This is in contrast to an alien friend who is the "subject of a foreign state at peace with the United States." *Id.*

alien enjoys the protections of the Fifth and Fourteenth Amendments.[58]

In a Fourth Amendment case, however, the Court ruled that a defendant whose home in Mexico was searched by American and Mexican officers may not challenge the search as constitutionally unreasonable.[59] The Court ruled that because the defendant was a Mexican citizen who had no voluntary attachment to the United States and the search was not conducted in this country, he enjoyed no Fourth Amendment protection.[60] In reaching this conclusion, the Court mentioned in dicta that "aliens receive constitutional protections when they have come within the territory of the United States and [have] developed substantial connections with this country."[61] Thus, the Court seemed to confirm that even if a person had entered the United States illegally, but was present voluntarily and had "developed substantial connections with this country," he would enjoy constitutional protection.[62] In addition, the Court stressed that "the Fifth Amendment . . . speaks in the relatively universal term of 'person,' [as opposed to] the Fourth Amendment, which applies only to 'the people.'"[63]

Although the Supreme Court has not decided whether an alien is protected by *Miranda*, every lower court that has consid-

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[58] Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.") (citations omitted).

[59] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[60] *Id.* at 274-75.

[61] *Id.* at 271 (citing, *inter alia*, *Plyler*, 457 U.S. at 212). Courts and commentators have considered this statement dicta because the question of the Fourth Amendment rights of aliens unlawfully residing in the United States was not before the Court. *See id.* at 279 n.* (Stevens, J., concurring) ("[C]omment on illegal aliens' entitlement to the protections of the Fourth Amendment [is not] necessary to resolve this case."); United States v. Iribe, 806 F. Supp. 917, 919 (D. Colo. 1992), *rev'd in part on other grounds, aff'd in part*, 11 F.3d 1553 (10th Cir. 1993); Rene L. Valladares & James G. Connell, III, *Search & Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1314-15 (1997).

[62] *Verdugo-Urquidez*, 494 U.S. at 271.

[63] *Id.* at 269.

ered the question has decided in favor of such protection.[64] For purposes of *Miranda* coverage, it is irrelevant whether the alien is at the border or within the country, or whether he is within the United States legally or illegally.[65]

III. CUSTODY

Miranda warnings need only be given to individuals who are subjected to custodial interrogation by government agents.[66] The Court in *Miranda* found that the interplay of custody and government interrogation is so inherently coercive that *Miranda* warnings are necessary to protect the suspect's privilege against self-incrimination.[67]

A. THE MEANING OF CUSTODY

For purposes of *Miranda*, a suspect is in "custody" "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'"[68] In contrast, a seizure under the Fourth Amendment is defined as a "meaningful interference, however brief, with an individual's freedom of movement."[69] A

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[64] United States v. Moya, 74 F.3d 1117, 1119 (11th Cir. 1996) (citing cases); Barrera-Echavarria v. Rison, 44 F.3d 1441, 1449 (9th Cir. 1995) (quoting United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979)); *Henry*, 604 F.2d at 914 (citing, *inter alia*, Wong Wing v. United States, 163 U.S. 228, 238 (1896)); Pena v. Thornburgh, 770 F. Supp. 1153, 1160 n.1 (E.D. Tex. 1991); United States v. Razzaq, 524 F. Supp. 881, 882 (E.D.N.Y. 1981) (citing *Henry*, 604 F.2d at 914).

[65] *Barrera-Echavarria*, 44 F.3d at 1449 (quoting *Henry*, 604 F.2d at 914); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 & n.3 (10th Cir. 1981) (citing *Henry*, 604 F.2d at 914); *Henry*, 604 F.2d at 914; Medina v. O'Neill, 589 F. Supp. 1028, 1033 (S.D. Tex. 1984), *judgment reversed in part, vacated in part*, 838 F.2d 800 (5th Cir. 1988) (citing *Henry*, 604 F.2d at 914).

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

[67] *Id.* at 457-58.

[68] Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)). Pursuant to the Fourth Amendment, the Court permits a police officer to temporarily seize and briefly question an individual based on reasonable suspicion, rather than on probable cause, to ascertain whether the individual is involved in criminal wrongdoing and whether he poses a threat to the police officer or to the public. Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

[69] United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry*, 392 U.S. at 16.

suspect is not in custody during a limited *Terry* stop,[70] unless the stop limits the suspect's freedom to a degree associated with arrest.[71]

To determine whether an individual was in custody at the time of the interrogation, "a court must examine all of the circumstances surrounding the interrogation,"[72] and must analyze "how a reasonable man in the suspect's position would have understood his situation."[73] Custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."[74]

There are several advantages to using this objective standard. First, it eliminates the likelihood that if a court used a subjective test, every suspect would later testify that he subjectively believed he was in custody at the time of the interrogation.[75] Conversely, every police officer would testify later that he subjectively intended to let the suspect leave if the suspect expressed a desire to do so.[76] Second, by using this objective test, the court sets standards of conduct for law enforcement, teach-

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[70] A "*Terry* stop" derives from the Supreme Court case of *Terry v. Ohio*, where the Court found that a police officer, with reasonable suspicion, may "stop and frisk" a suspect for weapons. 392 U.S. 1, 27 (1968). This is permissible, even if the officer does not have probable cause to arrest the suspect for a crime. *Id.*

[71] *See Berkemer*, 468 U.S. at 440; United States v. Perdue, 8 F.3d 1455, 1463-64 (10th Cir. 1993); United States v. Smith, 3 F.3d 1088, 1097-98 (7th Cir. 1993); United States v. Goodridge, 945 F. Supp. 359, 365 (D. Mass. 1996). For an interesting discussion of this issue, see Thomas Gerry Bufkin, Terry *and* Miranda*: The Conflict Between the Fourth and Fifth Amendments to the United States Constitution*, 18 MISS. C. L. REV. 199 (1997); Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); Note, *Custodial Engineering: Cleaning Up the Scope of* Miranda *Custody During Coercive* Terry *Stops*, 108 HARV. L. REV. 665 (1995).

[72] Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam) (citing *Beheler*, 463 U.S. at 1125).

[73] *Id.* at 324 (quoting *Berkemer*, 468 U.S. at 442 (quotations omitted)).

[74] *Id.* at 323. At least one court has held that a person confined at an Immigration and Naturalization Service detention center is in custody for the purposes of *Miranda*. *See* United States v. Cadmus, 614 F. Supp. 367, 372-73 (S.D.N.Y. 1985).

[75] Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 790 (1982), *citing* WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(g), at 52 (1978).

[76] Williamson, *supra* note 75, at 790.

ing police officers under what circumstances "custody" occurs.[77] This eliminates the need for police officers to make spontaneous judgments about either their own conduct or about the psychological or cultural idiosyncracies of the suspect whom they are questioning.[78] Courts prefer this objective approach because it "avoids imposing upon police officers the often impossible burden of predicting whether the person they question, because of characteristics peculiar to him, believes himself to be restrained."[79]

On the other hand, commentators argue that using the objective standard merely serves to maintain the power[80] of the dominant culture.[81] Because objective standards generally reflect the values of the dominant culture, judgments under those standards benefit that group and disadvantage minority cultures.[82] By referring to the mythical "objectively reasonable person," courts fail to acknowledge that persons of different cultures sometimes think or act differently than those in the dominant culture.[83] This lack of recognition of the idiosyncracies of different cultures maintains the power of the majority and disempowers those in the minority.[84]

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[77] *Id.*

[78] *Id.*

[79] United States v. Beraun-Panez, 812 F.2d 578, 581 (9th Cir. 1987), *amended by* 830 F.2d 127 (9th Cir. 1987) (citing United States v. Moreno, 742 F.2d 532, 537 (9th Cir. 1984) (Wallace, J., concurring)).

[80] "Powerful actors . . . want objective standards applied to them simply because these standards always, and already, reflect them and their culture. These actors have been in power; their subjectivity long ago was deemed 'objective' and imposed on the world." Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (1992).

[81] One commentator defines dominant culture as: "[n]on-Hispanic, European Americans [who] have long believed that their own ethnic culture defined the civic culture of the United States," and further states: "White Anglo-Saxon Protestant values define the identity of the United States." Carlos Villarreal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193, 1195-97 (1991).

[82] Delgado, *supra* note 80, at 818.

[83] *Id.* at 816.

[84] *Id.* at 818.

Others maintain that the use of the objective standard in criminal law may lead to injustice[85] or unfairness[86] because that standard does not encompass the suspect's "social reality."[87] Although the use of that standard appears to treat all individuals equally, in fact, it does not.[88] By ignoring cultural factors that have shaped the suspect's perspective, the objective test imposes a false norm upon the suspect.[89]

Additionally, commentators note that the use of the objective test, and the failure to consider subjective factors, denigrates "the human dignity and uniqueness of each individual."[90] Focusing on objective factors minimizes the value of individual rights and leads courts to "anaesthetize their hearts and detach themselves from the real human being who stands before them."[91]

B. THE REFINED OBJECTIVE STANDARD FOR CUSTODY

The courts have confronted this debate about the advantages and disadvantages of the objective standard. Generally, they have favored the use of the objective test in determining "custody."[92] A few courts, however, have been willing to consider subjective factors, such as alienage, threats of deportation,

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[85] *See* Delores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 462-63 (1981).

[86] *Id.* at 465. "The law, by abstracting human beings out of their social reality, confers upon them a formal equality. But this formal equality is illusory and in fact leads to unjust consequences, for the 'systematic application of an equal scale to systematically unequal individuals necessarily tends to reinforce systemic inequalities.'" *Id.* (citations omitted).

[87] *Id.* at 462-63.

[88] *See id.* at 465.

[89] *See id.*

[90] Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. 677, 724 (1998).

[91] *Id.* at 725.

[92] *See* United States v. Ramos-Toros, Nos. 94-30447, 94-30448, 1995 U.S. App. LEXIS 28186 (9th Cir. Sept. 28, 1995); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987); United States v. Joe, 770 F. Supp. 607 (D.N.M. 1991).

and language difficulties in their determination of the custody question.[93]

In *United States v. Beraun-Panez*,[94] the Ninth Circuit reiterated its support of an objective test for the analysis of custody, but held that when officers know of a subjective factor, such as the suspect's status as an alien, this element may be considered in determining whether the suspect was in custody.[95] The Ninth Circuit Court of Appeals referred to this approach as the "'refined' objective standard."[96] In this case, the court found that because the officers had known of the suspect's alienage, had taken steps to ascertain this information before the questioning, had threatened the suspect with deportation, had learned that he had some difficulty with the English language, and had isolated him from others, the test here should be "how a reasonable person who was an alien would perceive and react to the remarks."[97] Based on these facts, the court found the defendant

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[93] *See* United States v. Ontiveros, Nos. 88-1433, 89-10086, 88-10048, 1990 W.L. 56821 (9th Cir. Apr. 30, 1990); United States v. Beraun-Panez, 812 F.2d 578, *amended by* 830 F.2d 127 (9th Cir. 1987); United States v. Moreno, 742 F.2d 532 (9th Cir. 1984).

[94] *Beraun-Panez*, 812 F.2d at 578.

[95] *Id.* at 581.

[96] *Id.*

[97] *Id.* (citing, *inter alia*, *Moreno*, 742 F.2d at 537-38 (Wallace, J., concurring)). *See also Ontiveros*, 1990 WL 56821, at *4 (applying the same standard to consider "'how a reasonable person who was an alien would perceive and react to' the situation"); United States *ex rel.* Argo v. Platt, 673 F. Supp. 282, 289 (N.D. Ill. 1987) (reserving the question of whether to apply the *Miranda* refined objective test, but indicating that it seemed "more logical" than a purely objective test); *cf. Moreno*, 742 F.2d at 536 (explaining, in Fourth Amendment context, that the defendant's "lack of familiarity with police procedures in this country, his alienage and his limited ability to speak and understand the English language contributed significantly to the quantum of coercion present"); *id.* at 537-38 (Wallace, J., concurring) (disagreeing with majority's consideration of alienage and knowledge of police procedures, but acknowledging that "[i]ncluding obvious language barriers as a quality of a hypothetical reasonable man would not burden the police or make unnecessarily subjective the application of a reasonable man test"). *See also* United States v. $25,000 U.S. Currency, 853 F.2d 1501, 1510 (9th Cir. 1988) (Nelson, J., dissenting) (questioning the majority's failure to consider the defendant's alienage and language difficulties in reaching its decision that he was not "seized" under the Fourth Amendment); United States v. Recalde, 761 F.2d 1448, 1454 (10th Cir. 1985) (finding, in Fourth Amendment context, that the defendant, a resident alien, reasonably could have felt unable to terminate his encounter with police officers due to his Argentine background and cultural acquiescence to authority). *But see Ramos-Toros*, 1995 U.S. App. LEXIS 28186, at *15 (relying

was in custody when he was confronted by law enforcement officers.[98]

Other courts have declined to adopt the refined objective test for determining custody. In *United States v. Chalan*,[99] the defendant, a Native American, argued that he was in custody when the Pueblo Governor requested him to come to his office to talk with police officers.[100] The defendant contended that his attendance at the meeting was compelled because tribal custom dictated that he could not refuse the Governor's request and that he was not free to leave the meeting until the Governor dismissed him.[101]

The Tenth Circuit rejected this argument. It found that the defendant was not in custody when he was questioned by police.[102] The court explained that no one used force or even threats of force to get the defendant to attend the meeting, that he came to the Governor's office voluntarily, and that he was free to leave if he decided to do so.[103] The court recognized that the "Governor's actions and status may have influenced Chalan to attend the interview,"[104] but it ruled that this influence did not create a custodial situation so that the defendant was not objectively free to leave if he so chose. In reaching this conclusion, the court did not address how a reasonable person who was a Native American would perceive and react to this situation.[105]

A trial court concluded that, by approaching the custody question in this way, the Tenth Circuit had "implicitly rejected"

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on the traditional objective test in deciding that the defendant was not in custody when he was questioned).

[98] *Beraun-Panez*, 812 F.2d at 582.

[99] 812 F.2d 1302 (10th Cir. 1987).

[100] *Id.* at 1306.

[101] *Id.* at 1307.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *See generally* United States v. Zapata, 997 F.2d 751, 757 (10th Cir. 1993) (holding that subjective factors such as a defendant's "background" and "upbringing" are generally irrelevant to the legal question of whether a Fourth Amendment seizure had occurred, "other than to the extent that they may have been known to the officer and influenced his conduct") (quoting United States v. Bloom, 975 F.2d 1447, 1455 n.9 (10th Cir. 1992)).

the refined objective approach on the basis of cultural heritage. In *United States v. Joe*,[106] the district court reasoned:

> In spite of the fact that the Court in *Chalan* specifically found that a "reasonable Pueblo Indian" would not have felt free to leave the Governor's office, the Court determined that the defendant was not in custody when he made the statements he sought to suppress. Thus the Court implicitly rejected modification of the reasonable man standard to account for the defendant's cultural heritage.[107]

Following this lead, the court in *Joe* declined to adopt a refined objective standard that would consider the defendant's cultural history.[108] It found that adopting this standard would significantly burden the police officer because the officer would be required to ascertain each suspect's cultural background and then would have to determine if, or how, that background affected the suspect's perception of the encounter.[109]

This, however, is not the case. The Ninth Circuit specifically found in *Beraun-Panez* that the refined objective test applied only because the police officers had already ascertained Beraun-Panez's immigration status before questioning him and may have used that information to their own benefit.[110] Furthermore, the court noted that the determinative issue was not how this particular suspect perceived the situation, but how a "reasonable person who was an alien would perceive and react to the remarks."[111]

Despite its announced rejection of the refined objective standard, the *Joe* court was willing to consider the suspect's knowledge of English to determine whether custody had occurred. The court noted that "when a suspect's knowledge of English is *clearly inadequate*, it *may* be appropriate to refine the standard to account for this characteristic."[112] The court so decided because it believed that the suspect's language abilities would be obvious to the police officer. Consequently, the offi-

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[106] 770 F. Supp. 607 (D.N.M. 1991).

[107] *Id.* at 610.

[108] *Id.* at 611.

[109] *Id.*

[110] United States v. Beraun-Panez, 812 F.2d 578, 581, *amended by* 830 F.2d 127 (9th Cir. 1987).

[111] *Id.*

[112] *Joe*, 770 F. Supp. at 611.

cer would not have to speculate about the suspect's background and the officer could easily adapt his conduct to that factor.[113]

The Ninth Circuit's use of subjective factors, such as culture, alienage, and language difficulties, is appropriate and fair. By using such factors, the court is recognizing that not all persons act or think alike. The court is acknowledging that, occasionally, certain subjective factors, such as culture or alienage, may affect an individual's perception of a certain situation. The inclusion of these factors in the custody analysis does not unfairly burden the Government because, before the court uses these factors to analyze the situation, the court insists that the police know of these subjective factors through their own investigation.[114] Furthermore, the Government can easily prevent the later suppression of a suspect's statement, by merely taking the precaution of providing *Miranda* warnings to a suspect who, arguably, may have been in custody at the time of the interrogation.

IV. INTERROGATION

A. THE MEANING OF INTERROGATION

Interrogation under *Miranda* encompasses "express questioning or its functional equivalent."[115] The Court has defined "functional equivalent" as "any words or actions on the part of the police[116] (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[117] To deter-

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[113] *Id.* at 612 n.3.

[114] *Beraun-Panez*, 812 F.2d at 581.

[115] Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

[116] *Miranda* warnings are required when *police* are conducting a custodial interrogation of a suspect. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The warnings are required to safeguard the suspect's Fifth Amendment privilege during "incommunicado interrogation of individuals in a *police-dominated* atmosphere." *Id.* at 445 (emphasis added). If the interrogator is an undercover government agent and the suspect is unaware of this fact, no *Miranda* warnings need be given because the pressure of a "police-dominated atmosphere" is absent. Illinois v. Perkins, 496 U.S. 292, 296 (1990).

[117] *Innis*, 446 U.S. at 301. Because consent to search is not, in and of itself, a self-incriminating statement, a request by police for consent to search from the suspect

mine whether interrogation has occurred, courts may consider the intent of the police but the focus should be "primarily upon the perceptions of the suspect."[118]

The police are not expected to know the hidden idiosyncrasies of the suspect.[119] But unlike the objective standard used by most courts in the custody analysis, if the police have some knowledge about a suspect's "unusual susceptibility . . . to a particular form of persuasion,"[120] then this may be a critical factor in deciding "whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response . . ."[121]

Consequently, in the case of suspects from different cultures, the courts should ask: did the officer know of this suspect's unfamiliarity with the American system of justice, cultural fear of authority, or limited comprehension of English and if so, in light of these factors, should the officer have known that his words or actions were reasonably likely to elicit an incriminating response from this suspect?[122]

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does not constitute interrogation. United States v. Shlater, 85 F.3d 1251, 1256 (7th Cir. 1996); Cody v. Solem, 755 F.2d 1323, 1330 (8th Cir. 1985); Smith v. Wainright, 581 F.2d 1149, 1152 (5th Cir. 1978); United States v. Lemon, 550 F.2d 467, 472 (9th Cir. 1977); United States v. Goodridge, 945 F. Supp 359, 368 (D. Mass. 1996) (quoting United States v. Smith, 3 F.3d 1088, 1098 (7th Cir. 1993)). Some courts have held, however, that a request for a consent to search may require *Miranda* warnings before the government may use the consent to search in order to link the defendant to the searched item or location. *See* United States v. Henley, 984 F.2d 1040, 1043-44 (9th Cir. 1993).

[118] *Innis*, 446 U.S. at 301; *see also* United States v. Equihua-Juarez, 851 F.2d 1222, 1226 (9th Cir. 1988) ("[C]ourts should 'focus primarily upon the perceptions of the suspect, rather than the intent of the police.'" (quoting *Innis*, 446 U.S. at 301)); United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986) ("The officer's intent in asking the question is relevant, but not decisive.") (citing United States v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1981)).

[119] *Innis*, 446 U.S. at 301-02 ("[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.") (emphasis omitted).

[120] *Innis*, 446 U.S. at 302 n.8.

[121] *Id. See also* Jonathan L. Marks, Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition of Interrogation*, 87 MICH. L. REV. 1073, 1102 n.185 (1989).

[122] *See generally* Marks, *supra* note 121, at 1102-03.

B. THE BORDER EXCEPTION

There are several exceptions to the requirement that *Miranda* warnings must be given before one is subjected to custodial interrogation. Routine questioning at the international border is one such exception.[123] Some courts have decided that *Miranda* does not apply to border questioning because the environment is not custodial.[124] Other courts have held that, although custodial, a border interrogation may be exempt from *Miranda* requirements for security reasons.[125]

The Government may question individuals seeking entry into the United States about their citizenship and travel plans without first warning the travelers of their *Miranda* rights.[126] Even secondary interviews might not be covered by *Miranda* because they are viewed as "routine."[127] Although it is difficult to understand how moving a suspect to a separate area and detaining him for questioning could be reviewed as "routine," the courts have ruled that due to security concerns, greater restrictions on one's freedom of movement at the border will be

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[123] United States v. Berish, 925 F.2d 791, 797 (5th Cir. 1991); United States v. Garcia, 905 F.2d 557 (1st Cir. 1990) (per curiam); United States v. Lueck, 678 F.2d 895, 899 (11th Cir. 1982); United States v. Henry, 604 F.2d 908, 915 (5th Cir. 1979).

[124] *See, e.g.*, United States v. Moya, 74 F.3d 1117, 1119 (11th Cir. 1996); United States v. Manasen, 909 F.2d 1357, 1358-59 & nn.1-2 (9th Cir. 1990); United States v. Salinas, 439 F.2d 376, 379-80 (5th Cir. 1971); United States v. Pigott, No. 93-CR-199S(H), 1994 U.S. Dist. LEXIS 6922, at *9 (W.D.N.Y. Jan. 28, 1994).

[125] *See* Carroll v. United States, 267 U.S. 132, 154 (1925) ("National self protection reasonably requir[es] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."). *See also* United States v. Azoroh, Nos. 91-2074, 91-2075, 1992 U.S. App. LEXIS 7423, at *3 (6th Cir. April 9, 1992); United States v. Silva, 715 F.2d 43, 46-47 (2d Cir. 1983).

[126] *Moya*, 74 F.3d at 1120; *Azoroh*, 1992 U.S. App. LEXIS 7423, at *3; *Manasen*, 909 F.2d at 1358; *Silva*, 715 F.2d at 46; *Pigott*, 1994 U.S. Dist. LEXIS 6922, at *8-9; *cf.* United States v. Vigil-Montanel, 753 F.2d 996, 998 (11th Cir. 1985) (holding that questioning at an airport security checkpoint is analogous to routine questioning at the border and therefore does not require *Miranda* warnings); United States v. Zapata, 647 F. Supp. 15, 19 (S.D. Fla. 1986) (holding that U.S. Customs Officers may lawfully question individuals *departing* the country without first warning them of their *Miranda* rights).

[127] *Moya*, 74 F.3d at 1120 ("[A] secondary interview is part of the border routine and does not require Miranda warnings."); *Silva*, 715 F.2d at 47 ("Such routine questions are necessary to enforce immigration and customs regulations, and border officials are charged with the responsibility of detaining those seeking admission in order to determine their admissibility."); *see also Henry*, 604 F.2d at 920.

viewed as "routine," and not custodial.[128] If the encounter goes beyond routine, however, *Miranda* warnings are required.[129]

C. THE ROUTINE BOOKING QUESTION EXCEPTION

Another exception involves routine booking questions. In *Pennsylvania v. Muniz*,[130] a plurality of the Supreme Court recognized that questions of an arrestee regarding biographical data are exempt from the requirements of *Miranda*, not because these questions do not constitute interrogation, but because they are asked for administrative, rather than investigative, purposes.[131]

There are limits, however, to the booking exception. Government agents do not have free rein to ask any question they choose during the booking process. As a plurality of the Court declared, "'the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.'"[132]

Consequently, this exception is inapplicable when police officers knew or should have known that the questions they asked during the booking process "were reasonably likely to elicit an

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[128] *Moya*, 74 F.3d at 1120; *see also Pigott*, 1994 U.S. Dist. LEXIS 6922, at *9.

[129] For example, "when a person is discovered to be concealing suspicious materials, or 'when a person is taken to a private room and strip searched,'" *Miranda* may apply. United States v. McCain, 556 F.2d 253, 255 (5th Cir. 1977) (quoting *Salinas*, 439 F.2d at 380) (emphasis omitted); *see also Moya*, 74 F.3d at 1120 ("[Q]uestioning at the border must rise to a distinctly accusatory level before it can be said that a reasonable person would feel restraints on his ability to roam to the 'degree associated with formal arrest.'" (quoting Minnesota v. Murphy, 465 U.S. 420, 430 (1984)); United States v. Moody, 649 F.2d 124, 127-28 (2d Cir. 1981).

[130] 496 U.S. 582 (1990) (plurality opinion).

[131] *Id.* at 601-02. Biographical data includes the individual's name, address, height, weight, eye color, date of birth, and current age. *Id.* at 601. This exception "exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" *Id.* at 601 (quoting Brief for United States as *Amicus Curiae* at 12, *Muniz* (No. 89-213)); *see also, e.g.*, United States v. D'Anjou, 16 F.3d 604, 608 (4th Cir. 1994) (quoting *Muniz*, 496 U.S. at 601). On the other hand, some lower courts do not view booking questions as interrogation. Rather these courts view the "routine gathering of biographical data" as an administrative matter which, therefore, lacks the likelihood of eliciting an incriminating response. *See, e.g.*, United States v. Salgado, No. 92-30199, 1993 U.S. App. LEXIS 12322, at *8-*9 (9th Cir. 1993).

[132] *Muniz*, 496 U.S. at 602 n.14 (quoting Brief for United States as *Amicus Curiae* at 13, *Muniz* (No. 89-213)).

incriminating response."[133] The inquiry is an objective one: based on the totality of the circumstances, should the officers have known that their questions were likely to elicit incriminating information?[134] The officers' intent is relevant but not determinative.[135]

To ascertain whether the police have exceeded the boundaries of the booking exception, the courts should first consider "the nature of the information being sought."[136] If it goes beyond "'simple identification information,'"[137] then it probably goes beyond the parameters of the exception. Next, the courts should consider the nature of the question: "whether the inquiry was 'innocent of any investigative purpose?'"[138] "The relationship of the question asked to the crime suspected is highly

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[133] Hughes v. State, 695 A.2d 132, 140 (Md. 1997), *cert. denied* 118 S. Ct. 459 (1997). This case notes a distinction between the test for interrogation set forth in *Muniz* and the one set forth in *Innis*. *Id.* at 137-38. In *Muniz*, the Court defined interrogation as questions "designed to elicit incriminating admissions." *Muniz*, 496 U.S. at 602 n.14. In *Innis*, the Court defined interrogation as any questions that the police know or should know are "reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

The Maryland court noted that:

> The difference between the two standards is that the former limits the scope of the booking question exception based solely on the actual intent of the police officer in posing the question, while the latter restricts the exception based on an objective assessment of the likelihood, in light of both the context of the questioning and the content of the question, that the question will elicit an incriminating response.

Hughes, 695 A.2d at 138.

The court candidly admits that the distinction has gone largely unnoticed. *Id.* For the most part, lower courts rely on the *Innis* test to define interrogation and to determine whether the booking exception should apply. *See, e.g.*, Cornell Jr. v. Thompson, 63 F.3d 1279, 1286 (4th Cir. 1995); United States v. D'Anjou, 16 F.3d 604, 608 (4th Cir. 1994); United States v. Smith, 3 F.3d 1088, 1098 (7th Cir. 1993); United States v. Henley, 984 F.2d 1040, 1043 (9th Cir. 1993); United States v. Middleton, No. 90-30177, 1990 WL 198407, at *3 (9th Cir. Dec. 11, 1990); United States v. Goodridge, 945 F. Supp. 359, 365 (D. Mass. 1996); Thompson v. United States, 821 F. Supp. 110, 119-20 (W.D.N.Y. 1993).

[134] United States v. Doe, 878 F.2d 1546, 1551 (1st Cir. 1989).

[135] *Id.*

[136] United States v. Minkowitz, 889 F. Supp. 624, 627 (E.D.N.Y. 1995).

[137] *Id.* (quoting United States *ex rel.* Hines v. LaVallee, 521 F.2d 1109, 1113 n.2 (2d Cir. 1975)).

[138] *Id., quoting* United States v. Carmona, 873 F.2d 569, 573 (2d Cir. 1989) (quoting United States v. Gotchis, 803 F.2d 74, 79 (2d Cir. 1986)).

relevant."[139] If the information sought is closely tied to the crime being investigated, there is a strong inference that the officer should have known that his inquiry was "'reasonably likely to elicit an incriminating response from the suspect.'"[140]

In the context of alienage, the courts have been particularly strict about the application of the exception.[141] In *United States v. Gonzalez-Sandoval*,[142] the Ninth Circuit explained that the booking "exception is inapplicable . . . where the elicitation of information regarding immigration status is reasonably likely to inculpate the respondent."[143]

In this case, Gonzalez was arrested when his parole officer suspected he was illegally in the United States.[144] After the defendant's arrest, a Border Patrol agent visited him in a holding cell.[145] Without providing *Miranda* warnings, the agent "asked Gonzalez where he was born and whether he had documents verifying his legal entry into the United States."[146] Gonzalez responded to these questions.[147] Additionally the agent asked Gonzalez if he had ever used any other names.[148] Gonzalez told

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[139] United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983) (citing United States v. Booth, 669 F.2d 1231, 1237-38 (9th Cir. 1981)).

[140] *Minkowitz*, 889 F. Supp. at 627, *quoting* Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)); *see also* United States v. Garcia, No. 96 Cr. 115 (RPP), 1996 U.S. Dist LEXIS 14035, at *28 (S.D.N.Y. Sept. 25, 1996) (finding that questions relating to the residence of the defendant were not incriminating because they were not aimed at investigating the suspected crimes but rather at obtaining such information in order to complete a "pedigree sheet").

[141] For cases involving government questioning on matters other than alienage and citizenship in which the court found the booking exception inapplicable, see United States v. Henley, 984 F.2d 1040, 1043 (9th Cir. 1993) (car ownership); United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986) (address); *Minkowitz*, 889 F. Supp. at 627 (possession of credits cards); Hughes v. State, 695 A.2d 132, 140 (Md. 1997) (drug usage); but for a contrary view on questioning about drug usage see State v. Geasley, 619 N.E. 2d 1086 (Ohio 1993).

[142] 894 F.2d 1043 (9th Cir. 1990).

[143] *Id.* at 1046; *see also* United States v. Equihua-Juarez, 851 F.2d 1222, 1226 (9th Cir. 1988); *Mata-Abundiz*, 717 F.2d at 1280.

[144] *Gonzalez-Sandoval*, 894 F.2d at 1046.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

the agent that he had previously used an alias.[149] The agent ran a records check under the alias and found the record of the defendant's deportation.[150] At that time, the agent first advised Gonzalez of his *Miranda* rights.[151] Gonzalez was then charged with being a deported alien found in the United States.[152]

The Ninth Circuit suppressed the responses Gonzalez provided before he was warned of his *Miranda* rights.[153] The court found that because the agent suspected that Gonzalez was in the United States illegally and because the questions the agent asked were reasonably likely to elicit responses which would prove the crime with which Gonzalez was ultimately charged, Gonzalez was interrogated.[154] Consequently, the agent should have warned Gonzalez of his *Miranda* rights before undertaking this interrogation.

In *United States v. Doe*,[155] the First Circuit applied a similar rule and held the booking exception inapplicable when the Coast Guard questioned defendants about their citizenship without warning them of their *Miranda* rights.[156] In *Doe*, the Coast Guard rescued the defendants from their sinking sailboat and arrested them when the Guard saw bales of marijuana rising to the surface of the water.[157] The court refused to apply the booking exception to the Coast Guard's questions regarding the defendant's citizenship for two reasons. First, no administrative need to ask these questions existed at the time they were asked, as the authorities detained the defendants on a Coast Guard vessel, rather than at a police station.[158] Second, the court explained that

> questions about citizenship, asked on the high seas, of a person present on a *foreign* vessel with drugs aboard, would (in our view) seem 'reasona-

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[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1047.
[154] *Id.*
[155] 878 F.2d 1546 (1st Cir. 1989).
[156] *Id.* at 1551.
[157] *Id.* at 1548.
[158] *Id.* at 1551.

bly likely to elicit an incriminating response,' because the answers to these questions could determine whether the United States had jurisdiction to prosecute these individuals for drug smuggling.[159]

Although these cases were decided prior to the Supreme Court's explanation of the booking exception in *Pennsylvania v. Muniz*,[160] courts have continued to rely on their reasoning after *Muniz*. In *Thompson v. United States*,[161] for example, a federal immigration officer questioned the defendant about his citizenship during the course of investigating drug trafficking and immigration offenses.[162] The district court found the booking exception inapplicable because the agent's question was directly related to the crimes with which the defendant was ultimately charged, making it reasonably likely that the response would be incriminating.[163] Consequently, this question constituted interrogation.[164] The court found the booking exception inapplicable here because the agent's question about this defendant's immigration status was reasonably likely to inculpate the defendant.[165]

V. WARNINGS

Miranda warnings need not be given in any specific way.[166] "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."[167] As long as the warnings "reasonably 'conve[y] to [a suspect] his rights,'"[168] *Miranda* is satisfied.

To determine whether a government agent reasonably conveyed *Miranda* warnings to a suspect, the court examines the

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[159] *Id.* (quoting United States v. Mata Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983)).

[160] 496 U.S. 582, 601-02 (1990) (Brennan, J., plurality opinion).

[161] 821 F. Supp. 110 (W.D.N.Y. 1993), *aff'd*, 35 F.3d 100 (2d Cir. 1994).

[162] *Id.* at 120-21; *see also* United States v. Parra, 2 F.3d 1058, 1068 (10th Cir. 1993).

[163] *Thompson*, 821 F. Supp. at 120-21.

[164] *Id.* at 121.

[165] *Id.* at 120-21.

[166] California v. Prysock, 453 U.S. 355, 359 (1981) (per curiam).

[167] *Id.*

[168] Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (quoting *Prysock*, 453 U.S. at 361) (alteration in original).

language that the agent used to communicate those warnings.[169] If an agent communicates the warnings in a foreign language due to the suspect's lack of proficiency in English,[170] the court will analyze the foreign language used by the agents.[171]

The translation of a suspect's *Miranda* rights need not be perfect. If the defendant is told that: (1) he need not talk to the authorities; (2) if he does, his statements will be used against him; and (3) he has a right to an attorney, the court will likely find the advisal acceptable. Even if the translator conveys rights in a dialect different from the suspect's, or with grammatical errors or a poor accent, the translation will not be constitutionally defective as long as the translator reasonably conveys the gist of the rights.[172]

If the translation of the rights under this language does not adequately convey to the individual his rights under *Miranda*, then the court will find the warnings defective and will suppress the statements made by the suspect.[173] In *People v. Mejia-*

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[169] *Eagan*, 492 U.S. at 203; *Prysock*, 453 U.S. at 360-61.

[170] Language barriers also may affect the validity of a suspect's waiver of *Miranda* rights. For a fuller discussion of this topic, see *infra* notes 171-90 and accompanying text. "When a suspect cannot communicate in English, law enforcement officers should give the *Miranda* warnings in a language the suspect understands to ensure that the suspect comprehends the *Miranda* warnings and can knowingly and intelligently waive the *Miranda* rights." State v. Santiago, 556 N.W.2d 687, 690 (Wis. 1996).

[171] *See, e.g.*, United States v. Hernandez, 93 F.3d 1493, 1501-02 (10th Cir. 1996); United States v. Toscano-Padilla, 996 F.2d 1229 (9th Cir. June 16, 1993) (unpublished); United States v. Soria-Garcia, 947 F.2d 900, 901-02 (10th Cir. 1991); United States v. Yunis, 859 F.2d 953, 958-59 (D.C. Cir. 1988); United States v. Yousef, 925 F. Supp. 1063, 1077 (S.D.N.Y. 1996); United States v. Higareda-Santa Cruz, 826 F. Supp. 355, 359-60 (D. Or. 1993); People v. Marquez, 822 P.2d 418, 426 (Cal. 1992), *habeas corpus granted sub nom. In re* Marquez, 822 P.2d 435 (Cal. 1992); People v. Mejia-Mendoza, 965 P.2d 777 (Colo. 1998) (en banc); Commonwealth v. Perez, 581 N.E.2d 1010, 1014 (Mass. 1991); Commonwealth v. Colon-Cruz, 562 N.E.2d 797, 803 (Mass. 1990); Commonwealth v. Alves, 625 N.E.2d 559, 560-61 (Mass. App. Ct. 1993); State v. Dominguez-Ramirez, 563 N.W.2d 245, 250, 252-53 (Minn. 1997); State v. Delbosque, No. 18872-4-II, 1997 Wash. App. LEXIS 612, at *11 (Wash. Ct. App. Apr. 25, 1997); *Santiago*, 556 N.W.2d at 690, 696.

[172] United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990).

[173] *See, e.g., Higareda-Santa Cruz*, 826 F. Supp. at 359-60. "The translation of a suspect's *Miranda* rights need not be a perfect one, so long as the defendant understands that he does not need to speak to police and that any statement he makes may be used against him." *Hernandez*, 913 F.2d at 1510; *see also Hernandez*, 93 F.3d at 1502 (citing *Soria-Garcia*, 947 F.2d at 901-03); *Mejia-Mendoza*, 965 P.2d at 777; State v. Teran, 862 P.2d 137, 139 (Wash. Ct. App. 1993) (quoting *Hernandez*, 913 F.2d at

Mendoza,[174] the Supreme Court of Colorado ruled that the government failed to properly advise the defendant of his *Miranda* rights. The Court found that the translator lacked experience in translating and in assisting authorities in explaining *Miranda* rights to suspects.[175] Consequently his translation of the *Miranda* rights was inaccurate and embellished.[176] A tape recording of the interrogation disclosed that the translator's statements did not reasonably convey the *Miranda* rights to this defendant.[177] Additionally, the translator volunteered information to the defendant and to the police.[178] He actively encouraged the defendant to co-operate with the police, thereby violating his role as an impartial conveyor of information from one source to the other.[179]

The court may also examine the qualifications and status of the person who translates during the interrogation. If the interpreter is inexperienced in either translating or in helping authorities explain *Miranda* rights to a suspect, his translation may be inadequate.[180] On the other hand, the United States government is not constitutionally required to employ a certified interpreter at a police interrogation.[181] The fact of whether an interpreter is "certified" may be relevant to, but not determinative of, the issue of his competence.[182]

As a matter of fundamental fairness, courts expect the interpreter to be impartial. Although the setting of police inter-

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1510). *See also* People v. Ripic, 182 A.D. 2d 226, 236-37 (N.Y. 1992) (finding the state's failure to provide an appropriate interpreter for a hearing-impaired suspect rendered the *Miranda* warnings defective). For an interesting discussion of the constitutional rights of the deaf and hearing-impaired, see Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice if You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163 (1994).

[174] 965 P.2d 777 (Colo. 1998).

[175] *Id.* at 781.

[176] *Id.* at 782.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 781-82.

[180] *Id.* at 781.

[181] Commonwealth v. Colon-Cruz, 562 N.E.2d 797, 803 (Mass. 1990); State v. Delbosque, No. 18872-4-II, 1997 Wash. App. LEXIS 612, at *11 (Wash. Ct. App. Apr. 25, 1997).

[182] *Delbosque*, 1997 Wash. App. LEXIS 612, at *11-*12.

rogation is not as formal as that of the courtroom, the interpreter is still expected to serve as a neutral conveyor of information between the suspect and the police.[183] He is expected to translate exactly what he hears and is not permitted to add or delete any information.[184]

It is not unconstitutional, however, for a police officer to serve as an interpreter during custodial interrogation.[185] But if the point of *Miranda* is to dispel the compulsion in the inherently coercive environment of custodial interrogation,[186] it is curious that courts are not impressed by the likelihood of increasing that compulsion, by allowing police officers to serve as translators during the interrogation.[187] Additionally it is curious that police officers, who are "engaged in the often competitive enterprise of ferreting out crime,"[188] are classified as impartial[189] when translating for suspects during incommunicado interrogation.

The courts do discourage the use of a confidential informant or a co-defendant as a translator. Although there is no *per se* rule that constitutionally prohibits an informant or co-defendant from serving as an interpreter during custodial interrogation, courts encourage the government to find better alternatives.[190]

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[183] *Mejia-Mendoza*, 965 P.2d at 781.

[184] *Id.*

[185] People v. Marquez, 822 P. 2d 418, 427 (Cal. 1992), *habeas corpus granted sub nom. In re* Marquez, 822 P.2d 435 (Cal. 1992); *Colon-Cruz*, 562 N.E.2d at 803-04; Commonwealth v. Alves, 625 N.E.2d 559, 561 (Mass. Ct. App. 1993); State v. Dominguez-Ramirez, 563 N.W.2d 245, 255 (Minn. 1997); Commonwealth v. Carrillo, 465 A.2d 1256, 1264 (Pa. Super. 1983); *Delbosque*, 1997 Wash. App. LEXIS 612, at *12. Some jurisdictions have statutes prohibiting police officers from serving as interpreters during custodial interrogation of a suspect. *See, e.g.*, D.C. CODE ANN. § 31-2702(e) (1981); MINN. STAT. § 611.30-.33 (1996). *See also* Barrera v. United States, 599 A.2d 1119, 1130-33 (D.C. App. 1991) (applying D.C. CODE ANN. § 31-2702(e)); *Dominguez-Ramirez*, 563 N.W.2d at 253 (applying MINN. STAT. § 611.30-.33); State v. Mitjans, 408 N.W.2d 824, 830 (Minn. 1987).

[186] *See supra* notes 15-16 and accompanying text.

[187] *Dominguez-Ramirez*, 563 N.W.2d at 255; *Carrillo*, 465 A.2d at 1264; *Delbosque*, 1997 Wash. App. LEXIS 612, at *12.

[188] Johnson v. United States, 333 U.S. 10, 14 (1948).

[189] *Delbosque*, 1997 Wash App. LEXIS 612, at *12.

[190] United States v. Caba, 955 F.2d 182, 185-86 (2d Cir. 1991); United States v. Villegas, 928 F.2d 512, 518 (2d Cir. 1991). *But cf.* State v. Cervantes, 814 P.2d 1232,

VI. ASSERTION OF RIGHTS

A. RIGHT TO REMAIN SILENT

Once an individual in custody has been provided *Miranda* warnings and asserts his right to remain silent,[191] all police interrogation of him must stop.[192] In order to introduce statements

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1234-35 (Wash. Ct. App. 1991) (finding a violation of due process for the police to use a potential co-defendant as an interpreter to advise the defendant of his *Miranda* rights).

[191] The Supreme Court has not yet decided whether an individual must assert the right to silence unequivocally. In *Davis v. United States*, 512 U.S. 452, 459 (1994), the Court held a valid assertion of counsel under *Miranda* requires the suspect to "unambiguously request counsel . . . . [H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *See infra* notes 211-21 and accompanying text.

A number of courts have adopted a similar rule for the right to remain silent. *See, e.g.*, United States v. Mikell, 102 F.3d 470, 476-77 (11th Cir. 1996); United States v. Banks, 78 F.3d 1190, 1198 (7th Cir. 1996), *vacated*, Mills v. United States, 117 S. Ct. 478 (1996), *remand*, 122 F.3d 346 (1997); United States v. Johnson, 56 F.3d 947, 955 (8th Cir. 1995) (citing United States v. Thompson, 866 F.2d 268, 272 (8th Cir. 1989)); United States v. Maisonneuve, 950 F. Supp. 1280, 1285 (D. Vt. 1996); United States v. Andrade, 925 F. Supp. 71, 79-80 (D. Mass. 1996), *aff'd*, 135 F.3d 104 (1st Cir. 1998); State v. Owen, 696 So. 2d 715, 717-18 (Fla. 1997), *cert. denied*, 522 U.S. 1002 (1997); State v. Williams, 535 N.W.2d 277, 285 (Minn. 1995); State v. Bacon, 658 A.2d 54, 66 (Vt. 1995). The question of whether the *Davis* standard should be applied to the assertion of the right to silence remains open in the Ninth Circuit. United States v. Soliz, 129 F.3d 499, 504 n.3 (9th Cir. 1997). *But see* Evans v. Demosthenes, 902 F. Supp. 1253, 1259 (D. Nev. 1995), *aff'd*, 98 F.3d 1174 (9th Cir. 1996), *cert. denied*, 521 U.S. 1108 (1997) (holding the *Davis* standard applicable to the right to remain silent).

For a discussion of this issue, see Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-*Davis *Analysis and Proposal*, 29 SETON HALL L. REV. 558, 581 (1998), wherein the author disagrees with the above decisions and proposes a different approach to ambiguous assertions of the right to remain silent. He suggests that an individual would invoke the right to remain silent "by any words or actions, including a refusal to answer questions, that could reasonably be interpreted by the police as intended to invoke the right to silence." *Id.* at 581. An invocation would be considered clear if there could be no "'reasonable doubt' of the suspect's intent to invoke the right to remain silent." *Id.* at 582. An invocation would be considered ambiguous if it left the "police 'reasonably uncertain' whether the suspect intended to invoke the right to silence." *Id.* at 583. In the event of an ambiguous invocation, the police could ask clarifying questions of the suspect. *Id.* at 583-85.

[192] Miranda v. Arizona, 384 U.S. 436, 473-74 (1966). If the police provide the suspect with defective warnings or the suspect asserts his rights and the police, nonetheless, continue to interrogate him, those statements will be suppressed in the Government's case-in-chief. The Government, however, may use the statements to impeach the defendant if he testifies in his own behalf. Oregon v. Hass, 420 U.S. 714.

made by a suspect after he expresses his desire to remain silent, the government must prove that the suspect's "'right to cut off questioning' was 'scrupulously honored.'"[193] To meet this burden, the government must establish that after a suspect asserted his right to silence,[194] a "significant period of time" passed before a government agent again gave the suspect *Miranda* warnings, the suspect validly waived his rights, and the agent questioned the suspect about an unrelated crime.[195]

The police do not have to scrupulously honor a person's demand for silence, however, if they do not "interrogate" him any further. If the court determines that an officer's statements to, or questions of, the suspect did not constitute interrogation, the responses are admissible.[196]

Consequently, the Ninth Circuit has held that after an individual had asserted his right to remain silent, an officer could permissibly tell him that "the agents had seized approximately 600 pounds of cocaine," and that he was "in serious trouble."[197] According to the Ninth Circuit, such statements do not constitute interrogation and are merely statements attendant to arrest and custody. It is difficult to understand how such statements were not "reasonably likely to elicit an incriminating response

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722-23 (1975); Harris v. New York, 401 U.S. 222, 226 (1971). On the other hand, an involuntary statement may not be used for any purpose, including impeachment of the defendant. Mincey v. Arizona, 437 U.S. 385, 397-98 (1978); Henry v. Kernan, No. 98-15768, 1999 U.S. App. LEXIS 26776, at *3-*4 (9th Cir. Oct. 25, 1999).

[193] Michigan v. Mosley, 423 U.S. 96, 104 (1975) (quoting *Miranda*, 384 U.S. at 473, 478; People v. Montano, 226 Cal. App. 3d 914, 930-31, (1991)).

[194] A suspect may choose to "selectively waive his *Miranda* rights by agreeing to answer some questions but not others." *Soliz*, 129 F.3d at 503. An officer must "scrupulously honor" the defendant's decision to remain silent on certain subjects and answer questions about other subjects. *Id.* at 504. If the officer does not "scrupulously honor" the defendant's decision and proceeds to question the defendant about matters other than the ones he indicated a willingness to discuss, the responses to those impermissible questions will be suppressed. *Id.*

[195] *Mosley*, 423 U.S. at 106; *see also* Campaneria v. Reid, 891 F.2d 1014, 1021 (2d Cir. 1989) (citing *Mosley*, 423 U.S. at 103-04); State v. Azuara, No. C2-96-113, 1996 WL 706875, at *3 (Minn. Ct. App. Dec. 10, 1996) (unpublished).

[196] *See, e.g.*, United States v. Moreno-Flores, 33 F.3d 1164, 1169-70 (9th Cir. 1994); United States v. Salgado, No. 92-30199, 1993 WL 164682, at *3 (9th Cir. May 13, 1993); State v. Salgado, 473 So. 2d 84, 89-90 (La. Ct. App. 1985).

[197] *Moreno-Flores*, 33 F.3d at 1169.

from the suspect."[198] If the focus is "primarily upon the perceptions of the suspect,"[199] it seems highly foreseeable that a suspect would be motivated to defend himself against such serious allegations.

The court also held that the officer's question regarding how the suspect's night was did not constitute interrogation, because this question was "innocuous" and unlikely to elicit an incriminating response from the suspect.[200]

Additionally, if an individual asserts his right to remain silent, a government agent may ask booking questions because generally these questions are asked for administrative purposes and are not reasonably likely to elicit an incriminating response from the suspect.[201] On the other hand, a government agent may not permissibly ask booking questions for an investigatory, rather than an administrative purpose after a suspect has asserted the right to remain silent.[202]

B. FIFTH AMENDMENT RIGHT TO COUNSEL

If an individual who is undergoing custodial interrogation requests an attorney,[203] "'the interrogation must cease until an attorney is present.'"[204] Once a suspect requests the assistance of counsel during an interrogation,[205] the police may not re-initiate

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[198] Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[199] *See* United States v. Equiha-Juarez, 852 F.2d 1222, 1226 (9th Cir. 1988) (quoting *Innis*, 446 U.S. at 301-02 n.7).

[200] *Moreno-Flores*, 33 F.3d at 1170.

[201] *Salgado*, 1993 WL 164682, at *3-*4; Gladden v. Roach, 864 F.2d 1196, 1198 (5th Cir. 1989); State v. Geasley, 619 N.E.2d 1086, 1089-90 (Ohio 1993).

[202] United States v. Poole, 794 F.2d 462, 467, *amended*, 806 F.2d 853 (9th Cir. 1986).

[203] This right to counsel emanates from *Miranda v. Arizona* and the Fifth Amendment's protection against compelled self-incrimination. 384 U.S. 436, 470 (1966); *see also* Michigan v. Jackson, 475 U.S. 625, 629 (1986).

[204] Edwards v. Arizona, 451 U.S. 477, 482 (1981) (quoting *Miranda*, 384 U.S. at 474).

[205] Because consent is not, in and of itself, self-incriminating, a request for consent is not interrogation. *See supra* note 117 and accompanying text. Consequently, if the suspect asserts his right to counsel after being mirandized, the authorities may still request his consent to search. United States v. Shlater, 85 F.3d 1251, 1256 (7th Cir. 1996).

questioning even if the suspect has consulted an attorney.[206] Counsel must be present at the interrogation.[207] Furthermore, the authorities may not re-interrogate the individual who has requested counsel about the same crime or even about a "separate investigation,"[208] unless the individual initiates[209] the conversation with the police and validly waives his rights.[210]

The suspect must unambiguously request counsel during the interrogation.[211] The test for whether the request was unambiguous is objective.[212] The suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[213] If the request is am-

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[206] Minnick v. Mississippi, 498 U.S. 146, 153 (1990); United States v. Chan, No. 97 Cr. 319 (MBM), 1997 U.S. Dist. LEXIS 17520, at *20 (S.D.N.Y. Nov. 6, 1997) (finding that, after asserting his right to counsel, the defendant Lee did not initiate any further discussion with the government agent when he conversed with his attorney over the telephone and then asked the agent to do the same).

[207] *Minnick*, 498 U.S. at 152. "'Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.'" *Id.* at 154 (quoting *Miranda*, 384 U.S. at 470); Commonwealth v. Santiago, 591 A.2d 1095, 1102-03 (Pa. Super. Ct. 1991) ("Proof that counsel had been requested, that the police had reinitiated questioning thereafter, and that counsel was not actually *present* during any such interrogation, dispositively establishes that the fifth amendment right to counsel as currently expounded by the Supreme Court was violated.").

[208] Arizona v. Roberson, 486 U.S. 675, 683 (1988).

[209] To "initiate" a discussion with police after he has asserted a right to counsel, the suspect must manifest "a willingness and a desire for a generalized discussion about the investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (plurality opinion); *see, e.g.*, United States v. Camacho, 930 F.2d 29 (9th Cir. 1991) (unpublished table opinion).

[210] To be valid, the waiver must be "'knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.'" *Bradshaw*, 462 U.S. at 1046 (quoting Edwards v. Arizona, 451 U.S. 477, 486 n.9 (1981)).

[211] Davis v. United States, 512 U.S. 452, 459 (1994).

[212] *Id.* (citing Connecticut v. Barrett, 479 U.S. 523, 529 (1987)); *see also* Diaz v. Senkowski, 76 F.3d 61, 64 (2d Cir. 1996) ("In the absence of . . . a clear statement, the *Davis* opinion, however, tells us that a suspect's intent is not the controlling factor.").

[213] *Davis*, 512 U.S. at 459; *see also* United States v. Muhammad, 120 F.3d 688, 698 (7th Cir. 1997) (holding that the words "an attorney" were not an unambiguous request for counsel); *Diaz*, 76 F.3d at 63 n.1, 65 (holding that "Do you think I need a lawyer?" was not an unambiguous request for counsel); Lord v. Duckworth, 29 F.3d 1216, 1220-21 (7th Cir. 1994) (holding that "I can't afford a lawyer but is there any-

biguous, the authorities are entitled to continue the interrogation.[214] They are not required to ask the suspect any clarifying questions in an effort to eliminate the ambiguity.[215]

Of course, this rule disadvantages those who are unfamiliar with the American legal system or those whose first language is not English because they may not know how to communicate an unequivocal request.[216] Furthermore, when a suspect does not speak English and the assertion is made in a foreign language, its meaning may be unclear and may depend on such factors as inflection, dialect, or context.[217] Additionally, people of certain

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way I can get one?" was not an unambiguous request for counsel); Valdez v. State, 900 P.2d 363, 373-74 (Okla. Crim. App. 1995) (holding primarily Spanish-speaking defendant's statement that he had signed a waiver form "because I understand it something about a lawyer and he want to ask me questions and that's what I'm looking for a lawyer" to be ambiguous); *cf.* United States v. Doherty, 126 F.3d 769, 774 (6th Cir. 1997), *cert. denied*, 524 U.S. 917 (1998) (holding that Native American defendant's statement "that his mother was going to retain [an attorney]" "failed to invoke his right to counsel at all").

[214] *Davis*, 512 U.S. at 459.

[215] *Id.* at 461.

[216] As Justice Souter noted in his concurring opinion in *Davis*:

> [C]riminal suspects who may (in *Miranda*'s words) be "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language; many are "woefully ignorant," and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.

Davis, 512 U.S. at 469-70 (Souter, J., concurring) (citations omitted); *see also id.* at 460 (recognizing that the *Davis* rule will disadvantage defendants with a "lack of linguistic skills"); United States v. Prestigiacomo, 504 F. Supp. 681, 683 (E.D.N.Y. 1981) (declaring, prior to *Davis*, that where the "[d]efendant was in a strange country, spoke no English and was undoubtedly unfamiliar with the rights of the accused under American law[,] [i]t would hardly be fair to require such a suspect to formulate his desire for legal assistance in more formal or precise terms" than he did) (citation omitted); Janet Ainsworth, *In A Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 318-19 (1993); Samira Sadeghi, *Hung Up On Semantics: A Critique of* Davis v. United States, 23 HASTINGS CONST. L.Q. 313, 330 (1995).

[217] *See, e.g.*, United States v. Uribe-Galindo, 990 F.2d 522, 526 n.4 (10th Cir. 1993) (rejecting the defendant's argument that the Spanish interpreter who translated his question regarding the possibility of getting an attorney at some future point did not translate his question properly); United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992), *overruled by Davis*, 512 U.S. at 461; Ainsworth, *supra* note 216, at 287; Sadeghi, *supra* note 216 at 330-32; William G. Worobec, *Designing a "System for Idiots": An Analysis of the Impracticality of* Davis v. United States *on Ambiguous Waivers of the Right to the Presence of Counsel*, 16 N. ILL. U. L. REV. 239, 266-67 (1995).

cultures may deem a firm and unambiguous request to be disrespectful or dangerous and, therefore, will be unlikely to voice such a request.[218] Lastly, people of certain ethnic backgrounds are more likely to speak equivocally because they feel powerless in American society.[219] Their demeanor and speech reflect this lack of power.[220] The added feature of coercive custodial interrogation merely exacerbates these feelings of powerlessness and increases the likelihood that they will speak equivocally in this setting.[221]

As with the right to remain silent, if the suspect invokes his right to counsel, the authorities may still ask routine booking questions, as long as the questions are deemed to be non-incriminating.[222] If the suspect initially asserts his right to counsel, but, during biographical questioning, initiates discussions with the police and validly waives his right to counsel, the court will not suppress any statements the suspect subsequently makes.[223] As in other contexts, if the booking questions are intended for investigative rather than administrative purposes, the questions will be deemed interrogation.[224]

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[218] *See, e.g.*, United States v. Bing-Gong, 594 F. Supp. 248, 256 (N.D.N.Y. 1984) (where witnesses for the defendant testified that the defendant "characteristically will nod his head as if in agreement with the person to whom he is speaking while also saying 'yes, yes' even if he cannot understand what is being said to him"); Liu v. State, 628 A. 2d 1376, 1381 (Del. 1993) (where the defendant argued that it is "extremely unlikely that a native Chinese would understand that he could refuse to submit to official police requests . . . . [T]he Chinese socialization process would lead one to follow whatever—instructions—a law officer would require"); Le v. State, 947 P.2d 535, 543-44 (Okla. Crim. App. 1997) (where the defendant argued that "in Vietnam, citizens risked torture if they did not cooperate with police").

[219] Ainsworth, *supra* note 216, at 287.

[220] *Id.*

[221] *Id.* at 287-88.

[222] *See generally* United States v. Camacho, 930 F.2d 29 (9th Cir. 1991) (unpublished table opinion); United States v. Dougall, 919 F.2d 932, 935 (5th Cir. 1990); Gladden v. Roach, 864 F.2d 1196, 1198 (5th Cir. 1989); United States v. Hughes, 921 F. Supp. 656, 658 (D. Ariz. 1996).

[223] *See, e.g., Camacho*, 930 F.2d at 29; *Dougall*, 919 F.2d at 934-36; *Gladden*, 864 F.2d at 1197-98; *Hughes*, 921 F. Supp. at 658-59.

[224] *See* United States v. Parra, 2 F.3d 1058, 1068 (10th Cir. 1993); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1046 (9th Cir. 1990); United States v. Doe, 878 F.2d 1546, 1551 (1st Cir. 1989); United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983); United States v. Minkowitz, 889 F. Supp. 624, 627-28 (E.D.N.Y. 1995); *supra* note 132 and accompanying text.

VII. SIXTH AMENDMENT RIGHT TO COUNSEL

An "accused" may also enjoy a Sixth Amendment right to counsel. Unlike the Fifth Amendment right to counsel, which attaches at custodial interrogation, the Sixth Amendment right attaches only "'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'"[225] Moreover, this right to counsel is offense-specific.[226] Once an accused validly asserts his Sixth Amendment right to counsel for a specific offense, the authorities may not "deliberately elicit information"[227] from him about that offense.[228] After his assertion of his Sixth Amendment right to counsel, any waiver of this right by the accused during a police interrogation about the offense for which he invoked the right will be deemed invalid.[229]

On the other hand, if the accused invokes his Sixth Amendment right to counsel on a specific offense, the police

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[225] United States v. Gouveia, 467 U.S. 180, 188 (1984) (plurality opinion) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). *See* United States v. Doherty, 126 F.3d 769, 776-78 (6th Cir. 1997) (holding that a tribal court arraignment did not trigger the Sixth Amendment right to counsel).

[226] McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).

[227] The term "interrogation" is not nearly as relevant in the Sixth Amendment context as it is in the Fifth Amendment/*Miranda* context. Rather, for the Sixth Amendment to apply, the government official must deliberately elicit statements from an accused. Massiah v. United States, 377 U.S. 201, 204 (1964). Although courts use the term "interrogation" in Sixth Amendment cases, it is not the type of "interrogation" defined by the Supreme Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980). In Sixth Amendment cases, courts must focus on the Government's *purpose* and must determine whether the words or the actions of the Government were *intended* to elicit an incriminating response from the accused. Brewer v. Williams, 430 U.S. 387, 399 (1977). This contrasts with the "interrogation" defined in *Innis* as, "express questioning or its functional equivalent . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . . " *Innis*, 446 U.S. at 300-01.

For a discussion of this issue, see Yale Kamisar, Brewer v. Williams, Massiah *and* Miranda*: What is "Interrogation?" When Does it Matter?*, 67 GEO. L.J. 1, 33 (1978); Jonathan L. Marks, Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition of Interrogation*, 87 MICH. L. REV. 1073, 1075-76 nn.24-27 (1989); Welsh S. White, *Interrogation Without Questions*: Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209 (1980).

[228] Michigan v. Jackson, 475 U.S. 625, 635 (1986).

[229] *Id.*

may still interrogate him about unrelated, uncharged crimes.[230] Generally, because the Sixth Amendment is offense-specific and attaches only when a prosecution has begun, the person questioned has no Sixth Amendment right to counsel with respect to the unrelated offenses if no prosecution has begun on those charges.[231] A number of courts, however, have held that although the Sixth Amendment right to counsel does not attach to unrelated, uncharged offenses, it does attach to "'closely related' but uncharged crimes."[232]

The Supreme Court has held that the Sixth Amendment assertion of counsel on the charged crimes does not function as a *Miranda-Edwards* assertion of counsel on the uncharged offenses because the purpose behind the two rights differs.[233] The purpose behind the Sixth Amendment right to counsel is the protection of the layperson against a legal opponent, the government, once charges have been filed against him.[234] The purpose behind the *Miranda-Edwards* rule is the protection of a suspect in the inherently coercive environment of custodial interrogation.[235]

Applying this rule, the Second Circuit has held that interrogation by government agents about a defendant's immigration status after he had signed a form allowing his counsel to obtain INS records does not violate the Fifth Amendment right to counsel.[236] The court explained that the actions of the defen-

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[230] *McNeil*, 501 U.S. at 175-76.

[231] *Id.* at 175.

[232] United States v. Arnold, 106 F.3d 37, 40 (3d Cir. 1997), *aff'd*, 172 F.3d 41 (3d Cir. 1998); United States v. Doherty, 126 F.3d 769, 776 (6th Cir. 1997); United States v. Kidd, 12 F.3d 30, 33 (4th Cir. 1993); Hendricks v. Vasquez, 974 F.2d 1099, 1104 (9th Cir. 1992); United States v. Carpenter, 963 F.2d 736, 740 (5th Cir. 1992); United States v. Hines, 963 F.2d 255, 257-58 (9th Cir. 1992); United States v. Cooper, 949 F.2d 737, 743-44 (5th Cir. 1991); United States v. Mitcheltree, 940 F.2d 1329, 1342-43 (10th Cir. 1991); People v. Clankie, 530 N.E.2d 448, 452 (Ill. 1988); Whittlesey v. State, 665 A.2d 223, 235 (Md. 1995); State v. Tucker, 645 A.2d 111, 120-21 (N.J. 1994); *In re* Pack, 616 A.2d 1006, 1010-11 (Pa. Super. 1992).

[233] *McNeil*, 501 U.S. at 177-78; *Carpenter*, 963 F.2d at 739 (citing *McNeil*, 501 U.S. at 175-78).

[234] *McNeil*, 501 U.S. at 177-78.

[235] *Id.* at 178.

[236] United States v. Thompson, 35 F.3d 100, 104 (2d Cir. 1994) (quoting *McNeil*, 501 U.S. at 178).

dant and the attorney did not manifest a request for the assistance of counsel for the client during any subsequent custodial interrogation.[237]

Moreover, the Supreme Court has suggested, in dicta, that an individual may not assert the *Miranda-Edwards* Fifth Amendment right to counsel anticipatorily.[238] This right is intended to protect a person against the inherent pressures of custodial interrogation and "[m]ost rights must be asserted when the government seeks to take the action they protect against."[239] Consequently, many courts will not recognize a defendant's earlier anticipatory assertion of his Fifth Amendment right to counsel at a later police interrogation.[240]

There are two flaws in this reasoning. First, a defendant may not understand the difference between a Sixth Amendment and a Fifth Amendment right to counsel.[241] He may believe that once he has secured the assistance of an attorney, he has asserted his interest in being represented by that counsel for all purposes.[242] He may not know, or understand, that he must reassert that interest when the police interrogate him.[243] But the

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[237] *Id.* at 103-04.

[238] *McNeil*, 501 U.S. at 182 n.3 ("We have, in fact, never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' . . . .").

[239] *Id.*

[240] United States v. Grimes, 142 F. 3d 1342, 1348 (11th Cir. 1998), *cert. denied* 119 S. Ct. 840 (1999); United States v. Doherty, 126 F.3d 769, 774-75 (6th Cir. 1997); United States v. LaGrone, 43 F.3d 332, 339 (7th Cir. 1994); Alston v. Redman, 34 F.3d 1237, 1245-46 (3rd Cir. 1994); United States v. Wright, 962 F.2d 953, 955 (9th Cir. 1992); United States v. Caldwell, No. 94-310-01, 1995 U.S. Dist. LEXIS 10868, at *9 (E.D. Penn. Aug. 2, 1995); United States v. Barnett, 814 F. Supp. 1449, 1453-54 (D. Alaska 1992); People v. Calderon, 63 Cal. Rptr. 2d 104, 105-06 (Ct. App. 1997); Sapp v. State, 690 So. 2d 581, 585 (Fla. 1997), *cert. denied* 118 S.Ct. 116 (1997); Sauerheber v. State, 698 N.E. 2d 796, 802-03 (Ind. 1998).

[241] "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not." Michigan v. Jackson, 475 U.S. 625, 633-34 n.7 (1986).

[242] "When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel." *Id.*

[243] "The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." *Id.* at 634.

Supreme Court, in *McNeil*, rejected this viewpoint. Without any analysis, the Court concluded that the individual's invocation of the right to counsel could not possibly imply "a desire never to undergo custodial interrogation, about anything, without counsel present."[244]

Secondly, there is the "danger of 'subtle compulsion'"[245] when an individual indicates to the Government that he has an attorney representing him and then later the individual, in the absence of that attorney, is still approached and interrogated by the authorities. It is possible that this individual believes that no matter how many times he asserts his interest in the assistance of counsel, that interest will not be heeded. He may think that it is pointless to request counsel in the context of the custodial interrogation because his interest in being represented by an attorney has already been, and likely will continue to be, ignored.[246]

VIII. WAIVER OF RIGHTS

The validity of a suspect's waiver is, by far, the most controversial issue in the matter of *Miranda* rights and cultural or ethnic background.[247] The three major cultural factors in determining the validity of a *Miranda* waiver are the suspect's language difficulties, the suspect's lack of familiarity with the American legal system, and the mandates of the suspect's culture with respect to obedience to the police. Additionally, appellate courts have examined the role of an interpreter in the waiver process to determine whether the use of an interpreter at trial vitiates the suspect's earlier waiver, if that waiver was given without an interpreter.

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[244] *McNeil*, 501 U.S. at 180 n.1.

[245] *Id.* at 189 (Stevens, J., dissenting) (quoting McNeil v. Wisconsin, 454 N.W.2d 742, 753 (Wis. 1990) (Heffernan, C.J., dissenting)).

[246] *Id.* at 189 n.2.

[247] For a general discussion about this issue, see Linda Friedman Ramirez et al., *When Language is a Barrier to Justice: The Non-English-Speaking Suspect's Waiver of Rights*, CRIM. JUST., Summer 1994, at 2.

A. KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER STANDARD

To be valid, a waiver of *Miranda* rights must be made voluntarily, knowingly, and intelligently.[248] The burden is on the government to prove a valid waiver by a preponderance of the evidence.[249] The court may not presume a valid waiver from the suspect's silence,[250] but an explicit waiver is not required.[251] Sometimes a waiver may be "inferred from the actions and words of the person interrogated."[252] The validity of a waiver is decided on "the particular facts and circumstances surrounding [each] case, including the background, experience and conduct" of the person questioned.[253] The suspect need not be advised of "all the possible subjects of questioning in advance of interrogation" for his waiver to be valid.[254]

To be voluntary, a waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception."[255] To make this determination, the court will analyze whether the waiver was a result of coercion by either physical force or "other deliberate means calculated to break the suspect's will . . . ."[256] It will ask whether as a result of alleged coercion, the questioned person's "'will [was] overborne and his capacity for self-determination critically impaired.'"[257]

To be knowing and intelligent, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon

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[248] Miranda v. Arizona, 384 U.S. 436, 475-76 (1966).

[249] Colorado v. Connelly, 479 U.S. 157, 168-69 (1986) (citing, *inter alia*, Nix v. Williams, 467 U.S. 431, 444 & n.5 (1984)); State v. Santiago, 556 N.W.2d 687, 696-97 (Wis. 1996).

[250] *Miranda*, 384 U.S. at 475 (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)).

[251] North Carolina v. Butler, 441 U.S. 369, 373 (1979).

[252] *Id.*

[253] Fare v. Michael C., 442 U.S. 707, 725 (1979); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[254] Colorado v. Spring, 479 U.S. 564, 577 (1987).

[255] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[256] Oregon v. Elstad, 470 U.S. 298, 312 (1985).

[257] *Spring*, 479 U.S. at 574 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

it."[258] The suspect need not, however, "know and understand every possible consequence" of waiving his rights.[259] As long as a person "knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time,"[260] then his waiver is knowing and intelligent.

B. CULTURAL FACTORS IN THE VALIDITY OF *MIRANDA* WAIVER

Language and culture play a critical role in determining the validity of a waiver. If a person 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.

"[L]anguage difficulties may impair the ability of a person in custody to waive these [*Miranda*] rights in a free and aware manner."[261] When an officer warns a suspect in the suspect's native language, the suspect's waiver is likely to be found valid.[262] On the other hand, if an officer gives warnings only in English to a suspect who does not understand English well, the waiver is less likely to be valid.[263] But language barriers do not always

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[258] *Burbine*, 475 U.S. at 421.

[259] *Spring*, 479 U.S. at 574.

[260] *Id.*

[261] 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).

[262] *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 Corrections, 817 F.2d 448, 453 (7th Cir. 1987); *Gonzalez*, 749 F.2d at 1335-36; 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). Of course, the defendant may still challenge the translation of the warning. *See, e.g.*, United States v. Higareda-Santa Cruz, 826 F. Supp. 355, 359-60 (D. Or. 1993); United States v. Kim, 803 F. Supp. 352, 358 (D. Haw. 1992); United States v. Fung, 780 F. Supp. 115, 116-17 (E.D.N.Y. 1992). *See also supra* notes 170-71 and accompanying text. For a discussion of the interaction of language and waiver, see also Ramirez et al., *supra* note 247.

[263] *See, e.g.*, United States v. Garibay, 143 F.3d 534, 537-38 (9th Cir. 1998); United States v. Guay, 108 F.3d 545, 549 (4th Cir. 1997); *Alaouie*, 1991 U.S. App. LEXIS 18415, at *13; Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989), *cert. denied* 499

render a waiver invalid.[264] These determinations are made on a case-by-case basis. The courts 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."[265]

In *United States v. Alaouie*, the court found that the *Miranda* waiver of the defendant, a Lebanese citizen who did not understand English well, was valid.[266] The court reasoned that the police officer "took special care to thoroughly explain" the rights to the defendant, and the defendant responded in English that he understood his rights.[267] Additionally, at trial, the defendant did not use an interpreter, and testified in English.

In *United States v. Bernard S.*,[268] the court found a juvenile defendant's waiver valid, despite his inability to read or write English, his occasional conversation in Apache with his mother and one of the officers during the questioning, and his need for an interpreter during trial.[269] The court found the waiver valid because the defendant had studied English through the seventh

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U.S. 949 (1991); United States v. Bernard S., 795 F.2d 749, 751-52 (9th Cir. 1986) (citing cases); United States v. Short, 790 F.2d 464, 469 (6th Cir. 1986); United States v. Vasiliavitchious, 919 F. Supp. 1113, 1118-19 (N.D. Ill. 1996); United States v. Granados, 846 F. Supp. 921, 923-24 (D. Kan. 1994); United States v. Lizardo-Acosta, No. 93-40030-02-SAC, 1994 WL 191862, at *7-*8 (D. Kan. Apr. 12, 1994); *Higareda-Santa Cruz*, 826 F. Supp. at 359-60; United States v. Yong Bing-Gong, 594 F. Supp. 248, 256-57 (N.D.N.Y. 1984); Liu v. State, 628 A.2d 1376, 1380 (Del. 1993); State v. Melendez, No. 93-A-1795, 1994 WL 738489, at *3 (Ohio Ct. App. Dec. 23, 1994); Le v. State, 947 P.2d 535, 542 (Okla. Crim. App. 1997); Marquez v. State, 890 P.2d 980, 985-86 (Okla. Crim. App. 1995); State v. Van Tran, 864 S.W.2d 465, 473 (Tenn. 1993); Solis v. State, 851 P.2d 1296, 1299-1300 (Wyo. 1993).

[264] *See, e.g., Campaneria*, 891 F.2d at 1020; United States v. Alvarez, No. 1: 98-CR-110, 1999 U.S. Dist LEXIS 9107, at *11-*13 (W.D. Mich. 1999); United States v. De Yian, No. 94 Cr. 719 (DLC), 1995 U.S. Dist. LEXIS 10072, at *8 (S.D.N.Y. July 18, 1995); United States v. Pichhadze, No. 2: 95-CR-58-01, 1995 U.S. Dist. LEXIS 19877, at *12 (D. Vt. Nov. 9, 1995).

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

[266] *Alaouie*, 1991 U.S. App. LEXIS 18415, at *13.

[267] *See id.*

[268] 795 F.2d 749 (9th Cir. 1986).

[269] *See id.* at 752-53.

grade, answered the agent's questions in English, and responded that he understood his rights after the interrogating officer explained each of the *Miranda* rights in English.[270]

On the other hand, in *United States v. Garibay*,[271] the court found the defendant's waiver invalid due to the defendant's English language difficulties and low I.Q. The court applied the totality of circumstances test to determine the validity of the waiver. Pursuant to that test, the court examined the following factors: (1) whether the defendant had signed a waiver; (2) whether he was advised of his rights in his native language; (3) whether an interpreter assisted him during the interrogation; and (4) whether he appeared to understand his rights.[272]

The court found that none of the factors were met here.[273] The defendant did not sign a waiver.[274] He was advised of his rights only in English.[275] He was not advised of his rights in his native language, Spanish.[276] Despite the availability of interpreters, no interpreter was provided to him.[277] It was not clear that he understood the government agent because the agent admitted that he had to rephrase questions when the defendant appeared confused.[278] Moreover, the government offered no evidence that the agent explained or clarified each right for the

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[270] *See id.*; *see also* Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989), *cert. denied* 499 U.S. 949 (1991) (finding that despite the defendant's poor English, he manifested a sufficient understanding of English to understand and waive his rights); United States v. Abou-Saada, 785 F.2d 1, 10 (1st Cir. 1986) (ruling that the defendant's waiver was valid despite the fact that he was an alien with limited education); United States v. Alvarez, 54 F. Supp. 2d 713, 716-17 (W.D. Mich. 1999) (concluding the defendant's waiver was valid because the defendant appeared intelligent, had previously experienced the American criminal justice system, and had testified that the officer read him his rights and that he understood his rights); United States v. Granados, 846 F. Supp. 921, 924-25 (D. Kan. 1994) (finding the defendant's waiver valid because the officer "took special care to communicate in simple and direct language and to discern if the defendant understood what the officer was saying").

[271] 143 F.3d 534 (9th Cir. 1998).

[272] *Id.* at 538.

[273] *Id.* at 538-39.

[274] *Id.* at 538.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* at 539.

defendant.[279] Additionally, the defendant had no previous experience with the American criminal justice system, so there was no evidence that he was familiar with his constitutional rights.[280] Consequently, the court found that the *Miranda* waiver was invalid and the defendant's statements should have been suppressed.[281]

In *United States v. Short*,[282] the court found that the defendant's waiver was invalid because she spoke and understood English poorly.[283] Furthermore, the defendant was a West German national who had only been in the United States for three months when she was questioned, and lacked any knowledge of the American criminal justice system. Despite the agents' testimony that they had taken "special precautions" to explain the *Miranda* warnings to the defendant and that she seemed to understand her rights, the court found that her poor comprehension of English and her ultimate need for an interpreter at trial indicated that she did not understand her rights.[284] The court suppressed Ms. Short's confession and reversed her conviction.[285]

The suspect's familiarity with the American justice system is another factor the courts weigh to determine whether a suspect's waiver was valid.[286] Just as the court considers a suspect's

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[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] 790 F.2d 464 (6th Cir. 1986).

[283] *Id.* at 469.

[284] *Id.*

[285] *Id.*

[286] *See, e.g, Garibay*, 143 F.3d at 538; United States v. Yunis, 859 F.2d 953, 964-66 (D.C. Cir. 1988); *Short*, 790 F.2d at 469; Government of the Canal Zone v. Gomez, 566 F.2d 1289, 1292 (5th Cir. 1978); United States v. Fung, 780 F. Supp. 115, 116 (E.D.N.Y. 1992); United States v. Nakhoul, 596 F. Supp. 1398, 1402 (D. Mass. 1984); Peterson v. Alaska, 562 P.2d 1350, 1363 (Alaska 1977); People v. Jimenez, 863 P.2d 981, 983 (Colo. 1993) (en banc); Liu v. State, 628 A.2d 1376, 1381 (Del. 1993); Le v. State, 947 P.2d 535, 543-44 (Okla. Crim. App. 1997); State v. Tran, 864 S.W.2d 465, 473 (Tenn. 1993); *cf.* United States v. Scarpa, 897 F.2d 63, 69 (2d Cir. 1990) (finding that previous encounters with criminal justice system supported finding of valid waiver); State v. Montes, 667 P.2d 191, 195 (Ariz. 1983) (same); State v. Leuthavone, 640 A.2d 515, 520 (R.I. 1994) (rejecting the suggestion that police officers should have disregarded the defendant's claim of comprehension of his rights due to his unique cultural background and inexperience with the American legal system); Solis

age, mental deficiency, literacy, facility with the English language, or level of education in determining the validity of a waiver, it will also consider the suspect's alienage and lack of familiarity with the American criminal system.[287] The court, however, does not demand that the suspect comprehend the disadvantage of waiving his rights, but only that the suspect understands that he enjoys certain constitutional rights which he abandons by waiving them.[288]

Using this analysis, the D.C. Circuit Court of Appeals reversed a lower court's ruling suppressing the defendant's statements in *United States v. Yunis*.[289] Before agents interrogated the defendant, a Lebanese citizen, they orally advised him of his *Miranda* rights in English and in Arabic, gave him a form which set forth his *Miranda* rights in Arabic, and secured both an oral and written waiver.[290] In deciding that the defendant's waiver was valid, the court rejected the argument that his lack of familiarity with the American justice system caused his waiver to be unknowing.[291] In the court's view, the precautions taken to ensure that the defendant understood his *Miranda* rights outweighed the defendant's lack of familiarity with the American legal system.[292]

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v. State, 851 P.2d 1296, 1300 (Wyo. 1993) (finding that previous encounters with criminal justice system supported finding of valid waiver). For a discussion of this case, see Phong T. Dinh, *Criminal Law: Self-Incrimination Clause Requires that Suspects Understand Plain Meaning of* Miranda *Rights Before Making Valid Waiver*, 29 SUFFOLK U. L. REV. 619 (1995).

[287] *See Yunis*, 859 F.2d at 965; *Nakhoul*, 596 F. Supp. at 1402.

[288] The court in *Yunis* 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 system of justice, of not speaking—does not affect the validity of his waiver.

Yunis, 859 F.2d at 964-65; *see also* United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990).

[289] 859 F.2d at 965-66.

[290] *Id.*

[291] *See id.* at 966.

[292] *See id.*

Cultural heritage is another factor the court considers in determining the validity of a suspect's waiver.[293] To decide whether the defendant's culture led him to waive his rights, the court will examine the defendant's background and social and work history to determine whether the defendant has maintained his prior culture or has been socialized into American culture.

In *Liu v. State*, the defendant argued that his Chinese heritage demanded "unquestioning cooperation with authority figures" leading him to "instinctively" relinquish his *Miranda* rights.[294] In evaluating the validity of the defendant's waiver, the court found that although the defendant's cultural heritage was a relevant factor to consider, it did not decide the issue. Assessing the totality of the circumstances, the court concluded that it was not the defendant's Chinese background which mandated his waiver. The court found it relevant that the defendant had "lived and worked in New York City for several years" where he had "obtained a taxicab license, conducted business and participated in a small claims court proceeding."[295] Furthermore, the defendant's "decision to stop answering questions during the interrogation in a police dominated setting and his request for an attorney" persuaded the court that the defendant understood his rights and that his initial waiver was not due to his cultural background.[296]

Additionally, courts examine whether the failure to provide the defendant with an interpreter during the custodial interrogation rendered a waiver invalid. This consideration is particularly relevant when the same defendant required the assistance of an interpreter during court proceedings.[297] Like other con-

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[293] *See* Liu v. State, 628 A.2d 1376, 1380-81 (Del. 1993).

[294] *Id.* at 1380.

[295] *Id.* at 1381.

[296] *Id.* at 1381-82.

[297] *See* United States v. Short, 790 F.2d 464, 469 (6th Cir. 1986); United States v. Lizardo-Acosta, No. 93-40030-02-SAC, 1994 WL 191862, at *8-*9 (D. Kan. Apr. 12, 1994). *But see* United States v. Bernard S., 795 F.2d 749, 752 (9th Cir. 1986); United States v. Granados, 846 F. Supp. 921, 925 (D. Kan. 1994); State v. Tran, 864 S.W.2d 465, 473 (Tenn. 1993); *cf.* United States v. Abou-Saada, 785 F.2d 1, 10 (1st Cir. 1986) (using fact that defendant answered questions before interpreter had interpreted them as a factor in validity); State v. Nguyen, 832 P.2d 324, 327 (Idaho Ct. App. 1992)

siderations, the courts blend this factor into the totality of the circumstances test to determine whether the defendant's waiver was voluntary, knowing, and intelligent. The courts examine whether the suspect indicated in any manner that he did not understand what the authorities were saying and whether he answered their questions in English or another language.[298]

These cases demonstrate that it is not particularly onerous for the Government to prove a valid waiver. Despite *Miranda*'s declaration that "a heavy burden rests on the government"[299] to prove the defendant's valid waiver of his privilege against self-incrimination and his right to counsel,[300] when the authorities interrogate a suspect in the absence of the suspect's attorney, the courts often find that the Government has sustained its burden of proof.[301]

Additionally, these fact-specific determinations make it difficult to predict how a court will evaluate a suspect's waiver. While one court may view the suspect's language difficulties or cultural heritage to be of paramount importance in deciding

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(rejecting claim that defendant needed interpreter); Commonwealth v. Maldonado, 451 N.E.2d 1145, 1149 & n.4 (Mass. 1983) (noting infrequent use of interpreter as a factor in finding of voluntary waiver).

[298] *Nguyen*, 832 P.2d at 327. In *United States v. Granados*, the court found that the failure to use an interpreter during the custodial interrogation of the defendant did not render his waiver invalid. 846 F. Supp. 921, 925 (D. Kan. 1994). The court compared the "complexity and breadth of what is typically done and said in the courtroom with what is involved in the *Miranda* warning," and concluded that "limited English skills may suffice to understand the latter but not [the] former." *Id.* In *State v. Roman*, the government had provided the suspect with an interpreter during the questioning but the interpreter did not translate everything that was said. 616 A.2d 266, 269 (Conn. 1992). Although the court recognized that when a defendant does not understand English, due process requires a continuous translation at trial, it was not required to extend that ruling to the context of custodial interrogation. *Id.* at 270. Because the defendant understood English and rarely used the services of the interpreter during trial, the court found that his rights to due process were not violated. *Id.* On the other hand, dissenting Associate Justice Berdon argued that the defendant's waiver of rights during the custodial interrogation was invalid because his deficiency in English rendered him unable to understand the questions posed to him and to respond to them intelligently. *Id.* at 271-72.

[299] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[300] *Id.*

[301] *See supra* note 249 and accompanying text.

the validity of a waiver,[302] another court may minimize the significance of these characteristics.[303] This results in inconsistent conclusions from different courts and makes it difficult for both police and suspects to predict what factors will define the validity of a waiver.

IX. CONCLUSION

When the Court decided *Miranda v. Arizona* more than thirty years ago, it could not foresee how profoundly the composition of American society would change in the coming years. The Court could not predict that between the years 1969 to 1989, over 12 million people would legally immigrate to the United States,[304] and that the majority of these immigrants, rather than emanating from Europe, would come from Latin America and Asia.[305] The Court had no way of knowing that by 1990, 32 million people in the United States would report speaking a language other than English in their homes.[306]

So it is not surprising that in *Miranda*, the Court made little mention of the defendant's cultural heritage and language skills. Because the Court could not foresee the seachange in the cultural landscape of the United States, factors such as culture and language were not particularly relevant to the Court when it decided *Miranda*.

But now that American society has experienced this cultural transformation, courts throughout the country have been forced, in their interpretation of *Miranda*, to confront such fac-

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[302] *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); State v. Santiago, 542 N.W.2d 466, 471 (Wis. Ct. App. 1995); *see also supra* note 261 and accompanying text.

[303] *See, e.g.*, 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. De Yian, No. 94 Cr. 719 (DLC), 1995 U.S. Dist LEXIS 10072, at *8 (S.D.N.Y. 1995); United States v. Pichhadze, No. 2: 95-CR-58-01, 1995 U.S. Dist. LEXIS 19877, at *12 (D. Vt. 1995); *see also supra* note 264 and accompanying text.

[304] *See* YANG, *supra* note 25, at 18; *see also supra* note 45 and accompanying text.

[305] *See* UNGER, *supra* note 25, at 103; YANG, *supra* note 25, at 18; *see also supra* notes 46-47 and accompanying text.

[306] *See* UNGER, *supra* note 25, at 103; *see also supra* note 48 and accompanying text.

tors as the defendant's cultural heritage, language skills, and familiarity with the American criminal justice system. As this article demonstrates, the suspect's cultural heritage and language abilities affect every facet of *Miranda.* From the definition of custody to the evaluation of waiver, courts have considered whether and how the defendant's culture should be factored into the *Miranda* analysis. This article makes clear that with the newly-populated American society, it is critically important for lawyers, judges, and legal scholars to be sensitive to the roles culture and language play in the interpretation of confession law under *Miranda v. Arizona.*