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Language Barriers and Cultural Incompetency in the Criminal Legal System: The Prejudicial Impacts on LEP Criminal Defendants

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LANGUAGE BARRIERS AND CULTURAL INCOMPETENCY IN THE CRIMINAL LEGAL SYSTEM: THE PREJUDICIAL IMPACTS ON LEP CRIMINAL DEFENDANTS

*Sarah Moya**

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* J.D. Candidate, 2022, Fordham University School of Law, Stein Public Interest Scholar; B.A., 2010, Villanova University. This Note is dedicated to the limited English proficient people who are persistently and systematically disrespected and disenfranchised by the criminal punishment system. It is their resilience that motivates me to tell these stories and prompted me to pursue publication. I would also like to thank the court interpreters and multilingual defenders, clinicians, and advocates whose challenges and experiences provide invaluable perspective. Finally, a special thanks to Professor Bennett Capers for his encouragement, Dr. Karen Pita Loo for her insight, and the editors and staff at the *Fordham Urban Law Journal* for their guidance in developing and crafting this Note.

INTRODUCTION

The criminal legal system is a maze. People who find themselves in this maze are frequently cornered by its classist and racist hedges and dead ends. While much of the system is plagued with elitist legalese that disadvantages lay people, this complexity is compounded when an individual cannot understand its language. From arrest to sentencing, limited English proficient (LEP)¹ defendants are tasked not only with finding their way through the maze, but are essentially also doing so with a blindfold.

Language and cultural barriers affect every element of the criminal legal process. These challenges are even more pronounced when dealing with minority cultures and underrepresented languages. While the use of translation services and interpreters attempt to ameliorate the challenges, the salves are insufficient to address these inequities.

LEP criminal defendants are often left behind as the criminal legal system churns through its docket. According to a 2014 study conducted by Legal Services NYC, 74% of New York City lawyers reported experiencing interpreter-related adjournments and delays while representing their LEP clients.² Even when interpreters are made available, dire mistakes are made when carrying out representation due to errors in interpretation: for example, in 2016, a Spanish-speaking defendant in Virginia thought he was he was being accused of rape when his interpreter used the term “violación” to describe a criminal violation.³ These missteps go beyond mere miscommunication and constitute constitutional violations of the protections guaranteed by the Fifth Amendment, *Miranda v. Arizona*,⁴ *Brady v. United States*,⁵ and *Padilla v. Kentucky*.⁶

LEP criminal defendants are some of the criminal legal system’s most vulnerable victims.⁷ As our society becomes increasingly multicultural and

1. LEP is an acronym for Limited English Proficient and is a common acronym used for individuals who, for our purposes, lack the English competency to meaningfully assist in their defense.

2. See *Interpreting Justice: Issues Affecting LEP Litigants*, LEGAL SERVS. NYC, <https://www.legalservicesnyc.org/what-we-do/practice-areas-and-projects/civil-rights-initiative/interpreting-justice-language-access-in-the-new-york-courts/issues-facing-lep-litigants> [https://perma.cc/H9YU-2E3N] (last visited Sept. 15, 2021).

3. See Rebecca Beitsch, *How Bad Translation by Court Interpreters Can Turn Misunderstanding into Injustice*, PBS (Aug. 17, 2016, 4:19 PM), <https://www.pbs.org/newshour/nation/bad-translation-by-court-interpreters-injustice> [https://perma.cc/PX6V-ELDA].

4. 384 U.S. 436 (1966).

5. 397 U.S. 742 (1970).

6. 559 U.S. 356 (2010).

7. See *infra* Part II.

multilingual,⁸ and as the Latine⁹ community becomes the dominant “minority” group in the United States,¹⁰ it is imperative that the criminal legal system improves its solutions to meet the needs of our diverse U.S. communities.

While legal scholars, such as Jasmine B. Gonzales Rose, have articulated the ramifications of poor interpretation and linguistic and racial bias in particular parts of the trial process, few scholars have surveyed the compounding due process implications which, in each step of the criminal process, distort and disrupt the rights of LEP criminal defendants. This Note provides an exploration of common issues that arise for LEP criminal defendants throughout the criminal process, while also providing guidance to stakeholders in the criminal legal system who might be able to intervene and improve upon these problematic practices.

This Note outlines the obstacles that LEP defendants encounter from the point of criminal arrest to sentencing and post-conviction proceedings. Part I will introduce the appropriate legal context for analyzing these issues, summarizing the holdings of *Miranda*, *Brady*, and *Padilla*, and highlighting the gravity of the due process implications for LEP criminal defendants — particularly BIPOC¹¹ LEP defendants. Part II will discuss

8. See C.R. DIV., U.S. DEP’T OF JUST., LANGUAGE ACCESS IN STATE COURTS (2016), <https://www.justice.gov/crt/file/892036/download> [<https://perma.cc/3J6D-A73R>] (“In the last twenty-five years, the number of LEP individuals in the United States has nearly doubled to over 25 million. These demographic shifts are happening all across America. Thus, while immigrants and the next generation learn English, data from the U.S. Census Bureau reveals the widespread need for language services. In 2013, one out of every three counties was home to 1,000 or more LEP residents, and in one out of every five counties, at least 5% of residents identified as LEP.” (citations omitted)).

9. “Latine” is the gender-inclusive term for Latin American people. It is preferable to the term “Latinx”, as the letter “x” does not serve the same linguistic function in Spanish as the letter does in English. See Terry Blas, “*Latinx*” Is Growing in Popularity. *I Made a Comic to Help You Understand Why*, VOX (Oct. 23, 2019, 7:15 AM), <https://www.vox.com/the-highlight/2019/10/15/20914347/latin-latina-latino-latinx-means> [<https://perma.cc/5HSM-2BY5>]; see also Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSCH. CTR. (Aug. 11, 2020), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2020/08/PHGMD_2020.08.11_Latinx_FINAL.pdf [<https://perma.cc/Y2WX-D4BY>].

10. See Talk of the Nation, *Hispanics Become America’s New Majority Minority*, NPR (Apr. 18, 2011, 1:00 PM), <http://www.npr.org/2011/04/18/135517137/hispanics-become-americas-new-majority-minority> [<https://perma.cc/CN3K-XX6B>]; see also *Hispanics in the US Fast Facts*, CNN (Feb. 24, 2021, 3:06 PM), <http://www.cnn.com/2013/09/20/us/hispanics-in-the-u-s-/index.html> [<https://perma.cc/W8FL-8ZPT>].

11. “BIPOC” is a commonly used acronym for “Black, Indigenous, People of Color.” *But see* Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 118 (2021) (“While language is key to anti-subordination, BIPOC damages those efforts rather than being helpful, especially among those searching for new language addressing contemporary issues of race and racism.”).

how these issues manifest in various stages of criminal procedure: first, how law enforcement — citing the New York City Police Department as one example — fails to provide sufficient interpretation and circumvents the standards outlined in *Miranda* under the guise of efficiency. Next, the Part outlines the role of interpreters in arraignment and pretrial proceedings, focusing on the consequences of poor or biased interpretation, which can manifest in illegitimate plea bargains. This Part will also discuss how U.S. juries deny due process to minority LEP defendants and describe cultural mitigation strategies and obstacles to post-conviction relief for language-based claims. Finally, Part III proposes solutions to mitigate the prejudicial consequences of the U.S. criminal system on LEP defendants.

I. LEGAL AND SOCIO-POLITICAL CONTEXT

The criminal legal system, as a matter of constitutional law, is structured to protect individuals who are arrested from unreasonable government intervention and intrusion.¹² These staunch limitations on the power of the police and the government extend to the criminal process, wherein the right to procedural and substantive due process is guaranteed to any individual facing criminal prosecution.¹³ While the United States has fallen short on this promise in many areas, it has especially fallen short for LEP criminal defendants, for whom the system often fails to provide even the basic rights under *Miranda*, *Brady*, and *Padilla*. To understand the extent to which these rights have been circumvented, it is crucial to understand the U.S. Supreme Court's foundational holdings.

Miranda v. Arizona established the right for a person facing a criminal arrest to be apprised of their Fifth Amendment right against self-incrimination once they have been taken into custody.¹⁴ These rights are commonly known as “Miranda warnings”: an arresting officer must inform the individual of their right to remain silent, their right to have an attorney present, even if they cannot afford it, and that any statement they make may be used against them in the court of law.¹⁵ A heavily litigated issue is what constitutes “custody.” The Supreme Court has defined “custodial interrogation” as any “questioning initiated by law enforcement officers

12. See generally U.S. CONST. amends. IV, V, VI.

13. See *id.* amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law . . .”).

14. 384 U.S. 436, 444 (1966) (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

15. See *id.*

after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”¹⁶ In such a custodial interrogation, the right to remain silent must be provided to an individual in “clear and unequivocal terms.”¹⁷ If a defendant proceeds with their interrogation without an attorney and provides a statement, the prosecution must meet a “heavy burden” to demonstrate that the defendant knowingly and voluntarily waived their right to remain silent and their right to counsel.¹⁸

The promise of *Brady v. United States* carries similar significance but relates to the defendant’s decision to plead guilty. *Brady* requires that a defendant plead guilty knowingly, intelligently, and voluntarily.¹⁹ In other words, the defendant’s guilty plea must be “the voluntary expression of [the defendant’s] own choice.”²⁰ This is not only because of the potential liberty interests at stake but also because a defendant’s decision to plead guilty waives their constitutional right to a jury trial.²¹ Importantly, this does not mean that the defendant cannot be subject to coercion or induced to plead guilty due to fear of the penalty or hope of leniency.²²

Another vital consideration when considering a guilty plea, especially for LEP criminal defendants, is the defendant’s immigration status. In *Padilla v. Kentucky*, the Court held that a counselor’s failure to advise a noncitizen criminal defendant of the immigration consequences of a guilty plea constitutes ineffective assistance of counsel under *Strickland v. Washington*.²³ This means that a defense attorney who fails to offer adequate immigration advice to noncitizen defendants falls below the objective standard of reasonableness in providing competent representation.²⁴ This obligation holds defenders accountable for misleading or incorrect affirmative advice, but their culpability can be

16. *Id.*

17. *Id.* at 467–68.

18. *Id.* at 475.

19. *See* *Brady v. United States*, 397 U.S. 742, 748 (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” (citation omitted)).

20. *Id.*

21. *See id.*

22. *See id.* at 751 (“We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.”).

23. *See* *Padilla v. Kentucky*, 559 U.S. 356, 369; *see also* *Strickland v. Washington*, 466 U.S. 668 (1984).

24. *See* *Padilla*, 559 U.S. at 369.

limited depending on how complicated or unclear the consequences may be.²⁵

In addition to this legal context, there is an undeniable socio-political context which informs a LEP defendant's experience in the criminal legal system. To put it plainly, the criminal legal system is plagued with bias.²⁶ Legal scholars such as Michelle Alexander and Paul Butler, as well as prominent activists such as Angela Y. Davis and Mariame Kaba, have dedicated their professional lives to exposing the criminal legal system for what it is: a system of oppression designed to disenfranchise poor people of color.²⁷ Policing and the carceral state have roots in the American slave trade and have since evolved to mask their nefarious purpose of maintaining white supremacy.²⁸ These efforts expand to the regulation and oppression of immigrant communities; currently, the United States exceeds all other nations in how many of its citizens, asylum seekers, and undocumented immigrants are under some form of criminal supervision, and the number of Black and Latine detainees exceeds the population of some African, Eastern European, and Caribbean countries.²⁹ The American Bar Association has written that “[t]he criminal [legal] system’s pervasive problems with racism start before the first contact and continue through pleas, conviction, incarceration, release, and beyond.”³⁰

25. *See id.* at 369–70.

26. *See* Radley Balko, *There’s Overwhelming Evidence That the Criminal Justice System Is Racist. Here’s the Proof.*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/> [<https://perma.cc/6X98-5UWA>].

27. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (Greg Ruggiero ed., 2003); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); Mariame Kaba, *For Blacks, America Is Dangerous by Default*, WASH. POST (Aug. 22, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/08/22/for-blacks-america-is-dangerous-by-default/> [<https://perma.cc/7H46-6Q3T>].

28. *See* Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [<https://perma.cc/7MAA-R7UM>]; *see also* Anna North, *How Racist Policing Took over American Cities, Explained by a Historian*, VOX (June 6, 2020, 8:00 AM), <https://www.vox.com/2020/6/6/21280643/police-brutality-violence-protests-racism-khalil-muhammad> [<https://perma.cc/AJJ4-D9NN>]; Throughline, *American Police*, NPR (June 4, 2020, 12:08 AM), <https://www.npr.org/2020/06/03/869046127/american-police> [<https://perma.cc/D9GM-HGPJ>].

29. *See* Lepore, *supra* note 28 (citing Khalil Gibran Muhammed, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010)).

30. Shasta N. Inman, *Racial Disparities in Criminal Justice: How Lawyers Can Help*, AM. BAR ASS’N., https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ [<https://perma.cc/SD88-A6M9>].

Compounding this racial and ethnic bias, LEP criminal defendants may face another distinct form of discrimination: linguicism. Linguicism, or linguistic discrimination, is a term utilized by Jasmine B. Gonzales Rose and is broadly defined as “ideologies, structures and practice which are used to legitimate, effectuate, regulate and reproduce an unequal division of power and resources (both material and immaterial) between groups which are defined on the basis of language.”³¹ In short, linguicism occurs when an individual is discriminated against because of the language they speak or appear to speak. While cases like *Batson v. Kentucky* bar purposeful discrimination in the criminal process “on the basis of race,”³² Gonzales Rose argues that language and accents serve as a proxy for racial and ethnic discrimination, further disenfranchising BIPOC communities who participate in the criminal legal system.³³

Both the legal and socio-political context call for additional scrutiny when ensuring these constitutional protections throughout the criminal legal process. Despite these purported protections, in practice, courts and lawyers alike fail to fulfill their obligations when it comes to LEP criminal defendants. Part II outlines several issues that arise when dealing with LEP criminal defendants and uses examples from New York City to highlight how these issues manifest in practice.

II. THE PREJUDICIAL IMPACTS

Linguicism permeates all aspects of the criminal legal process. This Part discusses each stage of that process, focusing on the areas in which the criminal legal system has failed to address the needs of LEP defendants. Section A focuses on arrests and policing, highlighting how a lack of language access and cultural competence violates due process for LEP individuals who encounter the police. Section B discusses the pretrial process, emphasizing the complex role of interpreters in pretrial proceedings and plea bargaining. Section C explores jury selection, specifically how the use of linguistic bias as a proxy for racial bias violates the LEP defendant’s right to a trial by a jury of their peers. Finally, Section D outlines the consequences of linguicism in post-conviction and sentencing proceedings.

31. See Jasmine B. Gonzales Rose, *Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection*, 44 N.Y.U. REV. L. & SOC. CHANGE, 309, 313 n.32 (2020).

32. 476 U.S. 79 (1986).

33. See Gonzales Rose, *supra* note 31, at 312–13; see also *infra* Part II (exploring linguicism in jury selection).

A. Arrests and Policing

Advocates for LEP individuals have long recognized the disparate treatment that people who lack English proficiency experience when dealing with the police.³⁴ Not only have they raised concerns of abuse and overt racism in police interactions, but they have also noted the procedural and constitutional violations that can occur when an individual is not properly advised of their rights when arrested.³⁵ Susan Shin, President of the Asian American Bar Association of New York, compels all individuals involved in the arrest, prosecution, and defense of LEP defendants to ensure that “the important protections of *Miranda* are not merely futile and empty procedural formalities to this country’s growing non- or limited-English speaking population.”³⁶ According to the Innocence Project, 40% of Latine exonerees are individuals who falsely confessed to crimes they did not commit because they did not understand English.³⁷ As a matter of law, a LEP defendant’s capacity to understand their *Miranda* warnings are determined ad hoc based on a totality of the circumstances.³⁸ Despite the purportedly individualized analysis required for arrested individuals, under federal law, there are few examples where an inadequate understanding of one’s rights due to language and cultural barriers can provide a sufficient basis to invalidate an alleged waiver of one’s legal rights under *Miranda*.³⁹

34. See, e.g., *Translating Justice*, VERA INST. JUST., <https://www.vera.org/projects/translating-justice/learn-more> [<https://perma.cc/9EX2-ACSP>] (last visited Jan. 3, 2022) (“Language barriers are associated with a number of adverse outcomes, including victimization.”).

35. See *Miranda v. Arizona*, 384 U.S. 436, 466 (1966); see also Manuel Triano-López, *The Pre-trial Stages of Arrest and Police Questioning: Implications for Interpreters and Translators in the United States*, 212 *PROCEDIA — SOC. & BEHAV. SCIS.* 256 (2015).

36. Susan Shin, *Ensuring Rights of Non- and Limited-English Speakers*, N.Y.L.J. (Apr. 29, 2016), https://cdn.ymaws.com/sites/www.aabany.org/resource/resmgr/In_the_News/Ensuring_Rights_of_Non_and_.pdf [<https://perma.cc/J6RU-2QTS>].

37. See Daniele Selby, *Why Latinx People Are Uniquely Vulnerable to Wrongful Conviction*, INNOCENCE PROJECT (Oct. 7, 2020), <https://www.innocenceproject.org/how-wrongful-conviction-impacts-latinx-latino-hispanic-communities/> [<https://perma.cc/XEX8-HCZ3>].

38. See Triano-López, *supra* note 35, at 257 (“[C]onstitutional challenges in the context of police arrest and custodial interrogation normally focus on the adequacy of the *Miranda* warnings, and the validity of the defendant’s waiver To establish the degree of freedom of the suspect’s choice and his/her level of comprehension, courts consider the totality of the circumstances surrounding the interrogation.”).

39. See Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 *W. NEW ENG. L. REV.* 193, 201 (1997). The article cites leading federal cases on the issue, including *United States v. Nakhoul*, which held that “Nakhoul’s understanding of American law, customs, and constitutional rights may have been too limited and the warnings too inadequate in this situation to permit him to understand his rights.” *Id.*; see also *United States v. Short*, 790 F.2d 464 (6th Cir. 1986) (finding English-

Given this flexible and unhelpful standard, more must be required of law enforcement agencies to protect the rights of LEP criminal defendants.

The New York City Police Department (NYPD), as one example, has taken insufficient steps to ensure that our criminal legal system lives up to the promise of *Miranda*. Various complaints of police misconduct with LEP individuals recently culminated in a civil rights lawsuit, *Padilla v. City of New York*, filed against Mayor Bloomberg and the NYPD in 2013.⁴⁰ The complaint alleged that the discrimination and disparate treatment of LEP individuals who encountered the NYPD had violated federal, state, and local law.⁴¹ The allegations centered specifically around victims of domestic abuse. According to the lawsuit, the NYPD not only failed to provide necessary language support to these individuals (resulting in the wrongful arrest of domestic violence victims rather than their abusers), but also “on many occasions actively mock[ed] and humiliate[d] LEP individuals who request[ed] such services, and retaliate[d] against them for making such requests.”⁴² The plaintiffs settled and received monetary damages in 2016; the settlement required the NYPD to (1) implement a domestic violence language access program and (2) engage in prominent outreach outlining the access to language services available to community members.⁴³ The agreement also required further training for NYPD employees and an overhaul of NYPD policies, procedures, and training materials to reflect the language access programs.⁴⁴

Pursuant to this settlement and Local Law 30,⁴⁵ the NYPD is required to “take reasonable steps to provide timely and meaningful access for LEP

only rights given to German immigrant with limited understanding of basic English were insufficient to ensure defendant’s understanding of his rights); *United States v. Higareda-Santa Cruz*, 826 F. Supp. 355 (D. Or. 1993) (holding limited English proficiency of Mexican defendant warranted suppression of evidence because defendant did not understand rights he had waived); *United States v. Nakhoul*, 596 F. Supp. 1398, 1401–02 (D. Mass. 1984).

40. See Civil Rights Litigation Clearinghouse, *Case Profile: Padilla v. City of New York*, UNIV. MICH. L. SCH., <https://www.clearinghouse.net/detail.php?id=14207> [<https://perma.cc/ZW9K-EUPY>] (last visited Jan. 3, 2022); see also Second Amended Complaint & Demand for Jury Trial at ¶ 5, *Padilla v. City of New York*, 1:13-cv-00076-MKB-RER (E.D.N.Y. 2017).

41. See Second Amended Complaint & Demand for Jury Trial, *supra* note 40, at ¶ 5.

42. *Id.* at ¶ 42, 44.

43. See Civil Rights Litigation Clearinghouse, *supra* note 40.

44. See *id.*

45. Local Law 30 was enacted by City Council in 2017; it requires city agencies to “appoint language access coordinators, translate commonly distributed documents into 10 designated languages, provide telephonic interpretation in at least 100 languages, and develop and implement language access implementation plans, among other requirements.” *Local Laws and Executive Orders*, NYC MAYOR’S OFF. IMMIGRANT AFFS.,

persons to the services and benefits that the Department provides to the degree practicable.”⁴⁶ In their 2018 Language Access Plan, the NYPD identified ten languages for which they aspire to provide all essential documents; any communication outside of these ten languages is to be conducted through Language Line.⁴⁷ All language services must be offered to LEP individuals free of charge.⁴⁸ In the NYPD’s Language Initiative Program, there are 2,452 interpreters for 85 different languages.⁴⁹ However, these interpreters need only be available to officers in “particularly complex cases.”⁵⁰ Officers who arrest LEP individuals must also report the use of language services when utilized in their investigations or responses to domestic incidents.⁵¹

The policies implemented in the Language Access Plan (Plan) fall short in a variety of ways. First, according to the NYPD’s internal policy, officers maintain discretion over what is reasonable and practicable when communicating with LEP individuals. This protects officers who fail to involve an interpreter or access Language Line in high-stakes circumstances, including the arrest of LEP defendants. The Plan additionally highlights that the victims of crimes, rather than those who suffer criminal arrests, are the primary beneficiaries of language services. The Plan fails to outline protocol for emergency encounters with the NYPD, which culminate in the arrest of a LEP person, nor does it outline post-arrest communication advising LEP clients of their rights while detained. Additionally, because LEP defendants are not entitled to an interpreter with the advanced language skills of a certified court interpreter, this will often result in “bilingual” officers relying on their elementary, insufficient language skills to communicate with individuals being arrested; this is an especially common problem for officers who use street Spanish.⁵²

<https://www1.nyc.gov/site/immigrants/about/local-laws-executive-orders.page>
[<https://perma.cc/D8AF-TF3F>] (last visited Jan. 3, 2022).

46. JAMES P. O’NEILL, N.Y.C. POLICE DEP’T, NYPD LANGUAGE ACCESS PLAN 2 (2018), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/language-access-plan-aug-2018.pdf [<https://perma.cc/E9JW-EKEY>] (citation omitted).

47. *See id.* at 3.

48. *See id.* at 2.

49. *See id.* at 4–5.

50. *Id.* at 4 (“The New York City Police Department established the Language Initiative Program in 2002, in order to create a corps of interpreters who could be called upon in particularly complex cases . . .”).

51. *See NYPD and Legal Services NYC Announce New Language Access Policies*, N.Y.C. POLICE DEP’T (May 24, 2017), <https://www1.nyc.gov/site/nypd/news/article.page?id=pr0524&permalinkName=nypd-legal-services-nyc-new-language-access-policies> [<https://perma.cc/RDN6-4WC3>].

52. *See Cole & Maslow-Armand, supra note 39, at 204; see also Triano-López, supra note 35, at 258* (“Because of their inferior linguistic training and the stress of having to

Finally, training initiatives fail to address cultural competency issues, in addition to language concerns, that may arise during an arrest. Regarding training initiatives, the Plan requires precincts to train personnel on how to identify an individual's primary language, to use the Department smartphone and dual hand-set telephone, to use telephonic interpreters, and to properly use certified and non-certified interpreters.⁵³ Notably, neither cultural competency nor education level are ever mentioned. This raises problems for immigrant or less-educated LEP criminal defendants, many of whom lack familiarity with the customs and culture surrounding law enforcement in the United States.⁵⁴ When a defendant comes from a culture where deference to law enforcement or legal authority is a custom, or even required of them to avoid torture or death, one cannot claim that these defendants have waived these important rights knowingly and voluntarily.⁵⁵

LEP individuals, many of whom are immigrants or are the children of immigrants, often lack familiarity with the U.S. police force and criminal legal system.⁵⁶ As a result, the hectic, traumatizing process of a criminal arrest is littered with confusion.⁵⁷ A failure to address this is a failure to meet the expectations of *Miranda*, as it fails to ensure that the warnings are "clear and unequivocal" and ignores the context in which the defendant may "knowingly and voluntarily" be waiving constitutional rights.

Perhaps direr, though, are the moments that occur before a LEP individual is officially apprehended. Even if the proper measures are in place to ensure that a LEP person under arrest is advised of their rights,

perform two roles simultaneously, allegedly bilingual officers do not fare better than interpreters/translators in their rendition of the *Miranda* warnings."). "Street Spanish" refers to the informal or slang language that law enforcement may use to communicate with Spanish-speaking individuals on the street. *See, e.g.,* *Castrejon v. State*, 482 S.W.3d 179, 188 (Tex. App. 2014) (reviewing a translation by an officer taught "Street Spanish" by the police department).

53. *See* O'NEILL, *supra* note 46, at 8.

54. *See* William Y. Chin, *Multiple Cultures, One Criminal Justice System: The Need for a "Cultural Ombudsman" in the Courtroom*, 53 *DRAKE L. REV.* 651, 658–59 (2005) ("Cultural incompatibility also creates problems for minority defendants, such as the minority defendant waiving important rights, mistakenly admitting to charges, and suffering unanticipated consequences . . . [such as] if the immigrant defendant fears authority and thus agrees to whatever the authorities demand, including admitting to crimes the defendant did not commit. These problems stem from cultural, rather than language, differences.").

55. *See* *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

56. *See supra* Part I.

57. *See generally* Lena J. Jäggi et al., *The Relationship Between Trauma, Arrest, and Incarceration History Among Black Americans: Findings from the National Survey of American Life*, 6 *SOC. MENTAL HEALTH* 187 (2016).

many police departments take advantage of an individual's failure to invoke their rights and question them prior to bringing them into custody.⁵⁸ Under current jurisprudence, so long as the individual who is the focus of the criminal investigation is offering to speak freely and a reasonable person would understand that they are free to leave, this practice is acceptable, and *Miranda* is inapplicable.⁵⁹ Historically, the use of the "reasonable person" standard invokes the image of a white male in the applicable circumstances; consider also that we are likely to think of this white male as an English-speaking U.S. resident.⁶⁰ The standard fails to appreciate the effect that culture and language will have on one's understanding of "detention."

This issue is exacerbated by the Supreme Court's decision in *Beckwith v. United States*, which involved a discussion of "psychological restraints" imposed on the defendant, "which are the functional, and, therefore the legal, equivalent of custody."⁶¹ The Court rejected this argument, holding that the imposition of these psychological restraints during questioning did not amount to "[c]ustodial police interrogation."⁶² This raises unique problems for LEP individuals; if a LEP person cannot understand this distinction due to language or cultural barriers, police can easily manipulate this lack of understanding to coerce incriminating statements out of LEP individuals. Further, cultural differences manifesting in immediate deference to authority or fear of the police may cause LEP individuals to believe that they have no choice but to answer the officer's question, even when they have no obligation to do so.⁶³

An arrest is a jarring experience for anyone; for LEP individuals, the trauma is compounded by their lack of linguistic and cultural

58. See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (holding an individual need not be advised of their *Miranda* rights until "there has been such a restriction on a person's freedom as to render him 'in custody.'").

59. See *Beckwith v. United States*, 425 U.S. 341, 347 (1976).

60. See Marvin L. Astrada & Scott B. Astrada, *Law, Continuity and Change: Revisiting the Reasonable Person Within the Demographic, Sociocultural and Political Realities of the Twenty-First Century*, 14 RUTGERS J.L. & PUB. POL'Y 196, 200 (2017) ("Revisiting the [reasonable person (RP)] through the lens of culture and demographic change reveals that the enduring historic RP requires some form of reconceptualization if law is to maintain congruence with the sociocultural, political, and economic actualities of the present. Retaining the historical RP — one premised on specific racial (White), ethnic (Western), class-based (upper or middle class) and gendered (Male) components — is problematic if the law is to serve and reflect the People that comprise the present polity Cultural and demographic reevaluation of the RP touches upon both the illusory applicability of the historical RP to the present and the political consequences that result from applying an antiquated version of the RP to present society.").

61. 425 U.S. at 345.

62. *Id.*

63. See *supra* note 54.

understanding.⁶⁴ By failing to impose proper support and services for LEP community members, police departments, and specifically the NYPD, fall short of the standard outlined in *Miranda*.⁶⁵

B. Pretrial Proceedings and Plea Bargaining

The disparities between how cases are heard and adjudicated when involving LEP defendants, compared to English-speaking defendants, are stark. While LEP individuals are entitled to a court interpreter on the record, issues ranging from staff shortages to inadequacy of interpretation services plague these defendants.

The right to an interpreter is guaranteed by the Court Interpreters Act, which requires the use of interpreters in federal criminal and civil proceedings whenever necessary for a party to comprehend the proceedings, or to communicate with counsel or the presiding judicial officer.⁶⁶ Interpreters serve a critical role in the criminal legal process, but this important responsibility is rarely acknowledged.⁶⁷ In a system that heavily relies on pretrial plea bargaining, the interpreters' role has been unequivocally expanded with few safeguards to ensure that interpreters are fully prepared for the undertaking.

In New York City, for example, where 25% of residents are not fluent in English, there is no system tracking how many defendants require interpretation services.⁶⁸ While Spanish interpreters are generally available at arraignments, interpreters who speak other languages such as Mandarin or Arabic are called to court and hired on a per diem basis once the defendant is able to disclose that they speak another language.⁶⁹ At this point, a LEP defendant who has been in custody is required to wait for the interpreter to arrive in order to communicate with their lawyer and appear before the judge for arraignment.⁷⁰ This slows down the process for LEP

64. See Jäggi et al., *supra* note 57.

65. See *infra* Section II.B (discussing police misconduct regarding false confessions).

66. See 28 U.S.C. §§ 1827–1828.

67. See C.R. DIV., U.S. DEP'T OF JUST., *supra* note 8, at 8 (“For LEP individuals, accurate interpretation is the only way that they will be able to communicate their side of the story, preserve their evidence for the record, and challenge the testimony of adverse witnesses. Interpretation requires a high level of fluency in two languages, and skill in conveying — sometimes simultaneously — what is being said. Interpreters who have not been properly trained or assessed may have trouble understanding or accurately conveying important information, including difficult legal terminology.”).

68. See Daniel Parra, *City Courts Seen Lacking in Interpreters*, CITY LIMITS (May 25, 2020), <https://citylimits.org/2020/05/25/citys-courts-seen-lacking-in-interpreters> [https://perma.cc/2C8S-EM7B].

69. See *id.*

70. See *id.*

individuals and makes it difficult to comply with the City's rule requiring defendants to appear before an arraignment judge within 24 hours of their arrest.⁷¹ Further, it is already challenging and traumatizing for LEP people who cannot communicate with court officers and guards, and do not understand the basic court process.⁷² When a LEP person cannot communicate their more serious needs, such as a health concern or an injury, this could also lead to devastating physical consequences.⁷³

The issue extends into other pretrial proceedings. While criminal courts attempt to schedule interpreters for appearances at other pretrial court dates, LEP defendants continue to experience interpreter-related adjournments.⁷⁴ Even when interpreters are available in the courtroom, attorneys and defendants suffer communication issues; lack of availability of interpreters in hallways, offices, and other off-the-record court spaces make conversations about legal strategy and potential offers impossible or, when possible, abbreviated.⁷⁵ Because court interpreters are officers of the court, not advocates for the defendant, their interest lies in conforming with the expectation of other court parties rather than the needs and desires of the LEP client.⁷⁶ Because the LEP defendant relies so heavily on an

71. See *People v. Roundtree*, 570 N.E.2d 223, 225 (N.Y. 1991) (holding that bringing a defendant before the court for arraignment “without unnecessary delay” meant doing so in 24 hours).

72. See *Interpreting Justice: Issues Affecting LEP Litigants*, *supra* note 2 (“The minute an LEP person walks into a courthouse, he or she is at a disadvantage. Many of the most important signs are in English, including signs telling people where the petition room or clerk’s office is, or how to find the court attorney[.] [sic] Moreover, the court interpreter’s office is often difficult to locate in an overwhelming and crowded [courthouse], and the multi-lingual signs telling people the location of the court interpreter’s office can be difficult to read. Having to go to court is already a confusing, intimidating, experience for people. When the process starts by wandering lost through a courthouse, looking for help, people are disempowered before they have even begun.”).

73. Inability to communicate with supervisory professionals has led to avoidable safety risks in other contexts, such as medical malpractice. See, e.g., KELVIN QUAN & JESSICA LYNCH, U.C. BERKELEY & NAT’L HEALTH L. PROGRAM, THE HIGH COSTS OF LANGUAGE BARRIERS IN MEDICAL MALPRACTICE (2010), <https://9kqpw4dcaw91s37koz5jx17-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/Language-Access-and-Malpractice.pdf> [<https://perma.cc/F9SW-EWUL>] (“Health care providers report that language difficulties and inadequate funding of language services are major barriers to LEP individuals’ access to health care and a serious threat to the quality of the care they receive.” (citation omitted)).

74. See *Interpreting Justice: Issues Affecting LEP Litigants*, *supra* note 2.

75. See *id.*

76. Many interpreters do see themselves as advocates for individual clients and family members. Carlos A. Astiz argues that this “adaptation role” and willingness to simplify and explain the criminal legal system in plainer terms to the defendant and their community is an improper way to proceed with formal interpretation services. Carlos A. Astiz, *Interpreting Services in American Criminal Courts: A Violation of the Due Process Clause?*, U.S. DEP’T JUST. (Oct. 3, 2002), <https://www.ncjrs.gov/pdffiles1/nij/>

interpreter that does not work in their interest but those of the court, efficiency becomes more important than accuracy and advocacy. Additionally, if a LEP defendant does not fully understand the role of the interpreter, they may discuss or disclose important elements of the case with an individual who is not their advocate, presenting issues related to representation including confidentiality and trust-building in the attorney-client relationship.⁷⁷

This phenomenon is especially prominent in the context of plea bargaining. While judges are instructed to simplify the language they use when a LEP defendant is pleading guilty, there are no procedural protections to ensure that an interpreter is accurately representing the consequences of a guilty plea.⁷⁸ Primarily, this raises *Brady* concerns; if all pleas must be knowing, voluntary, and intelligent, misrepresentations made by an interpreter can obfuscate the consequences or realities of pleading guilty.⁷⁹ When so much depends on the adequacy and competency of the interpreter, there is little accountability: there is no true record of what the LEP defendant is saying, as everything that is recorded by a court reporter is filtered through the interpreter.⁸⁰ Particularly when relying on non-certified interpreters, which is frequent for languages that are not commonly used in the criminal legal context, there is no way to ensure that the defendant is being accurately represented or that collateral consequences as articulated by the judge and attorney are adequately explained to the defendant.⁸¹ Under these circumstances, there is no guarantee that the LEP defendant is pleading guilty voluntarily, knowingly, and intelligently.⁸²

In addition to raising *Brady* issues, it also raises *Padilla* concerns for immigrant LEP defendants.⁸³ While there should not be an assumption that

grants/196661.pdf [https://perma.cc/2XRN-GWHC]. Conversely, Muneer I. Ahmad advocates for a community-based approach to interpreter training that allows the interpreter to work alongside the attorney as both a linguistic and cultural authority. See generally Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007).

77. See Ahmad, *supra* note 76, at 1004.

78. See Annabel R. Chang, Note, *Lost in Interpretation: The Problem of Plea Bargains and Court Interpretation for Non-English-Speaking Defendants*, 86 WASH. U.L. REV. 445, 462–63 (2008).

79. See generally *Brady v. United States*, 397 U.S. 742 (1970).

80. See Chang, *supra* note 78, at 463–64.

81. See Astiz, *supra* note 76, at 13 (“[T]here is no real difference in terms of meeting the constitutional guarantees of non-English speaking individuals between refusal to provide interpreting services and use of incompetent interpreters: In both cases defendants are denied due process of law . . .”).

82. See *Brady*, 397 U.S. at 748.

83. See generally *Padilla v. Kentucky*, 559 U.S. 356 (2010).

all LEP defendants are noncitizens, it is imperative, particularly for LEP defendants, that the topic is raised and fully explored. As the criminal legal system is complicated enough on its own, layering the complex immigration consequences on top of this requires additional attention, especially when the threat of deportation is imminent.⁸⁴ These circumstances are also subject to governmental abuse: for example, when equipped with knowledge about an individual's immigration status, police and prosecutors can use this knowledge to coerce confessions and/or pleas.⁸⁵ For individuals using an interpreter, it is crucial that interpreters and defenders fully explain and advise on deportation and inadmissibility consequences of entering a guilty plea to prevent state actors from manipulating immigrant LEP defendants.⁸⁶

Another consequence is the confusing, and sometimes damaging, effect that the use of an interpreter can have on the attorney-client relationship. In a client-centered advocacy approach,⁸⁷ it is crucial to ensure that a client feels heard and understood. The capacity to build trust between the defender and the client is central to the attorney-client relationship; this is best achieved when a lawyer promises confidence and loyalty.⁸⁸ Involving

84. See WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, AM. IMMIGR. COUNCIL, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf [https://perma.cc/HR7X-NXAL] (“Immigrants who experience even the slightest brush with the criminal justice system, such as being convicted of a misdemeanor, can find themselves subject to detention for an undetermined period, after which they are expelled from the country and barred from returning.”).

85. See Barbara O'Brien et al., *Latinx Defendants and the Difficult Road to Exoneration*, 66 UCLA L. REV. 1682, 1698 (2019).

86. See Kate O. Rahel, *Why the Sixth Amendment Right to Counsel Includes an Out-of-Court Interpreter*, 99 IOWA L. REV. 2299, 2317–18 (2014) (“Courts are reluctant to acknowledge the need for out-of-court interpretation, but a number of recent cases demonstrate how the violation of an LEP defendant's consultation right produces undesirable results. Without an appointed interpreter, defendants are forced to rely on inadequate substitutes that can lead to conflicts of interest or misunderstandings.” (internal citation omitted)).

87. “Client-centered lawyering” involves adhering to and enhancing the client's values and autonomy during legal decision-making. Further, though, it acknowledges that client objectives are not fixed:

Engaged client-centered representation recognizes that clients do not arrive with static and pre-determined objectives to which lawyers can simply defer. Clients' objectives are tied to their feelings, relationships and experiences; their objectives often change over the course of representation; and their objectives are shaped in part by the information about the law and available legal options that their lawyers explain to them.

Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 587 (2011) (citation omitted).

88. See Ahmad, *supra* note 76, at 1045.

a third party, such as an interpreter, can create tension and confusion where the roles of each party are not clearly delineated. For example, a LEP client may see their interpreter as an ally, an advocate, or a legal expert determining the choices made in their case.⁸⁹ Not only does this disrupt the traditional attorney-client relationship, but it introduces a person whose presence may affect client disclosure and decision-making.⁹⁰

The dynamics can also compromise client autonomy; when communication occurs primarily between the interpreter and the attorney, the client may be or feel powerless to express their concerns when their desires or goals are not being accurately represented.⁹¹ This is especially poignant in strategy meetings, where experienced interpreters may have additional cultural insight that interferes with an attorney's line of questioning or approach to a particular issue.⁹² While this may be helpful in assisting a vulnerable client, it can undermine the trust and confidence between the LEP client and their defender.

Even when defenders are bi- or multilingual and do not rely on an interpreter, separate challenges emerge. While it may make logical sense for multilingual defenders to serve as interpreters for their LEP clients, conflicts of interest, as well as issues of loyalty, prevent objective interpretation.⁹³ It is irrational to expect that a defender can effectively interpret for all parties during a court proceeding in addition to arguing their own case and adhering to client needs as they arise.⁹⁴ A salient consequence of this practice is that LEP defendants have a more difficult time filing claims of ineffective assistance of counsel when their attorney serves as both interpreter and counselor.⁹⁵ Another important consideration is the conflict of interest that may arise; a defender may not actually interpret what their client says but rather adjust the commentary to suit the

89. *See id.* at 1004.

90. *See id.* at 1002.

91. *See id.* at 1024 (“[U]nless attended to by lawyers, language difference can degrade the client’s ability to express herself. The resulting dilution of client voice diminishes the presence of the client, her ability to make decisions for herself, and ultimately, her very personhood.”).

92. *See id.* at 1051 (“Because interpreters do not merely transmit information, but mediate it as well, the personhood of the interpreter — her own subject position and associated biases and interests — cannot be removed from the process.”).

93. *See* Teresa B. Morales & Nathaniel D. Wong, *Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion — How Texas Courts Have Placed Attorneys and Their L.E.P. Clients at the “Discretion” of the Trial Court*, 37 ST. MARY’S L.J. 1123, 1138 (2006).

94. *See id.* at 1138–39.

95. *See id.* at 1140.

defense's narrative.⁹⁶ This compromises the truth-seeking function of the criminal legal system and undermines client autonomy and expression. Finally, if a defender operates as an interpreter and officer of the court, this can undermine their oath of loyalty to their client; it is difficult to maintain that one can be a zealous advocate, while also communicating the government's incriminating evidence about one's client in open court.⁹⁷

In addition to the language barriers that LEP defendants face, there are also cultural competency concerns for LEP individuals navigating the U.S. criminal legal system.⁹⁸

While not all LEP individuals are immigrants, many grow up within communities that conform to a non-U.S. cultural background.⁹⁹ Many LEP individuals are not familiar with the intricacies of the U.S. criminal legal system and are instead informed by their own cultural understanding of authority.¹⁰⁰ Thus, these individuals require special accommodation and support in interpreting and explaining U.S. legal dynamics and proceedings. This may manifest as additional support from community advocates or from particular legal professionals. For example, Dr. Karen Pita Loor, Associate Dean for Experimental Education and Associate Clinical Professor of Law at Boston University School of Law, performed this role in a highly publicized homicide case.¹⁰¹ Dr. Pita Loor's client was Mr. Nicolas Dutan Guaman, a native of rural Ecuador, who only spoke Quechua.¹⁰² For the duration of his case, the court relied on Spanish and,

96. *See id.* at 1137 (“[I]f an attorney chooses to officially interpret for his client, no process assists in discerning the accuracy of the attorney’s translations throughout the course of a hearing, trial, or otherwise.”).

97. *See generally id.*

98. *See id.* at 1151 (“Interpreting for another person brings a host of challenges, which are not limited to the spoken and written language. Interpreting language implicates cultural norms and stigmas; legal, ethical, and moral concerns; expense; and conflicting duties of the legal profession.”).

99. *But see* Leti Volpp, *(Mis)identifying Culture: Asian Women and the “Cultural Defense”*, 17 HARV. WOMEN’S L.J. 57, 61 (1994) (“Reserving the term ‘American’ for those who seem fully assimilated erases two important and related factors. The first is the fluid and shifting nature of American identity. The second is the fact that both immigrant and Asian experience are integral and formative components of American identity. This failure to acknowledge the multiplicity of American identity leaves American identity, and specifically the identity of United States law, a neutral and unquestioned backdrop.”).

100. *See* Chin, *supra* note 54, at 658 (“Another example of cultural incompatibility is if an immigrant defendant from an authoritarian regime *distrusts* authority and thus fails to cooperate with his or her own defense attorney, believing the defense attorney to be aligned with the authorities.”).

101. *See* Lindsay Corcoran, *Denice Case: Attorney Says Guaman Competent to Stand Trial*, HERALD NEWS (Sept. 27, 2013, 10:43 PM), <https://amp.heraldnews.com/amp/37408609007> [<https://perma.cc/HAD9-8NSZ>].

102. *See id.* (“[Quechua is] a language indigenous to [Guaman’s] home country of Ecuador.”).

when available, Quechua interpreters.¹⁰³ Because of his language barriers and the lack of availability of appropriate interpreters, his hearings were continuously postponed.¹⁰⁴ Additionally, Mr. Guaman was perceived to have competency issues that, once he was able to work with Dr. Pita Loor, were eventually resolved.¹⁰⁵

Dr. Pita Loor, who is fluent in Spanish, was hired by defense counsel and the court to educate Mr. Guaman about the U.S. legal system.¹⁰⁶ While Dr. Pita Loor does not speak Quechua, she was able to use her Spanish to work with a Quechua interpreter, who themselves did not speak English. For Dr. Pita Loor, the most difficult part was explaining the abstract legal concepts that arise in a criminal proceeding, many of which do not have a direct translation, literally or conceptually, into Quechua.¹⁰⁷ Another challenge that arose related to the defendant's own cultural identity: the educational, racial, and class hierarchies that exist in Ecuador were internalized by the client, and it was difficult to explain to him that, even when working with white male lawyers, he had the final say over any decision being made.¹⁰⁸ This cultural difference makes it all the more necessary to emphasize that LEP clients from different backgrounds are entitled to their autonomy, and defenders should be mindful not to abuse their power, nor take for granted that a client is aware of their decision-making power.

In every pretrial decision, complex legal strategies and concepts arise. For a LEP defendant who does not fully understand criminal proceeding, whether their obstacles be linguistic or cultural, additional care must be taken to ensure that LEP individuals fully appreciate and understand the processes and consequences in pretrial appearances and decision-making.

C. Jury Selection and Trial Proceedings

Criminal defendants have an inalienable right to a trial by a jury of individuals representative of their community, barring the use of racial discrimination in jury selection.¹⁰⁹ Although the trial system is

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. Telephone Interview with Dr. Pita Loor (Sept. 23, 2020). Dr. Loor advised on various legal concepts, including the burden of proof on the prosecution and the decision to accept the terms of a plea bargain. What was most challenging, according to Dr. Loor, was ensuring that the defendant knew that he was in control of every substantive decision.

108. *See id.*

109. *See Smith v. Texas*, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from

increasingly eroding, when the opportunity to go to trial is presented to LEP criminal defendants, the process and proceedings remain wrought with prejudice. While interpreters continue to serve an essential role in trial proceedings, a notable new factor invites additional inquiry: the jury. From jury selection to jury deliberation, LEP individuals, particularly those from non-Western, non-U.S. cultures, operate at a disadvantage.¹¹⁰ Despite alleged constitutional protections, implicit and explicit bias lead to disparate consequences for minority LEP defendants.

It is well established that counsel may not strike a potential juror on the basis of race.¹¹¹ However, when faced with the question of whether this applied to one's language ability, the Supreme Court ruled that the practice of discriminating based on language ability is constitutional, as it does not categorically qualify as racial discrimination.¹¹² In *Hernandez v. New York*, the government used a peremptory strike against a bilingual, Hispanic juror based on their concern that the juror would not follow the official interpretation services provided by the court but instead would use his own Spanish competency to understand the defendant and witnesses.¹¹³ In its decision, while the Court conceded that disparate discriminatory impacts or consequences may be inferred from the circumstances of the case, the outcome of excluding bilingual jurors was not dispositive.¹¹⁴ In essence, the Court accepted the prosecution's assertion that a bilingual juror, who directly understands the witness and does not rely on the interpreter, will introduce the possibility of juror bias or inconsistent understandings of the facts, thus undermining the efficiency and integrity of the trial process.¹¹⁵ To address the concern that this amounts to ethnic

jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government." (internal citation omitted)).

110. See Gonzales Rose, *supra* note 31, at 312–13 ("Exclusion from jury service on the basis of accent relegates people of color that are perceived to be foreign, such as Latinxs, Asian Americans, Middle Eastern Americans, and — ironically — indigenous Americans, to second class citizenship based upon the way they speak or, more accurately, the way that they are heard. The resultant elimination of people of color from juries defeats our legal system's commitment that juries be a body truly representative of the community. When juries are not truly representative of the community, it delegitimizes the verdict and, in turn, the legal system as a whole." (internal citation omitted)).

111. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

112. See generally *Hernandez v. New York*, 500 U.S. 352 (1991) (finding the state provided sufficient race-neutral reasons to survive a *Batson* challenge).

113. See *id.* at 360.

114. See *id.* at 363 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))).

115. See generally *id.*

discrimination, the Court explained, “[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.”¹¹⁶ Because the Court asserts that this did not amount to discrimination here, the broader impact is pronounced: so long as a prosecutor can cite “race-neutral” reasons based on language competency or efficiency, *de facto* race and ethnic discrimination can still occur. This undermines the holding in *Batson* and promotes a white-washed jury selection process.

This practice of linguisticism not only affects potential bilingual jurors but also potential jurors with accents.¹¹⁷ Stringent English language requirements have prevented approximately 13 million U.S. citizens from serving on a jury.¹¹⁸ Often, these individuals speak English competently but are presumed to have language barriers because of their accents.¹¹⁹ As Gonzales Rose articulates, “listeners’ unconscious racial biases can be aroused by accent, triggering assumptions about the speaker’s lack of comprehensibility and worth as an interlocutor, which then leads to avoidance.”¹²⁰ This results in LEP defendants being denied jury members from their ethnic and cultural background, likely resulting in a less understanding or empathetic jury panel. This constitutional violation is compounded for minority LEP defendants, for “even when a [Latine] or Asian American speaks English fluently, they can still be foreclosed from jury service on the basis of language because of an actual or perceived

116. *See id.* at 371. The dissent by Justice Stevens provides persuasive reasoning behind why this is, in fact, discriminatory: (1) the practice of excluding Spanish-speaking jurors based on their understanding of Spanish leads to disproportionate disqualification of Spanish-speaking jurors; (2) the strike was not the least harmful way to dissuade bilingual jurors from interpreting independently; and (3) the prosecutors’ concern did not support a challenge for cause. *See id.* at 379 (Stevens, J., dissenting).

117. *See* Gonzales Rose, *supra* note 31, at 321 (“Courts recognize the ability of laypeople to identify a person’s race or national origin through voice. The majority of jurisdictions permit witnesses ‘to testify that an individual’s voice or manner of speech sounded like the speaker was of a particular race [or] ethnic background, [or] geographic area.’ Accent is such a well-established and ostensibly reliable racial characteristic and identifier that it is given evidentiary value in our legal system.” (quoting Clifford S. Fishman & Anne T. McKenna, *Voice Identification by Law Witnesses, Jurors and Judges* § 38.11, in *WIRETAPPING AND EAVESDROPPING* (2016))).

118. *See id.* at 315.

119. *See id.* at 316 (“In the jury selection process, lawyers too often strike potential jurors on the assumption that citizens who possess ‘heavy’ or ‘thick’ accents can be neutrally identified and excluded from jury service because they lack the requisite English language skills. However, a listener’s beliefs about a minority speaker’s accent and corresponding English language ability are frequently a matter of subjective racialized perception rather than objective reality.” (internal citations omitted)).

120. *Id.* at 331.

accent or language ability.”¹²¹ Again, where one’s accent can serve as race-neutral reasoning that suggests an inability to understand the proceedings, the ruse can enable what is otherwise a clear *Batson* violation.

It is evident that a LEP defendant would benefit from a jury that understands them completely, regardless of what language they or the juror speak.¹²² The argument against this, though, relates to court expenses and the need for expediency. In New York, for example, while LEP defendants are entitled to an interpreter during any criminal court proceeding at the court’s expense, challenges arise when multiple interpreters are required for defendants and witnesses. Best practice requires separate interpreters for each party, but, particularly when the language is not commonly used, this can slow down due process when finding the necessary interpreters; these due process concerns are exacerbated when the LEP defendant is incarcerated.¹²³ In spite of what is clearly beneficial (arguably, required) for a LEP criminal defendant, courts instead are eager to preserve neutrality and efficiency in the jury selection process, denying LEP defendants the right to a trial by a jury of their peers.¹²⁴

Another hallmark in trial practice is the deference towards jurors as “factfinders.” This becomes relevant for LEP defendants when jurors are making credibility determinations about defendants and witnesses. When evaluating one’s credibility, a juror will inevitably look to the demeanor of the defendant or witness to assess their character.¹²⁵ When juries are primarily comprised of individuals with a U.S.-based understanding of cultural expression, perceptions of nonverbal behavior will be inaccurate.¹²⁶ The prime example provided by Daniel Procaccini and

121. *Id.* at 350.

122. *See* *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure. ‘The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.’” (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880))).

123. *See* *Cole & Maslow-Armand*, *supra* note 39, at 218 (“Using only one interpreter may deny a defendant ‘a spontaneous understanding of the testimony and the proceedings.’” (quoting *People v. Romero*, 200 Cal. Rptr. 404, 406 (Ct. App. 1984) (citation omitted))); *see also* *Franklin v. District of Columbia*, 163 F.3d 625 (D.C. Cir. 1998); *People v. Romero*, 200 Cal. Rptr. 404, 405 (Ct. App. 1984).

124. *See* *Gonzales Rose*, *supra* note 31, at 336.

125. *See* Daniel J. Procaccini, Note, *What We Have Here Is a Failure to Communicate: An Approach for Evaluating Credibility in America’s Multilingual Courtrooms*, 31 B.C. THIRD WORLD L.J. 163, 179 (2011).

126. *See id.* at 177–78 (“Intonation, pitch, body language, and nonverbal gestures are not necessarily fungible between cultures. Thus, in monolingual and monocultural courtrooms,

William Y. Chin is gaze pattern. While eye contact is considered as a demonstration of confidence and truth-telling in U.S. culture, for other cultures, such as Haitian or certain Asian cultures, the choice to look at the floor instead of making eye contact suggests a learned respect for authority.¹²⁷ Other examples include speaking in an unnaturally loud or soft voice, failing to “verbalize remorse,” using exaggerated gestures that are common in minority culture, and failing to express emotion.¹²⁸ These indirect communications extend beyond demeanor and into procedural requirements such as the use of an interpreter¹²⁹ or into cultural expressions such as the way one is dressed.¹³⁰

Additionally, there is nothing to suggest that these credibility determinations are actually serving truth-seeking objectives. In a 1990 study that explored the ability to detect deceit across different races and cultures, in the cross-cultural/racial encounters, the accuracy rate for the detection of deception was less than 50%; in other words, the groups “had a better chance of accurately predicting whether their subject was telling the truth by flipping a coin.”¹³¹ Because a layperson has no greater capacity to ascertain the truth than chance, it invites the question of whether the jury actually undermines the judicial system, especially in cross-cultural courtrooms.¹³²

While linguistic discrimination remains unchecked in the jury selection process, juries remain disproportionately comprised of English-speaking,

a fact-finders unguided reliance on demeanor evidence based upon the conduct of a limited- or non-English speaking individual is dangerous.”)

127. *See id.* at 178.

128. *See* Chin, *supra* note 54, at 659 (quoting Flo Messier, Note, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1401).

129. *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 893–94 (2019) (“[T]here is evidence that jurors consider the fact that a defendant is listening to the trial through an interpreter as a negative and give less credibility to those witnesses who speak with an ‘outsider’ accent, while giving extra credibility to those witnesses who speak with an ‘insider’ or even British accent.” (internal citation omitted)).

130. *See id.* at 875. (“While witnesses’ verbal and non-verbal behaviors affect their credibility, another factor in jurors’ perceptions of them is their appearance.’ Indeed, in all likelihood, it is the first thing considered by jurors.” (quoting Merrie Jo Pitera, *Courtroom Attire: Ensuring Witness Attire Makes the Right Statement*, JURY EXPERT (July 31, 2012), <https://www.thejuryexpert.com/2012/07/courtroom-attire-ensuring-witness-attire-makes-the-right-statement/> [<https://perma.cc/7P7Q-JV2S>])).

131. Procaccino, *supra* note 125, at 185.

132. *Id.* at 183–84. Procaccino proposes the use of an expert witness regarding credibility where non-English speaking parties or witnesses would otherwise suffer prejudice. *See id.* at 186. *But see* Volpp, *supra* note 99, at 58 (“[A]ny testimony about a defendant’s cultural background must embody an accurate and personal portrayal of cultural factors used to explain an individual’s state of mind and should not be used to fit an individual’s behavior into perceptions about group behavior.”); *see also infra* Section III.D (discussing cultural mitigation in defense strategies).

white, U.S.-educated jurors. With so many nonverbal “cues” being invoked because of cultural disparities, it is inevitable that, when left to the jury, these differences and disparities will be used against LEP defendants. When paired with the procedural limitations, this unfairly prejudices LEP individuals.

D. Sentencing and Post-Conviction Relief

The challenges facing a LEP defendant do not end upon conviction. Unique concerns arise in important post-trial stages of a criminal proceeding: sentencing and post-conviction relief. In the sentencing schema, like all criminal defendants, LEP individuals and their defenders have an opportunity to present mitigating evidence that can reduce their criminal penalty. This invites an analysis of the role of cultural competency in understanding human behavior, an especially important consideration when representing non-English-speaking defendants.¹³³ Beyond this, even where mitigation succeeds, the lack of multilingual alternatives to incarceration makes treatment and diversion impossible for many LEP defendants.¹³⁴ Finally, regarding appeal and exoneration, while language barriers significantly contribute to Latine defendants’ wrongful conviction, these errors are often difficult to measure or quantify.¹³⁵ For this reason, establishing grounds for appeal or a vacated conviction present a unique challenge for LEP defendants.

Individualized mitigation strategies require an analysis of the defendant’s cultural background.¹³⁶ When presenting a defendant’s

133. See Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 919 (2008).

134. See, e.g., CASES, <https://www.cases.org/> [<https://perma.cc/35Y7-N79C>] (last visited Oct. 26, 2021); EAC NETWORK, <https://eac-network.org/> [<https://perma.cc/QBZ7-RMGM>] (last visited Oct. 26, 2021). The Author is also speaking from personal experience in alternatives to incarceration (ATI) work, having worked at a clinical non-profit (Brooklyn Justice Initiatives) for two years handling referrals for LEP clients. When capacity did not exist for individual case management with Spanish-speaking staff or via Language Line, LEP clients were referred to community service programming as there were very few well-vetted community-based programs. The Author developed Brooklyn Justice Initiatives’ first CBT (cognitive behavioral therapy) ATI group in 2017 to attempt to address this need.

135. See O’Brien et al., *supra* note 85, at 1702–03.

136. While mitigation is generally discussed within the capital sentencing scheme, there is a noted expansion of individualized noncapital sentencing:

Individualized noncapital sentencing appears to be resurging and its expansion will have an impact on incarceration rates. The Supreme Court’s recent emphasis that the background of a convicted person is as important as the crime itself should serve as a clarion call for institutional change. Though resource and doctrinal constraints present challenges to a full reconciliation of capital and noncapital mitigation practice, a good deal of change can begin immediately by reorienting defense lawyers to take mitigation as seriously in noncapital cases as

circumstances before the court, it is crucial to not only explain the context of their conviction but how their upbringing and worldview have brought them to where they are today.¹³⁷ Inevitably, cultural competency concerns arise. As noted by Scharlette Holdman and Christopher Seeds, this cultural analysis should not be limited to the “group” that a person belongs to. Rather, the team asserts that one’s cultural identity is more individualized, existing beyond one’s distinct race, ethnicity, nationality, or class, but instead tied to their personal relationship with these broader cultural categories.¹³⁸ This holistic approach to cultural analysis requires special attention when dealing with communication barriers. Establishing rapport is critical when gaining understanding of an individual; when two people do not speak the same language, it is difficult to establish trust, as it could hinder the defender and LEP defendant’s ability to speak plainly and honestly.¹³⁹

Still, the use of interpreters or family members as interpreters also presents challenges; for professional interpreters, critical legal information or elements of the LEP defendant’s story could be misconstrued or brushed over, particularly when conveying sensitive information.¹⁴⁰ On the other hand, for family or community member interpreters who are emotionally involved in the outcome, there is a risk that these individuals will manipulate information being conveyed to avoid insult, embarrassment, or bad news.¹⁴¹ In both contexts, this not only interferes with the attorney-client relationship but also prevents the LEP defendant from telling their story on their terms.

Even where mitigation is successful and sentencing schema favors a non-jail outcome for LEP defendants, available resources do not always guarantee fair or restorative sentencing options for LEP individuals. Often, diversion programs cannot offer or do not have the capacity to

capital defense lawyers do, and to realign their practices and professional standards accordingly.

Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 42, 85 (2013).

137. *See id.*

138. *See* Holdman & Seeds, *supra* note 133, at 886 (“Culture is not something that a minority group has, but whichever demographic characterizes itself as dominant lacks. Cultural imperatives and dictates exist for everyone in varying degrees.” (citations omitted)).

139. *See id.* at 919, 921 (“‘Participant observation’ means that the ethnographer participates in the life of the people in order to discover what the right questions are Only if ethnographers learn to speak with people in their own language can they understand the rational reasons people have for doing what they do.” (quoting PAUL BOHANNAN & DIRK VAN DER ELST, *ASKING AND LISTENING: ETHNOGRAPHY AS PERSONAL ADAPTION* 24 (1998))).

140. *See id.*

141. *See id.* at 919–20.

accommodate non-English speaking individuals resulting in either inappropriate treatment options or even jail time as a default. For example, in *Flores v. State*, when there was no viable alcohol treatment program available for a Spanish-speaking defendant, the court sentenced them to one year in jail.¹⁴² On appeal, the court found that probation in lieu of incarceration was not a fundamental right for this defendant, given that language ability (unlike race or national origin) is not a suspect classification; therefore, carceral punishment was deemed appropriate, absent any meaningful alternative.¹⁴³ Throughout the country, diversion programs are primarily offered to English-speaking participants; therefore, LEP defendants are often sentenced to community service, a less rewarding and more taxing alternative, or simply sent to prison.¹⁴⁴ As a society that posits the immorality of mass incarceration, a critical step to achieve a reduced prison population must be to ensure meaningful non-jail alternatives for LEP individuals.

Finally, a conversation about criminal proceedings involving LEP defendants would be incomplete without a discussion of wrongful convictions. As with non-Latine exonerees, factors that contribute to wrongful convictions for Latine defendants include mistaken eyewitness identification, false confessions, forensic error, misconduct by the police and prosecutors, and perjury.¹⁴⁵ While these enumerated grounds carry precedent and can often lead to exoneration, procedural and substantive issues related to language barriers also weigh heavily on the integrity of a conviction.¹⁴⁶ Research conducted by the National Registry of Exoneration outlined police and prosecutorial abuses of LEP individuals that constituted grounds for a vacated conviction. The misconduct ranges from falsified documents or testimony to mischaracterization of the LEP defendant's response to questioning.

As one example, a Spanish-speaking defendant once gave three different statements to the police through an interpreter.¹⁴⁷ On appeal, the appointed interpreter in these investigations debunked several allegations articulated by the officers who took these statements; in fact, falsified statements were included by the detective in the affidavit that the defendant eventually

142. 904 S.W.2d 129 (Tex. Crim. App. 1995).

143. *See id.* at 130–31. For discussion, see also Cole & Maslow-Armand, *supra* note 39, at 227.

144. *See* C.R. DIV., U.S. DEP'T OF JUST., *supra* note 8, at 5 (“In a survey conducted by the National Center for State Courts, two-thirds of community-based service and treatment providers had received LEP individuals who had been ordered by the courts to participate in their programs, but 41% often or sometimes turned them away.” (citation omitted)).

145. *See* O'Brien et al., *supra* note 85, at 1684.

146. *See id.* at 1685.

147. *See id.* at 1694.

signed.¹⁴⁸ Additional examples of this corrupt practice include a defendant who unwittingly signed a confession in English, and a defendant who signed a statement in English that he discovered, upon translation, was never given.¹⁴⁹ For an emblematic example of misconduct, one can turn to the story of Vincente Benavides Figueroa: Mr. Figueroa's statement was taken by an officer who only spoke broken Spanish, the interpreters in the trial were not certified (one having learned Spanish from watching television and reading books) and consistently provided inaccurate translations, and the prosecution relied on a misinterpreted phrase (for example, that "he lost sight of her for a short time") to bolster claims of the defendant's inconsistent testimony.¹⁵⁰ While these interpretation errors were not disputed, the court relied on the discredited forensic findings to overrule the conviction rather than on the language issues raised on appeal.¹⁵¹

LEP defendants require additional attention and resources in all criminal proceedings, but it is especially relevant when it comes to sentencing and post-conviction relief. Even where a defense team has sufficient time and resources to successfully implement a cultural mitigation strategy, alternatives to incarceration are limited by a lack of multilingual court-certified diversion programming. Finally, once it is determined that there was a miscarriage of justice due to language-based concerns, there is no precedent outlining misconduct relating to language barriers as an avenue for exoneration. For all these reasons, LEP defendants are especially vulnerable in post-trial proceedings.

III. PROPOSED SOLUTIONS

Several steps have been and must be taken to ensure that LEP criminal defendants are guaranteed their constitutionally protected due process throughout their involvement in the criminal legal system. While these proposed measures to correct these problems are flawed and incomplete, they provide a meaningful intervention to the various way in which the criminal legal system perpetuates harm against LEP individuals.

Broadly speaking, pursuant to Executive Order 13166, "Improving Access to Services for Persons With Limited English Proficiency," federal

148. *See id.*

149. *See id.* at 1694–95.

150. *See id.* at 1703–04.

151. *See id.* at 1703 ("At no point in the decision did the court even mention Benavides's inability to speak English or his claim that his interpreter so incompetently translated his testimony that the prosecution, during cross-examination, was able to mischaracterize that testimony. Nor did the court address the claim that the incompetent translation of the detective interrogation mischaracterized Benavides's responses.").

law requires any law enforcement agency that receives funding to take “reasonable steps” to provide meaningful access to LEP individuals.¹⁵² The Department of Homeland Security (DHS) also provides several strategies for compliance with the federal regulations, including tips for determining English proficiency, recommendations to gather data in each jurisdiction to determine the language spoken and the type of assistance utilized, and implementing a holistic plan or jurisdictional policy to establish a uniform approach to working with LEP individuals.¹⁵³ Additionally, as highlighted above, the Court Interpreters Act is intended to ensure meaningful language access for criminal defendants.¹⁵⁴ However, the measures have proven insufficient as states continue to circumvent or ignore these recommendations.¹⁵⁵ Therefore, there is more work to be done.

A. Improving Communications in Criminal Arrests

First, specified standards must be introduced to ensure that LEP individuals can understand when they are under arrest and when their *Miranda* rights may be invoked. As the NYPD example demonstrates, language “access” alone is insufficient and subject to abuse. Some jurisdictions have taken additional steps to attempt to resolve these concerns. For example, Washington, D.C.’s Interpreter Act guarantees access to interpreters at various stages of criminal procedure.¹⁵⁶ In particular, under this provision, an arresting officer must have a qualified interpreter or interviewer present to conduct the custodial interrogation, warning, notification of rights, or taking of a written or oral statement in a language other than English, including sign language.¹⁵⁷ Furthermore, no LEP individual can be held if otherwise eligible for release during the time period for which the officers are seeking a qualified interpreter or interviewer.¹⁵⁸ Finally, any statement or admission made by a LEP individual cannot be used against them unless a qualified interpreter or interviewer is present at the time of said statement or admission.¹⁵⁹ While

152. See 42 U.S.C. § 2000d-1 (outlining how Title XI of the Civil Rights Act of 1964 applies to federally-funded programs).

153. See *LEP Resource Guide for Law Enforcement*, DEP’T HOMELAND SEC., https://www.dhs.gov/sites/default/files/publications/lep-resouce-guide-law-enforcement_0_1.pdf [<https://perma.cc/Q566-X28J>] (last visited Jan. 3, 2022).

154. See 28 U.S.C. §§ 1827–1828.

155. See *supra* Part II.

156. See generally D.C. CODE § 2–1902 (2021).

157. See *id.* § 2–1902(e)(1).

158. See *id.* § 2–1902(e)(2).

159. See *id.* § 2–1902(e)(3).

this still does not address cultural competency concerns, these protective measures place LEP defendants on a more equal playing field with English-speaking defendants. Another practice aimed at resolving literacy issues was implemented by the New Orleans Police Department (NOPD). In addition to written versions of one's *Miranda* rights, in 2018, the NOPD implemented a 45-day trial period wherein officers carried photo representations and audio recordings of one's rights.¹⁶⁰ This measure attempts to address both cultural and educational inequities that may arise during the arrest of a LEP criminal defendant.

In addition to these efforts, officers should be educated in cultural competency including trauma-informed responsiveness to individuals triggered by police contact and nonverbal communication across cultural contexts. For example, a cross-cultural training was conducted in the Little Rock Police Department in 2018. According to the training facilitators, the objective of the initiative was to train officers to be professional and objective with each community member they encounter, “‘blindfolded’ like Lady Justice,” while also acknowledging that every person is an individual with clear cultural expectations of law enforcement.¹⁶¹ Further, “given that there are cultural differences among people, an officer [should understand] different expectations, [predict] culturally derived behavior, and appropriately [adapt] his or her approaches.”¹⁶² The story outlines a positive response to the training program from trained officers, though it does not survey its impact or impression on the Little Rock community.¹⁶³ Still, a training like this could help ensure that police-citizen communications accommodate and appreciate different cultural understandings that may arise when LEP individuals and non-U.S. residents are dealing with law enforcement.

B. Raising Standards for Certified Court Interpreters

Interpreters also require additional training and support. The Federal Court Interpreter Certification Exam (FCICE) Program only provides certification exams in three languages: Spanish, Navajo, and Haitian-

160. See *Non-English Language Miranda Tools Promise Major Changes in Criminal Justice Arena*, AM. BAR ASS'N (Aug. 5, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/non-english_language/ [<https://perma.cc/84HC-P5UH>].

161. See Marcus Paxton & Robert Strauss, *Cultural Diversity and Cultural Competency for Law Enforcement*, POLICE CHIEF MAG., <https://www.policechiefmagazine.org/cultural-diversity-and-competency/> [<https://perma.cc/TRQ6-CCVR>] (last visited Jan. 18, 2022).

162. See *id.*

163. See *id.*

Creole.¹⁶⁴ The New York State system (Consortium for State Court Interpreter Certification (CSCIC)), while offering 18 language exams, merely assesses whether interpreters possess “*minimal* levels of language knowledge and interpreting skills required to perform competently during court proceedings.”¹⁶⁵ Further, the New York State court interpreter job description requires a high school diploma but does not require native fluency in a second language or a language immersion experience.¹⁶⁶ Therefore, in addition to expanding languages available for certification, the American Bar Association recommends building in structural checks to ensure interpreter skill, rather than mere competency. These include: test components and scoring systems that have utility for diagnostic evaluation of candidate strengths and weaknesses as well as for summative evaluation; a program that informs candidates and users of interpreter services of the names and credentials of all individuals involved in the testing development and administration process; test source materials that are derived exclusively from specimens of court and related justice system language; and test scoring that utilizes a procedure that is readily perceived to be objective and unaffected by personal bias.¹⁶⁷ By implementing a thorough certification process that ensures an interpreter is fully fluent in a second language, and by providing consistent checks on the success and style of interpretation, court interpretation will be more proficient and consistent.

In addition to these checks, court interpreters should be provided with competitive pay and benefits to improve retention and attract talent, particularly talent from underrepresented backgrounds and languages. These procedures and incentives will help produce more equitable outcomes for LEP criminal defendants.

C. Clarifying the Role of Defenders

Public defender offices can also play a role in resolving communication challenges between defenders and LEP clients. As one measure, they can hire in-house community interpreters to help with pretrial communication,

164. See AM. BAR ASS'N, STANDARDS FOR LANGUAGE ACCESS IN STATE COURTS (2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf [<https://perma.cc/X284-BJPN>].

165. *Id.* at 96 (emphasis added).

166. See Sandro Tomasi, *May Compensation Policies Show State Court Interpreters Are Underpaid*, NAT'L ASS'N JUDICIARY INTERPRETERS & TRANSLATORS (May 6, 2020, 7:19 AM), <https://najit.org/proteus/compensation-policies-show-state-court-interpreters-are-underpaid/> [<https://perma.cc/H2T2-5THG>].

167. See AM. BAR ASS'N, *supra* note 164, at 96.

plea-bargaining, and trust-building. Muneer Ahmad, for example, advocates for a reconceptualized, community-oriented approach to interpretation that promotes collaboration among client, defender and interpreter and respects the cultural and linguistic knowledge that the interpreter offers.¹⁶⁸ While Ahmad concedes that the approach is technically imperfect (for example, community interpreters may lack certain legal knowledge), he argues that this is the surest way to ensure a balanced power dynamic that centers the client and their goals.¹⁶⁹ Under this advocacy model, clients will feel heard and respected, knowing that both their communications and cultural context are being understood by someone on their lawyering team.

D. Preventing the Implementation of White-Washed Juries

There are two ways to achieve equity in the jury selection processes and assurance that LEP defendants are tried by a jury of their peers: allowing for entirely bilingual juries or allowing for complete interpretation services for jurors. The former proposal, while ambitious, seems unlikely; in recognizing the benefit of having their case heard by a jury of their peers, one Spanish-speaking defendant petitioned for a Spanish-speaking bilingual jury and was denied because (in a rather bare-bones explanation) no other cases required the need for a bilingual jury.¹⁷⁰ The latter proposal is more hopeful. As highlighted by Jasmine Gonzales Rose, juror language accommodation (provided through interpretation and translation services) has been refined in New Mexico, for example, over the past 150 years. “Under these guidelines, all parties and jurors are informed of the interpreters’ role, and the interpreters take an oath in open court that they ‘will only provide translation services to the non-English-speaking juror and will not otherwise participate in the trial or jury deliberations.’”¹⁷¹ While this may expend extensive judicial resources, this provides the surest guarantee that LEP criminal defendants are provided procedural and substantive due process.

The court should also take measures to educate jurors in cultural competency; this can be implemented using expert witnesses who are members of the same race, ethnicity, and/or community as the LEP

168. See Ahmad, *supra* note 76, at 1062.

169. See *id.*

170. See Christopher F. Bagnato, *Change Is Needed: How Latinos Are Affected by the Process of Jury Selection*, 29 CHICANO/A-LATINA-O L. REV. 59, 63 (2010).

171. Gonzales Rose, *supra* note 31, at 352 (quoting Edward L. Chávez, *New Mexico’s Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 305 (2008)).

defendant. Leti Volpp presents a case study of a more successful “cultural defense” in *People v. Wu*.¹⁷² Here:

[T]he “experts” extensively interviewed the defendant, so that the focus of their testimony was on the individual and how her behavior fit into their conceptions of “culture,” In addition, Helen Wu’s “experts” based their theory on “transcultural psychology.” Their analysis was based on the experience of people who migrate to the United States rather than in “culture” as observed in the country of origin. Finally, the “experts” *were* experts in the sense that they were immigrants to the United States themselves and were thus invested in representing the experience of immigrants from a subjective position.¹⁷³

By implementing a thorough and personalized approach to evaluate the role one’s cultural experience plays in their culpability, expert witnesses can provide context and reasoning in support of the LEP defendant’s story. Furthermore, this prevents the defense team from pathologizing one’s cultural identity or from creating a “formalized ‘cultural defense’” that presents a particular race or culture as a monolith.¹⁷⁴

E. Enhancing Mitigation Techniques and Post-Conviction Relief

Regarding sentencing solutions, the bare minimum is to include at least one person who speaks the language of the LEP defendant on the mitigation team.¹⁷⁵ However, a truly successful cultural mitigation requires a team of experts, in addition to community support, to speak to the cultural and personal background of the LEP defendant.¹⁷⁶ It is imperative here that an individual, particularly a LEP individual from a minority culture, is not presented as a cultural stereotype. As with cultural defenses, cultural mitigation evidence should not be used to present all people in a certain racial or ethnic group as “the same”; one should not equate “cultural dictates with cultural compulsion — in assuming that cultural dictates apply with equal force to all who share a cultural background.”¹⁷⁷ Instead, one should seek to contextualize the LEP individual’s experience and perspective within well-supported, authentic explorations of their own cultural identity.¹⁷⁸ Though not all LEP individuals identify with distinct

172. See Volpp, *supra* note 99, at 89.

173. See *id.*

174. See *id.*

175. See Holdman & Seeds, *supra* note 133, at 919.

176. See *id.* at 904–05.

177. *Id.* at 887 (citation omitted).

178. See Volpp, *supra* note 99, at 100 (“Information about the defendant’s culture should never be reduced to stereotypes about a community but rather should concretely address the individual defendant’s location in her community, her location in the diaspora and her

cultures, this approach to implementing a cultural mitigation strategy acknowledges the role that language plays in relationship-building and prevents biased cultural assumptions about LEP individuals.

Finally, to create more pathways for appeal and exoneration, appellate attorneys and civil rights advocates should develop and press litigation around language and cultural barriers throughout criminal proceedings as a violation of the Fourteenth Amendment Due Process Clause, grounding their argument in the use of language or cultural background as a proxy for race and nationality-based discrimination.

CONCLUSION

LEP criminal defendants require and deserve additional investment and support. As outlined above, from arrest to sentencing, these individuals face countless hurdles in achieving due process and fair treatment under the law. Whether these violations occur at the point of arrest, in pretrial proceedings, during a jury trial, or at their sentencing, LEP defendants are left with few avenues for relief as language barriers and cultural incompetency provide no clear basis for post-conviction or appellate review. By improving the standards of linguistic and cultural competency for police officers and interpreters, barring the use of linguisticism to achieve white-washed juries, and pursuing all advocacy in a culturally competent way, we can begin to address these damaging inequalities.

history. The information should be provided so as to give insight into an individual's thoughts, and should not be used for purposes of explaining how an individual fits into stereotypes of group behavior.”).