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Bilingual Notice--The Rights of Non-English Speaking Welfare Recipients

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BILINGUAL NOTICE—THE RIGHTS OF NON-ENGLISH SPEAKING WELFARE RECIPIENTS

In recent years, there has been a growing interest in the extent to which the fourteenth amendment protects the rights of non-English-speaking citizens.[1] As a consequence, litigation involving this question has increased significantly,[2] particularly in such contexts as voting and welfare. One aspect of the question of the rights of non-English-speaking citizens in the welfare area was recently considered by the California Supreme Court.[3]

Plaintiffs were Spanish-speaking recipients of welfare payments, who sought to enjoin California's Welfare Department from notifying Spanish-speaking welfare recipients in English of a reduction or termination of welfare payments.[4] The plaintiffs asserted that this practice was unconstitutional under the due process clause of the fourteenth amendment.[5] Although they expressly admitted that there were no cases directly supporting their position,[6] the plaintiffs based their claim on the Supreme Court's decision in *Goldberg v. Kelly*,[7] which held that welfare recipients were entitled, under the due process clause, to a fair hearing before their welfare grants could be terminated. Plaintiffs further argued that they had been denied the equal protection of the laws, because the California practice had created a class of non-English-speaking welfare recipients

1. See, e.g., Puerto Rican Org. for Political Action v. Kusper, 350 F. Supp. 606 (N.D. Ill. 1972), aff'd, No. 73-1035 (7th Cir., Dec. 18, 1973). It has been assumed arguendo that all of the plaintiffs involved in these various cases are citizens. Whether this distinction is important in view of the fourteenth amendment rights granted to aliens is debatable. See, e.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). For recent cases dealing with the problems of aliens see, e.g., Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (term national origin does not include citizenship requirements); In re Griffiths, 413 U.S. 717 (1973) (state cannot refuse admission to its bar to aliens); Sugarman v. Dougall, 413 U.S. 634 (1973) (state may not flatly ban aliens from competitive positions in its civil service); Graham v. Richardson, 403 U.S. 365 (1971) (violation of equal protection to deny welfare benefits to aliens). A good general discussion of the problems in this area may be found in Leibowitz, English Literacy: Legal Sanction for Discrimination, 45 Notre Dame Law. 7 (1969).

2. See, e.g., Chavez v. San Francisco, No. C-73-1130-SC (N.D. Cal., filed July 5, 1973), summarized at 7 Clearinghouse Rev. 340 (1973) (Spanish-speaking mechanic claims examination discriminates against those whose native language is not English); Sanchez v. Norton, No. 15732 (D. Conn., filed Apr. 18, 1973), summarized at 7 Clearinghouse Rev. 178-79 (1973) (bilingual assistance in Spanish for welfare recipients); Aspira of New York, Inc. v. Board of Educ., 58 F.R.D. 62 (S.D.N.Y. 1973) (bilingual education); Asociacion Mixta Progresista v. HEW, No. C-72-882 SAW (N.D. Cal., filed May 16, 1972), summarized at 6 Clearinghouse Rev. 452 (1972) (lack of bilingual personnel).

3. Guerrero v. Carleson, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201, cert. denied, 94 S. Ct. 883 (1973). A similar issue was raised in New York in the context of eviction from public housing in Morales v. Golar, 75 Misc. 2d 157, 347 N.Y.S.2d 325 (Sup. Ct. 1973).

4. 9 Cal. 3d at 809, 512 P.2d at 833, 109 Cal. Rptr. at 201.

5. Id. at 810, 512 P.2d at 834, 109 Cal. Rptr. at 202.

6. Id.

7. 397 U.S. 254 (1970).

who were discriminated against because they had been denied welfare payments due to improper notification.[8]

Following the refusal of the Los Angeles Superior Court to grant such an injunction, the plaintiffs appealed.[9] The California Supreme Court affirmed, holding that the due process clause of the fourteenth amendment had not been violated since it would not be unreasonable to assume that upon receipt of an official notice from the Welfare Department an individual logically would arrange for its translation.[10] Based on its holding on the due process question, the California court also concluded that the state had not violated the equal protection clause by creating a specific class comprised of individuals whose welfare payments were improperly terminated due to failure to give notice in a language intelligible to them.[11] *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied*, 94 S. Ct. 883 (1974).

The broader question raised by *Guerrero*—the extent of the rights of non-English-speaking citizens—has been presented to the courts in such diverse situations as voting,[12] education,[13] unemployment insurance[14] and consumer affairs,[15] as well as welfare. Furthermore, since most of the cases in these areas involved only specific language groups[16] and did not involve the question of non-English-speaking citizens in general, such decisions have not been uniform and their precedential value is limited.[17] Thus, for example, relief that was granted to Mexican-Americans,[18] may not have been granted to other non-English-speaking Americans. The problem has been complicated further by the

8. 9 Cal. 3d at 814, 512 P.2d at 837, 109 Cal. Rptr. at 205.

9. Id. at 809, 512 P.2d at 833, 109 Cal. Rptr. at 201.

10. Id. at 814, 512 P.2d at 837, 109 Cal. Rptr. at 205.

11. Id.

12. E.g., Puerto Rican Org. for Political Action v. Kusper, 350 F. Supp. 606 (N.D. Ill. 1972), aff'd, No. 73-1035 (7th Cir., Dec. 18, 1973). See notes 21-29 infra and accompanying text.

13. E.g., Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972). See notes 30-48 infra and accompanying text.

14. Carmona v. Sheffield, 325 F. Supp. 1341 (N.D. Cal. 1971), aff'd, 475 F.2d 738 (9th Cir. 1973). The federal government is also concerned with the employment problems of the Spanish-speaking in the federal civil service. Hearings on Federal Employment Problems of the Spanish Speaking Before the Subcomm. on Civil Rights Oversight of the House Comm. on the Judiciary, 92d Cong., 2d Sess., ser. 26, 1-170 (1972).

15. See notes 55-57 infra and accompanying text.

16. This is primarily due to the fact that many of these cases involve class actions, and the class cannot be so diverse that the courts will dismiss the action on this ground. Lopez Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969), appeal dismissed, 398 U.S. 922 (1970) (Indo-Hispano—too vague a class to be meaningful). But see, e.g., Lau v. Nichols, 94 S. Ct. 786 (1974), rev'g 483 F.2d 791 (9th Cir. 1973) (Chinese students); Keyes v. School Dist. No. 1, 413 U.S. 189, 197 (1973) (Hispanic students); Hernandez v. Texas, 347 U.S. 475, 477-80 (1954) (Mexican-Americans distinct class for purposes of representation on a jury);

17. This is particularly true of cases involving Puerto Ricans; the courts can distinguish them as citizens by birth under 8 U.S.C. §§ 1101(a)(38), 1402 (1970).

18. Serna v. Portales Municipal Schools, 351 F. Supp. 1279, 1282-83 (D.N.M. 1972).

argument that the United States is an English-speaking country[19] and that fluency in English is required before an individual can be naturalized.[20] This argument, which conspicuously fails to take into account, *inter alia*, the constitutional rights of citizens born in the United States who do not speak English, has been raised frequently in proceedings involving non-English-speaking persons.

The first case in the area was set in the context of voting rights and dealt primarily with the rights of Puerto Ricans.[21] This case upheld the right of Congress to enact section 4(e) of the Voting Rights Act of 1965, which stated, in effect, that Puerto Ricans, who were literate in Spanish but not in English, could not be denied the right to vote.[22] More recently, the voting rights of non-English-speaking citizens were expanded still further by the courts.[23] For example, one court has issued an injunction requiring the preparation, distribution and display of Spanish language materials at polling places,[24] basing its decision on the fact that "the right to vote *effectively* which is guaranteed . . . by federal law would otherwise be seriously impaired . . . ."[25] In another case, the court ordered bilingual ballots and sufficient interpreters to be available in any area in which Spanish-speaking voters made up five percent or more of the voting population.[26] Following this opinion, Connecticut chose to institute bilingual elections in areas containing a given percentage of Spanish voters.[27]

Such decisions clearly indicate that non-English-speaking citizens have a right to participate intelligently in the election process. Moreover, since the right to vote has been adjudged to be a fundamental right,[28] the state must demonstrate a compelling interest in order to justify laws that substantially infringe upon voting rights.[29] However, inasmuch as other aspects of the rights of non-English-speaking persons—such as welfare—have not yet been determined to be fundamental rights, it is not clear to what extent the decisions in the area of voting rights may prove relevant in later cases.

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19. Lau v. Nichols, 483 F.2d 791, 798 (9th Cir. 1973), rev'd, 94 S. Ct. 786 (1974). See Leibowitz, English Literacy: Legal Sanction for Discrimination, 45 Notre Dame Law. 7, 8 (1969).

20. 8 U.S.C. § 1423(1) (1970).

21. Katzenbach v. Morgan, 384 U.S. 641 (1966).

22. Id.; see United States v. County Bd. of Elections, 248 F. Supp. 316 (W.D.N.Y. 1965), appeal dismissed, 383 U.S. 575 (1966). See also 111 Cong. Rec. 11061 (1965) (remarks of Senator Long on French-speaking citizens of Louisiana).

23. See, e.g., Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970) (citizens literate in Spanish but not in English not required to take literacy test in English).

24. Puerto Rican Org. for Political Action v. Kusper, 350 F. Supp. 606 (N.D. Ill. 1972), aff'd, No. 73-1035 (7th Cir., Dec. 18, 1973).

25. Id. at 611 (emphasis added).

26. Torres v. Sachs, 73-Civ.-3921 (S.D.N.Y. Sept. 26, 1973) (preliminary injunction), discussed in N.Y. Times, Sept. 28, 1973, at 1, cols. 2-3.

27. N.Y. Times, Oct. 5, 1973, at 14, col. 5.

28. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

29. For a discussion of this test see Shapiro v. Thompson, 394 U.S. 618, 627-633 (1969), which held that the denial of welfare benefits to individuals who had resided in the state

Results in areas other than voting indicate a growing concern with the rights of non-English-speaking citizens. For example, recent cases in the field of non-discriminatory education reveal a judicial recognition that non-English-speaking students are entitled to the protection of the fourteenth amendment. Although formerly there had been only a few such decisions, enjoining discriminatory practices against Mexican-Americans in the Southwest,[30] recently the courts have specifically extended the rights to education set forth in *Brown v. Board of Education*,[31] to members of other minority groups.[32] In these decisions the courts have emphasized the applicability of *Brown* to situations other than those involving race. In *Cisneros v. School District*,[33] for example, the court stated that:

> *Brown* . . . mean[s] that when a state undertakes to provide public school education, this education must be made available to all students on equal terms, and that segregation of any group of children in such public schools on the basis of their being of a particular race, color, national origin, or of some readily identifiable, ethnic-minority group, or class deprives these children of the guarantees of the Fourteenth Amendment . . . . Although these cases speak in terms of race and color, we must remember that these cases were only concerned with blacks and whites. But it is clear to this court that these cases are not limited to race and color alone.[34]

Following these cases, the courts have used the guidelines established by the Supreme Court[35] to decide whether a school district is segregated, and have ordered desegregation of schools populated primarily by students of Hispanic background.[36] At the same time, as a means of enabling such non-English-

for less than a year was not justified by a compelling state interest. See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). Recent cases in the area of voting seem to be applying a test that is somewhere between strict scrutiny and rational basis. See, e.g., Kusper v. Pontikes, 414 U.S. 51 (1973); Rosario v. Rockefeller, 410 U.S. 752, 762 (1973); Mahan v. Howell, 410 U.S. 315, 326, 328 (1973). See also O'Brien v. Skinner, 94 S. Ct. 740, 745 (1974) (Marshall, J., concurring).

30. Gonzales v. Sheely, 96 F. Supp. 1004, 1009 (D. Ariz. 1951); Mendez v. Westminister School Dist., 64 F. Supp. 544, 551 (S.D. Cal. 1946), aff'd, 161 F.2d 774 (9th Cir. 1947). However, neither of these decisions is as far-reaching as later ones. For example, in Gonzales, the court held that separate classrooms for students who have language deficiencies could be justified after proper examination of these students. 96 F. Supp. at 1009. Congress recently has concerned itself with the problems involved in the education of the Spanish-speaking, particularly the problems of Mexican-Americans in the Southwest. See Hearings on Reports of the U.S. Comm'n on Civil Rights on the Educ. of the Spanish Speaking Before the Subcomm. on Civil Rights Oversight of the House Comm. on the Judiciary, 92d Cong., 2d Sess., ser. 35, 1-103 (1972).

31. 347 U.S. 483 (1954) (non-discrimination as to blacks).

32. Cisneros v. School Dist., 324 F. Supp. 599, 604-05 (S.D. Tex. 1970), modified, 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920, 922 (1973). See also Montoya, Bilingual-Bicultural Education: Making Equal Educational Opportunities Available to National Origin Minority Students, 61 Geo. L.J. 991, 999-1004 (1973).

33. 324 F. Supp. 599 (S.D. Tex. 1970).

34. Id. at 604-05 (footnotes omitted).

35. See, e.g., Swann v. Board of Educ., 402 U.S. 1 (1971).

36. E.g., Cisneros v. School Dist., 324 F. Supp. at 617-20 & n.58.

speaking students to participate in the educational process, some courts also have begun to order the implementation of specialized bilingual programs in these schools.[37]

The question of whether there is a constitutional *right* of non-English-speaking students to receive bilingual education has not yet been decided. In the past year, a number of groups have argued that the failure of a school system to provide bilingual education is a violation of the fourteenth amendment on the ground that such students have been denied equal educational opportunities because of their inability to speak English.[38] Although at least one court has held that there is no constitutional right to a bilingual education,[39] the Supreme Court recently held that Chinese-American students in San Francisco are entitled to English language instruction.[40] The Court based its decision not on equal protection grounds but on § 601 of the Civil Rights Act of 1964,[41] which bans discrimination in any program that receives federal assistance, and on an HEW directive which stated that school districts must take steps to rectify language deficiencies.[42] In reaching its conclusion, the Supreme Court considered the effect on the Chinese students involved, rather than the purpose for not teaching them English.[43] The Court further noted that it is "obvious that the Chinese-speaking minority receives less benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program . . . ."[44] This application of § 601 in the area of bilingual education does not indicate whether the arguments based on the section in contexts other than education involving non-English-speaking citizens will be similarly successful. However, the Federal Government has recognized the particular problems of the non-English-speaking student and—via the Bilingual Education Act[45]—has intervened and attempted to alleviate them. This statute, furthermore, is not limited to Spanish-speaking groups, but includes within its scope all non-English-speaking groups.[46] The Bilingual Education Act and the aforementioned decisions suggest an implicit recognition on the part of Congress and the courts that the rights of non-English-speaking persons should not be diminished by virtue of a language disability. In a recent decision, however,

37. Such programs include the hiring of Spanish-speaking teachers, Serna v. Portales Municipal Schools, 351 F. Supp. 1279, 1282 (D.N.M. 1972), and the teaching of both Spanish and English in the schools, see, e.g., United States v. Texas, 342 F. Supp. 24, 30 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972).

38. E.g., Morales v. Shannon, 366 F. Supp. 813, 821 (W.D. Tex. 1973).

39. Id. at 824.

40. Lau v. Nichols, 94 S. Ct. 786 (1974), rev'g 483 F.2d 791 (9th Cir. 1973).

41. 42 U.S.C. § 2000(d) (1970).

42. 94 S. Ct. at 788. See also Aspira of New York, Inc. v. Board of Educ., 58 F.R.D. 62, 65 (S.D.N.Y. 1973), where the same argument was raised. For HEW regulation relied on by the plaintiffs see 35 Fed. Reg. 11595 (1970).

43. 94 S. Ct. at 788-89.

44. Id. at 789.

45. 20 U.S.C. §§ 880b to 880b-5 (1970).

46. Leibowitz, The Imposition of English as the Language of Instruction in American Schools, 38 Revista de Derecho Puertorriqueño 175, 234-40 (1970).

the Court rejected the contention that education is a fundamental right.[47] On the other hand, since the Court has stated that "education is perhaps the most important function of state and local governments,"[48] the precedential value of the cases in the area of education for cases such as *Guerrero* is unclear.

A number of other recent cases, of more limited scope than voting or education rights in which certain aspects of the rights of non-English-speaking citizens have been drawn into question, suggest that the welfare situation posed in cases such as *Guerrero* will come under renewed judicial scrutiny. One of these involved the question of the right in a criminal trial to a state-appointed interpreter. Although this question has been raised frequently, it has never been clarified fully by the courts.[49] Traditionally, the appointment of such an interpreter has been left to the discretion of the trial judge.[50] However, the Court of Appeals for the Second Circuit recently held that due process requirements give a defendant with a severe language disability the *right* to have a competent translator assist him throughout his trial at state expense.[51]

The issue of the rights of non-English-speaking persons has also been raised with regard to state unemployment benefits in *Carmona v. Sheffield*.[52] There, plaintiffs asserted they had been denied equal protection of the laws because various aspects of the state unemployment insurance program were carried out only in English. Basing its decision on the finding that it was reasonable for California to use only English in conducting its state unemployment affairs, the district court dismissed the action under rule 12(b)(6) of the Federal Rules of Civil Procedure.[53] In its decision, the court also stated that relief in this area must be granted by legislative action.[54]

In the consumer field, there has been a growing movement toward legislation requiring the expansion of polylingual notification. The Uniform Consumer Credit Code takes cognizance of the problems encountered by non-English-speaking citizens in its provisions concerning unconscionable agreements and contracts.[55] In this it follows the leading case in this area, *Frostifresh Corp. v. Reynoso*,[56] in which a New York court held as unconscionable a contract writ-

47. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-35, 37 (1973).

48. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). This statement is quoted in Rodriguez, 411 U.S. at 29. See also 411 U.S. at 30 and cases cited.

49. United States v. Desist, 384 F.2d 889, 901 (2d Cir. 1967), aff'd, 394 U.S. 244 (1969). See generally Note, The Right to an Interpreter, 25 Rutgers L. Rev. 145 (1970).

50. E.g., United States v. Rodriguez, 424 F.2d 205, 206 (4th Cir.), cert. denied, 400 U.S. 841 (1970); Suarez v. United States, 309 F.2d 709, 712 (5th Cir. 1962).

51. United States ex rel. Negron v. New York, 434 F.2d 386, 390-91 (2d Cir. 1970). See also H.R. 7728 93d Cong., 1st Sess. (1973) (proposed Bilingual Courts Act, which would provide for bilingual court facilities and personnel in given districts, which contain either five percent or 50,000 persons who do not understand English, whichever is less).

52. 325 F. Supp. 1341 (N.D. Cal. 1971), aff'd, 475 F.2d 738 (9th Cir. 1973).

53. Id. at 1343.

54. Id. at 1342.

55. Uniform Consumer Credit Code § 5.108 & Comment 2, § 6.111 & Comment 3.

56. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau Cty. Dist. Ct. 1966), rev'd as to damages,

ten and signed in English, where the terms had been negotiated in Spanish, and the buyer was literate only in Spanish. Further, the Federal Trade Commission now requires that when foreign-language advertising and sales materials are used, and when affirmative disclosure of certain information is required of advertisers, these disclosures must be in the same language as the advertisements or sales materials.[57]

Any consideration of the rights of non-English-speaking citizens in the area of welfare must begin with the Supreme Court's decision in *Goldberg v. Kelly*.[58] There, the Court held that welfare recipients were entitled to a hearing before their welfare benefits could be terminated.[59] At the same time, *Goldberg* effectively eliminated the concept that welfare was a privilege,[60] "a 'gratuity' furnished by the state, and thus . . . made subject to whatever conditions the state sees fit to impose."[61] Since *Goldberg*,[62] the courts have expanded the right of welfare recipients so as to require a fair hearing before the state can reduce or terminate payments,[63] regardless of whether the state's decision was based on

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54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967). See also Chavez v. Sunnyvale Dodge, Inc., No. C-72-1517 CLR (N.D. Cal., filed Aug. 18, 1972), summarized at 6 Clearinghouse Rev. 492 (1972) (complaint filed under Truth in Lending Act by a non-English-speaking person who alleges violation of this act because he was provided with a contract in English). Spanish translation of certain terms such as cash price and unpaid balance which are required by Regulation Z of the Truth in Lending Act, 12 C.F.R. §§ 226.1-226.1002 (1973), have been approved. 4 CCH Consumer Credit Guide ¶ 30,918 (1973).

57. 38 Fed. Reg. 21494-95 (1973). As still another indication of a developing concern with the problems of the non-English-speaking consumer, see New York Court Rules § 2900.2(e)(3) (McKinney Supp. July, 1973) (statutory requirement that summons forms in Spanish and English be served in actions involving consumer transactions).

58. 397 U.S. 254 (1970), noted in Tigar, The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1, 100-08 (1970); 19 De Paul L. Rev. 552 (1970); 16 Vill. L. Rev. 587 (1971). See also K. Davis, Administrative Law Treatise § 7.08 (Supp. 1970); O'Neil, Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases, 1970 Sup. Ct. Rev. 161, 165-68. The holding in Goldberg was incorporated into California case law in McCullough v. Terzian, 2 Cal. 3d 647, 650-51, 470 P.2d 4, 5-6, 87 Cal. Rptr. 195, 196-98 (1970).

59. 397 U.S. at 264.

60. See id. at 262, citing Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). Prior to the decision, the courts had developed various techniques to avoid applying this distinction between rights and privileges. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1451-54 (1968) [hereinafter cited as Van Alstyne].

61. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245 (1965). See O'Neil, Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases, 1970 Sup. Ct. Rev. 161, 163-64; 19 De Paul L. Rev. 552, 555-63 (1970). See generally Van Alstyne.

62. The companion case to Goldberg, Wheeler v. Montgomery, 397 U.S. 280 (1970), held that a fair hearing was required before any termination of old age benefits.

63. Daniel v. Goliday, 398 U.S. 73 (1970) (per curiam).

factual or policy reasons.[64] Under other decisions, federal regulations[65] which apply to such hearings have been held mandatory on the states.[66]

The court in *Guerrero*, in deciding the narrow issue involved—the right of non-English-speaking welfare recipients to receive notification in their own language of any proposed termination of their benefits—stated that the essential question was not whether this type of notice was adequate to satisfy due process, but whether those receiving such notice would be likely to seek a translation.[67] Speaking for the court, Justice Mosk concluded that it *was* likely that such persons would obtain a translation, and, therefore, that this type of notice satisfied the requirements of due process.[68] Relying upon the traditional argument that the United States is an English-speaking country,[69] the court said that there should be an incentive for non-English-speaking persons either to learn English or to obtain translations. The court further argued that to support the plaintiff's position would eventually mean that the principle of non-English notification would have to be extended to official communications to all non-English-speaking language groups. The subsequent burden on the state, according to the court, would be overwhelming.[70] Finally, Justice Mosk discussed the California practices which insured that Spanish-speaking recipients would obtain a fair hearing prior to termination of their welfare grants, *e.g.*, the appointment of an interpreter at the hearing, the use of bilingual social workers whenever possible, and the printing of some welfare forms in Spanish.[71]

64. Yee-Litt v. Richardson, 353 F. Supp. 996 (N.D. Cal.), aff'd sub nom. Carleson v. Yee-Litt, 412 U.S. 924 (1973). The right to a fair hearing has been extended beyond the area of welfare. See, e.g., Richardson v. Wright, 405 U.S. 208 (1972) (per curiam) (disability benefits); Java v. California Dep't of Human Resources Dev., 317 F. Supp. 875 (N.D. Cal. 1970), aff'd, 402 U.S. 121 (1971) (unemployment benefits). The effects of this decision can also be seen in many other areas, see, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972) (hearing required before revocation of parole); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970) (eviction from public housing). See also United States ex. rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973).

65. 45 C.F.R. § 205.10 (1973).

66. Guerrero v. Schmidt, 352 F. Supp. 789, 793 (W.D. Wis. 1973); Jeffries v. Swank, 337 F. Supp. 1062, 1066 (N.D. Ill. 1971).

67. 9 Cal. 3d at 812, 512 P.2d at 835, 109 Cal. Rptr. at 203.

68. Id. at 814, 512 P.2d at 837, 109 Cal. Rptr. at 205. However, it has been noted that "[w]elfare recipients are often ignorant of their rights to a 'fair hearing.'" The Supreme Court, 1969 Term, 84 Harv. L. Rev. 105 (1970) (footnote omitted). Thus, it is difficult to accept the court's argument that such recipients would have such notices translated. See also Note, El Derecho de Aviso: Due Process and Bilingual Notice, 83 Yale L.J. 385, 391-93 (1973).

69. 9 Cal. 3d at 812, 512 P.2d at 835, 109 Cal. Rptr. at 203. See Lau v. Nichols, 94 S. Ct. 786, 791 (1974) (Blackmun, J., concurring). See also text accompanying note 19 supra.

70. 9 Cal. 3d at 816, 512 P.2d at 838, 109 Cal. Rptr. at 206. But see note 75 infra and accompanying text.

71. 9 Cal. 3d at 816-17, 512 P.2d at 838-39, 109 Cal. Rptr. at 206-07. For methods adopted by other states see State of Connecticut Welfare Department, Departmental Bull. No. 2795,

In *Guerrero*, the court was faced with an attempt to extend still further the requirements of due process as applied to welfare recipients. The California court, however, made no real attempt to analyze this case in terms of the decision in *Goldberg*. Instead, it relied upon the fact that *Goldberg* did not directly support the plaintiffs' due process contention, since, although some of the welfare recipients in *Goldberg* had Spanish surnames, the Supreme Court stated that the form and content of the notice, which was in English, was adequate.[72] However, in *Goldberg*, the Court did not consider the question of the language in which such notification must be given. Thus, in *Guerrero*, the California court failed to confront the crucial element in *Goldberg:* that welfare is of critical importance to the recipient in that it provides the very bases of life, such as food and housing.[73] Furthermore, "[s]ince [the welfare recipient] lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."[74] Since welfare payments are so important to the recipient, it would appear to be unreasonable for the state to refuse to inform a recipient, in language comprehensible to the latter, of the termination of welfare payments on the policy grounds that notification in the recipient's own language would place too great a burden upon the state. It would appear that the state should be required to carry this burden.[75]

Delivery of Departmental Services to Non-English Speaking Applicants and Recipients, Sept. 5, 1973, on file with the Fordham Law Review; 6 Clearinghouse Rev. 33-34 (1972) (New Jersey translates welfare forms into Spanish and hires bilingual caseworkers).

72. 9 Cal. 3d at 810-11, 512 P.2d at 834, 109 Cal. Rptr. at 202. See Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

73. 397 U.S. at 264.

74. Id. (footnote omitted).

75. A corollary argument has been raised in the area of equal protection. In Reed v. Reed, 404 U.S. 71, 76 (1971), the Supreme Court held that the state could not justify a law which discriminated against women administrators on the ground that it decreased the workload of the state's probate court. In Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969) (which is distinguishable because the fundamental right to travel was involved), the Supreme Court also rejected this argument. In the area of due process, the same argument was rejected in Bell v. Burson, 402 U.S. 535, 540-41 (1971) and in Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (wherein the lower court's disposition of that case sub nom. Kelly v. Wyman, 294 F. Supp. 893, 901 (S.D.N.Y. 1968) was quoted). See also Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 799-800 (1974) (mandatory maternity leave dates not justified by administrative convenience).

Undercutting the thesis that the state should carry this burden is the recent decision in Kuri v. Edelman, No. 74-1093 (7th Cir. Feb. 11, 1974). There the plantiffs sought declaratory and injunctive relief from Illinois' welfare program which, in effect, terminates assistance to recipients who fail to return information cards printed in English or follow the procedure in the suspension notice which is also in English and is sent to the recipient upon his failure to return these cards. In upholding the district court's denial of plaintiffs' petition, the court found inapposite Lau v. Nichols, 94 S. Ct. 786 (1974) (see notes 105-13 and accompanying text). Relying on Guerrero as "comparable to the case at bar" the court failed to find a "basis for granting the extraordinary relief requested." Slip. op. at 6.

However, in this context, the number of non-English-speaking welfare recipients who require bilingual notification would have to be considered in the determination.[76] The fact that notification in other languages besides Spanish might be required would not, it would seem, place an undue burden on the state, since procedures could be developed to minimize administrative difficulties.

Avoiding this problem, Justice Mosk dealt with the due process question in *Guerrero* in terms of the ability of the plaintiffs to understand and to obtain a translation of any such notification.[77] In so doing, he failed to analyze the question of the right of a welfare recipient to be notified in a language intelligible to him and to take into account the Supreme Court's statement that "the right to due process reflects a fundamental value in our American constitutional system."[78] This right includes an opportunity to be heard,[79] and proper notification is an essential part of that right.[80] In *Mullane v. Central Hanover Bank & Trust Co.*,[81] the Supreme Court set forth the requirements for notification: "An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . ."[82] In *Guerrero*, however, the court analyzes these requirements for notice only in terms of the reasonable nature of the state's expectation that a welfare recipient will obtain a translation of such notice.[83] Even if *Mullane* can be analyzed as requiring a balancing between the interests of the state and those of the individual,[84] it can be argued,

76. Lau v. Nichols, 94 S. Ct. 786, 790-91 (1974) (Blackmun, J., concurring).

77. 9 Cal. 3d at 814, 512 P.2d at 837, 109 Cal. Rptr. at 205.

78. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

79. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178 (1951) (Douglas, J., concurring). Since Goldberg, the Court has analyzed due process questions as follows: the Court first decides if the interest involved is "one within the contemplation of the 'liberty of property' language of the Fourteenth Amendment," Morrissey v. Brewer, 403 U.S. 471, 481 (1972); if so the Court then balances the government's interests against that of the individual. See Goldberg v. Kelly, 397 U.S. 254, 262-66 (1970). For recent cases discussing this process see, e.g., Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). One of the ways that the Court finds such an interest is through statutory entitlement. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court said "the welfare recipients in Goldberg v. Kelly . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them." Id. at 577. In Guerrero, statutory entitlement might be claimed under 45 C.F.R. § 205.10 (1973). See note 65 supra and accompanying text. See generally Note, Procedural Due Process in Government—Subsidized Housing, 86 Harv. L. Rev. 880, 887-93 (1973).

80. Covey v. Town of Somers, 351 U.S. 141, 146-47 (1956) (notice to an incompetent); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-16 (1950) (notice by publication); Londoner v. City of Denver, 210 U.S. 373, 385 (1908) (right to be notified of a hearing before tax assessment fixed).

81. 339 U.S. 306 (1950).

82. Id. at 314.

83. 9 Cal. 3d at 812-15, 512 P.2d at 835-37, 109 Cal. Rptr. at 203-05.

84. See Note, Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, 87 Harv. L. Rev. 426, 434 (1973).

just as easily, that notice in a language unintelligible to its reader would certainly not meet the *Mullane* requirements. Moreover, it does not follow that the ability to receive a fair hearing should depend upon the welfare recipient's ability to procure a competent translation. The importance of considering the particular factual circumstances when welfare recipients are involved was recognized by the Supreme Court in *Goldberg* when it stated:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing . . . . Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.[85]

As Justice Tobriner noted as the lone dissenter in *Guerrero*, the non-English-speaking welfare recipient may neither understand the need for, nor be able to obtain, a translation.[86]

The court's discussion of the ad hoc procedures that have arisen in California to provide fairer treatment in the judicial or administrative process to non-English-speaking persons illustrates the need for a definitive court decision in this area. Although provisions made by the state[87] for such aids as social workers assigned to specific clients, Spanish-language forms, and/or translators are clearly of assistance to Spanish-speaking individuals, the failure to provide such assistance on a mandatory and consistent basis renders such assistance less than fully reliable. The decision as to who is eligible for these services is, under the California practice, effectively left to the discretion of a governmental administrator. As the court said in *Guerrero*, these practices are "good-faith efforts . . . to do as much as can reasonably be done—within the limits of budget, staffing, and time—to insure that recipients who are not fluent in English are not deprived of their welfare rights solely because of their language handicap."[88] Even where the requirements of due process and fair hearing have been mandated by the state or federal government, "due process guarantees . . . can be vitiated . . . . This can be done by discrepancies between theory and practice . . . . The prior hearing required by *Goldberg* can be redndered [sic] ineffective by county and state policies which discourage claimants from seeking aid pending a hearing."[89] Such guarantees are even more ineffective when, as here, they are not mandated but are left to the discretion of state administrators.[90]

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85. 397 U.S. at 268-69 (footnote omitted).

86. 9 Cal. 3d at 821, 512 P.2d at 842, 109 Cal. Rptr. at 210.

87. See id. at 816-17, 512 P.2d at 838-39, 109 Cal. Rptr. at 206-07.

88. Id. at 817, 512 P.2d at 839, 109 Cal. Rptr. at 207.

89. Comment, California Welfare Fair Hearings: an Adequate Remedy?, 5 U. Cal., Davis L. Rev. 542, 558 (1972) (footnote omitted).

90. The California procedures for communicating with welfare recipients in Spanish are detailed at 9 Cal. 3d at 816-17 & n.10, 512 P.2d at 838-39 & n.10, 109 Cal. Rptr. at 206-07 & n.10. A discussion of the fair hearing regulations can be found at 9 Cal. 3d at 810, 816 & n.11, 512 P.2d at 833-34, 838 & n.11, 109 Cal. Rptr. at 201-02, 206 & n.11. These may be compared with the federal requirements, see note 65 supra, and with the New York

Plaintiffs also argued in *Guerrero* that the California procedure had denied them the equal protection of the law by arbitrarily creating a class of welfare recipients who did not receive proper notification of the right to a hearing. This argument might have been more persuasive had they argued that, under the rational basis test set forth in *Reed v. Reed*,[91] the issue was whether or not California could justify a procedure that created two classes of welfare recipients—one which spoke English, and the other which didn't speak English—on the basis of increased administrative burdens. The plaintiffs, however, were faced with the problem that in the context of economic and social welfare, the "rational basis" test has usually been applied in such a way as to uphold the state's particular application of its regulatory powers.[92] Instead, they relied on the leading California case in the context of voting or literacy tests, *Castro v. State*,[93] which held that it was impermissible to give literacy tests in English to those literate only in Spanish.[94] Justice Mosk, however, held that plaintiffs' reliance on *Castro* was misplaced, since in *Castro* the court had rejected specifically the notion that the state was required to provide bilingual ballots and election materials.[95] The court in *Guerrero* also stated that *Castro* was distinguishable because the right to vote, unlike the right to welfare payments, has

State requirements for a fair hearing, 18 N.Y.C.R.R. § 358 (1972). Although the New York rules contain detailed regulations regarding information to be given to recipients, 18 N.Y.C.R.R. § 355.1 (1968), and the type of notification to be given prior to a hearing, 18 N.Y.C.R.R. § 358.11 (1972), no mention is made of the necessity for notification in a language other than English. Thus, the issue raised in California by Guerrero might also be raised in New York, given its large Spanish-speaking population. See 9 Cal. 3d at 811, 512 P.2d at 834, 109 Cal. Rptr. at 202.

91. 404 U.S. 71 (1971). Under this test "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Id. at 76. The advantage to the plaintiffs of having a court apply this test is that statutes adjudged according to this test have been found to violate the equal protection clause, without the plaintiffs in these cases being forced to prove that a suspect class or fundamental right is involved. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-48 (1972); Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605, 614-38 (1973) [hereinafter cited as Equal Protection].

92. Wyman v. James, 400 U.S. 309 (1971) (New York's home visitation program reasonable administrative tool); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (reasonable basis test applied in area of "economic and social welfare" to uphold maximum limit on welfare grant). See Richardson v. Belcher, 404 U.S. 78 (1971) (rational basis found for reduction of social security benefits by amount paid by workmen's compensation). See generally Equal Protection 629-30. This test is set forth in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

93. 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

94. Id. at 242-43, 466 P.2d at 258-59, 85 Cal. Rptr. at 34-35. In Oregon v. Mitchell, 400 U.S. 112, 118 (1970), the Supreme Court held that Congress had the power to abolish the use of literacy tests as a requirement to vote.

95. 9 Cal. 3d at 814-15, 512 P.2d at 837, 109 Cal. Rptr. at 205.

already been judicially declared a "fundamental right", thus requiring the state to show a compelling interest to justify its regulatory authority.[96]

Thus far, decisions concerning different aspects of the broad area of the rights of non-English-speaking citizens have been confined to the specific groups and particular problems involved in each case. As the court noted in *Guerrero*, however, a holding in any aspect of this area may reach far beyond the specific factual situation involved.[97] A decision in one aspect may affect and strengthen the arguments made in another.[98] It is, therefore, important to analyze the decision in *Guerrero* in terms of its *effect* upon future cases, not only in the specific context of welfare but also in the broader context of the rights of non-English-speaking persons in general. Given a factual situation in which there has not been a determination that a fundamental right or suspect classification is involved,[99] non-English-speaking citizens will, it appears, have to rely upon the "new" equal protection test set forth in *Reed v. Reed*,[100] and other recent decisions.[101] Under this test, "[t]he 'desirability' of the end, and the effectiveness of the statute in accomplishing it are being balanced against the impact or burden which the classification imposes upon the members of the named class."[102] *Guerrero*, however, demonstrates that this test may not always be applied. As a result, plaintiffs in welfare cases have had to develop other approaches,[103] and the situation is likely to continue.[104]

96. Id., 512 P.2d at 837, 109 Cal. Rptr. at 205; see notes 28-29 supra and accompanying text.

97. 9 Cal. 3d at 815, 512 P.2d at 837-38, 109 Cal. Rptr. at 205-06.

98. See Yudof, Equal Educational Opportunity and the Courts, 51 Texas L. Rev. 411, 416 (1973) (discussing the impact of Goldberg).

99. Whether a court will ever hold that "all people who do not speak English" are members of a group defined by means of a suspect classification is doubtful.

100. 404 U.S. 71 (1971); see note 91 supra.

101. See, e.g., Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 537-38 (1973); Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972); cf. Equal Protection 614-31. But cf. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

102. Equal Protection 623.

103. Among the arguments that may be advanced is that a given governmental practice, although appearing to be non-discriminatory, actually operates in a discriminatory manner in violation of the equal protection clause of the fourteenth amendment. See Brief for Plaintiff at 16-20, Torres v. Sachs, 73-Civ.-3921 (S.D.N.Y. Sept. 26, 1973). In some of these cases, the court has not decided whether to apply the "rational basis" test or the "compelling state interest" test, but has decided that the procedure violates the equal protection clause. See, e.g., Chance v. Board of Examiners, 458 F.2d 1167, 1177 (2d Cir. 1972), in which a prima facie case of de facto discrimination was found in the examination procedures for supervisory positions in the New York City Board of Education. See also Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931 (2d Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), a school desegregation case in which the court stated: "[W]e now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Id. at 497. But see Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), cert. denied, 401 U.S. 1010

The recent Supreme Court decision in *Lau v. Nichols*[105] raises the possibility that plaintiffs in a welfare context may be able to argue that, under § 601 of the Civil Rights Act of 1964,[106] and HEW regulations in the welfare area,[107] the failure to provide bilingual notification to non-English-speaking welfare recipients discriminates against them on the basis of national origin. Although most of the decisions based on this section have been in the context of education,[108] the legislative history of the act indicates that welfare was intended to be included within this section.[109] However, the applicability of § 601 to areas other than education must still be determined. The decision in *Lau* suggests two alternative formulations as to the scope of this section. First, it is possible to argue that § 601, standing alone, may mandate that programs receiving federal assistance must take the necessary steps to guarantee that non-English-speaking recipients are treated on an equal basis with English-speaking recipients.[110] Acceptance of this theory rests upon the premise that in passing § 601 Congress intended to create a mechanism for combatting discrimination in any program that receives federal assistance.[111] If this premise is correct, the problem becomes one of determining the forms of discrimination prohibited by § 601. However, if Congress intended by § 601 to ban discrimination based on national origin, whether it might also be construed as intended to require bilingual notice to non-English-speaking recipients of federal funds is questionable. Secondly, the more probable interpretation of the extent of § 601 derives from the fact that HEW had promulgated regulations regarding bilingual education and this led to the Court's decision in *Lau*.[112] Thus, in the absence of specific guidelines, § 601 does not, either specifically or through inference, speak to the question of bilingual notice. If this interpretation of *Lau* is correct, its significance in areas other than education is problematic. For instance, in the area of welfare,

(1971), wherein the court held that the city must show a compelling state interest before re-zoning property selected for low income housing to recreational use, when "invidious discrimination guided the actions of the City." Id. at 109.

104. See Equal Protection 630 n.227.

105. Lau v. Nichols, 94 S. Ct. 786 (1974).

106. 42 U.S.C. § 2000(d) (1970). This statute prohibits discrimination under federally assisted programs on the ground of race, color or national origin. See also N.Y. Times, Dec. 2, 1973, § 1, at 41, col. 1 (HUD hearings on § 2000(d)). It would follow from this that non-English-speaking welfare recipients, whose programs are federally assisted, see, e.g., 42 U.S.C. § 401 (1970), cannot be discriminated against because they do not speak English by such state procedures as notification in English of the termination of their benefits.

107. See 45 C.F.R. § 80.3(b)(iii) (1973).

108. See, e.g., Edgar v. United States, 404 U.S. 1206 (1971); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

109. See 110 Cong. Rec. 6545 (1964) (remarks of Senator Humphrey). For cases involving 42 U.S.C. § 2000(d) in the area of welfare, see, e.g., Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968); Lampton v. Bonin, 299 F. Supp. 336 (E.D. La. 1969), vacated, 397 U.S. 663 (1970).

110. Lau v. Nichols, 94 S. Ct. 786, 789 (1974) (Stewart, J., concurring).

111. See 110 Cong. Rec. 6544-45 (1964) (remarks of Senator Humphrey).

112. 94 S. Ct. at 788-89.

the only similar regulation is concerned with "separate treatment in any matter related to his receipt of any service . . . ."[113] and whether this section would mandate bilingual notice is, at best, debatable. However, it is possible that the courts *may* interpret § 601 together with the above regulations to require bilingual notification in a context such as that in *Guerrero*. If not, those who wish to rely upon § 601 may have to turn their efforts to inducing the administrative agencies involved to issue applicable regulations before they may use this argument in the courts.

In the area of due process, plaintiffs situated as were those in *Guerrero* have available a much stronger argument. If they point out that such cases as *Goldberg* have held that the right to welfare is an "interest" within the meaning of the due process clause, the courts should then weigh the interest of the non-English-speaking person in receiving notification in his own language against the state's interest in retaining English as its official language and in avoiding administrative burdens and expenses which are asserted to be disproportionate to the good achieved. Since courts frequently have rejected state arguments of justification based on increased administrative costs,[114] it is clear that the state will bear a heavy burden in seeking to outweigh this essential individual interest.[115] As the Supreme Court said in *Stanley v. Illinois*:[116]

> Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination.[117]

Although the court in *Guerrero* held that the state had not denied due process to the plaintiffs, the court did not apply the due process balancing test suggested above. Had it done so, the outcome might well have been altered.

The resolution of the problem posed in *Guerrero*—the extent to which the due process clause imposes on the state the obligation to provide official notices in languages other than English—in effect justifies the continuation of the state's limited ad hoc procedures, rather than requiring that fully effective procedures be applied with consistency to all non-English-speaking welfare recipients. Although this is a problem that may have to be resolved at least partially by legislative action, it appears to be one that properly can be determined judicially. As questions similar to those raised in *Guerrero* arise more frequently, it is reasonable to assume that the courts will begin to expand the application of constitutional guarantees to non-English-speaking citizens.

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113. 45 C.F.R. § 80.3(b)(iii) (1973).
114. See note 75 supra.
115. Cf. Goldberg v. Kelly, 397 U.S. at 261-66.
116. 405 U.S. 645 (1972).
117. Id. at 656-57.