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S. MEREDITH MORRIS

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The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.

Intro
When I attended college in New Orleans, Louisiana, I volunteered at a poverty law center made famous by Sister Helen Prejean, the author of Dead Man Walking. It was located in the St. Thomas Projects, which have now been replaced by a WALMART. During the course of my volunteer work, the attorneys for the center required that everyone in the office attend a workshop about race and racism. The objective was revealing what is called aversive racism or unconscious racism along with other culturally complex and

1 The author is aware that many indigenous people who live in the United States prefer the term “American Indian” to the term “Native American.” Still many indigenous people in the U.S. prefer to use their specific tribal affiliation.

*Coppage v. United States, 369 U.S. 438, 449 (1962).*
equally deep-seated—many times subconscious—bias. After the workshop, I became involved with an organization in New Orleans focused on race issues and semi-radical efforts to raise community awareness. This group created bumper stickers promoting a very clever hybridized word, which appeared in black lettering over an American flag. “Eracism” it read. I sent these bumper stickers to all my friends, proudly handed them out and lauded the bookstores that sold them. My intentions were truly good. My actions were based on my most fundamental belief that all people should have equal opportunity and justice within reach. The process of researching and writing this essay moved me to peel that sticker off my truck. I am about to inform you about my bold step: the removal of a statement I thought I believed in whole-heartedly.

Come to find out, Eracism is a term used by Critical Race Theorists to mean the removal of race, and a history of subjugation “from the books”, from the law and from our daily interactions by remaining silent or actively re-writing history. It is the process and practice of eliding race and class from discourse, watering-down controversy and omitting injustice by erasing a history of hostility, subjugation, slavery and hatred. It is a product, and, in turn, the perpetuation, of a hegemonic legacy founded in privileged race-ignorance, by “ignoring” the disenfranchisement of entire groups of people.

In this paper, I posit that the Miranda ruling from the infamous case Miranda v. Arizona, when poorly applied, results in profound and blatant Eracism. Under Miranda the Supreme Court melded the Fifth Amendment of the United

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4 See Francis Jennings, The Invasion of America (University of North Carolina Press 1975). “The invaders also anticipated, correctly, that other Europeans would question the morality of their enterprise. They therefore prepared... quantities of propaganda to overflow their own countrymen’s scruples. The propaganda gradually took standard from as an ideology with conventional assumptions and semantics. We live with it still.”

5 Eracism is “The omission of references to or acknowledgment of racial issues that either implicitly or explicitly present themselves.” Margaret Montoya, Silence and Silencing: The Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse, 5 Mich. J. Race & L. 847, 898 (2000). Also, Montoya quotes Dirk Tillotson on Constitutional Eracism, “a rewriting of our shared history as an exclusive and ostensibly objective ‘perspectiveless’ text. It is a dangerous form of historical revisionism that seeks to deny the standing of certain groups. It elevates the history of some and denies that of others.” See Montoya’s footnote 259. “If we forget the great stain... that stands at the heart of our country, our history, our experiment—we forget who we are, and we make the great rift deeper and wider.” Ken Burns, “Mystic Chords of Memory” from a speech delivered at the University of Vermont, September 12, 1991.

6 Hegemony from the Greek hegemonia, from hegemon leader, from hegeisthai to lea: preponderant influence or authority over others.

States with a Sixth amendment-like privilege to have an attorney present at an interrogation. The Court then handed down Miranda, complete with a new set of procedural rules/guides for suspects and cops, which did not alter the Constitution but sought to uphold it. The Miranda Rule was created to protect the citizens of America; it was to protect suspects from coercion during custodial interrogations. What was originally a good idea has turned into a farce, because the Supreme Court was apparently oblivious to the cultural composition of America at the time and did not consider how the population would grow, change and become increasingly diverse. Miranda was written by economically privileged justices, to be most often applied to poor and under-privileged suspects who are often minorities and many times uneducated—people who know next to nothing about the legal system in the United States.

I will begin Part I by stepping back in history to look at the evolution of Miranda and the cases that followed. Next, I take a look at the 2000 Census data and address the relatively current minority population percentages. Then, in Part II, I dissect Miranda, revealing what “custody” and “interrogation”, the “right to an attorney” and “valid waiver” mean according to the Supreme Court. As I scrutinize each of these four terms or concepts, I elucidate the misapplication of these ideas by exposing how they play out in cases where the suspects or defendants are Native American. For each of these concepts I attach a federal circuit court case, where each defendant appealed based on the belief that his Miranda rights were violated.

In Part III of this paper, I take a deeper look at how language and culture interact and intersect with Miranda. Language and culture have profound impact on the outcome of Miranda cases. Miranda analysis is affected on every level by the suspect’s cultural perspective. Background and heritage can alter the way in which a suspect understands custody, waiver, what rights he/she has, how to interact with the police, when a formal interrogation has begun and

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8 The police model of justice is based upon power, force and authority. It is a “vertical” system of law, which used hierarchical institutions to keep order. Such a vertical system is comprised of federal and state law using a system of rules made by legislatures, interpreted by courts, and applied by enforcers and decision-makers. Many times it seems as thought the rules are not made by ordinary people but by the elite, often elected to a legislature because their members have a lot of money or access to it though campaign contributions. Oftentimes, many of the police officers assigned to poor areas are not from the community, and very often it is the more wealthy and educated Americans who become lawyers and judges. "The Honorable Justice Yazzie, “Hozho Nahasdlii”—WE ARE NOW IN GOOD RELATIONS: The Navajo Restorative Justice, St. Thomas Law Review, 118 (Fall 1996).
how to ask for an attorney. A suspect's cultural understanding of those issues has a substantial effect on the outcome of the interrogation and, ultimately, the outcome of the trial or plea. While it may sound dramatic, the result is a form of ethnocide. By rejecting modifications on the “reasonable person” standard, and failing to consider the cultural background of a defendant, the court fosters repression of cultural differences and deems minority defendants subordinate or inadequate. It is the system’s unspoken commitment to “reducing the Other to the Same... the dissolution of the multiple into one... the inclination to refuse the multiple, the fear and horror of difference.” It is the authoritarian suppression of socio-cultural diversity; it is the process of standardizing.

In Part IV, I move on to discuss solutions to the problems resulting under Miranda and what some jurisdictions in the United States are doing to remedy these problems. I explore legal and educational options and solutions. The dominant culture in America is unconscious and oblivious to discrimination (and the benefits that come with being white) and inherently racist. Therefore, I propose that attorneys and judges, police officers and FBI agents need to be educated on the critical relationship between cultural heritage/understanding/interpretation and the outcome of Miranda cases. I insist that interrogations be videotaped and that attorneys be “on call” and available so that an attorney is present for every interrogation. I suggest that the right to a licensed interpreter be added to the Miranda language. I conclude with a plea for education on Constitutional rights, for a strong movement of Native American Critical Race Theorists and more cultural studies and cultural competency training.

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9 Ethnocide: a blending of the word ethnic or ethno- and the suffix -cide. Ethnic comes from Middle English, from the Latin ethnicus and from the Greek ethnikes meaning “national” and from ethnos meaning “nation or people.” The root is similar to the Greek ethos or custom. a. Of or relating to large groups of people classed according to common racial, national, tribal, religious, linguistic, or cultural origin or background: being a member of an ethnic group -cide: The suffix comes from French and is derived from the Latin -cida “killer,” and from Latin -cidium “killing,” both from Latin caedere “to strike, kill.”1. Killer, as in a fungicide and patricide or, 2. Killing as in tyrannicide. Essentially the hybridization of the two suggests the killing of culture, ethnicity, custom, and tradition.

On Miranda

The Background and History of Miranda

Before Miranda, suspects were interrogated in private and attorneys were not allowed to sit in on interrogation proceedings. Police brutality and intense coercion were rampant and fully accepted.\(^\text{11}\) Around the middle part of the twentieth century, the judiciary decided to target violent and reprehensible police practices used to obtain confessions. There was a shift in strategy and the police began to use psychological subterfuge and complex manipulation as a means of securing confessions. Many people found these methods to be just as abhorrent. Tyrannical and totalitarian as these methods were, the authors of the police manuals defended their work, proclaiming their necessity in interrogation. The justices of the Supreme Court were not satisfied. Confessions, derived from trickery and devious technique, were seen as "darkly the product of police coercion."\(^\text{12}\) The Court maintained that a fine balance had to be reached in every interrogation. Slowly, the Court moved to protect vulnerable suspects "minorities and the poor--by informing them of their rights and empowering them against coercive tactics."\(^\text{13}\)

The Court had long been disgruntled with the case-by-case evaluation of confessions and the application of the "voluntariness test" that preceded Miranda.\(^\text{14}\) There was a need for clarification and a bright-line rule. In a case titled Malloy v. Hogan,\(^\text{15}\) the Court held that the Fifth Amendment right against self-incrimination was fundamental and applicable to the states via the Fourteenth Amendment. Then in Escobedo v. Illinois,\(^\text{16}\) the Court extended the Sixth Amendment right to counsel so that it applied to pre-indictment interrogations. Defendant's statements were considered inadmissible if they were gathered in violation

\(^\text{11}\) See generally Joshua Dressler, Understanding Criminal Procedure (Lexis Nexis 2002).
\(^\text{13}\) Charles D. Weisselberg, Saving Miranda, 84 Cornell L. Rev. 109, 125 (1998). See also Raymond D. Austin, ADR and the Navajo Peacemaker Court, Judges’ Journal (Spring 1993). "When asked if another Navajo will do something . . . a tribe member will reply, "it is up to him." Navajos do not believe in making decisions for others. Navajo common law rejects coercion. This creates difficulties for any legal system, which is built upon coercion, authority, and levels of power, such as the adversary system."
\(^\text{14}\) Again see Joshua Dressler, Understanding Criminal Procedure (Lexis Nexis 2002).
of the right to counsel. If one was to distill the essence of Escobedo, and follow its rule in earnest, "all police interrogation should be prohibited until the defendant has had an opportunity to consult with an attorney." Then came Miranda.

In 1966, via the famous and controversial case Miranda v. Arizona, the Supreme Court ruled that all suspects must be informed of their Constitutional rights to both silence and counsel when they are held in custody for interrogation. Miranda v. Arizona was a case comprised of four consolidated cases brought on appeal. The police practices under scrutiny involved departments in four different jurisdictions, but the conditions were much the same in each scenario. All four suspects had been taken into custody, and each was questioned in an interrogation room. In each circumstance, the interrogation took place in a police dominated environment. All four suspects were alone with the interrogators. None of the suspects were informed of their Fifth Amendment right against self-incrimination. Thus, this case was the genesis of Miranda Warnings, now so prevalent in the media, glorified on Law and Order and Cops. Ironically, when Ernesto Miranda was killed in a bar fight ten years after the Miranda decision was handed down, the suspect for his murder was one of many beneficiaries of the Miranda ruling; he received Miranda warnings.

The Substance and Alteration of Miranda

"The recipients of police warnings are often frightened suspects unlettered in the law, not lawyers or judges or others schooled in interpreting legal or semantic nuance. Such suspects can hardly be expected to interpret, in as facile a manner as the Chief Justice, 'the pretzel-like warnings here—intertwining, contradictory and ambiguous as they are.'" Justice Marshall

The Miranda rule was a judicially created measure, a mechanism, derived from the Fifth Amendment of the United States, which provides "no person ... shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment privilege, originally only functional in the courtroom but applied in the police station, gives

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19 U.S. Const. amend. V.
suspects under custodial police interrogation two express substantive rights, created to protect suspects in inevitably coercive police dominated environments. Once in custody, and before interrogation, a suspect must be informed of his/her right to remain silent and right to have counsel present, whether the attorney is retained or appointed. If a suspect invokes his/her right to silence, the police interrogation must end immediately. Any statement given by the suspect after the invocation of his/her rights is presumed coerced, unless the suspect "knowingly, voluntarily, and intelligently waives his previously invoked right to silence." Furthermore, if a suspect states that he/she wishes to have the aid of an attorney, the interrogation must end until counsel is present or the suspect "initiates" conversation, with the police. Again, the suspect must knowingly, voluntarily and intelligently waive the right to an attorney. In some states, the government must prove beyond a reasonable doubt that the waiver was made knowingly, voluntarily and intelligently. Under federal law, the government bears the same responsibility of proof, but with a lower standard: preponderance of the evidence.

Today the Miranda opinion is still alive, even though the Supreme Court had the opportunity to overrule it in Dickerson v. United States. But Miranda is no longer in its original form; it has been described as "twisting slowly in the wind." Ideally, the Fifth Amendment is effectuated by the procedural precautions provided by Miranda. Ideally, Miranda should protect citizens from police pressure and coercion. However, the Supreme Court has further illustrated how Miranda should apply, in the cases listed below, and has created many exceptions to the Miranda rule. The application and interpretation have been narrow. The potential for positive impact has been abandoned. The rights have been diluted. For example, in New York v. Quarles, the Court decided that "overriding considerations of public safety" might excuse the police for not advising suspects of their rights. In Michigan v. Harvey, the Court held that while statements taken in

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22 See generally Joshua Dressler, Understanding Criminal Procedure (Lexis Nexis 2002).
violation of Miranda cannot be used in the government’s case in chief, they could be used to impeach defendants who testify at trial. In California v. Prysock, the Court held that Miranda warnings need not be given in any specific way. Additionally, circuit and state courts have helped to dilute and dissolve Miranda’s substance. According to the Tenth Circuit, “No talismanic incantation is required to satisfy its strictures.” The Tenth Circuit has also held the translation of Miranda warnings need not be perfect but merely "convey the gist of the rights." The government is not constitutionally required to employ or make available a certified interpreter during a police interrogation, and it is not unconstitutional for a police officer to serve as an interpreter.

The rights created by the Fifth Amendment, and given shape by Miranda, are distinct from other substantive rights in that they must be invoked before they can be exercised. If an individual “desires the protection of the privilege, he must claim it or he will not be considered to have been ‘compelled’ within the meaning of the Amendment.” In other words, the Miranda construct does not impede the volunteering of an individual’s statement. Miranda simply provides judicially created “magic words” in an attempt to arm citizens (or pretend to) with the power to invoke of the Fifth Amendment. Its purpose is to prevent against police compelled self-incrimination and to ensure that statements given post-Miranda warnings are, almost without exception, valid and thus admissible. There are some tricks to the art of invocation: 1) A suspect must be very clear when evoking his/her rights. Without the "magic words," Miranda rights cannot take effect. 2) The suspect must be in custody and under formal interrogation. If the suspect is not in formal custody or under formal interrogation, their statements, with or without Miranda, are admissible. If Miranda rights are not validly waived, a confession/statement cannot be brought as evidence at trial.

The faces of America: What the Supreme Court did not Consider in Miranda

28 Id. at 359.
29 U.S. v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990).
America is a cultural montage, a combination of immigrant culture and indigenous culture mixed with the still-too-dominant white Euro-based culture. The cultural attributes of all these assorted and varied groups have a deep influence on American society. Consequently, culture, sense of self-identification, race, ethnicity, religion and language profoundly influence the perceptions and responses of persons in the legal system and specifically under interrogation. When the Supreme Court wrote the *Miranda* opinion, the country was at the precipice of major change due to a massive wave of immigration. Between 1969 and 1989, twelve million people legally immigrated to the United States, mostly from Latin America and Asia.33

According to the statistics of the United States Census Bureau, in the year 2000, at least twenty five percent of the American population is non-White. Of this twenty five percent, Native Americans and Alaska Natives make up 1%, combined with 12.3% African American, 3.7% Asian/Pacific Islander, 12.5% Hispanic/Latino. The other 7.9% classified themselves as "other," or a combination of "two or more races." As documented by the 2000 Census, 18% of the United States population speaks a non-English language in their home. Of the 18%, 23% report they do not speak English well, or do not speak English at all. Though the minority population of America embodies only 25%, minorities make up at least 64% of the prison population in the U.S.34

The Supreme Court failed to acknowledge and foresee the composition of this country’s population. But after *Miranda* it didn’t take long before the courts were forced to address the application of *Miranda* to people from varying cultures—spanning the gambit. While *Miranda* was written with the goal of limiting coercion and protecting vulnerable criminal suspects, failing to recognize cultural difference in its application has aided in maintaining the power of the dominant white culture. As a judicial tool, *Miranda* merely serves in imposing a false norm, and consequently disempowers minorities. If a suspect does not understand his/her rights—because of cultural and linguistic difficulties—the *Miranda* waiver may be suspect. Thus, when a non-English speaking suspect or a suspect from

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34 Census data can be found on the web: http://www.usatoday.com/graphics/census2000/unitedstates/state.htm
a different culture makes a confession, misinterpretation is of major concern. Language and culture are critical elements in determining the validity of a waiver. Who could be more vulnerable than suspects who do not speak English or are unfamiliar with the United States legal system? Yet, in applying *Miranda*, the courts rarely take the suspect’s cultural reality into account.

II

The *Miranda* Rule Applied to Native American Suspects

The United States government has made every possible effort to force assimilation on Native American Indians. As author Robert Grey Eagle explains:

> They took our land and put us in prisons called reservations. They tried to exterminate us. Next came ethnocide when they tried to take our language and religion from us. They tried to strip us of our identity. It has amounted to the genocide of our culture, and the results have been disastrous.

Robert Grey Eagle describes a disaster that continues today through the application of *Miranda* analysis—without deep consideration of a suspect’s cultural background and heritage—is a continuation of the disaster Robert Grey Eagle describes. The following cases will expose a grave potential for injustice, ethnocide and continued imprisonment. The outcomes of these cases are real and relevant and have a notable impact on Native American communities. It is important to qualify that I am not asserting that defendants in these cases are “right” or that their arguments are perfectly sound or consistently well grounded. It is impossible to know the specifics of each case, based on the courts’ opinions (which omit some of the most essential information) to reach such conclusions. Still, reading the cases closely helps to raise questions and cause us to dare to ask for—and demand—more information and a more just application of *Miranda.*

As *Miranda* gives rise to a great deal of ambiguity and

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uncertainty, the opinion generates some simple questions with complex answers. It is important to ask them: When is a person in custody? When is a suspect under interrogation? How does one sufficiently and unambiguously request an attorney? Has Miranda been waived and what constitutes a valid waiver?

1. Don’t worry; you’re not in Custody.

A suspect is in custody as soon as "a suspect’s freedom is curtailed to a degree associated with formal arrest." However, the Court has followed a very literal definition of custody. Miranda does not typically apply outside of the police station, many times does not apply within. In determining whether an individual was in custody at the time of the interrogation, the court looks to the circumstances of the interrogation and considers how a “reasonable man” would have interpreted the situation. This is a source of substantial injustice. You may be asking, “Who is this reasonable man and why haven’t I met him?” This is because he does not exist. He is a judicial construct, and the men who thought him up were white. "Now their ideas about meaning, action and fairness are built into our culture... their subjectivity long ago was deemed “objective” and imposed on the world.”

Custody, in essence, is not determined by the subjective views of the police officers and suspects, but by the objective circumstances involved in the interrogation. This objective standard attempts to eliminate subjectivity that would lead to suspects claiming they believed they were in custody, when in fact they were not, and help define a set standard for the police. But in doing so, this standard merely sustains and upholds the power of the dominant white culture and white hegemony. Judging suspects belonging to minority and disadvantaged cultures by the values and standards of the dominant culture can lead to discrimination and unjust application of the law. “This lack of recognition of the idiosyncrasies of different cultures maintains the power of the majority and disempowers those in the minority.” Thus, the

38 For more, Joshua Dressler, Understanding Criminal Procedure (Lexis Nexis 2002).
40 Berkmer, at 440. Stansbury, at 322.
41 Delgado, 77 Cornell L. Rev. 813 at 818.
"objective standard" is often an unfair standard that rejects not only the suspect but also reality. Underlying these standards "is a well-hidden issue of cultural power, one neatly concealed in elaborate arguments." Based on this tradition of objectivity, derived from Eurocentric ideology, inherently racist in its foundation, the court ignores cultural factors and the suspect's cultural prospective thereby maintaining a superficial norm and testing the suspect based on this norm. I maintain that the court is then detached from the actual state of things when there is no alteration of the "reasonable man" standard. The examples that follow show what happens, in reality, to Native Americans within the criminal justice system.

Albert Dean Begay

In a Tenth Circuit case, U.S. v. Begay, a young Navajo man appealed his conviction by arguing that his written confession should not have been admitted in to evidence. Begay was convicted for burglary of a store in Shiprock, New Mexico, on Indian land. A FBI agent met with Begay (who was nineteen years old at the time) at his home, and expressed a desire to speak with Begay about the burglary. The FBI agent stated that they could speak at Begay’s home or at the police station. Begay chose the police station and the agent drove Begay there. Begay was not advised of his rights at this time, but he did not speak to the agent during the drive. At the station Begay was advised of his rights and waived them before making the statement later used in the trial court, despite Begay’s motion to suppress. The motion was denied for two reasons: 1) the court held the defendant was not in custody at the time of his interrogation 2) the court found the FBI agent had properly advised Begay of his rights.

On appeal, Begay maintained that his confession was involuntary because of the “inherent pressures of the interrogation atmosphere.” The Tenth Circuit was not persuaded by this argument. Begay’s “subjective background”

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42 Delgado, 77 Cornell L. Rev. 813 at 817. Consider also James Zion, The Dynamics of Navajo Peacemaking, Journal of Contemporary Criminal Justice, Vol. 14 No. 1, February 1998 58-74. See note 3. “As Mary Shirley, a Navajo lawyer, once put it, ‘You Anglos always have reasons for everything. Don’t you know that some things just are?’”

43 Eurocentric: centered on Europe or the Europeans, reflecting a tendency to interpret the world in terms of western and especially European values and experiences.

44 United States v. Begay, 441 F.2d 1136 (10th Cir. 1971).

45 Id. at 1137.

46 Begay, 441 F.2d 1136, 1137.
was not to be considered.\textsuperscript{47} The court noted that Begay gave his statement free of coercion as he was "nineteen, attended school midway through the eleventh grade, was a good student, spoke English fluently and gave no indication of incapability to understand."\textsuperscript{48} The court concluded that Begay's confession was voluntary and, thus, did not readdress the issue of custody, even though being questioned in a police station is much like (if not equivalent to) a true interrogation, especially since Begay had no means of leaving the station. The court did not consider whether the defendant might have believed—as a reasonable teenager uncomfortable around FBI agents would—that he was in custody when he was driven by a FBI agent, in the agent's car, to the police station and was thoroughly questioned at the station.

2. Don't worry; you have the right to an attorney.

The invocation of one's Fifth Amendment Right to Counsel is a procedural pause button. If a suspect in the midst of custodial interrogation requests the aid or presence of an attorney, the interrogation "must cease until an attorney is present."\textsuperscript{49} Furthermore, the police may not resume questioning a suspect who has consulted with an attorney. Counsel must be present for questioning to proceed, unless the suspect initiates conversation with the police regarding a separate crime or waives his/her rights, the police must remain paused.

Pretty powerful, isn't it? The suspect has control. The police are subordinate to these very powerful magic words. But here's the glitch, the court requires that the request be "unambiguous," which disadvantages suspects who may not know how to communicate an unambiguous request for counsel. As when parents require the magic words "please" or "thank you" a child must use the correct expression or yield no power and achieve few results. Like a secret code, one has to be in on the secret. The suspect's request cannot be vague. Rather, he/she must articulate his/her request to have counsel present "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."\textsuperscript{50} If the request is in any way vague or uncertain, the police

\textsuperscript{47} Id.
\textsuperscript{48} Id.