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S. Meredith Morris
University of New Mexico

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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 It was located in the St. Thomas Projects, which have now been replaced by a WALMART.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

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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.

equally deep-seated—many times subconscious—bigotry. 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 though 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.

9 Ethnocide: a blending of the word ethnic or ethno- and the suffix -cide. Ethnic comes from Middle English, from the Latin ethnius 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 b. being a member of an ethnic group -cide The suffix comes from French and is derived from the Latin -cida “killer,” and from Latin -cidiun “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.

I
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. 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." 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."

The Court had long been disgruntled with the case-by-case evaluation of confessions and the application of the "voluntariness test" that preceded *Miranda*. There was a need for clarification and a bright-line rule. In a case titled *Malloy v. Hogan*, 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*, 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

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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."
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."20 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.21 Under federal law, the government bears the same responsibility of proof, but with a lower standard: preponderance of the evidence.22

Today the Miranda opinion is still alive, even though the Supreme Court had the opportunity to overrule it in Dickerson v. United States.23 But Miranda is no longer in its original form; it has been described as "twisting slowly in the wind."24 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,25 the Court decided that "overriding considerations of public safety" might excuse the police for not advising suspects of their rights. In Michigan v. Harvey,26 the Court held that while statements taken in

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 gamut. 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

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 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 (LexisNexis 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. 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." 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.” 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.” If the request is in any way vague or uncertain, the police

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47 Id.
48 Id.
may proceed with the interrogation. They need not clarify the suspect’s request by asking questions of the suspect or explaining the suspect’s options/rights further; such behavior is not expected or required.51

Many Americans, even those brought up with substantial privilege and a strong education, would not know to be so precise in order to rouse their Fifth Amendment right to counsel. What about those who are not familiar with the system, not privileged, not educated? This so-called “protection” under Miranda discriminates against those who are unfamiliar with the legal system in the United States or who lack the vocabulary to articulate their request to the law enforcement. Miranda discriminates against those who, for whatever reason, do not know how or cannot express or articulate an “unequivocal request.” They are the very people the Supreme Court sought to protect with Miranda. As Justice Souter stated in his concurring opinion in Davis, “Criminal suspects... thrust into an unfamiliar atmosphere and... menacing police interrogation... would seem an odd group to single out for the Court’s demand for heightened linguistic care.”52 Souter solidifies his statement by adding, “a substantial percentage of them lack anything like a confident command of the English language... when overwhelmed by the uncertainty of their predicament ... the ability to speak assertively will abandon them.”53

Many Native Americans feel very powerless and disenfranchised in the white-hegemony of American culture.54 The colonization of America (the attempted removal of tradition, culture, identity and lifestyle) killed, wounded and isolated the native populous of this country. What remains is a deep—and exceedingly legitimate—distrust of the United States government. The likelihood of Native American citizens speaking up and asserting their rights during a custodial interrogation is pretty slim. Native

51 U.S. v. Davis, 512 U.S. 452, 459 (1994); U. S. v. Muhammad, 120 F.3d 688, 698 (7th Cir. 1997); Diaz v. Senkowski, 76 F.3d 61, 63 (1996) (holding “Do you think I need a lawyer?” was not an unambiguous request) also, Lord v. Duckworth, 29 F.3d 1216, 1220-21 (7th Cir. 1994) (holding that “I can’t afford a lawyer, but is there any way I can get one?” was not an unambiguous request for counsel).
52 Davis, 512 U.S. 512 at 469-70 (Souter, J., concurring).
53 Id. at 461.
American defendants are unlikely to feel any sense of entitlement, empowerment or exhibit the kind of behavior the court demands, based entirely on Western and primarily Eurocentric standards. Police custody can exacerbate an already strong sense of powerlessness and increase the likelihood of resistant silence or unequivocal speech. Additionally, it is difficult for persons unfamiliar with the Western legal system invoke a right he/she does not know exists. How can a suspect make a firm request when they fear it may be interpreted as disrespectful or dangerous? Also how can a person speak with certainty when at the mercy of the police who are known to be extremely coercive and representative of a system that is not worthy of trust? To answer these questions, we must continue to dissect the problems exhibited in case law, and delve below the surface.

Ross Allen Doherty

In U.S. v. Doherty, a Native American defendant and resident of Hannahville Indian Community tribal reservation was convicted on two counts of knowingly engaging in sexual acts with a child. Doherty was arraigned in the Hannahville Indian Community Tribal court. There he was informed that he had the right to retain counsel at his own expense and was asked if he wished to have an attorney. Doherty responded in affirmation; he stated that his mother was attempting to obtain a lawyer at that time. Implied in his statement was his clear desire to have an attorney.

While in tribal custody in the tribal police station, a FBI agent visited Doherty, knowing that Doherty’s alleged tribal court violation was also in violation of federal law. Doherty agreed to speak with the federal agent. He was informed of his rights, including the right to have an appointed lawyer paid for by the government, a right he did not have in tribal court. Doherty signed a waiver and indicated that he understood his rights and was willing to voluntarily proceed. He admitted to sexually abusing his two stepdaughters many times over the last seven years. Doherty’s motion to suppress the confession was denied by the district court, and the FBI agent read his confession into evidence.

55 U. S. v. Doherty, 126 F.3d 769 (6th Cir. 1997).
56 Id.
Doherty appealed to the Sixth Circuit arguing a violation of his Fifth Amendment rights. Doherty maintained that his statement in tribal court, regarding his mother’s efforts to obtain legal counsel, was a request for an attorney under Miranda. He further argued that the FBI agents should have ceased their questioning as it proceeded in violation of his Fifth Amendment right to have an attorney present during interrogation. The court found that the FBI agents “carefully explained to Doherty his rights, and Doherty voluntarily elected to proceed with the interview.”

Doherty based his argument on Edwards v. Arizona, stating that once a suspect has invoked his Fifth Amendment Right to Counsel, any Miranda waiver that follows is, as a matter of law, involuntary. He further argued that there are only two exceptions to the Edward’s rule: (1) a suspect’s counsel is present or (2) the suspect initiates the conversation.

The court held that all of this was irrelevant because under Edwards the suspect must “unambiguously request counsel” for the Fifth Amendment to take effect. Judge Boggs expressly stated in his opinion, “Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly... If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect.” The court concluded, regarding Doherty’s Fifth Amendment rights that the rule of Edwards “applies only when the suspect has expressed his wish for the particular sort of lawyerly assistance that is the subject of Miranda.” According to the Sixth Circuit, requesting counsel at his arraignment in tribal court was not within the ordinary meaning of a “request for counsel” under Miranda and Edwards.

3. Don’t worry; this isn’t an interrogation.

If the court determines that an officer’s statement to questioning of a suspect did not equal interrogation, then the suspect’s words and responses are admissible.

58 Doherty, 126 F.3d 769 at 769.
60 Doherty, at 775, quoting Edwards v. Arizona, supra.
61 Id. at 482.
62 Id. at 774.
63 United States v. Moreno-Flores, 33 F.3d 1164, 1169-70 (9th Cir. 1994).
Under *Miranda*, interrogation is defined as "clear, deliberate questioning or its functional equivalent." The functional equivalent, the Court explains, would be "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response." Therefore, in determining whether an interrogation has transpired, the court will take the intent of the police into consideration, but will mainly focus on the understanding of the suspect and his/her perception. The police are not expected to take each person's subtle character/cultural traits into consideration at the time of the interrogation. However, if the police know a suspect is sensitive or vulnerable the police must not exploit that vulnerability by using a "particular form of persuasion" likely to bring about such a response. If the police know a suspect's cultural heritage makes him/her vulnerable due to cultural fear of authority, unfamiliarity with the system, lack of fluency in English, or specific nationality, they should then consider if their words or activities would be likely to invoke an incriminating response from the suspect. The following case is an example of such a situation.

**Daniel Chalan**

In another Tenth Circuit case, a witness identified the defendant, Daniel Chalan from Cochiti pueblo, as a robber of a convenience store and murderer of an employee. At trial, the principal evidence used to convict Chalan was his confession, made on the day of his arrest. The confession was allowed into evidence because Chalan was deemed to have not been in custody when he answered FBI agents' questions at the request of his tribal governor, in the governor's office. As there was no obvious use or threat of force exercised to compel Chalan to answer the FBI agents' questions or keep him in the governor's office, the questioning was not considered an interrogation under *Miranda*. The court held that Chalan's Indian status and deep sense of obligation to obey the tribal governor did not convert the period of questioning into a custodial interrogation. The court held this, regardless of the presence of Chalan's mother, two investigators, and an

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68 *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).
officer from the county sheriff’s office, the governor himself in addition to the FBI agents, throughout the questioning. Some of the officers were clearly armed, and Chalan was clearly outnumbered.

In the tribal governor’s office, Chalan was asked several questions related to the events at the convenience store. He was asked about his involvement in an “often accusatory” manner. He was “exhorted to tell the truth” by all of the people present during the interview. Still, the court notes that no one threatened Chalan, harmed him physically or forced him to stay. Chalan denied any involvement or activity in the murder/robbery. A day later, after talking about the murder and robbery with several of his cousins (who were later given the privilege not to testify as their testimony would have been self-incriminating), Chalan summoned one of the FBI agents, and he confessed to the commission of the two crimes. He then signed a written waiver of his Miranda rights and gave a very specific confession to the crimes.

Chalan argued to the trial court that some of his statements should be suppressed. He explained that his confession was involuntary because he was acting under coercion created by the “interview”, one day earlier, at the governor’s office. The trial court held that all his statements were admissible, based on several factors. The court not only refused to acknowledge that the “interview” was an interrogation but also held that Chalan was “not in custody for purposes of Miranda” during the questioning at the governor’s office. The court maintained that Chalan was free to leave the governor’s office at any time and was not held there by force or threat of force.

Chalan attempted to express that his desire to be respectful and not displease the governor created a kind of restraint of his freedom. In other words, Chalan felt he was not able, or allowed, to leave. This feeling was based on tribal custom. The governor is the leader of the pueblo; he oversees the tribal council and runs the pueblo police force. At the suppression hearing, Chalan brought a cultural expert who explained, “Obedience to the Governor

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69 Chalan, 812 F.2d 1302 at 1304.
70 Id.
71 Id.
72 Chalan, 812 F.2d 1302 at 1306.
is expected of all tribal members. 73 Chalan further explained that any tribal member would be expected to make an appearance when summoned by the governor and would not feel free to leave.

Regardless of Chalan’s explanation, the trial court held that because there was no use of physical or mental “pressure, threats or promises ... to coerce defendant into giving a statement” 74 the “interview” was not an interrogation under Miranda. In Miranda, as quoted by the Tenth Circuit, an interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” 75 I posit that Chalan’s freedom of action was limited in a very significant way when armed officers, his own mother and a local sheriff summoned him to the governor’s office, at the governor’s request. This was an order Chalan felt he could not ignore. He was not free to leave.

In measuring the magnitude of Chalan’s restraint of freedom of movement, the Tenth Circuit cited Berkemer v. McCarty, 76 which states that a court should consider how a reasonable person in the suspect’s situation would understand that situation. Given that, the court admitted that Chalan’s “interview” was “both coercive and accusatory.” 77 One would conclude, under the circumstances, this was a restraint from freedom, followed by prolonged accusational questioning. The interview was a police interrogation. Nevertheless, the trial court maintained that Chalan “could not have reasonably believed he was in custody during the interview.” 78 Then the Tenth Circuit held that the trial court’s findings were not clearly erroneous and stated that the officers told Chalan at the time of the interview that he was not being charged with a crime. “We believe this information, under the circumstances of this interview, would lead a reasonable person to think that he would be free to leave.” 79

73 Id.
74 Id.
75 Chalan, 812 F.2d 1302 (quoting Miranda v. Arizona, 86 S. Ct. 446, 612 (1996)).
77 Chalan, at 1307.
78 Id.
79 Chalan, 812 F.2d 1302 at 1307.
The circuit court was unwilling to take Chalan's cultural heritage and custom into consideration, but was willing to consider Chalan's age and education, perhaps because such considerations worked in favor of the trial court's conclusion. The trial court held that Chalan was not "unusually susceptible to coercion" due to his age or education or intelligence. The Tenth Circuit affirmed the trial court's conclusion.

3. Don't worry; you just waived your rights.

Many ambient factors come into play in assessing whether a waiver of one's Miranda right is valid. The results differ from court to court and from judge to judge. As stated before, a waiver must be made voluntarily, knowingly and intelligently. The burden is on the government to prove a valid waiver, and the federal legal standard is preponderance of the evidence. However, under North Carolina v. Butler, the waiver need not be explicit but can be "inferred from the actions and words of the person interrogated." Typically, the validity of a waiver is determined based on the circumstances of the case; the facts and the specific suspect being interrogated. This is precisely why waivers are so convoluted and controversial. For example, if the suspect does not speak English well, doesn't know much about the American legal system or has specific beliefs, cultural values, mannerisms or linguistic disparities, the waiver process may be rife with misunderstandings and misapplication. While the court may consider unfamiliarity with American legal system, generally the court seems satisfied when a suspect knows he/she has generic rights, which "go away" upon waiver. The law does not expect the suspect to understand the obstacles created by waiving those rights.

Under Moran v. Burbine, a waiver should be the result of "free and deliberate choice" not "intimidation, coercion, or deception." Thus the court looks for threats, physical force, or specific means of manipulation and coercion. This analysis supposedly ensures that the will of the suspect has not been strained to such an extent that

80 Id.
83 Id.
85 Burbine, 475 U.S. 564.
he/she has lost the ability to make decisions for him/herself. According to the court in Burbine, a waiver must be made knowingly and intelligently, with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Yet courts do not require that suspects know of every possible outcome of the waiver, but need only have a very simplistic, face value understanding of their rights, at best.

Bernard S.: Voluntary/Involuntary

In U.S. v. Bernard S., a juvenile Apache defendant was found guilty of assault resulting in serious bodily injury. He appealed to the Ninth Circuit by arguing that the district court was wrong in finding that he had waived his Miranda rights before he made incriminating statements. The circuit judge held his waiver was valid.

The assault, with which Bernard was charged, occurred on the San Carlos Apache Reservation. The victim sustained injuries to his head that required hospitalization. An agent named Bedford questioned Bernard at the San Carlos police department located on the reservation. Bernard’s mother was present along with Lieutenant Stevens. Both the Lieutenant and Bernard’s mother spoke Apache. Agent Bedford read Bernard his Miranda rights in English. Bedford gave a brief explanation of these rights to Bernard and his mother. Bernard stated that he understood these rights and that he was willing to waive them. According to the court, "He did ask his mother and Lt. Stevens to explain a few items into Apache, but these translations were made after the Miranda rights were read and waived and did not involve those rights." Bernard spoke mostly in English with the agent; he gave a statement confessing to the assault.

Bernard brought a pre-trial objection to the use of his post-Miranda statements on the basis that they were involuntary and violated his Miranda rights. His objection was overruled, and he was found guilty. The appellate court reviewed the district court’s opinion under the clearly erroneous standard as proscribed by U.S. v. Doe. Bernard argued that he had a very limited comprehension of English.

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86 Id. at 577.
87 United States v. Bernard S., 795 F.2d 749 (9th Cir. 1986).
88 Bernard S., 795 F.2d 749.
89 U.S. v. Doe, 787 F.2d 1290, 1293 (9th Cir. 1986).
and that because his rights were not explained to him in Apache, he could not, for that reason, have validly waived his rights. He further argued that because he was only seventeen years old, the district court should have "scrutinized his confession... with special care." The Ninth Circuit found that the district court's opinion was supported by substantial evidence and the determination that Bernard validly waived Miranda was not clearly erroneous.

Still, the appellate court conceded that it was clear in the trial court record that Bernard did have some difficulty with English. At trial, Bernard had testified that he could neither read nor write in English, "he occasionally spoke Apache with his mother and Lt. Stevens during the questioning to clarify some items, and he was assisted in his testimony at trial by an interpreter." Normally the use of an interpreter at trial weighs heavily in the court's determination of a valid waiver. But the appellate court was unwilling to take these factors into consideration and continued; "on the other hand, he admitted that he studied English through the seventh grade and that he answered Agent Bedford's questions in English."

The dispositive fact for the appellate court was that Bernard had stated to Agent Bernard that he understood his rights. According to Agent Bedford, at no time did Bernard or his mother state that they did not understand the wording of Miranda or have any questions regarding these rights. The court concluded that regardless of his "language difficulties" the evidence "seemed to indicate that he understood his rights and voluntarily, knowingly and intelligently waived them." With regard to Bernard's age, the appellate court applied the totality of the circumstance test. The court found that although age can be a factor in determining whether a waiver of Miranda is valid, the record in Bernard's case did not "indicate that appellant's age negated the district court's finding that he validly waived his Miranda rights." The court concluded by citing Doe, a case where the defendant was Native

90 Bernard S., at 752.
91 Bernard S., 795 F.2d 749 at 752.
92 Id.
93 Id.
94 Bernard S., 795 F.2d 749 at 752.
95 U.S. v. Doe, 787 F.2d 1290, 1293 (9th Cir. 1986).
American, a juvenile and also from an Apache reservation. The court explains that in Doe, the defendant had a good grasp of the English language, and was "able to converse coherently and rationally with an FBI agent. There was no indication that he was... of insufficient intelligence and maturity to understand the rights he was waiving or the consequences of his waiver."\footnote{96}

**Terrance Frank: Knowing and Intelligently**

In another Ninth Circuit case, *U.S. v. Frank*,\footnote{97} affirmed that a 24-year-old Navajo man, who lived in a hogan in a very remote part of his reservation, had validly waived his rights and confessed voluntarily, knowingly and intelligently to his charges. Thus his statement was admissible in court. The circuit court maintained the trial court's holding, despite the fact that during the trial experts explained that Terrance Frank was mildly retarded, suffered from depression, had a low IQ and knew very little about the court system of the United States. Frank was found competent; he sought the reversal of this finding on appeal, but his request was denied. He also sought a reversal on the court's denial of his motion to suppress his confession. This request was also denied.

Terrance Frank contested the admission of his confession on what the Ninth Circuit deemed "discrete constitutional grounds."\footnote{98} He argued that his confession was involuntary, unknowingly and unintelligently given based on his mental conditions, low I.Q. and on the basis that "his unsophistication and unfamiliarity with the criminal justice system made him vulnerable to suggestion."\footnote{99} Part of Frank's contention was that he had an inadequate mental capacity to properly comprehend his constitutional rights and thus knowingly and intelligently waive those rights.

The Ninth Circuit court reiterated and applied the standard set in *Townsend v. Sain*\footnote{100} and *Moran v. Burbine*.\footnote{101} Both cases held that a confession that is involuntary or coerced is inadmissible. Both cases also held that a voluntary confession made without a knowing and

\footnote{96} Id.
\footnote{97} *United States* v. *Frank*, 956 F.2d 872 (9th Cir. 1991).
\footnote{98} *Frank*, 956 F.2d 872 at 875.
\footnote{99} Id.
intelligent waiver of one’s constitutional rights is, likewise, inadmissible. According to the Ninth Circuit court, the trial record showed no sign of improper suggestion or coercion of Frank. For example, the police were very careful to explain the meaning of “coercion” to Frank. As the officers explained, Frank was not offered threats or promises. Frank was able to read his rights out loud and behaved cooperatively. Thus, the court concluded that the totality of the circumstances test had been met. Frank was not coerced; Frank comprehended his rights under Miranda.

However, the Government’s expert psychologist testified at the competency hearing that Frank had only “Limited understanding” of the rights that are implicated in entering a plea of guilty.”102 The same expert clarified that Frank’s lack of understanding of his constitutional rights was due, not just to mental illness or a handicap, but was “caused by the fact that as a Navajo who had lived on a reservation all his life, Frank had not been educated about the American system of justice.”103 On cross-examination, a psychiatrist/expert witness for the Government was asked if Frank was able to comprehend his constitutional rights. The expert testified that Frank “didn’t know what they meant.”104

In addition, a defense witness/district court interpreter, who specialized in Navajo, was present as an interpreter during a psychological evaluation of Frank. The interpreter illustrated many complex differences between English and Navajo. Many words in the English language have no Navajo equivalent. The interpreter used an example: the word “guilty.” Navajo requires “two or three sentences to explain the meaning of this word.”105 A “prosecutor” translates as a “Washington attorney; ” and “defense counsel” becomes “someone who negotiates or speaks for you.”106 The Ninth Circuit agreed with the experts for both the prosecution and defense and felt that Frank was hindered by his “cultural differences.”107 Nevertheless, the circuit court still found that the district court “did not clearly err in concluding that Frank had the mental

102 Frank, 956 F.2d 872 at 877.
103 Id. at 878.
104 Frank, 956 F.2d 872 at 878.
105 Id.
106 Frank, 956 F.2d 872 at 878.
107 Id.
capacity to comprehend his right to remain silent and right to counsel... and the consequences of the giving up of these constitutional guarantees."\textsuperscript{108}

The *Miranda* ruling and its panoply of results are complex and varied. Culture, language and tradition come into play when *Miranda* is applied and have a profound effect on the preservation and distribution of Fifth Amendment rights. Biases, police ineptitude, exceptions and ambiguities find their way into the application of *Miranda* and into the courtroom. The police still extract confessions from vulnerable suspects, and in the end, the courts maintain that a signed waiver is strong evidence that the waiver is valid regardless of the plethora of contrary facts.

III

On Misinterpretation

"Languages are imbedded in the history and struggles of the people who use them."\textsuperscript{109}

While I am aware that Indigenous languages and cultures are extremely complex and diverse, I posit that whenever two or more cultures come into direct conflict, and one has the political upper hand, the discriminatory results are often analogous.\textsuperscript{110} Similarities exist between tribal nations in their relationships with, and under, the dominant culture. Oppression through imperialism and conquest is easier to maintain when there is a racial or cultural distinction between the rulers and the oppressed, as evidenced by the history of indigenous people in the United States. Oppression can execute through language.\textsuperscript{111} The smallest and seemingly benign factors can add up to results of great magnitude. For example: inflection, dialect, context; all three add to the misinterpretation of a request for counsel under *Miranda*, which in turn leads to

\textsuperscript{108} Id.


\textsuperscript{111} Racial categorizing... in the courtroom depends not only on how Whites look at people of color but also how Whites hear people of color. *Montoya, supra at 878.*
an unjust result. The application and outcome of Miranda waiver cases are influenced by language difficulties, the mandates of suspect’s culture to be obedient to the police, unfamiliarity with the legal system and powerlessness in American society.\footnote{112} A suspect’s demeanor and speech may exhibit that lack of culturally ordained power, and acute sense of disenfranchisement. Oppression is harsher when a system is established through conquest over people with a different language, culture and history, and much is lost in translation. Much is ignored or intentionally manipulated for the benefit of the dominant group.\footnote{113}

The potential for misinterpretation and misunderstanding of Miranda is greatest for Native American defendants when the defendants come from remote locations and are entirely unfamiliar with the criminal justice system or their rights in the system.\footnote{114} When these defendants enter into interrogation-type scenarios dictated by powerful government agents, the results can be abominable (as seem by the cases in Section II: confessions to crimes never committed, ineffectual efforts to assert rights that are never acknowledged by the police or other law enforcement agents and ultimately the perpetuation of white supremacy. The examples that follow hardly begin to scratch the surface of the subtleties of culture and language as they factor into interrogation-type situations. I cannot begin to attempt an even representation of Indian Nations, individuals from different tribes, or their politics and culture. I do not pretend to be an expert on tribal culture and various customs, but rather cite and pull from essays I have found helpful and instructive in understanding the misinterpretation and cultural disconnect that further isolates Native American defendants in interrogation settings.

Native Alaskan Defendants in the Criminal System

\footnote{112}{See cases mentioned in Section II, also n. 50, supra, regarding efforts to request counsel.}
\footnote{113}{One is astounded in the study of history at the recurrence of the idea that evil must be forgotten, distorted, skimmed over. We must not remember that Daniel Webster got drunk, but only remember he was a splendid constitutional lawyer. We must forget that George Washington was a slave owner and simply remember the things we regard as credible and inspiring. The difficulty, of course, with this philosophy is that history loses its value as an incentive and example; it paints perfect men and notable nations, but it does not tell the truth. “W.E.B. Du Bois, Black Reconstruction, 722 (World Meridian 1964 [1935]).
\footnote{114}{There is no other country in the world where there is such a large gap between the sophisticated understanding of... professionals and... and the basic education given by teachers.” Marc Ferro, The Use and Abuse of History 225 (Rutledge and Kegan Paul 1981).}
In her extremely honest and revealing essay on Alaska Natives and the Criminal Justice system in rural Alaska, Rachel King, a public defender, notes that while her article is focused primarily on Alaska, "comparisons can be made to other situations where a traditional culture clashes with the Anglo legal culture." Her article exposes how a legacy of conquest and subjugation of indigenous people continues to the present and thrives in the American criminal court system. King writes about linguistic subtleties, cultural customs and mores, which often go unnoticed but hinder equitable results in the Alaska legal system. She asserts that there is intense disharmony between the Native Alaskan community, partly because of white presumptions and expectations that abound in the antagonistic legal system. She maintains that many cultural barriers due to disenfranchisement/mistrust of the government and language problems go un-addressed and result in a break down of communication, hazardous misunderstanding and grave injustice.

A look at the subtle nuance of both culture and language informs us of how domination and subjugation persevere. As King explains, "The Alaska Native defendant does not share the same rhetorical strategy as the players in the system. He is hampered both by his culture and the fact that he is unfamiliar with the legal system." I assert that this is true for anyone who has not had much exposure to the legal system or the formal education bestowed upon only the privileged of America. While many, if not most, Alaska Natives speak English, King asserts that fluency does not ensure that Native Alaskan suspects will be able to comprehend what she refers to as "Anglo legal proceedings." For many Alaska Natives, as for many indigenous people all over North America, English is often a second language. Yet even when the defendant is fluent in English, misinterpretation of cultural differences can distort understanding on both sides. For example, body language is easily misinterpreted. King notes that for many Alaskan tribes it is often considered disrespectful to make direct eye contact. She adds that by mainstream white, Euro-based standards this is considered to be strange and denote/connote untrustworthiness.

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116 King, 77 Or. L. Rev. 1 at 8.
117 Id.
118 King, 77 Or. L. Rev. 1 at 9.
In addition to body language, there are many other contrarieties in communication, as communication styles can differ in a plethora of deceivingly simple ways. The contents, pattern and frequency of speech and the way in which the speaker refers to his/herself can be strikingly different depending on the speaker's cultural background. King quotes Professor Morrow, an anthropology specialist at the University of Fairbanks who has observed many legal proceedings in Alaska, "Eskimo speech patterns use lengthy pauses between thoughts. Anglo speech tends to be more hurried with shorter pauses. Eskimo speech is qualified and less direct than Anglo speech."\(^{119}\) Furthermore, Morrow has noted that Eskimo defendants often reply with a "yes" or other affirmative response when asked if they have understood the proceedings, but later discussions expose the fact that they did not understand at all. This goes back to an inherent distrust of the system, a desire to be respectful—not get in trouble, and a general misunderstanding of the process and/or English language. Morrow also explains that "Yup'ik speech is characterized by numerous qualifiers, hedges, pauses, and topic shifts from direct answers, characteristics which rate as making the speaker appear less credible, certain, intelligent, and capable than those who use more direct constructions."\(^{120}\)

King cites other experts' conclusions about the communication patterns between native and non-native speakers in Alaska that lead to miscommunication. She insists misunderstandings are the direct result of the co-existence of intensely different customs, social norms and means of interacting, codes of conduct and decorum, and linguistic organization. For example, King relates to her readers how in Eskimo culture it is often considered rude to "assert or speculate about topics."\(^{121}\) Language is more indefinite and conditional. The word "maybe", King explains, "is common and acknowledges the possibility of incomplete knowledge."\(^{122}\)

King also mentions that during her work as a public defender in Alaska she came to the conclusion that Native Alaskan defendants have a tendency to not assert their

\(^{119}\) Id. at 10.

\(^{120}\) Id. at 13.

\(^{121}\) Id.

\(^{122}\) King, 77 Or. L. Rev. 1 at 12.
Fifth Amendment rights.\textsuperscript{123} King believes that her Native Alaskan clients confessed to crimes with more frequency. All, but one, of her Native Alaskan clients made some form of confession. This was not due to culpability; these defendants were undoubtedly "more likely to give false confessions, were reluctant to be involved in conflicts with the accusers, and had strong cultural predispositions to confess."\textsuperscript{124} In addition, King explains that false confessions are more frequent than anyone likes to think or admit. She maintains that the police are more likely to elicit false confessions from suspects who are "particularly vulnerable."\textsuperscript{125} King illustrates this vulnerability and asserts that tribal communities, not unlike island cultures or small towns, promote a strong sense of community. There is a communal push to move on and to resolve conflict for the benefit of all. The community, not the individual, is primary. A strong sense of tradition and a lack of anonymity often creates a deep sense of responsibility and a culturally created/endorsed need to repair communal harmony and bring back a sense balance. King remembers clients who were "reluctant to contradict accusations made against them," and recalls statements such as, "Well, I don't remember if I did it, but if she said I did, then I must have done so."\textsuperscript{126} King believes that this kind of response is related to a "deep seated aversion to direct confrontation within the Eskimo community."\textsuperscript{127}

Recounting her work with Eskimo defendants, King suggests that since aboriginal times, Eskimos have maintained confession to be a positive action and generally expected. King says this is because "Eskimo society was essentially noncensorious. Confession had as much of an aspect of news-bringing as it did alleviation of guilt."\textsuperscript{128} The inclination to confess is derived from the cultural understanding that "the universe responds to human actions."\textsuperscript{129} If a person refused to admit or openly address his/her guilty actions, the absence of such communication could bring bad luck, ill health, problems in relationships and general discomfort for the community. Therefore there

\textsuperscript{123} Id.
\textsuperscript{124} Id. at 2.
\textsuperscript{125} Id. at 29.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} King, 77 Or. L. Rev. 1 at 29.
is a need for repentance and reconcilement for the benefit of the community as a whole.

In a culture, like Eskimo culture, that emphasizes the significance of community; the predisposition to confess is a social construct that serves to heal a fractured community. Perhaps it is for this reason that Alaskan judges and defendants alike “rarely distinguish between evidentiary guilt and guilty feelings... and generally do not request counsel.”¹³⁰ A feeling of togetherness, or “we-ness” is an overarching culture-based objective. The defendant is part of the community and the goal is re-integration, punishment is a means of educating, and the confession is the beginning of healing a community breach.¹³¹ As King has concluded, Eskimo culture is “prone to confession.” She also laments the conclusion that follows, “an arrested Eskimo is a convicted Eskimo.”¹³²

Navajo Language: Translating the Spoken Word and Salient Silence¹³³

In an educative essay, Robert Yazzie, Chief Justice of the Navajo Nation, explains a tradition of fear of coercion, intrinsic to Navajo culture. He exposes a deep-seated (and legitimate) distrust of attorneys, law enforcement and the United States legal system. He further illuminates how, to Navajo people, Western concepts of guilt are inscrutable and illogical. In Navajo culture there is a saying that one should “beware of powerful beings.”¹³⁴ As Honorable Yazzie explains, this saying is derived from Navajo ethics where coercion is considered disreputable. Coercion is “so feared in Navajo ethics that the invocation of powerful beings... is a form of coercion considered to be witchcraft.”¹³⁵ Witchcraft is a crime punishable by death under Navajo common law. Given the history of the United States and the great chasm between Western moralistic ideology and Navajo tradition and philosophy, Yazzie explains that general distrust of the American legal system is exhibited in Navajo vocabulary. In Navajo, lawyer or “‘amaha ‘dii ‘aahii” is one who “takes

¹³⁰ Id.
¹³¹ Id. at 31.
¹³² Id.
¹³³ “If we do not speak of it, others will surely rewrite the script.” See George Swiers, as quoted in William Appleman Williams et al., eds., America in Vietnam ix (Norton 1989).
¹³⁵ Id. at 180.
away with words"). Within its meaning is the description of a person who uses deceptive words for duress. The entire Euro-based Western legal system is viewed as potentially coercive and oppressive.

The Navajo definition of guilt requires a long explanation, as exemplified by the case of Terrance Frank. When a Navajo member goes before a judge and is asked in English "Are you guilty or not guilty", according to Yazzie, "a Navajo cannot respond because there is no precise word for 'guilty' in the Navajo language." Yazzie explains that the word "guilt" suggests "a moral fault which commands retribution." In Navajo the word is nonsensical, because Navajo law focuses on healing a breach, promoting integration and "nourishing ongoing relationships with the immediate and extended family, relatives neighbors and community." Yazzie notes that judges of other Indian nations have reached similar conclusions with their languages. He adds that guilty plea rates for Native people are very high in state and federal courts.

Often, it isn’t what people say, or the language they use, but what remains unsaid that reveals a great deal about culture and heritage. Margaret Montoya discusses the use of silence in her essay specifically on silence and silencing. She argues, "One’s use of silence... is related to one’s culture and may correlate with one’s racial identity." Montoya cites the work of Keith Basso, who cultivated a study on silence. Ultimately, Basso concluded that silence is contextual. Silence is used differently in different scenarios and is dependent on the "social roles of the persons involved in the communication and their status in relation to each other." Basso analyzed the use and cultivation of silence in Navajo communities. He studied silence in the Navajo Peacemaking process. He found the use of silence in Navajo communities to be similar to

136 King, 7 Or. L Rev. 1 at 185.
137 United States v. Frank, 956 F.2d 872 (9th Cir. 1991).
138 Yazzie, 24 NMLR 175 at 182.
139 Id.
140 Yazzie, 24 NMLR 175 at 182. In order to restore hozho (harmony) though the fundamental concept of k'e, which reinforces clan relationships among hadane (in-law relationships) based on reciprocal responsibility, the notion of treating others as your relatives is strongly maintained. To behave poorly is to act as if you have no relatives.
that in Apache communities. "Navajos used silence, aware of the 'power of words' while non-Navajos were likely to conclude that silence signaled a breakdown in interaction." 143

As Montoya writes, "the negative valuation of (silence, or) the slow talker is based on the fast talker's perception that s/he has nothing to say or is unwilling to speak, while the fast talker gives the slow talker the impression of crowding out others." 144 From this negative valuation stem stereotypes seen in American culture describing and depicting Native people as slow, sullen, quiet, stupid or uncooperative. 145

The Subtext of Legal Discourse and the Preservation of a Racist System

In the same essay, Montoya maintains that language is stratified in ways we do not discuss. Montoya believes that there is a communication barrier between social and professional language. For example, in the case of U.S. v. Doherty, 146 were Doherty stated that his mother was securing a lawyer for him. He believed he was requesting an attorney, but in the legal realm, his request was ambiguous, asserted at the wrong time and essentially of no value. 147 Thus his language yielded no power. Montoya warns, "The logo centric 148 privileging of 'voice' can colonize the very differences we seek to recognize." 149 This is precisely why, in reality, the application of Miranda does not work to promote justice but instead precludes it. For example, Miranda was created to recognize and to protect vulnerable suspects' Constitutional rights against self-incrimination and ensure suspects the right to an attorney. However, when Doherty asserted that his mother was securing an attorney and believed that he was asserting his right to an

143 Id.
144 Id. at 863.
145 Montoya, 5 Mich. J. Race & L. 847 at 864. These stereotypes are rampant in our school systems as well. "There is not one Indian in the whole of this country who does not cringe in anguish and frustration because of these textbooks. There is not one Indian child who has not come home in shame and tears." Rupert Costo, in Miriam Wasserman, Demystifying School 192-93 (Praeger 1974).
146 U.S. v. Doherty, 126 F.3d 769 (6th Cir. 1997).
147 Id.
148 Logo centric: log or logo- from the Greek logos meaning: word: thought: speech: discourse -centric from Medieval Latin -centricus or centrum center 1: having a center or centers 2: having (something specified) as its center.
attorney, his efforts and voice were not recognized under the objective standards used in applying Miranda. Ironically, Miranda does not shield the people who need protection the most. In some respects, Miranda merely provides a procedural stamp of approval—an okaying that allows statements into court.

Montoya establishes that language used in legal discourse is calculatedly "unitary." By refusing to acknowledge or accept heteroglossia into the legal system in a country made up of a richly heterogeneous populous, the mainstream rejects "languages and silences of subordinated groups, such as people of color, sexual minorities, and others who have been historically oppressed." This rejection of heteroglossia is part of the maintenance and cultivation of the law of whiteness privilege and what Montoya refers to as "traditional legal discourse." This discourse reaffirms and aids the status quo by reiterating the doctrines of Mainstream, Euro-based, white-culture and supremacy and silences the voices of minorities. This process serves to "centralize power and privilege within the hands of those dedicated to maintaining the status quo." It is the handing down of magic words, and the book of secret codes. The result is continued ethnocide and legally sanctioned oppression.

Montoya expounds on her theory that people of color are kept silent by the mainstream. I assert that people of color are also forced to speak in a system that intends to preserve its power and authority. Minorities are denied access to the special words that invoke their Constitutional rights in being denied equal access to quality education in a system requiring "unitary language with a controlled and limited set of meanings." As long as education continues to fall short in America, meanwhile

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150 Heteroglossia: heter- or its variant hetero- comes from the Middle French or Late Latin from the Greek heteros; akin to Greek heis one: other than usual: other: different 2: containing atoms of different kinds. gloss- or glosso- from Latin, from Greek gloss-, glosso, or glossa. 1: tongue 2: language. "Heteroglossia" a word used in Margaret Montoya’s essay, borrowed from Mikhail Bakhtin, and early 20th Century Russian literary critic. See Montoya, at 851-52.


152 Id. at 852.

153 See n. 50 supra for more examples of Native American defendants not having access to the “magic words.” Diaz v. Senkowski, 76 F.3d 61, 63 (1996) (holding “Do you think I need a lawyer?” was not an unambiguous request) also, Lord v. Duckworth, 29 F.3d 1216, 1220-21 (7th Cir. 1994) (holding that “I can’t afford a lawyer, but is there any way I can get one?” was not an unambiguous request for counsel). Not everyone is an Oxford don.

law schools churn out more attorneys indoctrinated into traditional legal pedagogy, the result will be a widening of the rift between many defendants and those running the legal system.\textsuperscript{155} In will also be the continued promulgation of a group of law enforcement, professionals, judges and lawyers, who are oblivious to the sub-text of race and inequality, rampant within our legal system and its procedures. The preservation of this Euro-based system promotes/requires the refusal of other voices by cultivating objectivity. It requires magic words, as the hierarchy depends on them. It also depends on the limited distribution of certain words by refusing decent education to minority citizens and the poor of this county.

Montoya delves further and expresses that the legal system creates spaces for permitted silence such as the Fifth Amendment right against self-incrimination. What she leaves out is that this silence is privileged and can only be invoked if one knows the correct language, ordained by old, white, male judges to summon the rights created by the Fifth Amendment. Part of racial privilege is choosing who gets to speak and when, as well as who is taught the language, the secret codes, subtle nuance and magic words. Silencing of race is one of the principle mechanisms for maintaining the ideology of white supremacy.\textsuperscript{156} One’s precision with language can determine the scope of one’s rights.

Montoya believes that silencing works on two levels: the micro and macro level. The micro level applies to incidents in which race is arguably relevant, but are resolved with a resolute inattention to, and silencing of, racial aspects. The case \textit{U.S. v. Chalan} \textsuperscript{157} best exemplifies the micro level, where the court refused to acknowledge that a reasonable pueblo Indian would have believed he was in custody when summoned to the governor’s office. The macro level, according to Montoya, determines how areas of the law are defined and how disciplinary and professional worldviews are formed. An example would be the legal standard of an “unambiguous request for counsel” and what passes under the Court’s criterion as a valid request.

\textsuperscript{155} “America is a secular society, where law is characterized as rules laid down by human elites for the good of society. The Navajo word for law is bechaz’aanii. It means something fundamental, ad something that is absolute and exists from the beginning of time. Robert Yazzie, "Life Comes from it": Navajo Justice Concepts, 24 NMLR 175 (1994).

\textsuperscript{156} Montoya, 5 Mich. J. Race & L. 847 at 892.

\textsuperscript{157} \textit{U.S. v. Chalan}, 812 F.2d 1302 (10th Cir. 1987).
White domination is perpetuated by systemically maintaining a world/legal view, in which race is not relevant "and therefore does not have to be discussed, especially by those legal actors-judges, prosecutors, legislators and lawyers- who make and enforce rules by which this society is regulated and governed."158

Native Americans are often denied justice, robbed of their rights or kept silent in different ways. Language plays a substantial part in denying and achieving justice and power. Words, body language and cultural perception are complex, hold multiple meanings and resonate in different ways; they are heavy with significance and intention. Language promotes a collective agreement that certain issues are not to be discussed, and a sub-textual agreement to keep others out.

IV
What has been done & what can be done?

Courts have made a gradual effort to incorporate defendants’ cultural backgrounds into a totality of the circumstance test. Some courts do take cultural background into consideration when determining the admissibility of a confession.159 However, there has not been much importance placed on cultural factors or cultural experts. Though courts have discretion to include and admit the testimony of cultural experts, most courts still resist.160 The United States Supreme Court has remained silent on the issue of cultural background and cultural experts despite the trend of bringing cultural and language issues into both state and federal courts and the demographics of the American population.

The Ninth Circuit has used an approach they refer to as "the 'refined' objective standard." This is an objective test applied in custody analysis. The notion is that when police officers know of a subjective factor, like a suspect’s unfamiliarity with the American system, this subjective element can be considered in determining whether the suspect was in custody at the time of interrogation. This new standard originated in the U.S. v. Beraun-Panez

158 Montoya, at 892.
159 James J. Sing, Cultures as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law, 108 Yale L.J 1845 (1999).
160 See id. generally.
In this case the police had threatened the defendant, an alien, with deportation and held him in isolation after they discovered he was unfamiliar with the English language. The Ninth Circuit held that Beraun-Panez was in custody when confronted and questioned by the police. The test applied by the court was "how would a reasonable person who was an alien perceive and react to the remarks of the police?"\(^{162}\)

The Ninth Circuit has taken a step in the right direction, but it will take time for other courts to evolve. In the meantime, it is critical that education be improved in this country. Children of every ethnic and economic background need—and deserve—to be educated about the Constitution and how its mandates apply to their lives. I once heard a story on NPR about medical students teaming up with songwriters to create catchy tunes for children in Central America. The idea was to encourage hygiene and promote overall health. It wouldn’t be difficult to write a few songs for kids that remind them of their rights. They would never forget the songs, I guarantee. On the theme of education, I also call upon the Native American legal community for more Critical Race literature. As Margaret Montoya expresses, "We must learn to talk about the deep issues in law and culture, to openly debate them rather than smother them in silence."\(^{163}\)

Police must also be better educated. For example, Canada is implementing sensitivity training for all people employed by the criminal justice system, who work with Native Canadians. Cross-cultural training is slowly becoming required of police, lawyers, judges, probation officers and correctional officers. Canada has also made an effort to hire Native Canadians as court personnel in order to protect Native defendants rights within the system.\(^{164}\) The United States should require some kind of cultural competency training. While a course or weekend workshop can only do so much, ongoing training could make a substantial difference. Proper interrogation training is also essential. "Shoddy police practice derives in large part

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\(^{161}\) United States v. Beraun-Panez, 812 F.2d 578, 581 (9th Cir. 1987), amended by 830 F.2d 127 (9th Cir. 1987).

\(^{162}\) United States v. Beraun-Panez, 812 F.2d 578, 581 (9th Cir. 1987), amended by 830 F.2d 127 (9th Cir. 1987).


from poor interrogation training.\textsuperscript{165} As the American criminal justice system has yet to create proper safeguards to prevent police manipulation, psychological subterfuge and police induced false confessions. The education of police officers is imperative.

Videotaping interrogations is also essential.\textsuperscript{166} The risk of misinterpretation and police misconduct would be substantially limited if the police were required to videotape interrogations. A recording of an interrogation could provide an objective and exact account for the court to review. A video could help determine whether a suspect knowingly and intelligently waived their rights, assess a custodial situation and clarify whether the defendant was under formal interrogation. Videotaping would also allow for the court to view a suspect’s request for counsel, and furthermore, determine whether a waiver was coerced or freely made. Alaska and Minnesota both require videotaping of interrogations. Other states should follow their lead.

In addition, counsel should be required at all interrogations. The pedantic recitation of \textit{Miranda} does not prevent unethical police practice and fails to protect suspects from police misconduct. If a lawyer were present throughout every interrogation, there would be a balance of power that would deter misconduct and ultimately help suspects exercise their rights. Also, interpreters should be made available, and if requested an interrogation should not continue until a licensed interpreter is present. In short, Miranda rights should read "You have the right remain silent, you have the right to an attorney during this questioning and any other proceedings, if you cannot afford an attorney one will be made available for you, you have the right to an objective, and unbiased interpreter during this questioning and any other proceeding."

Conclusion

The \textit{Miranda} opinion had a profound impact on criminal procedure in this country. \textit{Miranda} aimed to protect


suspects who are stripped of power, dignity and control, and to clarify the role of the police and their behavior. However, the Supreme Court’s blurring of the *Miranda* rule in subsequent opinions, and the Court’s refusal to consider the cultural composition of the United States, has made the law difficult to follow and has allowed lower courts, police and prosecutors to ignore the rights of criminal defendants. *Miranda* does not achieve what it set out to do, and it does not create restrictions on interrogation practices once the suspect waives his/her rights. In fact, *Miranda* often harms the people it was fashioned to protect as the courts deem *Miranda* a “protection” and thus are able to procedurally presume that all statements made after *Miranda* warnings are legitimate, event though they are often as illegitimate as pre-*Miranda* interrogations. The whole thing is a farce, under the guise of providing protection. Thus *Miranda* is insincere and deceitful. All over the United States, courts have been forced to deal with cultural factors like heritage, language and familiarity with the legal system in their application and interpretation of *Miranda*. The results have been problematic.

It is critically important that attorneys, judges, scholars and police officers be sensitive to culture and language in the interpretation of confession law and the application of *Miranda*. We cannot erase racism, it is alive and thriving in our system, it is the foundation of our system. It will not be removed as easily as a bumper sticker, and donning a bumper sticker will not change it. For now, we should do more to protect the rights of citizens in this country and strive to keep dialog alive, meaningful and accessible. This is precisely why I removed my bumper sticker, as I have come to realize that no matter how much I wish injustice wasn’t rampant in this country, merely “erasing” it could never solve the problem.\(^{167}\)

In conclusion, I should mention that this discussion is not limited to Native Americans in the United States. Anyone who waives his or her *Miranda* rights and makes a

\(^{167}\)“History, despite its wrenching pain, cannot be unlived, and it faced with courage, need not be lived again.” Maya Angelou, from “The Pulse of Morning” a poem written for the Clinton inauguration, January 20, 1993. Implicit in the American ‘melting pot myth’ is the notion that immigrant or foreign cultures should blend into the fabric of American society... The underlying assumption is that white Anglo-Saxon Protestant values define the identity of the United States. This assumption, however, negates the identity of Americans that so not belong to the majoritarian group, and ignores the historical reality of the diversity of cultures defining the true American identity.”
statement or admission is more likely to be prosecuted, less likely to be dismissed, convicted more often and punished or sentenced more often. Those who confess are less likely to go before a grand jury and less likely to go to trial. Confessions are treated as "damning and compelling evidence of guilt... likely to dominate all other case evidence and lead a trier of fact to convict the defendant." Even though confessions can be as faulty as eyewitnesses' statements and the results can be substantial, recurrent and devastating. The police "induce false confessions so frequently that social science researchers, legal scholars and journalist have discovered and documented numerous case examples in this decade alone." An "I did it" statement substantially overpowers any evidence of the defendant's innocence. The worst part is that there are studies that show innocent people are more likely to waive their Miranda rights.

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168 Leo & Ofshe, 88 J. Crim. L. & Criminology 429 at 492.
169 Id.