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WHY ENGLISH-ONLY NOTICE TO SPANISH-ONLY SPEAKERS IS NOT ENOUGH: THE ARGUMENT FOR ENHANCING PROCEDURAL DUE PROCESS IN NEW MEXICO

Lysette P. Romero*

"Si acaso doblares la vara de la justicia, no sea con el peso de la dádiva, sino con el de la misericordia."—Miguel de Cervantes[1]

INTRODUCTION

A language barrier creates daily frustration and feelings of alienation for those who do not speak America's language. Perhaps the only way to appreciate the burden placed on those who are unable to speak the native language of those around them is to find oneself in that very situation.

Imagine that you are an American tourist in Paris, France. You have just visited one of the most stunning cathedrals in the city—the Saint-Etienne-du-Mont. You have taken sightseeing to a whole new level this day and are completely exhausted. You hop into your rental car, pull into traffic and head for your hotel. Suddenly, you see the flash of lights in your rearview mirror—it is the police. The officer speaks to you in French, and you attempt to explain to him that you do not speak French—English only. You present identification, rental papers, but you have not the faintest idea what he is saying or what he wants from you, as you are unable to understand his words or decipher his gestures. Eventually, he loses patience, hands you a piece of paper while pointing to it and

* University of New Mexico School of Law, J.D. Candidate 2012. The author wishes to thank Professor Ted Occhialino for providing the inspiration for this note, Professor Margaret Montoya for her insights and assistance, and Tara Kinman for her encouragement and indispensable advice. For my family whose support, love, and guidance I cherish deeply, and to my daughter, Anjolie Romero Córdova: *Eres una bendición maravillosa. Te amo, mi hija*. Thank you for the daily reminders of what is most important.

1. This quote is inscribed on a wall at the University of New Mexico School of Law. The quote originally appeared in chapter 42 of Miguel de Cervantes' *Don Quixote*. In English it means: "If perchance thou permittest the staff of justice to bend, let it be not by the weight of a gift, but by that of mercy."

leaves. As you might expect, it is written in French. Several days before leaving the country, you seek out someone who might be able to provide a reliable translation of the document. After all, it is probably important. You seek out an official source—you go to a police station, where several officers speak English and can explain the meaning and purpose of the document. They inform you that you are to pay several thousand dollars because you allegedly violated numerous traffic laws while driving that day—some of them quite serious. You could have contested the allegations at a hearing, but since you failed to do so within the required time period, that is no longer an option. The piece of paper the officer handed you was a "notice" that was meant to inform you of the charges against you, your right to a hearing to contest those charges, and the time period in which you needed to request the hearing.

Now imagine that the general circumstances just described actually occurred here in the United States—even in New Mexico. Even if the federal Constitution fails to protect a right to Spanish-language notice, does the New Mexico Constitution provide the legal framework for a right to notice that actually informs you, in Spanish, of your rights?

I. STATEMENT OF THE CASE: *MASO V. N.M. TAXATION & REVENUE DEP'T*

In 2004, the New Mexico Supreme Court considered whether personal notice of an administrative proceeding to a Spanish-only speaker satisfied federal due process requirements when the notice was written solely in English.[2] While the court held that the English-only notice did not offend *federal* due process requirements, the question of whether state law might require a different outcome was left unanswered.[3] The issue before the court stemmed from a December 8, 2001, incident involving Raphael Maso, a Spanish-only speaker, who was stopped at a sobriety checkpoint and arrested for driving under the influence of alcohol.[4] As

2. *See* Maso v. N.M. Taxation & Revenue Dep't, 2004-NMSC-028, ¶ 1, 96 P.3d 286, 287.

3. *See id.*

4. *Id.* ¶ 2, 96 P.3d at 287. Although this issue arises in the context of a DWI, the argument posited in this note is about notice requirements for Spanish-only speakers in the state—in all contexts. It is not about an accused drunk driver seeking to avoid justice, as many would call it "on a technicality." Indeed, many of the most protected and valued constitutional rights that all of us are entitled to, empathetic party or not, came to be as a result of unthinkable crimes committed by unsympathetic individuals. For example, consider *Arizona v. Miranda*, 384 U.S. 436 (1966), in which Ernesto Miranda was suspected of kidnapping and raping an eighteen year-old woman. The U.S. Supreme Court overturned his conviction and announced that an individual ar-

required by law, Maso submitted to a breath test that resulted in a .17 blood alcohol concentration reading, exceeding the legal limit of .08.[5] Under New Mexico's Implied Consent Act,[6] when an individual submits to a chemical test that results in an alcohol concentration in the person's blood or breath over the statutory limit, the law enforcement officer administering the test must serve "immediate written notice" upon that individual.[7] The notice serves to inform the individual of the revocation of their driver's license and of their right to a hearing regarding the revocation.[8] Pursuant to this statute, the arresting officer personally served Maso with an English-language "Notice of Revocation" of his driving privileges, which stated that any request for a hearing to contest the revocation "'must be made in writing within ten (10) days from the date of service of this notice.'"[9] The officer did not explain the contents of the notice, despite having conversed with Maso in Spanish during the incident.[10] On January 7, 2002, Maso's attorney mailed a letter requesting a hearing.[11] Two days later, the Motor Vehicle Division of the Taxation and Revenue Department sent a standard letter rejecting the request and citing Maso's failure to request the hearing within the required ten-day period.[12]

Maso appealed the Motor Vehicle Division's decision to the district court. The district court concluded that the English-language notice and

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rested or otherwise taken into custody by the police must be informed of their Fifth and Sixth Amendment rights. *Id.* at 444. Otherwise, any statements made by the suspect while in police custody are inadmissible in court. *Id.* Though Miranda "got off on a technicality," his case gave rise to a right that is one of the most safeguarded today. *See* Crow Tribe of Indians v. Lance Big Man, 2000-CROW-7, ¶ 37, *available at* http://www.littlehorn.com/Crow_Court/Decisions/Tribe%20v.%20Big%20Man.htm#Top ("Compared to the popular misconception that any violation of a defendant's *Miranda* rights will allow him to 'get off on a technicality,' the scope of the *Miranda* rule is quite limited.").

5. *Maso*, 2004-NMCA-025, ¶ 4, 85 P.3d at 276, 278; *see also* NMSA 1978, § 66-8-111.1 (2003).

6. NMSA 1978, §§ 66-8-105 to -112.

7. *Id.* § 66-8-111.1.

8. *Id.*

9. *Maso*, 2004-NMCA-025, ¶ 4, 85 P.3d at 278 (quoting language from the Notice of Revocation). The New Mexico Court of Appeals also addressed jurisdictional issues raised with regard to the scope of original and appellate jurisdiction of the district court, but these issues are beyond the scope of this note. *See id.* at ¶¶ 10–17.

10. *Id.* ¶ 4.

11. Maso v. N.M. Taxation & Revenue Dep't, 2004-NMSC-028, ¶ 2, 96 P.3d 286, 287.

12. *Id.* ¶ 2, 96 P.3d at 287–88.

denial of a hearing did not violate due process as Maso argued.[13] Maso then appealed to the New Mexico Court of Appeals.[14] The court of appeals affirmed the district court's decision, holding that "English-language notice regarding administrative revocation is compatible with due process when it is personally delivered to a driver during the course of his arrest for driving under the influence."[15]

The court of appeals acknowledged that procedural due process requirements are applicable to administrative proceedings, citing the U.S. Supreme Court in *Bell v. Burson*.[16] On the issue of the sufficiency of the notice, the court cited to federal case law and the most fundamental rule of procedural due process as set forth in *Mullane v. Central Hanover Bank & Trust Co.*[17] The court stated, "due process mandates 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[18] Actual notice, the court noted, is not necessarily required—especially in the administrative context.[19] The court concluded that the issue was not whether Maso understood the notice, but whether it was reasonably calculated to inform him of the ten-day time limit for contesting revocation of his driver's license.[20] From this legal framework, the court deduced that because Maso received a document "clearly labeled" as a revocation and because it was marked with the seal of the State of New Mexico, the notice was sufficient given that "a reasonable driver who did not understand the contents of the notice would inquire further."[21] In other words, the notice comported with due process because it should have prompted Maso to inquire as to its contents with enough time for him to request the hearing.

A. The New Mexico Supreme Court Decision in Maso

The New Mexico Supreme Court granted Maso's petition for certiorari and affirmed the court of appeal's decision under *federal* due process

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13. *Id.* ¶ 3, 96 P.3d at 288.
14. *Id.* ¶ 6.
15. *Maso*, 2004-NMCA-025, ¶ 21, 85 P.3d at 282.
16. *Id.* ¶ 19, 85 P.3d at 281 (citing 402 U.S. 535, 542 (1971)).
17. *Id.* (citing 339 U.S. 306 (1950)).
18. *Id.* (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).
19. *Id.*
20. *Id.*
21. *Id.* ¶ 20, 85 P.3d at 282. This form of notice is known as "inquiry notice," which is defined as "[n]otice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further." BLACK'S LAW DICTIONARY 494 (3d pocket ed. 2001).

requirements. The court declined to address Maso's argument that the New Mexico Constitution should provide him with more protection under its Due Process Clause than that recognized under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[22] Because Maso first made the state constitutional argument in the New Mexico Supreme Court, the court held that Maso had failed to preserve the argument for appellate determination.[23]

Since the New Mexico Supreme Court's ruling in *Maso*, the argument for more expansive procedural due process rights for Spanish-only speakers under New Mexico's Constitution has been advanced in one additional case.[24] However, like in *Maso*, in *State ex rel. Children Youth & Families Dep't v. William M.* the argument had not been properly preserved, and the court therefore declined to rule on the issue.[25] Accordingly, there has been no pronouncement as to whether New Mexico courts are willing or compelled to expand notice requirements under the New Mexico Constitution.

B. Note Outline

This note will explore the argument that under New Mexico's Due Process Clause,[26] notice to Spanish-only speakers—even at administrative level proceedings—is insufficient if it is provided solely in English. The note posits that if a case were brought up on appeal with facts analogous to those in *Maso* and the argument for a diverging standard under the New Mexico Constitution was properly preserved and argued, New Mexico courts should extend Spanish-language notice to Spanish-only speakers in New Mexico. While some lower federal courts have ruled on the issue, the U.S. Supreme Court has not. In choosing to deviate from federal case law, New Mexico would establish a new state right to Spanish-language or bilingual notice.

Part I has already set out the factual and procedural background of *Maso*, which prompted this note and the arguments that it posits. Part II of this note sets forth the applicable legal standards, including foundational due process requirements and New Mexico's approach for independent state constitutional interpretation. Part III presents an analysis of the issue and offers the conclusion that there exists a strong basis for

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22. Maso v. N.M. Taxation & Revenue Dep't, 2004-NMSC-028, ¶ 8, 96 P.3d 286, 289.

23. *Id.*

24. *See* State *ex rel.* Children Youth & Families Dep't. v. William M., 2007-NMCA-055, 161 P.3d 262.

25. *Id*. at 35–39, 161 P.3d at 270–71.

26. N.M. CONST. art. II, § 18.

extending such a right in New Mexico. The argument for broader protections under New Mexico's constitution is based on: (1) the historical background of the state, including the original iteration and surviving constitutional protections for Spanish-language speakers explicit in the 1911 constitution; (2) other New Mexico laws and regulations that require bilingual forms, documents, and publications, which bolster arguments about the state's broadly interpreted public policy stance requiring Spanish-language notices; (3) the language characteristics of New Mexico's current population; (4) the relatively low burden on the state in translating notice for Spanish-only speakers as weighed against the rights of and potential impact on the individual; and (5) a survey of other jurisdictions' conclusions on the subject and analysis of the reasoning as it applies to New Mexico. These sources serve as the framework for the analysis in Part III.

II. APPLICABLE LEGAL STANDARDS

A. Procedural Due Process: The Mullane *Standard for Notice*

1. The Federal Standard of Notice

The Fifth and Fourteenth Amendments of the U.S. Constitution safeguard individuals from governmental action that deprives any individual of "life, liberty or property without due process of law."[27] The mandates of due process have been interpreted to encompass both substantive and procedural requirements.[28] The fundamental elements of

27. U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property without due process of law."). The text of the Fourteenth Amendment, Section One of the United States Constitution states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. With regard to the circumstances in *Maso*, drivers' licenses are considered a liberty interest because the government controls who may and may not drive automobiles. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §17.4(d)(iv) (4th ed. 2007). Thus, Maso must be afforded due process before his driver's license can be revoked. *See* Bell v. Burson, 402 U.S. 535, 539 (1971) (holding that a state may not suspend a driver's license without affording the licensee the procedural due process guarantees of the Fourteenth Amendment); State v. Herrera, 111 N.M. 560, 562, 807 P.2d 744, 746 (Ct. App. 1991) (citing City of Albuquerque v. Juarez, 93 N.M. 188, 598 P.2d 650 (Ct. App. 1979) ("Except under certain emergency situations, notice and opportunity for a hearing are required by the due process clause of the fourteenth amendment before termination of an individual's driving privileges may be revoked.").

28. *See* ROTUNDA & NOWAK, *supra* note 27, §17.1.

procedural due process are notice[29] and an opportunity to be heard.[30] Thus, the government must notify individuals, by written document, of government actions and proceedings that affect any legally protected interest.[31] While this does not require "heroic efforts"[32] on the part of the government, it must satisfy the basic requirement set forth in *Mullane* that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[33] An inquiry must be made as to the appropriate method of notice on an ad hoc basis—in other words, the reasonableness of notice depends on the factual circumstances in any given case.[34] Because the focus needs to be on the reasonableness of notice in light of a particular party in a particular set of circumstances, adequate notice in one situation, to one individual, is not necessarily adequate in a different situation or to a different individual.[35] Sufficiency of notice is examined with reference to its ability to actually inform parties of pendency of proceedings that affect their interests.[36] The availability of alternatives is also a factor in determining the sufficiency of notice.[37] Notice that functions as a "mere gesture" is insufficient.[38]

Whatever the method employed in any given case, the means must be "such as one desirous of actually informing" the party whose rights may be affected.[39] In other words, the goals and actions must convey an intent to bring about actual notice.[40] However, actual[41] notice is not al-

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29. For Procedural Due Process purposes, "notice" can encompass any number of contexts, each potentially requiring a different analysis. For purposes of this note, "notice" includes any type of notice that governmental entities are required to give to individuals in the course of a potential deprivation of life, liberty, or property interest. It does not include notice from one private individual to another, including lawsuit notice, also known as Rule 4 notice. *See* FED. R. CIV. P. 4. This limitation is not based on the argument's inability to extend to such notice, but on the enormous task involved in analyzing all types of notice in this context.

30. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

31. *See id.*

32. Dunsenbery v. United States, 534 U.S. 161, 170 (2002).

33. *Id.* at 168.

34. *See* Garcia v. Meza, 235 F.3d 287, 291 (7th Cir. 2000).

35. *See* Bell v. Burson, 402 U.S. 535, 540 (1971).

36. *See* Greene v. Lindsey, 456 U.S. 444, 451 (1982).

37. *Id.* at 454.

38. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950) (holding that notice by publication in a newspaper to parties whose addresses were known is unconstitutional under the Due Process Clause of the Fourteenth Amendment).

39. *Id.*

40. *See* Dunsenbery v. United States, 534 U.S. 161, 170–72 (2002).

ways necessary to satisfy due process.[42] As long as the means employed meet the *Mullane* reasonableness requirement, due process has been satisfied regardless of whether actual notice was achieved.[43]

To determine reasonableness, courts employ a balancing test: the burden on the government is weighed against the individual's interest in receiving notice to determine whether the form of notice was indeed reasonable and thus sufficient to satisfy due process.[44] Thus, when actual notice is not reasonably feasible, notice is adequate as long as the form chosen is "not substantially less likely to bring home notice than other of the feasible and customary substitutes."[45] Conversely, when there is an efficient and inexpensive alternative that could be employed to effectuate actual notice, anything less than actual notice is unreasonable.[46]

2. The New Mexico Standard for Notice

New Mexico procedural due process caselaw tracks the federal standard. Citing *Mullane*, relevant New Mexico case law places an emphasis on notice "'appropriate to the nature of the case.'"[47] This is a consideration of context. For example, one's rights are less compelling when the individual faces administrative revocation of their driver's license, rather than potential incarceration as a result of a criminal trial. Thus, the reasonableness of notice requires much less in administrative proceedings because the right at stake is not as significant as those involved in other contexts. Still, this consideration of context is the federal standard—i.e., reasonableness under the circumstances in light of the individual's and state's respective rights—articulated in a different way. Essentially, then,

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41. In general, there are three types of service (ways to effectuate notice): "actual," "substituted," and "constructive." Professor Ted Occhialino, Univ. of N.M. Emeritus Professor of Law, Civil Procedure I: Notice and Opportunity to be Heard (2010) (notes on file with author).

42. *See Dunsenbery*, 534 U.S. at 170–73 (holding that a certified letter satisfied due process even though it had never been received).

43. *See id.*; City of Albuquerque v. Juarez, 93 N.M. 188, 190, 598 P.2d 650, 652 (Ct. App. 1979) (holding that actual notice is not required for an administrative suspension), *overruled on other grounds by* State v. Herrera, 111 N.M. 560, 807 P.2d 744 (Ct. App. 1991).

44. *See* Jones v. Flowers, 547 U.S. 220, 229–39 (2006) (holding that the *Mullane* reasonableness test was the appropriate standard for determining the adequacy of notice and that balancing the state's and individual's respective interests was the inquiry to be made to determine if the form was indeed reasonable).

45. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

46. *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983); Greene v. Lindsey, 456 U.S. 444, 455 (1982).

47. Maso v. N.M. Taxation & Revenue Dep't, 2004-NMSC-028, ¶ 10, 96 P.3d 286, 289 (quoting *Mullane*, 339 U.S. at 313).

both the federal standard and the New Mexico standard for determining the sufficiency of notice involve a weighing of the state's and individual's respective interests on an ad hoc basis.

New Mexico courts have interpreted the federal standard for notice as assuming that the intended recipient of notice as being "desirous of actually being informed."[48] Thus, the reasonableness of notice is not affected by a recipient who makes efforts to avoid being notified.[49] New Mexico courts have also rejected other jurisdictions' measure of the adequacy of notice that only require consideration of circumstances known by the sender as of the date of the initial attempt of notice.[50] Instead, New Mexico reads *Mullane*'s use of the phrase "under all the circumstances" as extending to circumstances occurring after the initial notice attempt.[51] Thus, when an initial attempt at notice fails, the sender must consider the failed attempt and whether, in light of that failure, it was indeed a reasonable attempt under the circumstances.[52] As a result of this "second look" requirement, notice may be insufficient if an initial attempt at notice is made, but fails, and there is no further reasonable method employed.[53]

Satisfying the *Mullane* standard ensures that notice, in any given situation, is constitutionally sufficient, but notice must also comply with any applicable statutes and rules of the jurisdiction where the action is pending. Thus, if there is a deficiency of notice at any level, the notice is inadequate and violates due process. For example, if the rule and statute are followed, but the notice does not meet the state or federal constitutional requirements, the notice is insufficient. All state and federal statutory and rule requirements for notice must be met in addition to the constitutional mandates in order to effectuate sufficient notice.

B. Gomez*: The Interstitial Approach to Greater Constitutional Protection in New Mexico*

Until 1976, New Mexico courts interpreted the New Mexico Constitution in "lock-step" with the federal Constitution, which means that the federal and New Mexico constitutions were treated as affording exactly the same rights.[54] The state constitution did not serve as an independent

48. Cordova v. State, 2005-NMCA-009, ¶ 30, 104 P.3d 1104, 1112 (emphasis omitted).

49. *Id.* (holding that a recipient's failure to accept notice via certified letter did not affect the reasonableness of the attempt to serve notice sent to correct address).

50. *See id.* ¶ 23, 104 P.3d at 1110.

51. *Id.*

52. *Id.*

53. *See id.*; Rule 1-004(F) NMRA.

54. State v. Gomez, 1997-NMSC-006, ¶16, 932 P.2d 1, 6.

tool for protecting individual rights. Where the federal Constitution had been interpreted to protect certain rights, so too did the New Mexico Constitution. Likewise, where the federal Constitution was interpreted as not protecting an asserted right, neither did the New Mexico Constitution. There were no independent interpretations of the New Mexico Constitution until *State ex rel. Serna v. Hodges*,[55] in which the New Mexico Supreme Court moved away from "lock-step" interpretation acknowledging that "states have inherent power as separate sovereigns in our federalist system to provide *more* liberty than is mandated by the United States Constitution."[56] Thus, the court stated:

> We now consider Article II, § 13 of the New Mexico Constitution. We do so as the ultimate arbiters of the law of New Mexico. We are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, "unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."[57]

In 1997, in *State v. Gomez*, the New Mexico Supreme Court *formally* adopted the interstitial approach to interpreting state constitutional provisions that are independent, but analogous to those in the federal Constitution.[58] Under the interstitial approach, the first inquiry is whether the asserted right is protected under the federal Constitution.[59] If it is protected, the court will not reach the state constitutional issue.[60] If it is not protected, the argument is examined to determine whether state constitutional provisions warrant an extension of additional rights or a deviation from federal law.[61] The state court will deviate from federal law for three reasons: (1) "a flawed federal analysis"; (2) "structural differ-

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55. State *ex rel.* Serna v. Hodges, 89 N.M. 351, 552 P.2d 787 (1976), *overruled on other grounds by* State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

56. *Gomez*, 1997-NMSC-006, ¶ 17, 932 P.2d at 7 (interpreting State *ex rel.* Serna v. Hodges).

57. *Serna*, 89 N.M. at 356, 552 P.2d at 792 (quoting People v. Brisendine, 531 P.2d 1099, 1112 (Cal. 1975)).

58. *Gomez*, 1997-NMSC-006, 932 P.2d 1. The "interstitial" approach is one of three ways that states interpret state constitutional provisions that are independent, but analogous to those in the federal constitution. *See id.* ¶ 18, 932 P.2d 7. *Gomez* does an exceptional job of describing the three approaches and also analyzes the soundness of each approach. *Id.*

59. *Id.* ¶ 19, 932 P.2d at 7.

60. *Id.*

61. *Id.*

ences between state and federal government"; or (3) "distinctive state characteristics."[62]

Since this pronouncement of state sovereignty, New Mexico courts have expanded rights under the state constitution in important areas of individual rights.[63] Both state legislative history and traditions have been employed to argue for broader state constitutional rights in New Mexico.[64] Using "distinctive state characteristics" as the basis for independent state constitutional interpretation, one scholar has suggested that:

> [C]ounsel look beyond the legal aspects . . . for state constitutional law analysis. In particular, counsel should consider the role of the state's multi-cultural demographic makeup in influencing public attitudes and policies. This makeup includes the recognition that New Mexico is, at a minimum, a bilingual state in terms of actual language usage. It is also a border state, resulting in significant interaction with a population not only from outside its state borders, but across the national border with Mexico. Consequently, it is subject to influences not only from Mexico, but other Latin American nations that press toward the United States border in terms of population shifts and political and social traditions.[65]

Indeed, advocates have looked beyond legal aspects in advancing arguments in favor of expanding state constitutional rights. For example, one scholar advocated for stricter requirements when Spanish-only speakers are waiving their *Miranda* rights.[66] This, of course, was in a context other than procedural due process.[67] In that instance, the requirements for preservation of greater state constitutional arguments under *Gomez* were not met, and thus the issue was not addressed.[68] In his concurrence, Justice Bosson called it "unfortunate [that] a better record was not made below on which we could consider a different standard under our state constitution."[69] He continued, "[g]iven the linguistic and cultural

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62. *Id*.

63. For in-depth information regarding the extent to which New Mexico courts have been receptive to differing interpretation of the New Mexico Constitution see J. Thomas Sullivan, *Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions*, 39 N.M. L. REV. 407 (2009).

64. *See id.* at 452, 456.

65. *Id.* at 460–61.

66. *See id.*; *see also* State v. Castillo-Sanchez, 1999-NMCA-085, ¶¶ 34–35, 984 P.2d 787, 795–96 (Bosson, J., concurring).

67. *Castillo-Sanchez*, 1999-NMCA-085, ¶¶ 34–35, 984 P.2d 787, 795–96.

68. *Id.* ¶ 21, 984 P.2d at 793.

69. *Id.* ¶ 34, 984 P.2d at 795 (Bosson, J., concurring).

differences our state enjoys, not to mention our border with Mexico, our citizens should demand no less [than record of a clear understanding that a Spanish-only speaking defendant waived his rights] as part of intelligent, responsible law enforcement."[70] The express willingness of New Mexico courts to consider an argument based on this state's distinctive history, culture and other characteristics makes the argument posited in this note imminent and palpable.

III. THE CONSTITUTIONAL SALIENCE OF NEW MEXICO'S DISTINCTIVENESS: ANALYSIS AND CONCLUSIONS

The California Supreme Court, in one of the earliest decisions on the issue of whether due process requires Spanish-language notice, notes that the United States is primarily an English-speaking nation.[71] However, that was not always the case in New Mexico (and, ironically, neither was it always the case in California). New Mexico's people, government, and other characteristics, both past and present, clearly reflect the state's history as a former majority Spanish-speaking population. These historical and present day characteristics serve as the basis for an argument of differing state constitutional interpretation for Spanish-only speakers in New Mexico. To understand the argument for a different interpretation of the state's constitution founded on distinctive state characteristics, one must have a basic understanding of New Mexico history.

A. The Distinctiveness of the Spanish Language in New Mexico

In 1848, under the terms of the Treaty of Guadalupe Hidalgo, Mexico ceded its northern territory to the United States, including present-

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70. *Id.*

71. Guerrero v. Carleson, 512 P.2d 833, 835 (Cal. 1973); *see also infra* Part III.C. Like New Mexico, California was, at one time, part of the Mexican territory that was later ceded to the United States. *See* Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. V, July 4, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo]. Under the Treaty of Guadalupe Hidalgo, Mexico relinquished a significant portion of their territory to the United States, including an area that today comprises most of New Mexico and California. *Id.* This is one reason the numbers of Spanish-only speakers in California and New Mexico—both upon statehood and presently—are significantly higher than other states. *See* U.S. CENSUS BUREAU, LANGUAGES SPOKEN AT HOME AND ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER BY STATE (Feb. 2003), *available at* http://www.census.gov/population/cen2000/phc-t20/tab04.pdf (last visited June 6, 2011) (reporting that 8,105,505 Californians speak Spanish at home in addition to English and 485,681 in New Mexico).

day New Mexico.[72] Among the provisions of the treaty was language that was intended to establish relationships between the people in the conquered territory and those who were to control and occupy it.[73] Scholars have called it an "interim bill of rights" for the people in the conquered territory.[74] It is from this period of time that New Mexico can trace its original and lasting protections for Spanish-speaking people in the state. Many of these protections were incorporated, and reiterated, in the state constitution ratified in January 1911.[75]

At the time that New Mexico was ceded to the United States, there were approximately 75,000 Spanish-speaking people in the southwest—60,000 of which were in New Mexico.[76] Several proposed terms of the treaty concerned the rights of the Mexican citizens in the ceded territory.[77] Three articles in the treaty were presented as Mexico attempted to protect their citizens in the ceded territories.[78] The first gave the people in the territory the option to return to Mexico with their portable property or remain there as Mexican citizens or as U.S. citizens—whichever they chose.[79] This article was the only one that was accepted as part of the treaty.[80] The other two, one which demanded statehood as soon as possible and the other, which dealt with land grants, were rejected.[81]

At the time of the treaty in 1848, Congress was hesitant to admit New Mexico to the Union.[82] In fact, New Mexico was kept out of the

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72. Treaty of Guadalupe Hidalgo, *supra* note 71.

73. Guillermo Lux, *The New Mexico Constitution and the Treaty of Guadalupe Hidalgo*, RACE, RACISM, AND THE LAW Part I, http://academic.udayton.edu/race/02rights/guadalu2.htm (last visited Oct. 30, 2011).

74. *Id.*

75. *See* NEW MEXICO GOVERNMENT 223 (F. Chris Garcia & Paul L. Hain eds., 1976).

76. U.S. COMM'N ON CIVIL RIGHTS, LANGUAGE RIGHTS AND NEW MEXICO STATEHOOD *in* MEXICAN AMERICAN EDUCATIONAL STUDY, THE EXCLUDED STUDENT: EDUCATIONAL PRACTICES AFFECTING MEXICAN AMERICANS IN THE SOUTHWEST 76–82 (1972), *available at* http://www.ped.state.nm.us/BilingualMulticultural/dl09/Language%20Rights%20and%20New%20Mexico%20Statehood.pdf.

77. Lux, *supra* note 73, at Part I.

78. *Id.*

79. Treaty of Guadalupe Hidalgo, *supra* note 71, at art. VIII.

80. Lux, *supra* note 73, at Part I.

81. *Id.*

82. *Id.*; *see* ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD: 1846–1912 25 (1968). In 1906 Congress passed a joint statehood bill for New Mexico and Arizona. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 76. If the voters of either territory rejected joint statehood, the territory would not be admitted to the Union as one state. *Id.* Arizona passed a resolution opposing joint statehood and later presented to Congress another protest which "prophesied that New Mexico would

Union longer that any other territory that had petitioned for statehood.[83] It has been asserted that the guarantees set forth in the treaty "served to retard progress toward achieving statehood."[84] The general sentiment seemed to be that of prejudice toward Spanish-speaking people and their Catholic background and culture, or as one congressman called the natives "a race speaking an alien tongue."[85] Even more pointedly, it was argued that statehood should be withheld "until every inhabitant had learned to read and write the English language."[86]

This was the backdrop for the New Mexico Constitutional Convention of 1910. There were many reasons for the Spanish-speaking population of New Mexico to require a state constitution that would adequately protect their interests. The rights set forth in the Treaty of Guadalupe Hidalgo were reasserted in article II, section 5, of the constitution: "The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate."[87] Other protections for Spanish-speaking people in New Mexico were expressly set forth in the state constitution of 1911.[88]

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control the constitutional convention and impose her dual language conditions on Arizona." *Id.* Arizona claimed:

> [T]he decided racial difference between the people of New Mexico, who are not only different in race and largely in language, but have entirely different customs, laws and ideals and would have but little prospect of successful amalgamation . . . [and] the objection of the people of Arizona, 95 percent of whom are Americans, to the probability of the control of public affairs by people of a different race, many of whom do not speak the English language, and who outnumber the people of Arizona two to one.

Id. (alterations in original) (citing S. DOC. NO. 216, at 1–2 (1906)).

83. Lux, *supra* note 73, at Part II.

84. *Id.*

85. LARSON, *supra* note 82, at 303 (internal quotation marks omitted).

86. Lux, *supra* note 73, at Part III (internal quotation marks omitted) (quoting Robert Larsson from an unidentified source).

87. N.M. CONST. art. II, § 5.

88. For example the constitution provides:

> (1) "The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or *Spanish* languages except as may be otherwise provided in this constitution . . . ."

N.M. CONST. art. VII, § 3 (emphasis added); (2) "The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and *Spanish* languages . . . ." N.M. CONST. art. XII, § 8 (emphasis added); (3) "Children of *Spanish* descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions . . . and they shall never be classed in separate schools . . . ." N.M. CONST. art. XII, § 10 (emphasis added); (4) "For the first twenty years after this constitution goes into effect all laws passed by the legislature

Finally, and perhaps most tellingly, four of these sections of the constitution were shielded from significant changes, and as such, they are called the "unamendables."[89] Extraordinary majorities were required for proposing and amending these particular sections of the New Mexico Constitution.[90] The inclusion of the extraordinary majority requirement reflects New Mexicans' desire to preserve and protect its culture and the rights of Spanish speakers in the state, which is clearly rooted in its spoken language.

The New Mexico Constitution was ratified on January 21, 1911, by an overwhelming majority of the state.[91] The following year, on February 14, 1912, New Mexico was admitted to the Union.[92] Given these facts, there is no need to point out the importance placed, by New Mexicans, on requiring certain guarantees—in addition to those that would already be theirs under the U.S. Constitution—that protect the Spanish-speaking population of this state. Each of those protections originally set forth in the state constitution remain to this day.[93]

The Spanish language and all who sought to preserve it are an irrefutable and significant part of New Mexico's history. This is evident even today if one examines New Mexico's present characteristics. Perhaps be-

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shall be published in both the English and *Spanish* languages and thereafter such publication shall be made as the legislature may provide." N.M. CONST. art. XX, § 12 (emphasis added); and (5)

> The secretary of state shall cause any such amendment or amendments to be published . . . once each week, for four consecutive weeks, in English and *Spanish* when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and shall further provide notice of the content and purpose of legislatively approved constitutional amendments in both English and *Spanish* to inform electors about the amendments in the time and manner provided by law.

N.M. CONST. art. XIX, § 1 (emphasis added).

89. NEW MEXICO GOVERNMENT, *supra* note 75, at 222; *see also* N.M. CONST. art. XIX, § 1 (as amended Nov. 7, 1911, and Nov. 5, 1996.) ("No amendment shall restrict the rights created by Sections One and Three of Article VII hereof, on elective franchise, and Sections Eight and Ten of Article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting on the amendment vote in favor of that amendment.").

90. *See* NEW MEXICO GOVERNMENT, *supra* note 75, at 238. The super-majority requirement was later held to violate the Fourteenth Amendment of the U.S. Constitution in *State ex rel. Witt v. State Canvassing Bd.*, 78 N.M. 682, 437 P.2d 143 (1968).

91. NEW MEXICO GOVERNMENT, *supra* note 75, at 223. There were 31,742 in favor and 13,399 opposed. *Id.*

92. LARSON *supra* note 82, at 304.

93. *See* N.M. CONST. art. VII § 3, art. XII §§ 8, 10, art. XX § 12 & art. XIX § 1.

cause of the unique standing that Spanish enjoys in the state, there remain a large number of Spanish speakers in New Mexico.[94] In fact, New Mexico has the third highest percentage of Spanish-only speakers in the nation.[95] Only California and Texas have a higher percentage,[96] and, notably, these two states share in New Mexico's history as part of the land ceded in 1864.[97] The most recent U.S. Census Bureau reports that there are 485,681 Spanish speakers in this state—29 percent of the population.[98] Of this number, 158,629 speak English "less than very well."[99] This is a significant number of Spanish-only speaking individuals.

Accordingly, many New Mexico statutes and regulations require bilingual forms and documents—some even require Spanish notice.[100] For example, one statute provides highly specific instructions on whether and when English and/or Spanish publications are required.[101]

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94. *See* U.S. CENSUS BUREAU, *supra* note 71.

95. *See id.*

96. *See id.* This does not include Puerto Rico, which is a territory of the United States. The U.S. Census Bureau reports that 75.2 percent of Puerto Ricans speak Spanish. *Id.* 65.8 percent of that group speaks English "not well or at all." *Id.* That means that 49.5 percent of all Puerto Ricans can be considered Spanish-only speakers. *Id.*

97. *See supra* text accompanying notes 72–77.

98. U.S. CENSUS BUREAU, *supra* note 71.

99. *Id.*

100. NMSA 1978, §§ 14-11-11 (1923), 49-2-4 (1917), 73-8-3 (1917), 27-6-17(A)(1) (1993); 11.5.6 NMCA; 11.6.2.10 NMCA; 17.5.410 NMCA; 17.11.16 NMCA; 19.15.39 NMCA; 20.2.72 NMCA; 20.4.5 NMCA; 20.6.2 NMCA; 20.9.2 NMCA; 20.9.20.19 NMCA.

101. It states:

> In all counties, cities or towns, in which the publication [population] is not less than seventy-five percent English speaking, the publication of such notices in English shall be sufficient; that in all counties, cities and towns, in which the population is not less than seventy-five percent Spanish speaking, the publication of such notices in the Spanish language shall be sufficient; that in all counties, cities and towns, in which the publication [population] using either language is between twenty-five percent and seventy-five percent of the whole, such notices shall be published in both English and Spanish . . . . And, provided further, that in case of question, or disagreement, as to the percentage of the population . . . using either language, the district judge . . . shall determine such percentage upon such information as he may have, without special investigation in the matter, and his opinion and determination thereon shall be conclusive.

NMSA 1978, § 14-11-11. One regulation states:

> The public notice shall . . . be published once in a newspaper of general circulation in each county . . . and at one other place in the newspaper calculated to give the general public the most effective notice, and when appropriate shall be printed in both English and Spanish.

20.9.2.15 (B)(7) NMAC.

In total, at least sixteen statutes and regulations require or provide for Spanish-language "notice."[102] Given the many instances that bilingual notice and publication is provided for by statute and regulation, it seems a modest step to extend such right to notice in administrative and other contexts to Spanish-only speaking individuals in the state. Indeed, by doing so, the state might eliminate the need to spell out such a requirement in so many statutes and regulations, as state constitutional law would mandate it. Additional evidence of a broad public policy stance on the special standing of the Spanish language in New Mexico can be found in the state's official adoption of a Spanish state salute, song, and bilingual song.[103] In effect, New Mexico has adopted Spanish as a quasi-official language. The state has protected it and given it special status as evidenced by the original and enduring state constitution, past and present statutory law, and regulatory law.

While the adoption of Spanish as a quasi-official language of the state is not conclusive, it bolsters the argument for required bilingual notice in two meaningful ways. For one, it demonstrates that any "burden" presented by requiring bilingual notice cannot be said to be unreasonable when weighed against individuals' rights. On the contrary, it seems that the opposite is true: bilingual translation in this state is completely feasible and very reasonable. Secondly, it presents a viable basis for expanding rights under the New Mexico Constitution based on distinctive state characteristics under the *Gomez* analysis.

B. Weighing the Burden of Translation on the State Against the Interests of the Individual

As established, the United States is primarily an English-speaking nation. In light of this reality, perhaps it is reasonable to conclude that in many instances, English-language notice to Spanish-only speakers is constitutionally sufficient under the *federal* Constitution. However, this is not New Mexico's reality, and this fact must be taken into account when considering the sufficiency of English-only notice in New Mexico because the *Mullane* requirement, i.e., notice reasonable under the circumstances, is necessarily a fact-specific analysis. Of factual significance is that New Mexico has the third highest percentage of Spanish speakers in the nation.[104] It is a state that has protected Spanish-language rights longer than it has been a state.[105] The constitutionality of notice is based, in part, on

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102. *See supra* note 100.
103. *See* NMSA 1978, §§ 12-3-6 (1971), 12-3-7 (1973), 12-3-12 (1995).
104. *See* U.S. Census Bureau, *supra* note 71.
105. *See* discussion *supra* Part III.A.

the burden on the state in providing notice most likely to inform as weighed against the potential loss to the individual. Therefore, the main question under the *Mullane* requirement, which New Mexico has adopted as state law,[106] is whether the burden on the State of New Mexico posed by requiring translation of notice into Spanish outweighs the right and potential loss by an individual so as to render it unreasonable and thus non-compulsory.[107] The answer is apparent. How can a state that has, in essence, adopted Spanish as a quasi-official language, protected under state constitutional, statutory, and regulatory law, claim that the burden of translation is too much? When a state makes an effort to identify Spanish-only speakers and accommodate them by providing official forms in Spanish, thus making it possible to function in society without having to learn English, the state has incrementally changed the balance in favor of the individual and weakened its argument that the burden of translation is too much. Hence, even the relatively minor possible adverse claims against an individual's life, liberty or property interest in any context—including administrative proceedings—outweighs any imagined burden that can be advanced. In other words, even the potential loss of something like a driver's license, which is a relatively minor liberty interest, presents a situation in which the balance between the individual and the state weighs in favor of the individual because the burden on the state posed by having to translate is so minimal.

Determining the burden on the state, like determining what is reasonable under the circumstances, is a fact-specific analysis. In this instance, the burden on the state would be exclusively the cost of translating notice from English into Spanish. Any time that notice is required, the cost of writing, printing, and serving notice is going to be present regardless of whether that notice is written in English or Spanish.[108]

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106. *See supra* Part II.A.2.

107. The New Mexico Court of Appeals posed the question as "not whether Driver understood the notice that he received, but whether personal service of an English-language notice is reasonably calculated to inform drivers of the ten-day time limit for contesting administrative revocation of a driver's license." Maso v. N.M. Taxation & Revenue Dep't, 2004-NMCA-025, ¶ 19, 85 P.3d 276, 282.

108. Because this note does not address any specific situation, and instead advocates for Spanish notice for Spanish-only speakers in all contexts, it is important to point out that different situations may present additional, albeit, minor burdens, on the state. For example, in a *Maso* situation, the officer serving notice on a Spanish-speaking individual will need to make sure that they have bilingual and/or Spanish-language notice on their person or police vehicle. This is so because the statute requires *personal* notice to the defendant. NMSA 1978, § 66-8-111.1 (2003). Nonetheless, this additional consideration is truly minor in the overall picture and does not tip the balancing scales in favor of the state.

The only thing that changes if Spanish-language notice is required is the additional cost of having to translate a document. The cost of translation in a state with a significant number of Spanish speakers cannot possibly exceed a reasonable fee.[109] There is even a chance that the governmental body responsible for writing these notices will have an employee on staff who is capable of translating the notice. This would eliminate the need to obtain an independent translator at additional cost to the state.

Justice Tobriner's dissent in *Guerrero*, the California case noted earlier and discussed *infra*, also lends some valuable insight on balancing the individual and state's respective interests and burdens.

> If some 'forms' are now printed in Spanish it cannot be unduly burdensome to print [an additional] form in Spanish . . . Indeed, every apologetic assertion as to that which the departments now do to communicate in Spanish is an argument that it is no great burden to do that which the Constitution requires.[110]

Even if English-only notice is defended on the grounds that it may reasonably be assumed that recipients will get notice translated, it is a stretch to conclude that this equates to notice "reasonably certain to inform" a Spanish-only speaker of their interests and of their right to a hearing.[111] Justice Tobriner sets forth two reasons that this is so. First, the recipient may not appreciate the need for translation.[112] If in the past, a particular agency or other governmental entity accommodated the individual by providing Spanish forms, that individual might expect any particularly important documents will be in Spanish as well.[113] Otherwise,

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109. Interesting fact about cost of translation: In 1915, the state legislature appropriated $ 2,000 to translate the code from English into Spanish. State *ex rel.* Sedillo v. Sargent, 24 N.M. 333, 171 P. 790 (1918).

110. Guerrero v. Carleson, 512 P.2d 833, 840 (Cal. 1973) (Tobriner, J., dissenting).

111. *Id.* at 841.

112. *Id.* at 842. This is harder to argue in a *Maso* scenario. Nonetheless, being handed a document by a police officer during a traffic stop may implicitly alert the recipient of the need for translation, but it does not give any clue as to how promptly the translation need be obtained.

113. *Id.* In New Mexico, many administrative agencies, including the MVD, have bilingual forms and manuals, one of which allows the driver's license exam to be administered in Spanish. N.M. MOTOR VEHICLE DEP'T, NEW MEXICO DRIVER'S MANUAL IN SPANISH (2011), *available at* http://www.mvd.newmexico.gov/SiteCollection Documents/assets/dlms.pdf. Thus, in Maso's situation, it can be argued that if he was able to obtain a driver's license through use of the agency's Spanish-language forms, it would be reasonable for him to expect that any notice of his right to the retain his license would also be in Spanish. This is especially true when notice is sent via mail. How is a recipient supposed to determine whether something looks important enough to warrant translation? Many documents are purposefully made to look official so

there might be an assumption that the document was not important enough to warrant translation.[114] Secondly, even if the individual recognizes the need for translation, it may be obtained too late to invoke the individual's right to a hearing.[115] Additionally, the recipient would have to consider how to secure a proper translation to ensure that it was accurate.[116] The time and possible expense in seeking the translation shifts the burden from the sender to the recipient and makes the possibility of obtaining a translation within enough time to assert one's right less feasible. Additionally, placing this burden upon the recipient places that individual in a position that requires them to reveal potentially personal information that they may not wish to disclose. In essence, the assumption that Spanish-only speakers will obtain a translation places the burden of obtaining notice on the recipient *despite it being the obligation of the party serving notice to ensure that they employ notice reasonably certain to inform*. It is true that the recipient must not seek to avoid notice, but failing to realize the need for translation at all, or within the required time, is a far cry from intentionally seeking to evade notice.

The burden of translating notice into Spanish in New Mexico cannot be said to be a "heroic effort" on the part of the government.[117] Indeed, anything less than Spanish notice to a Spanish-only speaker in New Mexico would be a "mere gesture"—like publishing notice in a newspaper intended for parties whose addresses are readily available and can be easily served notice through mail.[118] If one knows the recipient's address and it is feasible to send them notice via mail, then it is unreasonable to publish notice in the newspaper.[119] Similarly, if one knows someone only speaks Spanish, and it is feasible to provide a Spanish notice, then it is unreasonable to provide English-only notice. Though actual notice is not necessarily required in all contexts, when other feasible and customary substitutes that might easily achieve actual notice are available, it must be employed or it fails to meet the *Mullane* standard.[120] "Notice is the birth-

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that recipients are more likely to open them. Thus, it is unreasonable to place the burden of determining whether something needs to be translated on the individual.

114. *Id.*

115. *Id.*

116. *See* Hernandez v. Dep't of Labor, 416 N.E. 2d 263 (Ill. 1981) (recipients received notice of denial of unemployment benefits and promptly sought translation from friends who translated the notice inaccurately and incompletely); DaLomba v. Dir. of Div. of Emp't Sec., 337 N.E. 2d 687 (Mass. 1975) (same).

117. *See* Dunsenbery v. U.S., 534 U.S. 161, 170 (2002).

118. This was the factual situation and reasoning of the U.S. Supreme Court in *Mullane v. Cent. Hanover Bank & Trust Co.*. 339 U.S. 306 (1950).

119. *Id.* at 318.

120. *See* discussion *supra* Part II.A.1.

right of all people in this country, not just those who are vigilant enough to make daily inquiry about the status of proceedings, or to seek independent explanation of otherwise incomprehensible forms."[121] The Constitution's "guarantees are theirs by right, not by charity."[122]

Finally, in addressing a common argument presented by *Guerrero* and like decisions, dissenting opinions by Justice Tobriner and Chief Justice Wilentz have already handily refuted the assertion that to extend notice in one language would result in a requirement that it be extended in all languages. As part of the *Mullane* analysis, courts have said that providing Spanish-language notice to Spanish-only speakers is unreasonable because it could not be limited to Spanish alone.[123] It would result in a requirement to provide notice in all foreign languages, or at least relatively common foreign languages.[124] It would also, then, require the government to conduct all its affairs in every language spoken by any person in the jurisdiction.[125] This, in turn, would present an unreasonable—indeed disabling—burden to the state. This argument is simply without merit. Because the *Mullane* standard requires reasonableness in light of the circumstances and because it is not necessarily reasonable to provide notice in all languages (because perhaps very few individuals speak a particular language), the burden on the state will change depending on the language involved. As Justice Tobriner points out in *Guerrero*, "[u]nder a different set of circumstances, the balance of interests between individual and state may be entirely different and may accordingly dictate a different result."[126] Likewise, Chief Justice Wilentz, a former Chief Justice of the New Jersey Supreme Court, has stated, "for Spanish-speaking persons . . . the benefits of providing Spanish language notice outweigh the burdens as a matter of law. As to persons speaking other languages, the balancing test of proper due process analysis would have to be applied when that case arose."[127] Since the analysis in this note is confined to Spanish and benefits and burdens as it applies to New Mexico, other states' concerns regarding potential foreign language notice requirements should be addressed using the *Mullane* standard, when and if that situation arises.

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121. Alfonso v. Bd. of Review, 444 A.2d 1075, 1085 (N.J. 1982) (Wilentz, C.J., dissenting).

122. *Id.*

123. *See, e.g.*, Guerrero v. Carleson, 512 P.2d 833, 837–38 (Cal. 1973).

124. *Id.*

125. *Id.* at 838.

126. *Id.* at 843 (Tobriner, J., dissenting).

127. *Alfonso*, 444 A.2d at 1084 (Wilentz, C.J., dissenting).

C. Other Jurisdictions' Contrary Conclusions Provide Rationales for Reaching a Different Result Consistent with New Mexico's History

State and federal cases on this issue, in general, reflect an unwillingness to conclude that anything but English-only notice is required to satisfy due process. California was one of the first jurisdictions to address the issue of sufficiency of English-language notice to Spanish-only speakers. In 1973, the Supreme Court of California held, in *Guerrero v. Carleson*, that English-language notice to a Spanish-only speaker was constitutional notice under the *Mullane* requirement.[128] Like *Maso*, the factual context was that of an administrative proceeding in which claimants challenged the state's failure to provide Spanish-language notice prior to terminating and reducing welfare benefits.[129] The court concluded that Spanish notice would be "desirable and should be encouraged, [but] it does not rise to the level of a constitutional imperative."[130] After stating the standard set forth in *Mullane*, the court determined that it was "not unreasonable for the state to expect that persons such as those in plaintiffs' position will promptly arrange to have someone translate the contents of the notice."[131] Thus, the court found that the notice satisfied due process.[132]

The opinion also contained sentiments appearing to endorse English as the official language of the United States and of California. The court declared, "[t]he United States is an English speaking country," and went on to highlight a California statute that provided for English-language notice in all situations where notice was required or authorized by statute.[133] The opinion was met with a strong dissent authored by Justice Tobriner. Justice Tobriner pointed to California's history, quoting a

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128. 512 P.2d 833 (Cal. 1973). Ten years after the *Guerrero* court issued its decision, the Second Circuit concluded in *Soberal-Perez v. Heckler*, 717 F.2d 36, 41–43 (2d Cir. 1983), that providing Spanish-language services for Spanish-only speakers would shift discrimination onto all other non-English-speaking groups. This conclusion gives rise to an Equal Protection consideration. Though it is beyond the purview of this note, when language considerations are involved that can appear as a proxy for race or nationality, one must be aware of the Equal Protection questions that may arise. While no conclusions are offered on the subject, some may argue that an extension of Spanish-language notice may violate federal constitutional law.

129. *Guerrero*, 512 P.2d at 833.

130. *Id.*

131. *Id.* at 837.

132. *Id.* at 836–37.

133. *Id.* at 835. This is not also true of New Mexico. As noted previously, New Mexico has not adopted English as its official language and, in fact, requires notice to be in English and/or Spanish in many instances. *See supra* note 100 and accompanying text.

California decision issued only three years prior, in which the Supreme Court of California struck down a section of the state's constitution that conditioned the right to vote on one's ability to read English:

> We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote.[134]

After agreeing with the majority that *Mullane* controlled, the dissent articulated the issue as turning on the "relative importance of adequate notice to the welfare recipient and the corresponding burden to the departments in printing the notice in Spanish."[135] The burden to the state, he concluded, was minimal, as demonstrated by facts noted in the majority opinion, including the welfare department's effort to (1) identify Spanish-only speakers; and (2) provide welfare forms in Spanish to those individuals.[136] The state's effort and ability to provide these services demonstrated that the burden was relatively minimal as compared to a crucial loss of benefits by the recipients.[137] Thus, in Justice Tobriner's opinion, the English-language notice provided violated the Fourteenth Amendment.[138]

The dissent also addressed the state's successful arguments that an agency is safe in assuming that a reasonable person would have the notice translated and that to require Spanish-language notice would lead to a requirement that all notices be printed in all languages.[139] As discussed *supra*, Justice Tobriner attacked the majority's reasoning, noting that the state's assumption that one will have the notice translated "is a far cry from finding that the notices are 'reasonably certain to inform'" the recipient of crucial information regarding benefits and of the right to a hearing.[140] The recipient may not appreciate the need to have the document translated, and even if the need is realized and the translation is obtained, the time period for requesting a hearing on the matter may have lapsed.[141] Justice Tobriner concluded that this type of notice violated

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134. *Guerrero*, 512 P.2d at 839–40 (Tobriner, J., dissenting) (quoting Castro v. California, 466 P.2d 244, 259 (Cal. 1970) (internal quotations omitted)).
135. *Id.* at 841.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 842.
140. *Id.* (emphasis omitted).
141. *Id.*

Mullane because requiring the recipient to get the notice translated was not notice reasonably certain to inform the recipient of the need to request a hearing.[142]

With regard to the state's second assertion that notice would then need to be translated into all languages, Justice Tobriner found it to be "irrational."[143] He noted that procedural due process requires a weighing of the burden on the state against the individual's right in that situation, and since the state has already taken steps to recognize the significant number of Spanish speakers and has provided many forms in Spanish, the burden of translation into Spanish is truly very slight.[144] That, of course, cannot also be said of all languages, such as Basque or Chippewa, as Justice Tobriner pointed out.[145] The state need not provide notice in these languages because so few recipients speak those languages and thus, the expense and burden of translation and printing notices in these languages would be unreasonable.[146] In short, the balance between the state and the individual might be completely different if there were a different language involved, and, as such, a different result required.[147] But, given this balance, the Spanish-speaking individual's right clearly outweighs the burden placed on the state.[148] Justice Tobriner concludes, "[i]n the long effort of the subgroups in our culture to attain recognition and participation the majority opinion can only be an unfortunate step backwards."[149]

The conclusions reached by the *Guerrero* court are unpersuasive as they apply to New Mexico. *Guerrero* and the policy that it advances serve only as a comparison point to New Mexico law and policy that then bolsters the argument for enhanced protections based on distinctive state characteristics. First, the argument for broader *state* constitutional protections in New Mexico is based on distinctive *state* characteristics. It follows, then, that any other jurisdiction's reasoning on the issue ought not carry binding weight. However, New Mexico and California do share a similar history as former Mexican entities. Perhaps, then, California courts' reasoning, and failure to consider that history, might carry some weight in New Mexico. However, this would ignore the states' respective histories since joining the Union. In California, a strong anti-Hispanic sentiment developed that culminated in Proposition 63, which aimed to

142. *See id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 842–43.
147. *Id.*
148. *Id.*
149. *Id.* at 843.

amend the state constitution to declare English the state's official language.[150] In 1986, the proposition passed by an overwhelming majority—74 percent in favor.[151] It did not end there. In 1998, the "English for the Children" initiative appeared on the state ballot for possible approval by the California voters.[152] This initiative, Proposition 227, in effect, proposed to eliminate bilingual educational programs for non-English speakers in the state's public school system.[153] Although the proposition was rejected (61 to 39 percent),[154] it reflects the sentiment in California during that time period. The fact that it even appeared on the ballot, and 39 percent of the voters approved of it, demonstrates that the anti-Spanish, anti-Hispanic movement was far from over.

Indeed, other jurisdictions have addressed the Spanish-language notice issue similarly to the *Guerrero* majority.[155] The majority opinion in *Guerrero* has been widely cited and, for the most part, followed, almost always with a dissenter echoing Justice Tobriner's reasoning.[156] Scholars have criticized the decision and those that follow suit,[157] but the holding has proved to be enduring. Like California, many of those states following suit proposed and passed English-only and similar initiatives.[158] Most recently, in 2003, Arizona passed Proposition 203—the anti-bilingual initiative, which essentially imposes a statewide English-only mandate in schools and prohibits native language instruction for limited English-

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150. *See* Yang Sao Xiong & Min Zhou, *Structuring Inequity: How California Selectively Tests, Classifies, and Tracks Language Minority Students*, *in* CALIFORNIA POLICY OPTIONS 2006, at 145, 146 (Daniel J.B. Mitchell ed., 2006), *available at* http://www.spa.ucla.edu/calpolicy/files06/Xiong_Zhou_Policy_Paper_Sept30_2005_Final_1II.pdf.

151. *Id.*

152. *Id.*

153. Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1227 (2000).

154. Xiong & Zhou, *supra* note 150, at 146.

155. *See* Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983); Alonso v. Arabel, Inc., 622 So.2d 187 (Fla. Dist. Ct. App. 1993); Hernandez v. Dep't of Labor, 416 N.E. 2d 263 (Ill. 1981); DaLomba v. Dir. Of Div. of Emp't Sec., 337 N.E. 2d 687 (Mass. 1975); Alfonso v. Bd. of Review, 444 A.2d 1075 (N.J. 1982).

156. *See supra* note 155.

157. *See* Mary K. Gillespie & Cynthia G. Schneider, *Are Non-English-Speaking Claimants Served by Unemployment Compensation Programs? The Need for Bilingual Services*, 29 U. MICH. J.L. REFORM 333 (1995–96); Charles F. Adams, Comment, *"Citado A Comparecer": Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?*, 61 CALIF. L. REV. 1395 (1973); Mary Beth Diez, Note, *Bilingual Notice Not Required*—Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973)*, 1 PEPP. L. REV. 297 (1974); Note, *El Derecho de Aviso: Due Process and Bilingual Notice*, 83 YALE L.J. 385 (1973).

158. Adams, *supra* note 157, at 1396–98.

speaking students.[159] In direct contrast, New Mexico state policy has never reflected an anti-bilingual sentiment.[160] In other jurisdictions, only recently has there been caselaw that points to courts' willingness to move away from *Guerrero*.

In 2010, the New Jersey Supreme Court cited *Guerrero*, but reached a different conclusion.[161] The court held that police officers must inform motorists of the consequences of refusing to submit to a breath test in a language, in this case Spanish, that the motorist understands.[162] The court was presented with facts nearly identical to those in *Maso*; however, the defendant in this case was arrested for failing to comply with the state's implied consent law rather than for violating a DWI statute.[163] The state's appellate court, the Superior Court of New Jersey, held that due process had been satisfied when an officer read the state's implied consent warnings in English despite the knowledge that Marquez, the defendant, only spoke Spanish.[164] The Supreme Court of New Jersey granted certiorari and reversed the lower court. The court found that the plain language of the statute required that a police officer "inform" the individual, and since Marquez did not understand the statement because he did not understand English, he was not informed within the meaning of the statute.[165]

The court did not base its holding on a violation of due process; rather, the decision was based on an interpretation of the statutory requirement that the driver be "inform[ed]."[166] Nonetheless, the court's reasoning can be applied in the context of due process, and it demonstrates that, perhaps, other jurisdictions are ready to recognize the rights of Spanish speakers through state law, if not federal.

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159. Xiong & Zhou, *supra* note 150, at 146.

160. Under Governor Susana Martinez's administration, there has been a push to revoke licenses that were issued to non-U.S. citizens. Because of New Mexico's proximity to Mexico, many of the state's alien residents are Mexican nationals, who speak Spanish. Perhaps this is the first indication of a state agent-backed anti-Spanish sentiment in the state. See, for example, Press Release, State of New Mexico: Office of the Governor, Governor Susana Martinez Directs TRD, MVD Officials to Improve the Security of New Mexico Driver's Licenses (June 22, 2011), *available at* http://www.governor.state.nm.us/uploads/PressRelease/191a415014634aa89604e0b4790e4768/110622_2.pdf.

161. New Jersey v. Marquez, 998 A.2d 421 (N.J. 2010).

162. *Id.* at 436.

163. *Id.* at 425–26.

164. New Jersey v. Marquez, 974 A.2d 1092, 1096–97 (2009) (N.J. Super. Ct. App. Div. 2009), *rev'd* 998 A.2d 421 (N.J. 2010).

165. *Marquez*, 998 A.2d at 439.

166. *Id.*

Thus, because the argument posited here is based on New Mexico's distinctive state characteristics and because other jurisdictions' contrary conclusions do not align with the history, policy stance, and reasonableness consideration in New Mexico, New Mexico courts should not look to those jurisdictions as persuasive authority. To the extent that jurisdictions like New Jersey recognize the importance of ensuring that all individuals understand their rights, New Mexico courts can borrow and incorporate their reasoning to form state law that reflects the Spanish language's special status in the state.

D. Gomez*'s Interstitial Approach Supports a More Capacious Interpretation of New Mexico's Due Process Clause*

When interpreting New Mexico constitutional provisions that are analogous to those in the federal Constitution, New Mexico courts have adopted the interstitial approach.[167] Under the interstitial approach, which New Mexico formally adopted in *Gomez*, the first inquiry is whether the U.S. Constitution protects the right in question.[168] Here, that right is one of Spanish-language notice to known Spanish-only speakers as a requirement of procedural due process.

While the federal courts have articulated a standard for constitutional notice (*Mullane*), the Supreme Court has yet to address the specific right at issue. At least one federal circuit court has addressed Spanish-language notice under a procedural due process analysis, but it did not conclude that Spanish-language notice is a requirement of due process in any circumstance including the relevant context.[169] Rather, the consensus indicates that English-only notice, especially in administrative proceedings, is constitutionally sufficient.[170] Thus, it is clear that the federal courts, in their interpretation of the federal constitution, have failed to protect this right.

The next step in the *Gomez* interstitial analysis is determining whether there are grounds for diverging from federal law.[171] As stated previously, there are three reasons that a state court may diverge: (1) a flawed federal analysis; (2) structural differences between the state and federal government; or (3) distinctive state characteristics.[172] While at least two grounds are viable reasons for diverging from federal precedent in the present issue, it is New Mexico's distinctive state characteristics

167. *See* discussion *supra* Part II.B.
168. *Id.*
169. *See* Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983).
170. *See* discussion *supra* Part II.A.
171. *See supra* notes 61–63 and accompanying text.
172. *Id.*

that primarily warrant an expansion of rights for Spanish-only speakers in the state.

The factors that contribute to the argument for broader state procedural due process rights for Spanish-only speakers in New Mexico based on distinctive state characteristics are: (1) the historical background of the state including the original iteration and surviving constitutional protections for Spanish-language speakers explicit in the 1911 version; (2) other New Mexico laws and regulations that require bilingual forms, documents, and publications, which bolster arguments about the state's broadly interpreted public policy stance requiring Spanish-language notices; (3) the language characteristics of New Mexico's current population; (4) the arguably low burden on the state in translating notice for Spanish-only speakers as weighed against the right and potential impact on the individual; and (5) a survey of other jurisdictions' conclusions on the subject and analysis of the reasoning as it applies to New Mexico. These factors have already, in large part, been discussed in the previous sections. Thus, the following summarizes those considerations and arguments.

First, New Mexico courts should not ignore the fact that New Mexico was, at one time, a primarily Spanish-speaking state. History makes that quite clear. Additionally, the desire to protect the Spanish-speaking population of this state from infringements on individual rights was made clear by language in the original iteration of the state constitution—language that remains today.[173] Since statehood to present-day, there has existed a strong public policy in favor of preserving the Spanish-language and in ensuring that the Spanish-language is afforded significant legitimacy and standing in New Mexico law as reflected in the many state statutes and regulations which require or authorize information to be published in both English and Spanish languages.[174] Indeed, some of those sources of law protect not only a general equality of treatment of the Spanish-language, but in many instances, recognize an express right to Spanish notice, especially in instances where a significant number of Spanish-speakers exist. Further, the quasi-official status of Spanish as a language arguably equal in standing to English, reflects the state's policy stance as reflected in the current translation of numerous official forms and thus renders irrational any argument that the burden of translation of documents from Spanish into English is too great for this state. Because Spanish-language notice would be so feasible and inexpensive, it is unreasonable to only require English-language notice. This is so especially

173. *See supra* Part III.A.

174. *See supra* notes 100–103 and accompanying text.

when one considers the importance of *any* potential loss of a life, liberty, or property interest in any context, be it an administrative proceeding or a judicial proceeding.

Finally, because this argument is based on distinctive state characteristics, other jurisdictions' contrary conclusions on the issue are simply inapposite and, more importantly, unpersuasive. California's decision in *Guerrero* reflects its state policy during the time that it was rendered,[175] not New Mexico's. Even though most jurisdictions have jumped on the *Guerrero* bandwagon, New Mexico does not share their history and they do not share in the uniqueness of New Mexico's protections for Spanish speakers. Put simply, the needs of New Mexico's current population, the ability and reasonableness of providing notice actually intended to inform, and the distinctiveness of the Spanish language in this state all point to one conclusion: New Mexico courts should not hesitate to expand notice requirements under the New Mexico Constitution. It was best stated by former New Jersey Supreme Court Chief Justice Wilentz in dissent, "[W]hen, implicitly and explicitly, Spanish has achieved some measure of official recognition, the Spanish-speaking population may reasonably expect that information of great importance to their well-being will be conveyed to them in a manner that communicates the essential information required."[176] This note does not propose a giant leap, but a modest and natural extension of law and policy that already exists in New Mexico. Thus, when another *Maso* situation arises, be it in the context of a DWI, property rights, or welfare benefits,[177] it would be astute to assert the arguments advanced in this note, and the New Mexico Supreme Court should be proud to accept it as a basis for extending this right.

CONCLUSION

New Mexico is a distinctive state with a distinctive history, and its population's characteristics necessitate unique state protections. Its history, while not dispositive of the due process issue, favors interpreting the New Mexico Constitution differently from the federal Constitution in particular areas of law—namely, those areas that are influenced by our distinct history and present characteristics.

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175. *See* PERSPECTIVES ON OFFICIAL ENGLISH: THE CAMPAIGN FOR ENGLISH AS THE OFFICIAL LANGUAGE OF THE USA 2–3 (Karen L. Adams & Daniel T. Brink eds., 1990).

176. Alfonso v. Bd. of Review, 444 A.2d 1075, 1084–85 (N.J. 1982) (Wilentz, C.J., dissenting).

177. The context in which the situation arises is truly of little importance, the sole focus should be the issue and potential right for New Mexico's Spanish speakers.

For hundreds of years, the Spanish language has had a special standing in New Mexico—a standing that will continue, evolve, and thrive only in ways that the people and the law of New Mexico allow. Any failure to recognize the longstanding and continued importance of the Spanish language, the Spanish-speaking people, and the Spanish culture of this state, is, as Justice Tobriner put it when referring to California, an "iron[y] that . . . the heirs of a great and gracious culture, identified with the birth of [New Mexico] and contributing in no small measure to its growth, should be disenfranchised in their ancestral land."[178] For New Mexico, such a disenfranchisement of the Spanish language would not only be ironic, but also distressing, regrettable, and a reflection of our failure to preserve and continue the rich legacy of this state and protect it through state law.

The intentions of early New Mexicans, who succeeded in securing statehood, are clear and enduring. Past and present policies make clear that Spanish-speaking individuals, by virtue of the language they speak, have a unique standing in this state. As such, New Mexico courts should not hesitate to make a modest expansion of notice requirements to ensure that Spanish-only speakers have notice reasonably calculated to inform them of actions that affect their interests so as to afford an opportunity to be heard. This is a right that if not protected by the federal Constitution, must be protected in a state where history and present characteristics demand nothing less. Only then can the rights that were to be preserved "inviolate" be realized.

It could be the case that New Mexico may one day be the only jurisdiction in the United States to extend such a right, but rightfully so because the "constitutional deprivation in these matters does not lend legitimacy to the practice"—it only serves to remind those affected of the numerous barriers they face as a result of their inability to speak America's language.[179]

178. Guerrero v. Carleson, 512 P.2d 833, 839–40 (1973) (Tobriner, J., dissenting) (quoting Castro v. California, 466 P.2d 244, 259 (1970)).

179. *Alfonso*, 444 A.2d at 1085 (Wilentz, C.J., dissenting).