

**The Interrogation by a Police Officer of a Spanish-Speaking Defendant  
with Incipient Bilingualism**

Mercedes Niño-Murcia, University of Iowa  
Christopher J. Roth, Attorney

**Abstract**

Language proficiency plays a role in police interrogations when the defendant is not a native speaker of the language. The language barrier may also affect comprehension of *Miranda* warnings. This article addresses the challenges the U.S. legal system faces in exchanges with nonnative speakers of English. It closely examines the interaction between a Police Officer (PO) who is a native speaker (NS) of English and a Spanish-speaking defendant who is a nonnative speaker (NNS) of English. Speaking English as his second language (L2), the defendant shows the proficiency level of a novice learner. The questioning was therefore conducted in circumstances of linguistic imbalance or asymmetry. In forensic contexts, language asymmetry is consequential since it puts the understanding of law and evidence at risk, beginning with *Miranda* warnings, and can thereby hinder the proper administration of justice.

**0. - Introduction**

Anyone speaking in his or her native language is able to conduct conversations with people from a variety of social groups (Goffman 1972; Garfinkel 1967; Sacks 1972; Schegloff 1987). But conversational effectiveness is constantly at risk even among native speakers of a particular language variety. It may be damaged at any time because it is so easy to violate the unspoken rules or principles for maintaining coherence in a particular speech act. Interlocutors in any conversation continually negotiate how to produce meaning (Garner 2007). Those who share their first language usually find ways to mend communication that is disrupted by such factors as deficient timing, hesitation and so forth. The risk of not understanding each other becomes greater when the participants do not share a first language (L1), or speak different varieties of a shared L1, or when they have unequal proficiency in the language used. In such situations, linguistic ability is said to be unbalanced or asymmetrical.

This article analyzes the interaction between a Police Officer (PO) who is a native speaker (NS) of English and a nonnative speaker (NNS). Interaction with the defendant, whose first language is Spanish, during the interrogation showed how the lack of language symmetry impedes understanding and affects the production of coherent answers. It also affects comprehension of *Miranda* warnings because proficiency at a novice learner level, as measured by American Council on the Teaching of Foreign Languages (ACTFL) guidelines (standard scale used in academic placement and proficiency testing for job purposes), is not adequate for legal language. A translation of Miranda rights was provided but, as we will discuss below, it didn't seem to have achieved its objectives. The questioning was therefore conducted in circumstances of linguistic imbalance or linguistic asymmetry. There was no interpreter present and misunderstandings occurred throughout the entire interrogation session.

The case concerns a nonnative speaker of English who was interrogated by a police officer without a certified interpreter present. As Berk-Seligson (2009: 21-22) points out, when the defendant's English is not sufficient and the PO doesn't speak the language of the defendant, the administration of justice is more challenging if not problematic. Therefore, in 2000, President William Clinton issued an executive order (#13166): *Improving Access to Services by Persons with Limited English Proficiency*, known as the "DOJ LEP Guidance". It mandates that federal agencies must "assess and address the needs of otherwise eligible persons seeking access to federally conducted programs and activities who, due to Limited English proficiency, cannot fully and equally participate in or benefit from those programs and activities" (U.S. Department of Justice 2001:3, *Improving Access to Services by Persons with Limited English Proficiency*, cited by Berk-Seligson 2009:11).

However, how to implement the order in different situations was not specified then. In 2001, working on implementation of executive order 13166 (2000), the Civil Rights Commission sponsored a conference where the recommendation of establishing written and oral "uniform language initiatives" including "waivers and other law enforcement or detention related documents affecting important rights and privileges" was approved. There was discussion on how to offer oral interpretations, written translations, and outreach to persons of limited English proficiency (Berk-Seligson 2009:12).

It was apparent to the defendant's attorney that the defendant lacked a level of English comprehension and speaking ability sufficient to answer the officer's questions. To the attorney,

the lack of understanding among the two parties was obvious and crucial for the process, even the effectiveness of the initial reading of the *Miranda* warnings was questionable. The attorney sought an expert opinion and requested the services of a linguist to assess his client's linguistic abilities. He also requested a professional assessment from an independent evaluator who teaches English.

Data for the present analysis comes from a video transcript of the police interrogation of the defendant lasting 52:33 minutes. The analytical framework that will be used is interactional sociolinguistics, with a specific focus on conversation analysis (CA) in institutional settings (Berk-Seligson 2002; 2009; Drew et al. 2001, Silverman 2001, Gumperz 2001). CA has developed a systematic methodology. Essential prerequisites for using CA in sociolinguistic research are: 1) a recording of good quality; 2) contextual information about the relationship of the participants, the time and place of the interaction, their knowledge of the language(s) in play, and anything else that could have bearing on the conversation; 3) an accurate and detailed transcription. We have met all of those prerequisites for our analysis.

The language barrier constitutes a serious impediment to the proper administration of justice to immigrants whose English proficiency is limited. We will discuss issues germane to the debate on language policy and minority-language speakers' rights in the United States, especially as they affect immigrants due to language barriers. While the modern U.S English-Only Movement (USEOM) promotes the use of English in all domains and among all ethnic groups living in the USA (Crawford 2000) other groups are working toward establishing equity when defendants are speakers of languages other than English. The topic of language speakers' rights is being discussed actively in the media and in scholarly research. National Public Radio (NPR) ran a segment entitled "Lawyers Push for Spanish-Language Miranda Warnings" on August 13<sup>th</sup>, 2016. Alex Acosta, chair of the American Bar Association's Special Committee on Hispanic Legal Rights and Responsibilities, pointed out during an interview by Allison Aubrey that an official translation of *Miranda* rights into Spanish is urgently needed (08/13/16) to ensure total comprehension of the text. Translations currently provided are not consistent and not intelligible to speakers of all Spanish dialects.

In addition, the case shows how linguistic asymmetry prevents the police officer and the defendant from jointly construct meaning. In many instances they fail to understand each other. This analysis takes into account not just grammar rules but social "moves" like turn-taking, body language, and

a range of emotions marked by tone or hesitation. Asymmetrical power relations increase the constraints speakers feel and affect communicative effectiveness. We will concentrate on explaining communicative results in terms of the speaker's own understanding of the verbal task at hand due to his limited proficiency in English.

## **1. - Theoretical framework**

There is a growing body of conversation and discourse analytic work done inside the justice system. One major preoccupation is linguistic asymmetry (situations where speakers have unequal power due, among other factors, to unequal command of the linguistic code the setting requires), police interrogations being a crucial instance (Berk-Seligson 2009; Benneworth-Gray 2014; Holt, E. and A. Johnson 2013; Heydon 2005). In forensic contexts, language symmetry (or asymmetry) is consequential. Typically, institutional interaction is inherently asymmetrical "since power and control are located in the institutional participant, rather than being equally distributed" (Coulthard, M. and A. Johnson 2007). It can acquire an additional and non-legitimate increment of asymmetry when the institutional participant is the only one with high competence in the legal-norm form of language as well as cultural competence. This analytic tool has also been used in health-care settings (Drew et al. 2001), in psychological counselling (Silverman 2001), in classroom and school settings (Mehan 2001), in interethnic communication (Gumperz 2001), in political discourse on ethnic affairs (Van Dijk 2001), and in other institutional domains. As Yates (2001:83) points out "Conversation Analysis has become the most dominant sociological approach to the study of discourse as social interaction."

In any conversation, construction and negotiation of meaning among participants is affected by power, social status, symmetrical or asymmetrical personal relations, and by their respective levels of language proficiency in the language of the exchange. Those factors have greater weight when the participants are not both native speakers of the language in use. Interrogation by police is an asymmetrical framework even if everyone speaks the same language. Therefore, if the exchange is between a native speaker of English and a defendant with limited proficiency, interpreters should always be present.

## 2. - Data

The data set comprised of one police interview of a male defendant suspected of sexual offenses against a female child. The alleged victim is 13 years old. There are two recorded tapes but only one is analyzed here. It lasts 52.33 minutes. The interview was transcribed in its entirety and completely anonymized. All of the names and locations that could be attributed to individuals were replaced with a generic label about the missing detail (e.g. ‘name’, ‘place name’, ‘addresses). The interrogation was transcribed in a system internationally recognized as a protocol for close rendition of linguistic exchange. It is a “broad” transcription in sociolinguistic typology (as opposed to a “narrow” transcription, meaning one that itemizes fine phonetic details such as the length of vowels, syllables and pauses). A broad transcription captures the main features of the production of the interaction. For example, when intonation is marked with a certain graphic symbol in a broad transcription, it means the emphasis on a particular syllable adds a meaningful element relevant to the understandings exchanged or the behavior of the participants.

In the present case, the interaction is between a Police Officer (PO) who is a native speaker of English and a nonnative defendant whose first language is Spanish (NNS). Speaking English as his second language (L2) he shows the proficiency of a novice learner. In the recording, the PO speaks short sentences in Spanish, transcribed in *italics* and **bold face**. These indicate some degree of second language familiarity with Spanish but fall short of providing evidence that he has conversational command of Spanish. The questioning was therefore conducted in circumstances of linguistic imbalance.

The video was transcribed as accurately as possible. Segments of the interaction that were not clearly audible or intelligible to the transcriber are marked with an underline \_\_\_ to indicate a gap in the transcription (See conventions list below). Gaps are due in part to the position of the microphone. The police officer (PO) is better positioned for recording than the defendant. Additionally, because the PO is aware of the recording process and of the defendant’s NNS status, it can be reasonably inferred that he articulates his questions and comments for maximum audibility / intelligibility. The PO’s verbal expressions are easily understood. The defendant’s responses are not always clearly comprehensible. The defendant appears nervous and seems timid, and most relevantly, he possesses limited proficiency in English.

Excerpts of the interrogation when cited are identified by a numbered-line citation to the entire transcription.

### **3. - Reading *Miranda* rights to nonnative speakers of English**

Language access policies relate to both protective rights against discrimination and rights to services, legal and otherwise. Generally, every person, immigrant or citizen has a right against self-incrimination, or a right not to say something to police that may implicate that person in a crime (U.S. Constitution, 5<sup>th</sup> Amendment). Sometimes the police violate this right, and interrogate someone in a way designed to elicit statements that the person otherwise would not have given. Other times, for immigrants whose first language is not English, comprehension is difficult. As has been aptly demonstrated (Pavlenko 2008), the text of *Miranda* warnings is difficult even for defendants with high levels of English proficiency.

The best-known way to discern a procedural violation is to look at whether the police read a person their rights before conducting a custodial interrogation. These rights have become known as *Miranda* rights, stemming from a 1966 United States Supreme Court case, *Miranda v. Arizona*. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court was concerned with the police-dominated atmosphere that is usually present in interrogations, and the “evils it can bring.” (*Miranda* at 456).= The police must read out some version of the following before questioning a person in their custody: 1) You have the right to remain silent; 2) Anything you say can and will be held against you in a court of law; 3) You have the right to have an attorney; 4) If you cannot afford an attorney one may be provided for you; 5) Knowing all these rights, do you still wish to talk to me today? (*Miranda* at 468). The *Miranda* rights do not have to be conveyed exactly as written by the Supreme Court, but must be said in a way that is “clear and not susceptible to equivocation” and provide “meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act.” *United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir. 2003).

The court also ruled that the defendant may waive his or her rights, provided the waiver is *knowing, voluntary and intelligent*. Factors for evaluating the waiver by these criteria include whether the interrogated was in custody, his/her age, his/her intelligence, whether he/she has prior experience with the police (and as such, the *Miranda* procedure), as well as background, conduct, literacy,

language ability, mental illness and physical conditions among other factors. *U.S. v. Marquez*, 605 F.3d 604 (8th Cir. 2010); (Oberlander and Goldstein 2001).

The *Miranda* procedures developed in different states in the U.S. have focused on special populations (children, adolescents, and individuals with mental illness, mental deficiencies, and organic impairments). In 1993 the Illinois Court of Appeals mandated that police do “more” than reading defendants’ their rights, explaining them in special circumstances. This discussion culminated in *Illinois v. Higgins* (1993) (Oberlander and Goldstein 2001). Language asymmetry was not explicitly mentioned but it is obvious that even an intelligent individual who would understand the matter at hand if it were read and explained in his native language, would be in trouble if the procedure were done in a language he/she does not know well. Obviously, comprehension is in jeopardy.

Research on a lack of understanding of *Miranda*, as pointed out by Oberlander and Goldstein (2001:463), “has focused on individual factors that might result in poor *Miranda* comprehension: age, intelligence, experience, education and literacy. No single factor or circumstance automatically obviates comprehension in the eyes of the court, nor do the factors have specific or established demarcations.” Even comprehension in the L1 of the suspect is not a given since the vocabulary and syntax of the *Miranda* warning require certain level of reading comprehension. Oberlander and Goldstein state (463-64) that a seventh grade reading level is necessary for understanding the text based on Fulero and Everington’s (1995) study. The text may be simplified to a lower readability level but all of these considerations have been relevant to cases of special education and mental retardation in native speakers of English.

Some studies have pointed out the relevance of individual linguistic factors to cases of low or non-L1 proficiency in English (Berk-Seligson 2000 and 2009; Pavlenko 2008; Roy 1990). We want to emphasize that immigrants’ level of L2 proficiency should always be taken into consideration. If a translation in the defendant’s native language is provided, it should be official, standardized and easily comprehensible to speakers of any dialect or variety of the L2 language. The translation should be presented in a way that is “clear and not susceptible to equivocation” (*United States v. Perez-Lopez*, 348 F.3d 839 (9th Cir. 2003)).

As Alex Acosta, chair of the American Bar Association’s Special Committee on Hispanic Legal Rights and Responsibilities, pointed out in an NPR interview by Allison Aubrey (08/13/16), after

50 years of the Miranda warnings requirement, an official translation of Miranda is urgently needed. Acosta also pointed out that an estimated 800,000 individuals per year taken into custody are native Spanish speakers, presumably, with different degrees of English proficiency. Acosta holds that there is plenty of evidence that some individuals failed to understand the Miranda warnings because police using words that are not Spanish or using Spanish words whose translations into English vary from their meaning in the Miranda text. He gives as an example: “the right to have an attorney appointed” has been mistranslated into a phrase that means ‘the right to have an attorney that points to something.’ Police use translation cards that have been mistranslated. At the end the interview, Acosta rightly says:

I think any effort by law enforcement to understand that there are language barriers that need to be addressed could certainly play a role in easing these tensions [referring to a report of policing in Baltimore]. You know, police by and large, like every profession, are trying to get it right, and this is a tool that we hope can help police get it right.

However, it is clear that the majority of courts will not treat language proficiency or lack thereof as an overarching factor in considering whether a defendant knowingly and intelligently waives *Miranda* rights. Some courts have elevated the language proficiency factor to be almost a threshold barrier to finding knowing and intelligent waiver, but this is the rare exception and not the rule.

Studies regarding cases where a different language was in the equation support our linguistic plea to increase awareness of language as barrier in legal dealings. In 2009, the Iowa Supreme Court, in one decision, elevated the language barrier factor higher than the other voluntariness factors. *Iowa v. Ortiz*, 766 N.W.2d 244 (Iowa, 2009). The Iowa Supreme Court said, “because of this language barrier, it was incumbent upon the State to prove that the warnings given to Ortiz in Spanish provided him meaningful advice in a language he could comprehend and on which he could knowingly act.” (*Ortiz* at 253). To put another way, the State had to first prove that Mr. Ortiz could speak and understand English. The police in *Ortiz* also did not give Mr. Ortiz a meaningful *Miranda* warning. (*Id.* At 253). The written warnings were nonsensical, and the oral warnings given by the police interpreter was misinterpreted from the English version. *Id.* The interpreter stated “You have the right to consult with an attorney before *making* any questions and

have said attorney present during the interview” as opposed to someone having the “right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him *prior to any questioning* if he so desires.” *Id.* citing *Miranda*, at 479 (emphasis in original). The Court found that the defendant in *Ortiz* did not make a knowing and intelligent waiver of his rights due to Mr. Ortiz’s lack of language proficiency.

In another case from Colorado, the Colorado Supreme Court suppressed a non-English speaker’s statement in a decision that also gave considerably more weight to the language barrier factor than any of the other *Miranda* factors. *People v. Redgebol*, 184 P.3d 86 (Colo. 2009). In *Redgebol*, the police obtained an interpreter in the defendant’s native language of Dinka. (*Redgebol* at 88). Redgebol’s responses were nonresponsive to the police officer’s questions, including exchanges such as this one from the case:

[Police Officer]: “Okay. First, you have the right to remain silent. Do you understand that?”

Redgebol: He say, “Why should I remain silent” He say, “Why should I keep quiet? I have the right to tell my – to tell the truth.”

[Police Officer]: Yes sir, you have the right to tell the truth. But you also have the right to not tell me anything if you want.

Redgebol: He say, “I will never keep quiet. I have been looking for somebody so that I talk to you for like two days ago, but I found nobody, so since you came I would like to talk to you.

*Redgebol* at 89.

The Colorado Supreme Court found that Mr. Redgebol did not knowingly and intelligently waive his *Miranda* rights in part due to the “substantial miscommunication between the parties.” (*Redgebol* at 92). The miscommunications included “nonresponsive and nonsensical answers.” (*Id.* at 97). The Court did also believe that Redgebol’s “length of time in the country, education, and functioning intelligence level did bear on his depth of understanding such that he could not comprehend his three basic *Miranda* rights as explained by [the interpreter] and [police officer].” (*Id.* at 98). The *Redgebol* case is illustrative of a court’s use of the *Miranda* factors but also a court

focusing and giving more weight to the language barrier between the police interrogator and the interrogated subject.

Most courts have assessed a defendant's language skills, or lack thereof, as one among many of the voluntariness factors, giving the language barrier equal weight to other factors such as age, education, and prior experience with law enforcement. In *State v. Reyes*, the Nebraska Court of Appeals analyzed a defendant's waiver of his *Miranda* rights when the defendant claimed he lacked the ability to speak and understand English. *State v. Reyes*, 794 N.W.2d 886 (Neb.App., 2011). The court looked to federal law stating:

[T]he general conclusion of federal courts considering the issue is that the existence of limitations on language skills does not necessarily bar a finding of a knowing and voluntary waiver and that courts should consider it as a factor in the totality of the circumstances to determine whether or not a defendant's command of English is sufficient to permit the defendant to waive his or her *Miranda* rights." *Reyes*, at 894, referencing *U.S. v. Al-Cholan*, 610 F.3d 945 (6th Cir. 2010); *U.S. v. Marquez*, cited *infra*.

The *Reyes* court noted that "Reyes has lived and worked in the United States for approximately 10 years," conversed with law enforcement in English, and did not request an interpreter. *Reyes* at 895. However, Pavlenko (2008) has demonstrated how a Russian student, with "a high level of interactional competence" (2008:1) in other areas, studying finances in college in the U.S., could not understand the *Miranda* warnings. Not only was she not familiar with the legal terminology but the "linguistic and conceptual complexity of these texts and their cultural specificity" were beyond her English language proficiency level (2008:6).

### **3. a. - The present study**

In this section the focus is on obstacles to full understanding of *Miranda* rights in context of language asymmetry. In order to waive a right one needs to understand what is at stake. The defendant in the case at hand was given the *Miranda* text in written Spanish while the officer read the text in English; but we have no evidence of comprehension on the part of the defendant. The reading of the text in Spanish was done by the defendant very quickly while the PO read the

English text aloud. It is well known that the text in English is not easy reading and faulty translations have been documented as additional obstacles to understanding (Berk-Seligson, S. 2000 and 2009; *People v. Márquez* 1992:4; Pavlenko 2008; Connell and Valladares 2001; Roy 1990). It requires advanced reading ability in any language. It is necessary to analyze the text the defendant received because dialect differences in Spanish may also affect the defendant's comprehension. Providing a translation into Spanish may be seen as a step in the right direction. However, the quality of such translation is also important. To this date, no standard Spanish translation is available (Acosta 2016). Given the complexity of the text in question, the cultural specificity of the *Miranda* rights, and poor reading ability in Spanish may also have damaged understanding of the warnings. Having cursorily read a version in Spanish that he may or may not have understood, he signed under circumstances that leave room for doubt about whether he knew the implications of his signing. The concerns voiced by the American Bar Association's Special Committee on Hispanic Legal Rights and Responsibilities echo concerns that have been publicly discussed in the past but have not materialized in a uniform manner.

Although the results of both the analysis of the interrogation and the ACTFL language proficiency test (administered by a language teacher independently of the expert witness analysis) had indicated that the defendant had a poor comprehension of English, the Court decided that he had a sufficient command of English such that he would have been able to understand the PO's *Miranda* warnings and questions. The Court found that the defendant could knowingly, intelligently, and voluntarily waive *Miranda* because "at the time of the interview [the defendant] was 21 years of age. He has attended secondary school in the United States and worked in the United States for at least two years. He advised the officer that he understood and read English 'a little bit'. He read the [*Miranda*] advisement in Spanish and signed both the English and Spanish version, indicating his understanding."

The Court gave little weight to the language barrier factor and seemed to focus more on the other voluntariness factors in coming to the conclusion that the defendant's waiver of *Miranda* was voluntary. That decision revealed the importance of spreading language-difference awareness among all the parties who implement regulations. The court didn't take into consideration evidence of linguistic asymmetry. Not only had he shown evidence of poor understanding of English but also seemed unfamiliar with the high register of Spanish. ("Register" refers to a level of formality.)

Giving basic biographical information doesn't demonstrate ability to process the legal text in English, nor in Spanish. The defendant misunderstood English words that have a cognate with dissimilar meaning in Spanish. Relevant to the alleged crime is the fact that the defendant did not understand the word 'ejaculate.' The Spanish word *eyacular* resembles its English equivalent in sound, but in Spanish this term is not used in colloquial speech for the meaning the PO intended. *Correrse, venirse*, and other variants are in the terms for male orgasm used in casual contexts. *Ejaculate* is rather a term used in medical context. Educated people would likely know the word's medical sense, but even this usage would be out of the ordinary because *eyacular* more commonly means 'to exclaim.' So there was a lexical impediment:

Extract 1

361 PO: Did you ejaculate?

362 D: Yeah.

363 PO: Oh Ok. You had excited

(imitates bad English grammar as if that will help the ALS understand him)

365 D: yeah it was uh-uh (makes noises and acts something out) when I pss

(makes sign with finger of losing an erection )

367 D: then she say 'damn what the heck?' I don't know, sorry.

368 PO: (puts head in hands) Did you ejaculate?

369 PO: Or... did you squirt... your semen in her or outside of her?

370 D: uh... What I he... when I put it here when pss...

(makes noise and shows loses erection sign, although the noise sounds like a 370 squirt noise in English, PO understands ALS to mean he ejaculated)

...

478 PO: But you ejaculated inside of her when you got in?

479 D: no because it just... (makes sign of losing erection)

480 PO: (interrupts) while it was inside of her? Yes or no? Was it in her vagina?

481 D: no but it \_\_\_\_\_

(makes sign of finger outside hole)

...

646 PO: Ok and then you ejaculated?

(D's body language shows he does not understand that word)

648 D: Yeah.

...

684 PO: Ok. So... first you...she was on top..?

685 D: Yeah, and then... we can't do that... we can't... do...

686 D: cause I'm cause I'm I don't know

687 D: then when I'm... I'm top her

688 D: then done [makes squirt noise but shows gesture of losing erection... PO thinks he is saying that he ejaculated (\*!\*)

In the first part of the extract the defendant is talking about losing his erection. Later, he repeats what the word *ejaculate* meant to him, namely, losing his erection. When the PO keeps repeating the question the defendant's body language demonstrates lack of understanding by making again the sign of losing erection. The fourth segment of extract 1 (lines 684-688) confirms that he hasn't understand the term.

Language as a cultural tool is surrounded by complexities. In considering the role of language practices in bilingual exchanges, dialect is also crucial. Even if translation into Spanish of the oral Miranda advisory or text are provided to the defendant, dialect would still be relevant to our discussion because the various Spanish-speaking countries have somewhat different national varieties (and within many countries, also finer ethnic and socio-economic variations). It is not rare for intra-Spanish differences to partially block comprehension. So to ensure understanding among all parties in a conversation, several linguistic variables should be taken into consideration, more so in a legal context, where language details for better or worse become parts of a record with lasting consequences.

In popular parlance, the term *dialect* is socially-stigmatized as meaning something less than "a language," as canonized in serious contexts like the law. In linguistics, dialect is a neutral term. It simply means a variant of a language peculiar to a particular social setting. Many speakers of any language speak differently in formal contexts than they do among friends and family, but their formal, prestigious speech is no less a dialect than their informal one. The interplay of dialect or variety within and between languages never stops. For CA purposes we need to imagine a

conversation as interplay within a range of language practices, including a spectrum of modes (“registers” of varying formality), styles, and dialects.

Therefore, we need to deconstruct language as a concept in order to understand its effects when used as a discursive tool. No single dialect or style achieves universality because the code of any language is used differently in different practical realms. Interactions are especially strongly affected by this fact in specialized settings like hospitals or the courtroom. Institutions usually privilege one rather narrow set of language usages that is unfamiliar to outsiders – again, even when all have the same L1 -- and this can impede proper results even when nobody intends any impropriety. Language asymmetries increase this hazard. One viewpoint on equity requires that minority language speakers be accorded the protection and institutional support that speakers of the majority language enjoy

We argue that the U.S. legal system should take measures to deal with all proficiency levels in English and also provide an official written translation into the speaker’s native language.

#### **4. – Linguistic assessment**

In some cases linguists and researchers have administered English language proficiency tests at the time of police interrogation (Roy 1990). In this case, the linguistic analysis was done after the interrogation, based on a recording of the session. For the assessment we used sociolinguistic tools as well as the ACFL guidelines explained below.

As an attorney working with immigrants and a linguist familiar with language testing and evaluation, we soon became aware that language testing in forensic contexts requires a different approach from the academic one. Defendants’ literacy levels may be different from those of students or applicants for white-collar jobs. Speech acts in forensic dealings have unusual forms that alter the rules of communication in daily interactions. A speaker aware of the adversarial nature of conversation may nonetheless lack understanding about how details and implications of both parties’ speech will have fateful effects.

##### **4. a. – Interrogation Background**

During this interrogation, the PO was acting as interviewer. The defendant as interviewee was handcuffed. The speech event was a face-to-face interaction in a quasi-legal context, and was a formalized event regulated by norms of the law enforcement setting.

Prior to this interview, the police officer had obtained a statement from the alleged victim. The victim's version of events was reserved as the benchmark against which the suspect's account could be compared and challenged. The content of the alleged victim's statement was made known to the defendant by the police officer during the interrogations. The defendant is asked to describe his current living arrangements and his relationship with the alleged victim. The PO presents the alleged victim's allegations about the sexual contact they have had. At several moments in the interview, the PO's narrative and the defendant's version of the facts contradict each other. But the main point this article explores is that the low English proficiency of the defendant makes the interrogation awkward and frustrating due to the lack of a common linguistic ground for the interrogation.

#### **4. b. - Language barriers for both participants in legal conversations**

In legal operations, the lack of language proficiency creates asymmetrical interactions and therefore, puts Limited-English Proficiency (LEP) interactants at a disadvantage, such as in police interrogations of nonnative speakers of a particular language or variety of a language. If this is the situation, the services of professional interpreters are in order, but the services are not always available to the defendant. Cases of this sort, as Berk-Seligson (2009:2-3) points out, are "in large measure tied to immigrant statuses, in the context of U.S. administration of justice. I argue that Limited-English Proficiency (LEP) immigrants find themselves at a distinct disadvantage in their encounters with U. S. judicial authorities." We have discussed such a disadvantage here, based on data recently collected (Spring 2016).

As Berk-Seligson (2009) points out, language proficiency in the context of police interrogations has a dual relevance. On one hand, the suspect may not be proficient in English while on the other the PO may not be proficient in the language of the defendant. This has been a problem for a long time to which the Department of Justice in the USA responded with an executive order (#13166).

In US universities and corporate settings it is a normal pre-requisite for nonnative speakers of English to provide evidence of English proficiency. This is accomplished by taking the TOEFL

(Test of English as a Foreign Language) exam. But in other contexts (hospitals or legal encounters) such checks are neither required nor administered. This matters because, as we argue here, language proficiency is fundamental to the reliability of information obtained in police interrogations and other legal actions.

## **5.- Language Proficiency and Assessment of the defendant's English**

Even though language assessment is crucial in legal contexts in which nonnative speakers are interrogated, achieving it is not so simply. Language proficiency measurements have not been systematically used in forensic dealings. The instruments for producing such a diagnosis are also under scrutiny (English 2010) for reasons we will explain below.

Language assessment and measurement of communicative effectiveness in a second language are very complex matters. Formal assessment of nonnative speakers' proficiency is only an approximation of individuals' overall linguistic ability because languages are not fixed codes that are learned in chunks but skills learned in the culture of a community. For a minority immigrant, language acquisition depends on integration in the language's community of practice. Some linguists also now question proficiency measurements because the underlying normative assumptions about language that are used (Flores and Lewis 2016).

The linguist who served as an expert in this case used the American Council of Teachers of Foreign Languages (ACTFL) guidelines, which form the standard academic measure of proficiency in language learners of different levels. The attorney complemented her analysis, requesting an independent assessment of his client's English proficiency by another language professional. At the end, both independent evaluations agreed and categorized the defendant's English proficiency as typical of the Novice, Mid-low category. Looking back, we find that this method provided an incomplete view of the defendant's language proficiency, because ACTFL presupposes a whole infrastructure of literacy and educational/career context that does not socio-linguistically resemble the adversarial legal situation.

There should be a way to evaluate cases like this one with a measurement created for the particular situation. A series of task-based activities like the ones discussed by Fiona English (2010) working in London would provide a benchmark. Evaluation should be based on a conversation with a

language professional without the presence of the police or lawyers. This would give a more accurate language assessment than the ex-post evaluation of an interrogation in which the subject was under pressure. Samples collected in a first encounter will measure production of speech suitable for a legal situation. The examiner would look out for vocabulary that is likely to be used in the context of a police examination or cross-examination in court. What the defendant or detainee know about a language will be better reflected in his/her comprehension of input and in speech production. Evaluation would not gauge normative grammar but rather range and assess the clarity of responses: adequate vocabulary, articulated explanation, etc.

In this case, the 2012 ACTFL Proficiency Guidelines were used for language assessment in addition to the conversation and discourse analysis. ACTFL criteria measure linguistic competence by testing four discrete linguistic skills: reading, speaking, writing and listening in “real-world situations.” The levels classified by ACTFL summarize what a language learner can and cannot do with the language:

“For each skill, these guidelines identify five major levels of proficiency: Distinguished, Superior, Advanced, Intermediate, and Novice. The major levels Advanced, Intermediate, and Novice are subdivided into High, Mid, and Low sublevels. The levels of the ACTFL Guidelines describe the continuum of proficiency from that of the highly articulate, well-educated language user to a level of little or no functional ability.” (Preface)

ACTFL testing guidelines group together mastery of the sound system, grammar, and vocabulary of the language. Based on the recording of the police interrogation (November 16, 2015), the defendant’s linguistic competence was assessed as Novice, in the sub-category of Mid-novice. According to ACFL, Novice-level speakers can communicate short in messages on highly predictable, everyday topics that affect them directly. They do so primarily through the use of isolated words and phrases that have been encountered, memorized, and recalled. Novice-level speakers may be difficult to understand even by a sympathetic interlocutor accustomed to nonnative speech. Speakers in the Novice Mid sub-level bracket communicate minimally by using a number of isolated words and memorized phrases limited by the particular context in which the language has been learned. When responding to direct questions, they may say only two or three words at a time, or give an occasional stock answer. They pause frequently as they search for

simple vocabulary or attempt to recycle their own and their interlocutor's words. When called on to handle topics and perform functions associated with the Intermediate level, they frequently resort to repetition, or introduce words from their native language, or become silent.

<http://www.actfl.org/publications/guidelines-and-manudefendant/actfl-proficiency-guidelines-2012>

Specifically, the defendant in the police interrogation in question exhibited the following features in the recorded session: He is unable to narrate events in the past with verbs in past tense. His responses are minimal, using predominantly monosyllables or isolated words. He frequently pauses, searching for vocabulary or failing to understand vocabulary used by the PO. He shows difficulty in understanding questions. He repeats words, and finally, resorts to using words from Spanish or made-up words thinking that they may be English.

For example, he says *\*desblock*, taken from Spanish *desbloquear*, when seeking a verb meaning 'to unblock' a digital source.

Extract 2

- 63 D:** And then... she all time texts me... so I say that I'm... I need to put a block... her...
- 64 D:** and then... *\*desblock* her... again... and then...she... that's fine  
(PO interrupts 'Ok')...

The most salient linguistic feature frustrating understanding between the PO and the defendant is the latter's inability to produce a narrative using past tense verbs. By using verbs in present tenses, he makes the sequence of events confusing and renders his narrative hard to follow. Using verbal forms in past tense indicates a higher level of language proficiency. The defendant does not have effective command of verbal conjugations in any tense.

Examples of confusion in the transcription (marked with *\*!\*!\**) are many. There are 9 cases of misunderstanding between the two participants in this conversation, some of them crucial for the case. (Examples can be found in line numbers: 624-27, 710-16; 732-35; 744-754; 812-841; 876; 883; 898-901; 943).

Let's see this confusion in different extracts from the transcription.

Extract 3

- 624 D: I don't know. But I not leave here I'm so seriously \*!\*\*\*
- 625 D: I'm not leave here I'm leave to [place name] I'm work to [place name]... so... I
- 626 PO: (loudly turning pages) When did you leave?
- 627 D: To [place name]?

Here the PO gest confuses due to defendant's pronunciation of *live* as *leave*. Short vowel pronunciation is one of the main features of a Spanish speaker in English.

Extract 4

- 710 PO: Did you ever... were you able to get in...
- 711 PO: to her vagina at all? (PO confused) \*!\*\*\*
- 712 D: yeah
- 713 PO: Did you use a finger?
- 714 D: yeah \*!\*\*\*
- 715 PO: Did you ever put a finger in her vagina?
- 716 D: (now understands the question) Oh no...

The whole extract illustrates confusion, the defendant says "yeah" but later when the question is rephrased (715) he understands and denies it.

Extract 5

- 732 PO: (raises voice) Why do you think [victim's name] waited until now to tell us about this?
- 733 D: I don't know, I don't, I think so (\*!\*\*\*)
- 734 PO: When she told you she was pregnant...
- 735 PO: or thought she was pregnant

The answer given to the PO is completely incoherent. It seems he is using "*I think so*" as a memorized expression and he uses it with no regard for the substance of preceding sentences.

In addition to the instances of overt non-understanding, the defendant confuses the uses of the verbs *do* and *be* (Line numbers: **13-15**)

Extract 6

**13** PO: Alright. You are [first and last name of defendant]?

**14** D: Yeah, I do.

**15** PO: That's you?

Confusion of personal pronoun *she* with the possessive form *her* (Line number: **225**).

Extract 7

**225** D: She's pregnant? I don't know. How much, how many months have her but...

In this example, the defendant's response exhibits confusion between *she* and *her*. The word order displays one of many transfers from Spanish word order. "How many months have her" carries over the word order "cuántos meses tiene (*have*) ella (*she*)."

Verbal conjugations are marked by the absence of the copula *to be*. For example instead of *I am scared*, he only says *\*I scared* (Line number: **312**). Or the auxiliary verb *do* is missing, as in *\*I no like her* (Line numbers: **589**). His third person singular conjugations most of the time miss the final *-s* as in *\*She ask me* (Line numbers: **398; 783; 842; 966**).

The defendant's vocabulary in English is very basic. The influence of Spanish is notable in expressions that require in English the use of the verb *to be*. Instead, the defendant uses *to have* based on Spanish *tener*, as in *\*I have thirteen years*. (Line: **990**). What is crucial is that the defendant does not understand some of the PO's English vocabulary. He misses crucial words such as 'relationship', 'dating', 'ejaculate', 'silo', 'pregnant', and 'location,' which makes it impossible to answer the PO's questions accurately.

The defendant sometimes says he doesn't understand. Then PO explains, rephrasing the questions (extract 4) or drawing pictures on a paper (extract 9) and also making gestures (extracts 8 & 9).

The answers show this did not overcome the difficulty. The defendant also resorts to gestures to explain himself.

Extract 8

- 353 D: huh? (doesn't understand)
- 354 PO: Why wouldn't it work?
- 355 D: with a \_\_\_\_\_? (doesn't understand)
- 356 PO: Why couldn't you get a... ? Keep your penis hard?  
(making sign with finger)
- 358 D: I don't know

Extract 9

- 573 PO: Everything... from texting on phones  
(acts out texting with hands)
- 575 PO: to messenger... éverything...
- 576 D: (nods)

Extract 10

- 404 In the front seat!?! (with disbelief)
- 405 D: uh the... \_\_\_\_\_
- 406 PO: The back.
- 407 D: yeah
- 408 PO: Ok. (talking in short words. Drawing on paper) Car. Steering wheel.
- 409 PO: Driver's seat. Passenger seat. Back seat.

Most answers given by the defendant consist of a single word or even syllable. The defendant keeps saying “yeah”, “yeah” but there is no evidence he understands what the PO means. When that is not the case, the structure of the defendant’s sentences use the syntax typical of a novice second language learner, namely, short answers, many of them repeating of previously said words. Rarely, he produces a well-formed sentence like the following, a request for an explanation in

Spanish. *Can you explain a little bit in ... in Spanish?* (Line: 26). Relatively long utterances in the defendant's answers are repetitive. The length of these sentences is due to the joining of short expressions, all connected by the most frequent conjunctions *and* and *then*.

The defendant's speech in English shows other novice characteristics less consequential for the understanding of the conversation. For example, he uses the phrase *\*I am seriously* 10 times but this does not block comprehension. It is just his particular rendition of *I am serious* (Lines: 256; 448; 455; 527; 530; 612; 624; 848; 968).

A final observation concerns body language, hesitations, pauses, nodding, etc. that are not registered in ordinary writing and may not seem to the casual observer to be explicit communications. They do, however, provide important information to a trained conversation analyst. "Laugh tokens" indicate nervousness, for example. Defendant's laugh tokens are: *Heh, Hih, Hn* which indicate nervousness. Frequent nervous laughter suggests that he feels his conversation with PO is not going well.

In this section we have analyzed the defendant's English and concluded that it is very rudimentary with regard to the subject about which he is being questioned. His answers are short, oftentimes monosyllabic. He cannot understand the questions the PO asks due to lack of vocabulary and low command of English structures. This linguistic disparity in and of itself creates more tension than one would expect if the two participants were both native English speakers. The course of the interaction in this encounter was profoundly influenced by lack of parity. PO's sentences in English are fully-formed, while the defendant's answers are limited to: *No, yep, OK, yeah, I do, mhm, a little bit*. He uses numbers (date of birth, address and telephone number). However, using basic numbers in a second language is not considered evidence of a high level of language proficiency.

On the other hand, the police officer uses short sentences in Spanish but gives no evidence of high level of proficiency in that language. The interrogated subject, the defendant, uses English and demonstrates a low proficiency in it. The defendant in our case should be considered an *emergent bilingual*; in the future he may succeed in learning English as an additional language. In the meantime, he should have been interrogated with the assistance of a certified interpreter. The common situation of incipient bilingualism affects minority rights, education of minorities and national language policies but this is not taken into consideration by the justice system in the U.S.

## **6. - Conclusion**

Through our analysis of the data we have shown that the defendant does not have sufficient command of English to understand the questions, let alone to respond appropriately. Linguistic asymmetry between participants resulted in linguistic difficulties that impeded successful communication and introduced a barrier to understanding the *Miranda* warning. The analysis focused on the impediments to the progress of NS-NNS interaction and not on the participants' grammatical correctness. It is obvious that an interpreter was needed but one was not provided.

The analyzed data warrants two observations. First, the defendant has language difficulties and is sometimes unable to understand what the PO says to him. The defendant asks for explanations in Spanish but they are not provided. The PO provides only token Spanish such as *Entiende?* 'Do you understand?' Or *Entiende número tres?* 'Do you understand number three?' The conversation shows limited mutual understanding. Second, based on the linguistic profile of the defendant, and the fact that participants do not share linguistic resources, there are doubts but not evidence about the defendant's Miranda warning comprehension.

The findings presented here provide further examples of the challenges that the legal system faces in a multilingual society where English is not the dominant language of the persons involved. Knowledge of potential interactional trouble spots is crucial for institutions that perform their activities mostly in and through language exchanges. Legal institutions are one example of an institution of this sort. The fact that the defendant was not capable of following the PO's questioning due to the former's lack of English made the interrogation flawed if not useless.

We would like to increase public awareness of the fact that the language proficiency of nonnative defendants/detainees is highly relevant to the administration of justice. We intend to contribute to technical solutions that would lessen language-derived inequities.

### **Conventions used in the transcription**

The transcription identifies the participants as PO = Police Offices and D = Defendant.

925	Line notation, indicating the registered sentence in the transcription
_____	Stretch of unclear or unintelligible speech
Plain italics	Words that serve as an example in the text of the analysis
<b><i>Italics and bold</i></b>	Spanish words in the interrogatory
Stressed vowel	Adding emphasis as in <i>relaciónship éverything</i>
(.)	Very short untimed pause
?	Ordinary question
(?)	Indication of transcriber's doubt about a word
...	Impression of an incomplete expression
( )	Non-verbal actions or analyst's comments
[Bracketed]	English translations located below the original utterance, e.g. <i>Entiende?</i> [Do you understand?]
*	Erroneous linguistic form (verb tense, pronoun, lexicon, etc.)
*!*!*	Total lack of understanding between the participants

### Cases cited

*Iowa v. Ortiz*. [2009] 766 N.W.2d 244.

*Miranda v. Arizona*. [1966] 384 U.S. 436, 86 S.Ct.1602, 16 L.Ed.2d 694.

*State v. Reyes*. [2011] 794 N.W.2d 886 (Neb.App.).

*United States v. Al-Cholan*. [2010] 610 F.3d 945 (6th Cir.).

*United States v. Perez-Lopez*. [2003] 348 F.3d 839, 848 (9th Cir.).

*United States v. Marquez*. [2010] 605 F.3d 604 (8th Cir.).

## Bibliography cited

ACFL. 2016. <http://www.actfl.org/publications/guidelines-and-manudefendant/actfl-proficiency-guidelines-2012> (Accessed on March 10, 2016).

Acosta, Alex. 2016. Interviewed for *Lawyers Push for Spanish-Language Miranda Warnings* by Allison Aubrey, "All Things Considered", National Public Radio, August 13, 2016, 5:00 p.m. Audio format.

Benneworth-Gray, Kelly. 2014. 'Are you going to tell me the truth today?' Invoking obligations of honesty in police-suspect obligations of honesty in police-suspect interviews. *The International Journal of Speech, Language and the Law*, vol. 21.2 251-277.

Berk-Seligson, S. 2000. Interpreting for the police: Issues in pre-trial phases of the judicial process. *Forensic Linguistics*, 7:212-237.

\_\_\_\_\_. 2002. *The Bilingual Courtroom: Court Interpreters in the Judicial Process*. Chicago: University of Chicago Press.

\_\_\_\_\_. 2009. *Coerced Confessions: The Discourse of Bilingual Police Interrogations*. Berlin, NY: Mouton de Gruyter.

Connell, J. and R. Valladares. 2001. Cultural factors in motions to suppress. *The Champion*. <https://www.nacdl.org/Champion.aspx?id=22754> (Accessed on Dec. 11, 2016)

Crawford, J. 2000. *At War with Diversity: U.S. Language Policy in the Age of Anxiety*. Clevedon: Multilingual Matters.

Drew, P., Chatwin, J. and Collins, S. 2001. Conversation Analysis: a method for research into interactions between patients and health-care Professionthe defendant. *Health Expectations* 4:58-70.

Eggins, S. and Slade, D. 2004. *Analysing Casual Conversation*. London: Equinox.

English, F. 2010. Assessing non-native speaking detainees' English language proficiency. In *The Routledge Handbook of Forensic Linguistics*. Ed. M. Coulthard and A. Johnson. London and New York: Routledge, 423-439.

- Fairclough, N. 2003. *Analysing Discourse: Textual Analysis for Social Research*. London: Routledge.
- Flores, N. and M. Lewis. 2016. From truncated to sociopolitical emergence: A critique of super-diversity in sociolinguistics. *IJSL* 246:97-124.
- Garcia, Ofelia. 2009. *Bilingual Education in the 21<sup>st</sup> Century: A Global Perspective*. Willey-Blackwell.
- Garfinkel, E. 1967. *Studies in Ethnomethodology*. Englewood Cliffs, N.J.: Prentice-Hall.
- Garner, Mark. 2007. Techniques of Analysis. In *The Routledge Companion to Sociolinguistics*. Llamas, C., Mullany, L., Stockwel, P, eds. London: Routledge, 41-47.
- Goffman, E. 1972. *Interaction Ritual: Essays on Face-to-Face Behaviour*. London: Allen Lane.
- Gumperz, J.J. 2001 [1982]. Interethnic Communication. In *Discourse Theory and Practice: A Reader*. M, Wetherell, S. Taylor and S. Yates, eds. Los Angeles: Sage. 138-149.
- Holt, E. and A. Johnson. 2013. Socio-pragmatic aspects of legal talk: police interviews and trial discourse. In *The Routledge Handbook of Forensic Linguistics*. Ed. M. Coulthard and A. Johnson. London and New York: Routledge, 21-36.
- Llamas, C., Mullany, L., Stockwel, P, Eds. *The Routledge Companion to Sociolinguistics*. London: Routledge.
- Mehan, H. 2001. The Construction of an LD Student: A case Study in the Politics of Representation. In *Discourse Theory and Practice: A Reader*. M, Wetherell, S. Taylor and S. Yates, eds. Los Angeles: Sage. 345-363
- Oberlander, Lois B. and Naomi E. Goldstein. 2001. A Review and Update on the Practice of Evaluating *Miranda* Comprehension. *Behavioral Sciences and the Law*. 19: 453-471.
- Roy, J. 1990. The difficulties of limited-English proficient individuals in legal settings. In Rieber, R. and W. Stewart, eds. *The language scientist as expert in the legal setting: Issues in forensic linguistics*. New York: The New York Academy of Sciences, pp. 73-83.

- Sacks, H. 1972. An initial investigation of the usability of conversational materials for doing sociology. In *Studies in Social Interaction*, New York: Free Press, 31-74.
- Schegloff, E.A. 1987. Some sources of misunderstanding in talk-in-interaction. *Linguistics* 25: 201-18.
- Silverman, D. 2001. The Construction of 'Delicate' Objects in Counselling. In *Discourse Theory and Practice: A Reader*. M, Wetherell, S. Taylor and S. Yates, eds. Los Angeles: Sage. 119-137..
- U.S. Constitution 5<sup>th</sup> Amendment
- Van Dijk, T. 2001. Principles of Critical Discourse Analysis. In *Discourse Theory and Practice: A Reader*. M, Wetherell, S. Taylor and S. Yates, eds. Los Angeles: Sage. 300-317.
- Wooffitt, R. 2005. *Conversation Analysis and Discourse Analysis: A Comparative and Critical Introduction*. London: Sage.
- Yates, S.J. 2001. Researching internet interaction: sociolinguistics and corpus analysis. In *Discourse as Data: A Guide for Analysis*. London: Sage.