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NOTES

YOU HAVE THE RIGHT TO REMAIN MISUNDERSTOOD: THE IMPACT OF *MIRANDA*'S HIGH LINGUISTIC STANDARDS ON NON-NATIVE ENGLISH SPEAKERS INVOKING THEIR RIGHTS

Adriana Nikolova

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Adriana Nikolova*

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INTRODUCTION

Justice is blind. Yet, in many instances, the American criminal justice system, predicated on this promise of impartiality, weaponizes this blindness at the expense of marginalized groups, such as women and minorities, under the guise of upholding "fair," bright-line legal standards. One such marginalized group makes up a significant portion of the American population: non-native English speakers.

Take, for instance, the following scenario. You, a non-native speaker of English with rather shaky confidence in your pronunciation and sentence structuring, are taken into custody on suspicion of a crime and read your *Miranda* warnings. You sign a waiver, since the officers assured you that they just had a few questions, and you know you have nothing to hide. The second your pen lifted from the page where you left your signature to waive your rights, you are then suddenly "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," to take the famous words of Chief Justice Warren in *Miranda v. Arizona*.[1] The officers corner you into jumbling up your words, your recollection, and your confidence. Flustered and with your mind racing, you begin to struggle to produce simple English sentences. The word for "lawyer" slips your mind just as you begin to wonder whether you should have asked for the presence of one during the questioning. Your statements become filled with "ums" and long, awkward pauses, which bother the short-tempered officers and only speeds up the rate of their questioning.

Fifteen minutes in, or maybe even an hour in, you decide enough is enough. Under the intense glares of the interrogating officers, you ask, "Maybe I want a . . . um . . . lawyer? I can have a lawyer here, can't I?" You slip in the "maybe" so as to not offend your intimidating interrogators. Your pitch rises in each sentence, primarily because of your anxiety triggered by the intense questioning and having to assert your right in your non-native language, but to the officers, your rising intonation just makes you seem hesitant and confused.

The officers do not ask any clarifying questions. They also do not stop the interrogation. They do not pause to allow you to call your attorney, and they also do not pause to find out if they can have a public defender come in for the remainder of the interrogation, in case you do not have an attorney. Instead, they continue the questioning, extracting more incriminating statements despite your attempt to request a lawyer's presence, as is your right under the Fifth Amendment.

[1] Miranda v. Arizona, 384 U.S. 436, 457 (1966).

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The Supreme Court of the United States has found that this sort of behavior is constitutionally acceptable.[2] The Court set a bright-line standard for the invocation of a suspect's *Miranda* rights,[3] yet arguably also set an outlandishly strict linguistic standard for that invocation. By requiring suspects to unambiguously and unequivocally assert their *Miranda* rights, including their right to remain silent and their right to have an attorney present,[4] the constitutional protections afforded by *Miranda* are at risk of being minimized for suspects who fail to satisfy the particular language preferences of the Court.

Although a non-native suspect's level of English language proficiency has been taken into consideration when determining if the suspect fully understood their *Miranda* rights before waiving them, no such consideration has been given in determining whether a non-native suspect adequately *invoked* their *Miranda* rights.[5] Given the distinct psycholinguistic differences between native and non-native speech production,[6] it is unclear why the implications of invoking legal rights have not been studied further.

In this Note, I seek to illuminate the current gaps in this cross-section between psycholinguistics and law, proposing a direction for future research and modified legal practices in *Miranda* settings. In Part I, I begin by discussing the development of the *Miranda* doctrine, including the nuances in waiving and asserting the enumerated rights. I describe the critiques of scholars regarding the disproportionate impacts on women and non-native English speakers effectuated by the language-related *Miranda* rules, identifying the limitations and gaps therein. In Part II, I investigate the relevant psycholinguistic research surrounding non-native language speech production and perception, highlighting the important prosodic differences in intonation and pause patterns as compared to native English speech. Such differences

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[2] Davis v. United States, 512 U.S. 452, 459–62 (1994).

[3] *See id.* at 461–62.

[4] *Id.*; Berghuis v. Thompkins, 560 U.S. 370, 381–82 (2010); *see also* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[5] *See* State v. Klos, 455 P.3d 739, 743–44 (Ariz. Ct. App. 2019); United States v. Hadjiev, 535 F. Supp. 3d 328, 333 (E.D. Pa. 2021); Aneta Pavlenko, *"I'm Very Not About the Law Part": Nonnative Speakers of English and the* Miranda *Warnings*, 42(1) TESOL Q. 1, 26 (2008); Alicia Maria Puñales Morejón, *Can You Hear Me Now?: Contextualizing Miranda Rights for Low English Proficient Individuals*, 24 HARV. LATINX L. REV. 111, 114 (2021); Aneta Pavlenko, *Language Proficiency as a Matter of Law: Judicial Reasoning on Miranda Waivers by Speakers with Limited English Proficiency (LEP)*, INT'L J. SEMIOTICS L. 329, 350 (2024); Aneta Pavlenko, Elizabeth Hepford & Scott Jarvis, *An Illusion of Understanding: How Native and Non-native Speakers of English Understand (and Misunderstand) their* Miranda *Rights*, 26 INT'L J. SPEECH, LANG. & L. 1 (2019).

[6] *See infra* Part II.

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may have critical impacts on speech perception and comprehension by listeners of non-native speech. In Part III, I draw out the implications derived from the studies in Part II into the *Miranda* interrogation setting, explaining how non-native speech patterns may disadvantage non-native English-speaking suspects being interrogated by making it more difficult for them to adequately invoke their *Miranda* rights. In Part IV, I discuss the limitations of my argument, suggesting further research targeting the specific context of interrogation settings for non-native speech production. I also suggest new legal avenues for dealing with the potential disadvantages posed by *Miranda* onto non-native English-speaking populations. I conclude by reemphasizing the need for a closer evaluation as to the effects of high linguistic standards for invocation of *Miranda* rights onto suspects who may not be as linguistically competent or confident as the Supreme Court seems to require.

I. THE DEVELOPMENT (AND LIMITATIONS) OF *MIRANDA* PROTECTIONS

In the monumental decision of *Miranda v. Arizona*, the Supreme Court held that the Constitution affords certain protections to individuals questioned by authorities while in custody, finding that a detainee must be notified of his "right to remain silent, that anything he says can be used against him in a court of law, that he has 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."[7] Invocation of such rights is to be "scrupulously honored," and the opportunity to invoke these rights "must be afforded to him throughout the interrogation."[8] A waiver of such rights must be made "knowingly and intelligently."[9]

With such a monumental holding by the Court, a new body of case law emerged to define the details and procedural requirements of the *Miranda* protections.[10] In *Edwards v. Arizona*, the Court held firm that once a detainee invoked his right to the presence of counsel during the interrogation, the police were constitutionally prohibited from continuing the questioning unless and until counsel was provided,[11]

[7] 384 U.S. at 479.

[8] *Id.*

[9] *Id.*

[10] *See* Case Comment, *The Declining* Miranda *Doctrine: The Supreme Court's Development of* Miranda *Issues*, 36 WASH. & LEE L. REV. 259, 260 (1979).

[11] Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

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parallel to how the Court in *Miranda* asserted that the right of silence was to be "scrupulously honored" by interrogating officials.[12]

Next, the Supreme Court ruled on the specific issue of how a detainee was to invoke their rights. The Court in *Davis v. United States* announced that invocation of the right to the presence of counsel during questioning needed to be an unambiguous and unequivocal request, such "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[13] The decision favored the interrogators, granting them the deferential standard of reasonability while demanding a strict, clear, and unambiguous linguistic standard for the interrogated. In fact, the *Davis* Court recognized this inherent disadvantage, conceding that some suspects who "because of fear, intimidation, [or] lack of linguistic skills . . . will not clearly articulate their right to counsel although they actually want to have a lawyer present."[14] Moreover, the Court refused to readjust this imbalance to require interrogating officials to ask clarifying questions when facing an ambiguous or equivocal request.[15] In a scathing concurrence, Justice Souter criticized the majority's unwillingness to require clarification efforts on the part of the interrogators.[16] Justice Souter emphasized that "[a] substantial percentage of [suspects] lack anything like a confident command of the English language . . . and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them."[17] Justice Souter argued that asking clarifying questions would ensure that these suspects are still afforded their constitutional protections.[18]

Sixteen years later, the Court again held that a clear and unambiguous invocation of a suspect's *Miranda* rights was required, even for the right to remain silent,[19] which is somewhat backwards and contradictory logic. Yes, oddly enough, the Supreme Court held that if a suspect wants to assert their right to remain silent,

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[12] 384 U.S. at 479.

[13] Davis v. United States, 512 U.S. 452, 459 (1994).

[14] *Id.* at 460.

[15] *Id.* at 461.

[16] *Id.* at 473 (Souter, J., concurring).

[17] *Id.* at 469–70.

[18] *Id.* at 468–69.

[19] Berghuis v. Thompkins, 560 U.S. 370, 381 (2010).

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they have to unsilence themselves to unambiguously and unequivocally *say* just that.[20]

The Supreme Court set a clear direction for what constitutes an effective invocation of one's *Miranda* rights: the invocation must be unambiguous and unequivocal.[21] This high linguistic standard led to a series of cases in which phrases like "Could I call my lawyer?"[22] or "I just don't think I should say anything"[23] were just not enough for the courts to find that an invocation of the right to have an attorney present during questioning or an invocation of the right to remain silent had occurred.[24] An "invocation that is not assertive *enough*" has been interpreted as essentially too ambiguous for the *Davis* standard.[25]

Janet Ainsworth explores the rigid linguistic requirements set forth by the Court, specifically as to how the requirements disproportionately impact women.[26] Ainsworth argues that the 'unambiguous and unequivocal' requirement protects "those who use direct and assertive modes of expression" while penalizing "those who adopt indirect or unqualified ways of speaking," which has been observed more often in women and ethnic minorities who "have historically been powerless within society."[27] Although she notes that any person in police custody, an inherently confrontational setting, might naturally use less assertive language[28] due to the

[20] *Id.*

[21] Davis v. United States, 512 U.S. 452, 459 (1994); 560 U.S. at 381. *See also* 384 U.S. at 473–74 (providing the "in any manner" language which was the basis upon which the unambiguous and unequivocal standard evolved).

[22] Dormire v. Wilkinson, 249 F.3d 801, 803 (8th Cir. 2001).

[23] Burket v. Angelone, 208 F.3d 172, 196 (4th Cir. 2000).

[24] *See, e.g.*, 249 F.3d at 805; 208 F.3d at 199–200. *See also* Clark v. Murphy, 331 F.3d 1062, 1070 (9th Cir. 2003) ("I think I would like to talk to a lawyer."); James v. Marshall, 322 F.3d 103, 105 (1st Cir. 2003) ("Do you want to make a statement at this time?" "Nope."); Midkiff v. Commonwealth, 462 S.E.2d 112, 114 (Va. 1995) ("I'll be honest with you, I'm scared to say anything without talking to a lawyer."); State v. Hickles, 929 P.2d 141, 147 (Kan. 1996) ("I don't have anything to say.").

[25] United States v. Abdallah, 911 F.3d 201, 212 (4th Cir. 2018).

[26] Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 263 (1993).

[27] *Id.* at 261.

[28] *Id.*; *see also* Janet Ainsworth, *You Have the Right to Remain Silent . . . but Only if You Ask for It Just So: The Role of Linguistic Ideology in American Police Interrogation Law*, 15 INTL. J. SPEECH, LANG. & LAW 1, 11 (2008) (noting that from a linguistic standpoint, people tend to frequently use indirect imperatives, even as intended to be interpreted as unequivocal demands, in all kinds of different settings, so the hyper-literal interpretations by the courts contradicts basic linguistic principles of communication).

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intimidating context, Ainsworth points out that women tend to employ "indirect and deferential speech patterns" much more often than men.[29]

Female speech patterns often include the use of hedges, tag questions, modal verbs, avoidance of imperatives, the use of indirect interrogatives, and rising intonation, even in declarative statements.[30] Hedges are expressions that muddle the precision of a particular statement, such as "kind of," "about," "to some extent," and "perhaps," and women employ notably more hedges in their speech than men.[31] Tag questions are questions added to the end of a declarative statement that, in English, are used to seek confirmation, to avoid confrontation with the addressee, or to express uncertainty and indirectness of one's own statement.[32] Use of modal verbs, such as "may," "might," and "could," as well as avoidance of direct imperatives ("Would it be possible to have a muffin?" instead of "Give me a muffin.") comprise more of female speech patterns than male speech patterns, likely because women are socialized from a young age to be polite and avoid being bossy or demanding.[33] Further, women tend to adopt a rising intonation broadly, even for declarative statements, despite the fact that the rising intonation pattern is typically used in the English language to ask questions.[34] These speech patterns that exist more commonly in females ultimately prove to be ineffective in police interrogation settings where the utmost clarity is required for *Miranda* rights invocations, since these patterns convey uncertainty and soften the directness and assertiveness of a statement.[35] Case law tends to categorize questions concerning rights, indirect or tentative speech, and hedges as markers of ambiguity.[36]

In a similar linguistic vein, much research has been dedicated to exploring the cross-section between *Miranda* rights and non-native English speakers, specifically focusing on the adequacy of non-native English comprehension of the *Miranda* rights and the efficacy of subsequent waivers. Although courts will set aside *Miranda*

[29] Ainsworth, *supra* note 26, at 262.

[30] *Id.* at 275–76.

[31] *Id.* at 276.

[32] *Id.* at 277–79.

[33] *Id.* at 280–81.

[34] *Id.* at 282.

[35] *Id.* at 284, 290.

[36] Marcy Strauss, *The Sounds of Silence; Reconsidering the Invocation of the Right to Remain Silent under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 789–91 (2009); *see, e.g.*, State v. Piatnitsky, 325 P.3d 167, 174 (Wash. 2014) (Wiggins, J., dissenting) (noting that equivocal words like "maybe" or conditional words like "if" would be markers of ambiguity).

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waivers if it is demonstrated that the suspect clearly did not have the requisite English language competency to understand the waivers,[37] what constitutes a valid waiver of *Miranda* rights by non-native English speakers is still unclear. The mere fact that a suspect is a non-native speaker is insufficient to invalidate a *Miranda* waiver as being made unknowingly or without an understanding of the rights.[38] Some factors that courts have considered in determining whether there was a knowing waiver include "what effort the officer made to communicate, whether the defendant responded that he understood his rights[,] . . . and what the defendant displayed in English language skills."[39]

However, these factors carry several limitations. For instance, one study found that most non-native English speaker participants failed to understand their *Miranda* rights, and further, their affirmations that they did indeed understand the warnings did not actually correlate to a full understanding.[40] During in-custody interrogations, interrogators may assume the non-native English speaker's level of comprehension is higher than it actually is because of the speaker's ability to answer basic questions, which in turn may allow interrogators to exploit the vulnerabilities of non-native English speakers.[41] *Miranda* waivers can hardly be considered knowing and voluntary when the suspect does not understand them. In *State v. Klos*, a non-native English-speaking suspect signed a *Miranda* waiver despite not having particularly strong English skills.[42] The suspect also explicitly stated, "Okay right now, maybe that is the way we should do because I do not understand[,]" in response to the *Miranda* warning that she was able to be appointed an attorney if she did not have one prior to questioning.[43] The court upheld the validity of her *Miranda* waiver, finding that her English skills were sufficient.[44] Moreover, non-native English speakers, many of whom are immigrants, may not be familiar with the American

[37] *See* Aneta Pavlenko, *Language Proficiency as a Matter of Law: Judicial Reasoning on* Miranda *Waivers by Speakers with Limited English Proficiency (LEP)*, INT'L J. . L. 329, 332 (2023).

[38] *See* United States v. Hadjiev, 535 F. Supp. 3d 328, 333 (E.D. Pa. 2021).

[39] Puñales Morejón, *supra* note 5, at 127.

[40] Pavlenko et al., *supra* note 5, at 16.

[41] Pavlenko, *supra* note 37, at 351.

[42] State v. Klos, 455 P.3d 739 (Ariz. Ct. App. 2019).

[43] *Id.* at 741–42.

[44] *Id.* at 744.

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legal system and their right to remain silent, instead believing that they have to speak to the police in an interrogation setting.[45]

Furthermore, the *Miranda* warnings themselves are syntactically difficult to understand, even for a native English speaker. One scholar notes that the high number of embedded clauses in one single sentence, the use of low-frequency terms such as "afford," and the inclusion of legal phrases such as "waiver of rights" make the sentence processing of the *Miranda* warnings slowed and arduous.[46] And for the few interrogators who actually provide a translation of the *Miranda* warnings, they are often inaccurate, missing, or misconstruing major points of the *Miranda* protections.[47]

Among all the linguistic troubles associated with *Miranda* rights, one subject has yet to be fully explained: how well can non-native English speakers *invoke* their *Miranda* rights after they have initially waived them? Waiver of *Miranda* rights is a separate legal question,[48] which has been explored somewhat in the non-native English speaker context. However, it is reasonable to imagine that female speech patterns such as hedging or rising intonation, which disadvantage women in the interrogation context when attempting to *invoke* their *Miranda* rights, may also apply to other suspects invoking their *Miranda* rights who lack confidence or competence in the English language. In the next Part, I explore the speech patterns observed in non-native English speakers that may impact their ability to effectively invoke their *Miranda* rights.

II. SPEECH PATTERNS OF NON-NATIVE SPEAKERS

Speech patterns of non-native English speakers, especially those who are not at a level of near-fluency, may result in miscommunication and misinterpretation on the part of a listener. Regarding the substantive content of non-native speech, one reliable indicator that the speaker is not a native English speaker is the misuse of multi-word language units (lexical bundles); in other words, non-native speakers tend to make more mistakes when trying to employ phrases comprised of words that repeatedly appear fixed together more frequently than expected by pure chance ("point of view," "on the other hand," "by the way," "court of law," "take a look

[45] Pavlenko et al., *supra* note 5, at 4.

[46] Pavlenko, *"I'm Very Not About the Law Part": Nonnative Speakers of English and the Miranda Warnings*, *supra* note 5, at 5–6.

[47] Pavlenko et al., *supra* note 5, at 3–4.

[48] Smith v. Illinois, 469 U.S. 91, 98 (1984).

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at").[49] Conversely, a strong grasp of English lexical bundles is typically indicative of native-like fluency.[50]

Moreover, studies show that non-native English speakers tend to use particular word choice and sentence structuring, including syntactic and lexical mitigators, to soften the tone of their requests.[51] In a neutral, ordinary social setting, requests often require the speaker to make adjustments to their word choice and sentence structuring in order to convey politeness, a task which typically requires that the speaker understands the context in which they are making the request.[52] This level of understanding depends on the speaker's awareness of what sort of behavior is acceptable and expected.[53] Successful performance of such linguistic processing often results in hedging, questioning, or even apologizing.[54] In a study comparing non-native English speakers and native English speakers making requests, non-native speakers demonstrated a preference for preparatory interrogatives (i.e., asking initial indirect questions to set the scene for later more direct requests) and hinting rather than using direct language.[55] Another study noted that non-native speakers, as compared to native speakers, used a larger variety of syntactic downgraders (the use of conditionals like "if I do *X*, could I get *Y*?") and more lexical understaters ("a little bit") when making requests.[56]

In a study investigating non-native versus native speakers' responses to requests, researchers noted that the two groups approached the responses very differently.[57] While native speakers responded to requests with a direct, business-like frame, non-native speakers spoke in a more friendly tone, which ultimately was

[49] Scott Crossley & Thomas Lee Salsbury, *The Development of Lexical Bundle Accuracy and Production in English Second Language Speakers*, 49 IRAL 1, 3–4 (2011).

[50] *Id.*

[51] *See* Caryn Francis, *Talk to Me! The Development of Request Strategies in Non-Native Speakers of English*, 13 WORKING PAPERS IN EDUC. LINGUISTICS 23, 24–25, 38 (1997); Jasone Cenoz Iragui, *Requests and Apologies: A Comparison Between Native and Non-native Speakers of English*, 18 ATLANTIS 53, 56 (1996); Carmen Garcia, *Responses to a Request by Native and Non-Native English Speakers: Deference vs. Camaraderie*, 11 MULTILINGUA 387, 393, 400–02 (1992).

[52] Francis, *supra* note 51, at 24.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 38.

[56] Iragui, *supra* note 51.

[57] Garcia, *supra* note 51.

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more difficult to follow and impractical for the request context.[58] Importantly, non-native speakers used highly expressive language but failed to elaborate or confirm their responses to the request, leaving the listener unsure about whether the request would be fulfilled.[59]

Beyond the actual content of non-native speech, the prosody and performance of non-native speakers highlights the risks of miscommunication. Improper use of prosody—the patterns of rhythm, intonation, pausing, and emphasis in spoken language—could lead to significant comprehension issues.[60] Non-native speakers have an extra level of language processing they must complete in order to produce speech in their non-native language, causing an increase in working memory load as the speaker attempts to retrieve the words they want to use from their memory while simultaneously planning the execution of their idea into spoken word.[61] Such cognitive overload may lead to increased pauses, especially in face-to-face interaction.[62] Indeed, several studies note that non-native speakers pause significantly more often and longer than native speakers, especially in the middle of clauses and utterances, which sounds unnatural to a native listener and can indicate hesitation or difficulty.[63] Conversely, being "hesitation free" is typically a determinative factor in finding fluency.[64]

Intonation, one of the main components of prosody, also poses some trouble for non-native speakers. Intonation consists of changes in pitch throughout the sentence to convey a particular attitude or emotion.[65] Even the slightest deviation from the intended intonation can suggest an entirely different message as perceived

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[58] *See id.* at 393.

[59] *See id.* at 400–02.

[60] Christiane Ulbrich, *Acquisition of Regional Pitch Patterns in L2*, SPEECH PROSODY 575, 576 (2008); Pavel Trofimovich & Wendy Baker, *Learning Second Language Suprasegmentals: Effect of L2 Experience on Prosody and Fluency Characteristics of L2 Speech*, 28 STUDS. SECOND LANGUAGE ACQUISITION 1, 2 (2006).

[61] Michaela Albl-Mikasa, *Who's Afraid of ELF: "Failed" Natives or Non-Native Speakers Struggling to Express Themselves*, *in* DIMENSIONS OF SECOND LANGUAGE RESEARCH 109, 125 (2009).

[62] *See id.*

[63] Trofimovich & Baker, *supra* note 60, at 18–19; Parvaneh Tavakoli, *Pausing Patterns: Differences Between L2 Learners and Native Speakers*, 65 ELT J. 71, 77 (2010); Nivja H. de Jong, *Predicting Pauses in L1 and L2 Speech: The Effects of Utterance Boundaries in Word Frequency*, 54 INT'L REV. OF APPLIED LINGUISTICS TEACHING 113, 113 (2016).

[64] Tavakoli, *supra* note 63, at 72.

[65] Maria Gabriela Valenzuela Farías, *A Comparative Analysis of Intonation Between Spanish and English Speakers in Tag Questions, Wh-Questions, Inverted Questions, and Repetition Questions*, 13 REVISTA BRASILEIRA DE LINGUÍSTICA APLICADA [BRAZILIAN J. APPLIED LANGUAGES] 1061, 1062–64 (2013).

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by a listener.[66] Moreover, languages across the world vary greatly in the acceptable range of intonation.[67] Non-native speakers who lack exposure to the intricacies of a particular language's intonation patterns in turn often have difficulties producing the appropriate pitch and emphasis in their non-native language.[68]

One of the most important ways native English speakers employ intonation is in the use of tag questions, which are questions added to the end of statements such as in the sentence, "It's nice out, isn't it?" In English, tag questions can either be used to demand or seek confirmation, or they can be used to indicate uncertainty about the statement immediately preceding it.[69] The primary way to distinguish between these two purposes is to employ a different intonation: to seek confirmation, the tag question must be said with a falling pitch, whereas to indicate uncertainty, the tag question must be said with a rising pitch.[70] Thus, if a speaker said "It's nice out, isn't it?" with a falling pitch, the speaker would be seeking agreement from the listener about a position they have already taken (that it is nice out). On the other hand, if a speaker said, "It's nice out, isn't it?" with a rising pitch, then the speaker would be conveying the message that they are not sure if it is actually nice out or not, but they are guessing that it is. Interestingly, English is one of the only, if not the only, language that uses this differentiating mechanism.[71] In Spanish, for instance, tag questions are always spoken with a rising pitch, yet the purpose of Spanish tag questions is always to seek confirmation, *not* to indicate uncertainty.[72] This structure of Spanish intonation directly contradicts the structure of English intonation with regards to tag questions. Consequently, in a study with non-native English speakers whose native language was Spanish, the non-native English speakers tended to use rising pitch when asking English tag questions regardless of their intended message; this resulted in tag questions intended to be construed as seeking confirmation to be

[66] *Id.* at 1064; Dolores Ramírez Verdugo & Jesús Romero Trillo, *The Pragmatic Function of Intonation in L2 Discourse: English Tag Questions Used by Spanish Speakers*, 2 INTERCULTURAL PRAGMATICS 151, 152 (2005).

[67] *See* Farías, *supra* note 65, at 1064–66 (noting that Spanish has a narrower variation in intonation and different pitch levels than English).

[68] Farias, *supra* note 65, at 1066; Verdugo & Trillo *supra* note 66.

[69] Verdugo & Trillo *supra* note 66, at 153.

[70] *Id.*

[71] *Id.*

[72] *Id.*

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interpreted as expressing uncertainty.[73] Evidently, the misuse of English intonation practices could potentially lead to serious miscommunications.

Furthermore, anxiety and communication apprehension can seriously impede non-native speech, leading to issues with asking for help or even producing coherent sentences.[74] Several studies note that non-native speakers tend to feel anxiety when dealing with real or anticipated communication in their non-native language, and this anxiety in turn hinders the language production process.[75] One study, which focused specifically on non-native speakers in an academic setting, found that communication apprehension resulted in non-native speakers being more likely to avoid seeking assistance.[76] Thus, anxiety plays a key role in non-native speech, affecting both a non-native speaker's ability to produce speech and seek assistance.

On the listener's end, one study notes that non-native speech is harder to understand for native listeners.[77] In addition to grammatical or prosodic mistakes and accents, listeners' perceptions of non-native speech are also impacted by their own expectations and goals going into the verbal exchange, as well as the context in which it occurs.[78] Given the complex interplay between non-native speakers' language productions and native speakers' language perceptions, there are many opportunities for miscommunication within a conversation.

III. THE POTENTIAL FOR NON-NATIVE SPEECH PATTERNS TO NEGATIVELY IMPACT THE INVOCATION OF *MIRANDA* RIGHTS

As discussed in the previous Part, non-native speech patterns are distinct from native speech patterns and pose a wide range of misinterpretation risks, which may have serious implications in the *Miranda* context.

[73] *Id.* at 164.

[74] Albl-Mikasa, *supra* note 61, at 126; Md. Kawser Ahmed, *Psychological Barriers in the Acquisition of Second Language: A Non-Native Perspective*, 16 J. SOC. SCIS. & HUMAN WS. 1, 5 (2022); Marta Sobotka & Ilhan Raman, *The Role of Communication Apprehension and Self-Stigma of Academic Help-Seeking in Native and Non-native English Speakers: Evidence from UK University Students*, 12 INT'L J. EDUC. 30, 40–41 (2020).

[75] Ahmed, *supra* note 74, at 5–6; Sobotka & Raman, *supra* note 74, at 31–32.

[76] Sobotka & Raman, *supra* note 74, at 33.

[77] Melissa M. Baese-Berk, Drew J. Mclaughlin & Kevin B. McGowan, *Perception of non-native speech*, LANGUAGE LINGUIST COMPASS 1, 7 (2020).

[78] *Id.* at 8.

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One notable marker of non-native speech is the misuse of lexical bundles,[79] and law is riddled with them. In the commercial legal context, common lexical bundles include "breach of fiduciary duty," "ordinary course of business," and "all liabilities and obligations."[80] In a criminal legal context, words like "court of law," "privilege against self-incrimination," "beyond a reasonable doubt," and "right to remain silent" appear frequently and would likely be classified as lexical bundles. Because of the stringent standards set by the Court that require an invocation of *Miranda* warnings to be unambiguous and unequivocal,[81] the most unambiguous and unequivocal invocation would arguably use the lexical bundles embedded within the *Miranda* warnings, such as "right to remain silent." However, as demonstrated, non-native speakers struggle with accurately using lexical bundles, and the appropriate use of lexical bundles takes substantial experience and exposure to the non-native language.[82] It is highly plausible that non-native English speaking suspects might struggle to correctly use a lexical bundle like "right to remain silent" when attempting to invoke their right, thus producing an ambiguous and equivocal invocation that interrogators are free to ignore.

Additionally, characterizing the invocation of *Miranda* rights as a request to the interrogators to cease the questioning, non-native speakers are again at a disadvantage due to their tendency to use preparatory interrogatives, hints, conditionals, and understaters.[83] A preparatory interrogative such as "Am I allowed to ask for a lawyer?" or a hint such as "A lawyer would really be helpful right now" would clearly not pass the 'unambiguous and unequivocal' *Davis* test.[84] Similarly, a conditional like "If I am allowed to, can I talk to a lawyer?" or an understater like "I am a little uncomfortable talking without my lawyer" would likely reach the same result and not qualify as a sufficient *Miranda* invocation.[85]

Now, reframing the situation such that an invocation of *Miranda* rights is a *response* to a request by the interrogators to either assert one's rights or not, non-native speakers are again disadvantaged in forming clear and unambiguous

[79] Crossley & Salsbury, *supra* note 49.

[80] Ruth Breeze, *Lexical bundles across four legal genres*, 18 INT'L J. CORPUS LINGUISTICS 229, 238 (2013).

[81] Davis v. United States, 512 U.S. 452, 459–61 (1994).

[82] Crossley & Salsbury, *supra* note 49.

[83] Francis, *supra* note 51, at 38; Iragui *supra* note 51

[84] *See* 512 U.S. at 459–461; *see also supra* Part I (discussing what counts as "unambiguous" and "unequivocal").

[85] *See id.*

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responses.[86] Given that non-native speakers have been found to be more expressive yet less explicit in responses to requests as compared to the direct, business-like responses of native speakers, non-native responses may be interpreted as unclear and ambiguous.[87] If a non-native English speaking suspect was to respond to an interrogator's request (either invoke or waive your *Miranda* rights) by choosing "invoke" in an unclear manner, the interrogator would be free to continue the interrogation since the invocation attempt was ambiguous at best.[88]

Further, non-native English speakers' tendencies to pause awkwardly within clauses can muddle the meaning of their statement and indicate hesitation, both of which favor a finding of ambiguity in the statement in a *Miranda* context.[89] Non-native speakers attempting to transfer their own native language's intonation practices onto English may also find themselves miscommunicating through the use of tag questions, which can make statements intended to be clear become ambiguous.[90] Take for instance the scenario from the introduction, in which you, a non-native English speaker say, "I can have a lawyer here, can't I?" Presume for the purposes of this illustration that you are a Spanish speaker, and thus employ a rising pitch in tag questions, but only to signal that you already hold a particular belief and are open to agreement.[91] You are not asking if it is possible—you are saying that it is possible, and the listener (interrogator) is free to confirm. However, the interrogator interprets this as you expressing uncertainty and ambiguity, to which he is not obligated to heed.[92] Thus, your attempted invocation fails, all because of a misinterpretation of intonation.

What's more, the intensity and stress of the interrogation setting, with its "unfamiliar atmosphere" and "menacing police interrogation procedures,"[93] is bound to produce anxiety in the ordinary person, much more so in the non-native speaker who is likely to suffer from communication apprehension when trying to speak with

[86] *See generally* Garcia, *supra* note 51.

[87] *Id.*

[88] *See* 512 U.S. at 459–461; *see also supra* Part I (discussing what counts as "unambiguous" and "unequivocal").

[89] Trofimovich & Baker, *supra* note 60, at 18; Tavakoli, *supra* note 63; de Jong, *supra* note 63; *see* 512 U.S. at 459–461; *see also supra* Part I.

[90] Farías, *supra* note 65, at 1066; Verdugo & Trillo *supra* note 66.

[91] *See* Verdugo & Trillo *supra* note 66, at 153.

[92] *See* 512 U.S. at 461.

[93] 384 U.S. at 457.

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an intimidating interrogator in their non-native language.[94] The communication apprehension in this setting is likely to greatly hinder language processing, causing extreme difficulty in finding the right words and constructing the correct sentences.[95] It is highly likely that this cognitive overload would result in more confused speech production, which would likely result in an ambiguous attempted invocation.

Additionally, there may be implications from the correlation between communication apprehension and avoidance of seeking help in the academic setting that transfer into the *Miranda* interrogation setting.[96] If non-native English speaking students were less likely to seek assistance from a tutor due to their language anxiety, it is reasonable to argue that non-native English speaking suspects would be less likely to seek assistance of a lawyer in an interrogation due to their language anxiety.[97] Note that the inverse is also plausible, with a non-native English speaker actively seeking the assistance of an attorney because of their limited language abilities, but to this day there has not been a study examining this relation in a custodial interrogation setting.

Lastly, it is important to note that the listener's perception also impacts the adequacy of communication.[98] Arguably, because the listener in the *Miranda* context is an interrogator with a goal of extracting a confession or other vital evidence, this attitude may influence the interrogator's perception of a non-native English speaking suspect's statements, misconstruing them as ambiguous even though they may be unambiguous to a questioner without such motive. Because the standard for the interrogator's interpretation is rather deferential to the interrogator's understanding,[99] these perceptual biases may go undetected, leaving the non-native English-speaking suspect unprotected.

IV. THE FUTURE OF PSYCHOLINGUISTICS AND LAW WITH RESPECT TO NON-NATIVE INVOCATION OF *MIRANDA* RIGHTS

There are limitations to the argument that the stringent standards for invoking *Miranda* rights disproportionately impact non-native English speakers. First, most

[94] Albl-Mikasa, *supra* note 61, at 126; Ahmed, *supra* note 74, at 5–6; Sobotka & Raman, *supra* note 74, at 31–32.

[95] Ahmed, *supra* note 74, at 5–6; Sobotka & Raman, *supra* note 74, at 31–32.

[96] Sobotka & Raman, *supra* note 74, at 40–41.

[97] *See generally id.*

[98] Baese-Berk et al., *supra* note 77, at 8.

[99] 512 U.S. at 459.

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psycholinguistic studies focusing on non-native speech patterns take place in a clinical setting, or at least a neutral social setting such as a school or office. None quite capture the emotions and stress of an in-custody interrogation. For a more robust argument about the influence of non-native speech patterns in the *Miranda* setting, more research needs to be done in high-intensity, confrontational situations, as it is highly likely that these environmental factors may influence non-native speech production further.

Second, it is important to note that non-native language competency can hardly be classified as an all-or-none phenomenon. It also would not be just to classify it as a linear continuum, since so many non-native English speakers may be highly proficient in reading and comprehension, but struggle substantially with speaking and listening, or vice versa. Ultimately, there is no single definition of "proficiency," as a non-native English speaker could be proficient in some aspects of the language but not others. Therefore, future research should be directed toward answering the question of how "proficient" is "proficient enough" to avoid the disadvantages argued in this Note. Does experience in the United States moderate the effect of non-native speech patterns in the *Miranda* setting? Does an interrogator's familiarity with non-native speech patterns moderate their findings of ambiguity in attempted invocations?

Concerning future legal directions, it is evident that the high linguistic standard for unambiguously and unequivocally invoking one's *Miranda* rights contradicts basic psycholinguistics. All speakers, not just non-native speakers, are likely to be influenced by the high-stress, intimidating environment of an interrogation, naturally resorting to ambiguous language rather than the robot-like requirements that the Supreme Court seems to desire. In fact, the Supreme Court recognized this disadvantage in *Davis*, noting that "because of fear, intimidation, lack of linguistic skills, or a variety of other reasons . . . [a suspect may] not clearly articulate their right."[100] Rather than adopt the simple solution of constitutionally requiring interrogators to clarify ambiguity, the Court turned a blind eye.[101] This decision is due for reconsideration, given the significant increase in our understanding of how we produce and perceive language. A rule that is at odds with natural human psychology cannot actually afford the protections it intends to afford.

CONCLUSION

The unrealistically specific linguistic standards rendered by the Court for a proper invocation of *Miranda* rights, while maintaining a relatively weaker standard

[100] *Id.* at 460.

[101] *Id.* at 461.

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for waiver of such rights, has sparked a conversation into the disproportionate impacts on certain groups—women, ethnic groups, and non-native English speakers, to name a few. The difficulties in communicating in one's non-native language have substantial risks of misinterpretation in everyday conversation, and these risks may be amplified in an interrogation setting. The consequences of slight misinterpretations are grave, with the potential to deprive a suspect of their liberty, yet the slight misinterpretations could be the result of involuntary natural non-native speech patterns over which a suspect has no control. This subject has been underdeveloped prior to the exploration in this Note. With more research into the difficulties of non-native speakers in *invoking* their *Miranda* rights, a better solution to protect the constitutional rights of non-native English-speakers can be discovered, one which does not conflict with basic psycholinguistic principles.

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