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## Supreme Court of New York, Bronx County - People v. Garcia-Cepero

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**SUPREME COURT OF NEW YORK  
BRONX COUNTY**

People v. Garcia-Cepero<sup>1</sup>  
(decided October 23, 2008)

Javier Garcia-Cepero was charged with operating a motor vehicle under the influence of alcohol, pursuant to Vehicle and Traffic Law (“VTL”) section 1192.<sup>2</sup> At his *Mapp* hearing,<sup>3</sup> Garcia-Cepero claimed that the New York City Police Department’s procedure in administering a breathalyzer test and executing the provisions set forth in VTL section 1194(2)(f) to a non-English speaking motorist, violated his equal protection and due process rights guaranteed under the United States Constitution<sup>4</sup> and New York Constitution<sup>5</sup> by failing to provide an interpreter at the time of the breathalyzer request.<sup>6</sup> The Bronx County Supreme Court determined that the officers had probable cause to stop and arrest the defendant,<sup>7</sup> but the defendant’s expressions and body language did not indicate a refusal to submit to a breathalyzer test. Accordingly, the court held that the Police Department’s procedure for administering a breathalyzer test and executing the provisions set forth in VTL section 1194 violated Garcia-

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<sup>1</sup> 874 N.Y.S.2d 689 (Sup. Ct. Bronx County 2008).

<sup>2</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 691. N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 2006), states that “[n]o person shall operate a motor vehicle while the person’s ability to operate such motor vehicle is impaired by the consumption of alcohol.” N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney 2006), states that “[n]o person shall operate a motor vehicle while in an intoxicated condition.”

<sup>3</sup> A *Mapp* hearing is held to determine whether evidence, implicating a defendant, was obtained by a search and seizure in violation of the United States Constitution and thus, ought to be suppressed. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>4</sup> U.S. CONST. amend. XIV, § 1, states, in pertinent part: “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

<sup>5</sup> N.Y. CONST. art. I, § 11, states, in pertinent part: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”

<sup>6</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 695.

<sup>7</sup> *Id.* at 692.

Cepero's equal protection and procedural due process rights.<sup>8</sup>

In November 2006, Javier Garcia-Cepero, a non-English speaking motorist, was observed driving on the wrong side of the road by two police officers.<sup>9</sup> As the officers followed Garcia-Cepero, it took them multiple attempts to successfully pull him over.<sup>10</sup> After Garcia-Cepero complied with the officers' request to step out of the vehicle, the officers noticed a "strong alcohol odor emanating from the motorist's body," as well as other physical signs that he was heavily intoxicated.<sup>11</sup> As he exited the vehicle, Garcia-Cepero stated "un pequetas."<sup>12</sup> He was placed in custody and transported by the officers to the Forty-Fifth Precinct for a breathalyzer test.<sup>13</sup>

At the precinct, Garcia-Cepero was shown a video that provided a "verbatim Spanish interpretation"<sup>14</sup> of VTL section 1194.<sup>15</sup> When asked whether or not he "consented or refused to take the breathaly[z]er test," Garcia-Cepero stated "no drogas, no drogas," which translates to "no drugs, no drugs" in English.<sup>16</sup> The defendant was not provided with a Spanish interpreter.<sup>17</sup> Resultantly, the officers interpreted his response in Spanish as a refusal.<sup>18</sup>

After conducting a *Mapp* hearing, the Bronx County Supreme Court determined that: 1) the officers had probable cause to stop and arrest the defendant; 2) the defendant's statements in Spanish, facial expressions, and body language did not indicate a refusal to submit to a breathalyzer test; 3) the New York City Police Department's procedure of affording both breath and physical tests to English speaking defendants, but not non-English speaking defendants, violated equal

<sup>8</sup> *Id.* at 698.

<sup>9</sup> *Id.* at 691.

<sup>10</sup> *Id.*

<sup>11</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 691-92.

<sup>12</sup> The court had determined the phrase "un pequetas" did not have any Spanish translation. *Id.* at 691-92, 691 n.1.

<sup>13</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 692.

<sup>14</sup> *Id.*

<sup>15</sup> N.Y. VEH. & TRAF. LAW § 1194(2)(f) (McKinney 2006), states, in pertinent part: "Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based . . . upon a showing that the *person was given sufficient warning, in clear and unequivocal language*, of the effect of such refusal and that the person persisted in the refusal." (emphasis added).

<sup>16</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 692.

<sup>17</sup> *Id.* at 695.

<sup>18</sup> *Id.* at 692.

protection guarantees; 4) the New York City Police Department's procedure of conducting roadside sobriety tests to English speaking defendants, but not non-English speaking defendants, violated equal protection guarantees, and 5) playing only the Spanish translated video warning of the effect of the refusal to submit to a blood alcohol test, without providing an interpreter violated the defendant's due process rights.<sup>19</sup>

In its decision, the court relied heavily on the fact that VTL section 1194 "does *not* differentiate between an English or non-English speaking individual."<sup>20</sup> The court explained that even though "a statute may be nondiscriminatory on its face, it may be grossly discriminatory in its operation."<sup>21</sup> Although the question was asked in Garcia-Cepero's native language, the officers made no effort in determining whether or not he understood it.<sup>22</sup> According to the court, this mode of enforcement was a clear violation of Garcia-Cepero's equal protection rights, guaranteed by both the United States Constitution and New York Constitution, because he did not understand the English language.<sup>23</sup> The court further explained that the method used by the New York City Police Department "creates a classification predicated upon a person's ability to speak and understand the English language and therefore discriminates against non-English speaking individuals."<sup>24</sup> The court believed that Garcia-Cepero did not reach the minimum threshold of understanding that was necessary in order for him to make an informed decision.<sup>25</sup> "The mere presence of an interpreter who could have explained more fully the request to take a chemical/breathalyzer test and the ramifications for failure to consent, would have obviated the discriminatory procedure."<sup>26</sup>

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<sup>19</sup> *Id.* at 692, 698.

<sup>20</sup> N.Y. VEH. & TRAF. LAW § 1194(1)(b) (McKinney 2006), states, in pertinent part: "Every person operating a motor vehicle . . . which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer, submit to a breath test to be administered by the police." (emphasis added). *Garcia-Cepero*, 874 N.Y.S.2d at 695.

<sup>21</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 695 (quoting *People v. Kennedy*, 491 N.Y.S.2d 968, 970 (1985)).

<sup>22</sup> *Id.* at 695-96.

<sup>23</sup> *Id.* at 695.

<sup>24</sup> *Id.*

<sup>25</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 695 (citing *People v. Niedzwiecki*, 487 N.Y.S.2d 694, 696 (N.Y. City Crim. Ct. 1985)).

<sup>26</sup> *Id.* at 696.

The court also reasoned that this injustice was further advanced because of the availability of other sobriety tests that prove to be crucial pieces of evidence in a jury trial and such tests are not offered to non-English speaking defendants.<sup>27</sup> English speaking defendants are given alternate tests when they are thought to be intoxicated, whereas non-English speaking defendants are never given the option.<sup>28</sup> The court classified this distinction as “predicated merely on the ability of a defendant to speak and understand English . . . [which] violates the Equal Protection Clause of the [United States] Constitution and is discriminatory.”<sup>29</sup>

In its analysis of whether or not Garcia-Cepero’s procedural due process rights were violated, the court focused on the three-part test set out by the United States Supreme Court:

[First,] the private interest that will be affected by the official action, [second,] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and [finally,] the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>30</sup>

With respect to the defendant’s private interest, the court stated that the action or inaction of the officers would obviously affect Garcia-Cepero’s guilt or innocence and subsequently his privilege of having a driver’s license.<sup>31</sup> Furthermore, the court claimed that inquiry into the second part of the test reveals that the action or inaction of the officers has a “direct relationship to the defendant’s freedom and privilege to drive.”<sup>32</sup> If convicted based on the evidence gathered without remedying the defendant’s language barrier, Garcia-Cepero could be subject to costly fines or imprisonment and suspension of

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 696-97 (quoting *Medina v. California*, 505 U.S. 437, 443 (1992)).

<sup>31</sup> *Id.* at 697.

<sup>32</sup> *Id.*

his driver's license.<sup>33</sup> Furthermore, the court claims that both the prosecution and defense would have benefitted from the use of an interpreter.<sup>34</sup> Lastly, the government has a general interest and responsibility in safeguarding all citizens' rights to due process.<sup>35</sup> Due to this interest, the court reasoned that the benefits of employing an interpreter outweigh the financial and administrative burdens that would be assumed.<sup>36</sup>

The Equal Protection Clause of the United States Constitution requires states to provide equal protection under the law to all people within its jurisdiction.<sup>37</sup> As established by the United States Supreme Court, "a law nondiscriminatory on its face may be grossly discriminatory in its operation."<sup>38</sup> In addressing the issue, the Court determines whether there has been a violation of a defendant's equal protection rights by analyzing "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants."<sup>39</sup>

The New York Court of Appeals agreed with the evaluation stating, in *8200 Realty Corp. v. Lindsay*, that "[t]he question of equal protection turns ultimately on the similarity or dissimilarity of rights differentiated by a statute; and the reasonableness of classification when different methods are used to affect different classes."<sup>40</sup> In *Lindsay*, the Court reversed the First Department's decision and declared that the New York City Rent Stabilization Law of 1969 did not violate the Equal Protection Clause because its classification scheme had a rational basis.<sup>41</sup> The statute allegedly discriminated against owners of pre-1947 housing units, who were "subject to less favorable regulations" than owners of post-1947 housing units.<sup>42</sup> The Court determined the statute did not violate the Equal Protection Clause because of public policy reasons such as encouragement of future con-

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 697.

<sup>36</sup> *Id.* at 698.

<sup>37</sup> See U.S. CONST. amend. XIV, § 1.

<sup>38</sup> *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956).

<sup>39</sup> *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

<sup>40</sup> 261 N.E.2d 647, 653 (N.Y. 1970).

<sup>41</sup> *Id.* at 654-55.

<sup>42</sup> *Id.* at 653.

struction and security of affordable housing.<sup>43</sup>

In order to afford its motorists even greater protection than what is required under federal law, New York has enforced an additional burden on the prosecution in cases involving non-English speaking motorists to safeguard the defendant's guaranteed rights. In *People v. Niedzwiecki*, the court impliedly<sup>44</sup> addressed the equal protection issues posed by VTL section 1194, by establishing what exactly amounts to "clear and unequivocal language," as required by statute.<sup>45</sup> The defendant in *Niedzwiecki* was a Polish immigrant, pulled over by police for driving without headlights and in a weaving pattern.<sup>46</sup> When he was asked to take a breathalyzer test, the defendant specifically requested a Polish translator.<sup>47</sup> The court decided that "the warnings given to [the defendant] were not in clear and unequivocal language as mandated by . . . [VTL section] 1194" because the Polish speaking personnel obtained to recite the relevant statute did not sufficiently elevate the defendant to the "*threshold point of understanding* the choice presented to him, so he m[ight] at least be able to make a decision as to the course of conduct he w[ould] take."<sup>48</sup>

However, in *People v. Rosario*,<sup>49</sup> the warnings administered to the Spanish-speaking driver were held as sufficient to be considered "clear and unequivocal language."<sup>50</sup> Defendant Rosario was pulled over in his blue Chevrolet after a police officer observed him remain at a newly turned green light for an "unusual" amount of time.<sup>51</sup> The defendant's eyes were bloodshot, he spoke in a slurred manner, and his breath smelled of alcohol.<sup>52</sup> As a result, he was placed under arrest and transported to the local precinct, where a video advising him of his rights regarding the administration of breath-

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<sup>43</sup> *Id.* at 653-54.

<sup>44</sup> 487 N.Y.S. 2d 694. The court never expressly mentioned that Niedzwiecki's equal protection rights were allegedly violated by the police officer's implementation of VTL section 1194. However, the court, in its analysis, impliedly addressed this constitutionality issue.

<sup>45</sup> *See Niedzwiecki*, 487 N.Y.S.2d 694.

<sup>46</sup> *Id.* at 695.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 696 (emphasis added).

<sup>49</sup> 518 N.Y.S.2d 906 (N.Y. City Crim. Ct. 1987).

<sup>50</sup> *Id.* at 912.

<sup>51</sup> *Id.* at 908.

<sup>52</sup> *Id.*

lyzer tests was played for him in Spanish.<sup>53</sup> The defendant responded in the affirmative in Spanish when asked whether he was willing to take the breathalyzer test.<sup>54</sup> The court reasoned that the People met “their burden of going forward to show that warnings were indeed administered to defendant in Spanish, and that he gave every indication of appreciating the import of the message he viewed on the tape and acquiesced readily in Officer Kowalski’s invitation to submit to a test.”<sup>55</sup>

In *People v. Reynolds*, the Appellate Division, Third Department directly addressed the same issue regarding VTL section 1194.<sup>56</sup> The defendant in *Reynolds* had been observed crossing over double center lines, swerving, and eventually colliding with another vehicle.<sup>57</sup> The defendant was given multiple warnings, in his intoxicated state, by officers about his rights and each time refused to submit to a breathalyzer test.<sup>58</sup> One of the officers testified that on more than one occasion during the night of the incident “he specifically advised defendant that his refusal to submit to a chemical test would result in the immediate suspension and revocation of his license[,] regardless of whether he was found guilty of the charge for which he was arrested.”<sup>59</sup> The Appellate Division, Third Department, affirmed the lower court’s judgment in denying the defendant’s motion to suppress the evidence of his refusal to submit to the breathalyzer test.<sup>60</sup>

Turning to the procedural due process issue, it is a well-established principle that administrative procedures instituted and performed by governmental agencies must comport with procedural due process requirements, as determined by evaluating both the governmental and private interests affected.<sup>61</sup> The United States Su-

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<sup>53</sup> *Id.* at 909.

<sup>54</sup> *Rosario*, 518 N.Y.S.2d at 909.

<sup>55</sup> *Id.* at 912. In furtherance of its reasoning, the court stated that “the onus [was] on the People to establish voluntariness beyond a reasonable doubt.” *Id.*

<sup>56</sup> 519 N.Y.S.2d 425, 428 (App. Div. 3d Dep’t 1987).

<sup>57</sup> *Id.* at 426.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 427-28.

<sup>60</sup> *Id.* at 427.

<sup>61</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“[R]esolution of the issue [of] whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected.”); *Arnett v. Kennedy*,



preme Court has made it clear that “ ‘[d]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”<sup>62</sup> Rather, procedural due process protections ought to be addressed on a case-by-case basis, depending upon the particular circumstances.<sup>63</sup> Accordingly, the Court has established three factors to consider in procedural due process claims.<sup>64</sup>

New York courts have been steadfast in their adoption of the same standard while addressing procedural due process issues concerning non-English speaking defendants.<sup>65</sup> The New York Court of Appeals has recognized that “[d]ue process is a flexible constitutional concept calling for such procedural protections as a particular situation may demand.”<sup>66</sup> However, “[d]ue process is not . . . a mechanical formula or a rigid set of rules.”<sup>67</sup> Thus, procedural due process challenges require “an evaluation of the interests of the parties to the dispute, the adequacy of the contested procedures to protect those interests and the government’s stake in the outcome.”<sup>68</sup> Accordingly, the New York courts look to the three distinct factors that the United States Supreme Court set forth in *Mathews*.<sup>69</sup>

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416 U.S. 134, 167–68 (1974) (Powell, J., concurring) (“[R]esolution of this issue depends on a balancing process in which the Government’s interest [in the implementation of a certain policy] . . . is weighed against the interest of the affected [private individual].”); *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (“The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss,’ and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest.”); *Cafeteria and Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (“[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”).

<sup>62</sup> *Mathews*, 424 U.S. at 334 (quoting *Cafeteria and Rest. Workers Union*, 367 U.S. at 895).

<sup>63</sup> *Id.*

<sup>64</sup> See *supra* text accompanying note 30.

<sup>65</sup> See *Yellen v. Baez*, 676 N.Y.S.2d 724 (N.Y. City Civ. Ct. 1997); *People v. Torres*, 772 N.Y.S.2d 125 (App. Div. 3d Dep’t 2004).

<sup>66</sup> *LaRossa, Axenfeld & Mitchell v. Abrams*, 468 N.E.2d 19, 21 (N.Y. 1984) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Health Ins. Ass’n of Am. v. Harnett*, 376 N.E.2d 1280, 1284 (N.Y. 1978)).

<sup>67</sup> *Dobkin v. Chapman*, 236 N.E.2d 451, 457 (N.Y. 1968).

<sup>68</sup> *La Rossa, Axenfeld & Mitchell*, 468 N.E.2d at 21 (citing *Mathews*, 424 U.S. at 334-35).

<sup>69</sup> See *supra* text accompanying note 30; see also *In re K.L.*, 806 N.E.2d 480, 486-87 (N.Y. 2004); *County of Nassau v. Canavan*, 802 N.E.2d 616, 623 (N.Y. 2003); *La Rossa, Axenfeld & Mitchell*, 468 N.E.2d at 21.

In *Yellen v. Baez*, suit was brought against the Spanish-speaking defendants in pursuit of their delinquent rent payments and eviction.<sup>70</sup> The Richmond County Civil Court had determined that defendants, appearing pro se, needed the assistance of a Spanish interpreter.<sup>71</sup> However, one was not readily available without an advanced request and the case was adjourned in order to secure an interpreter.<sup>72</sup> Although the defendants had qualified under the express provisions of the relevant statute<sup>73</sup> as having requested two adjournments, the court determined that “in spite of the statutory language,” it would not charge the adjournment to the defendants because “[t]o do so would violate both the equal protection and due process clauses of the United States and New York State Constitutions.”<sup>74</sup> The court reasoned that the Legislature’s intent in drafting the statute was not to charge an adjournment against a defendant who requires an interpreter.<sup>75</sup> Furthermore, charging the defendant with the adjournment when the court is unable to obtain an interpreter and thereby triggering the rent deposit provisions of the statute would “make a mockery of the due process protection afforded by the Constitution.”<sup>76</sup>

In *People v. Torres*, defendant pled guilty and was convicted of criminal possession of a controlled substance in the first degree.<sup>77</sup> On appeal, Torres claimed that he had pled guilty to the offense because his “lack of proficiency in English prevented him from understanding what transpired during the plea proceeding.”<sup>78</sup> Torres had declined the Schenectady County Court’s offering of an interpreter and responded to all questions asked of him in English.<sup>79</sup> Based on the circumstances, the Appellate Division, Third Department found no merit to Torres’ argument that his “plea was not knowingly en-

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<sup>70</sup> *Yellen*, 676 N.Y.S.2d at 724.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See N.Y. REAL PROP. ACTS. LAW § 745(2)(a) (McKinney 2007) (discussing that upon a second request for an adjournment, a defendant may be required, by the court, to make a rent deposit or payment, if the proceeding is not resolved within thirty days of the first court appearance).

<sup>74</sup> *Yellen*, 676 N.Y.S.2d at 724.

<sup>75</sup> *Id.* at 725.

<sup>76</sup> *Id.* at 726.

<sup>77</sup> *Torres*, 772 N.Y.S.2d at 125.

<sup>78</sup> *Id.* at 126.

<sup>79</sup> *Id.*

tered because of a lack of fluency in English” and thus defendant’s due process rights were not violated.<sup>80</sup>

In light of the equal protection and procedural due process standards, the court’s reasoning in *Garcia-Cepero* was improper. It is indisputable that VTL section 1194 “does *not* differentiate between . . . English or non-English speaking individuals.”<sup>81</sup> However, if a distinction were to be made within VTL section 1194 between English and non-English speaking motorists, it would neither have the same effect nor serve a similar public good as the distinction made in the New York City Rent Stabilization Law of 1969 at issue in *Lindsay*. Furthermore, although VTL section 1194’s facially neutral status does not preclude it from a constitutional challenge, a disproportionate impact on non-English speaking motorists alone does not infer its unconstitutionality.<sup>82</sup>

There is no law in the United States that requires all persons operating a vehicle to have the ability to speak and understand English. However, not surprisingly, with a primarily English speaking population,<sup>83</sup> there has been a push to declare English the official language of the United States.<sup>84</sup> This is a clear indication of the nationwide legitimate interest and strong public policy reasons for why all persons operating a vehicle should have the ability to speak and understand English. After all, road signs that must be followed by all motorists are in English. Perhaps it can be criticized as an elitist point of view, but when visiting, living, or working in a country that employs a different language from one’s own, one can absolutely expect—and it should not come as a surprise—that the laws are dictated in such foreign language.

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<sup>80</sup> *Id.*

<sup>81</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 695.

<sup>82</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact.”).

<sup>83</sup> In 1990, it was reported that approximately only eighty-six percent of persons over the age of five in the United States spoke only English. See U.S. Census Bureau, <http://www.census.gov/population/socdemo/language/table5.txt> (last visited January 17, 2010).

<sup>84</sup> See *Sen. Inhofe Introduces English Language Unity Act*, U.S. FED. NEWS, May 16, 2009, available at 2009 WLNR 9347747 (discussing the English Language Unity Act of 2009 that was recently introduced in the Senate to “declare English as the official language of the United States”).

Furthermore, for any police procedure, the laws are silent on distinguishing between police conduct with an English speaking individual and non-English speaking individual. Does this mean that such laws that reference police procedure and do not specifically lay out how to handle an English speaking defendant and a non-English speaking defendant all violate equal protection rights?

Suppose, going forward, police provide a Spanish interpreter to a defendant in a similar situation as the defendant in *Garcia-Cepero* in order to support equal protection rights guaranteed under the law. Due to the strong demand for Spanish speaking interpreters, they are easily obtainable in the United States.<sup>85</sup> However, at what monetary cost to the government do we draw the line at providing an interpreter to the defendant? What happens when the person operating the vehicle only speaks an endangered or rare language such as Ticuna<sup>86</sup> or Kuna?<sup>87</sup> For obvious reasons, time is of the essence for administering a breathalyzer test. The costs would be astronomical for finding an interpreter immediately and for *any* language. Furthermore, due to the obscurity of certain languages, obtaining an interpreter may be nearly impossible. Does this mean the police should provide an interpreter for Spanish speakers, but not Ticuna speakers, due to financial restraints and impracticability? This most certainly would be a violation of equal protection rights and be considered discriminatory based on one's language.

The "threshold point of understanding"<sup>88</sup> established in *Niedzwiecki*, seems to be an arbitrary and subjective standard. At what point do law enforcement personnel know if the defendant does not understand the question presented due to a language barrier or due to his or her intoxication? Would an interpreter really be able to make this distinction? As stated by the Appellate Division, Second Department, in *Carey v. Melton*, VTL section 1194(2) is not con-

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<sup>85</sup> See Bureau of Labor Statistics, <http://www.bls.gov/oco/ocos175.htm> (last visited January 17, 2010) (citing that the demand for translators of Portuguese, French, Italian, German, Spanish, Arabic and other Middle Eastern languages, and the principal Asian languages is, and will remain, strong).

<sup>86</sup> See The Archive of the Indigenous Languages of Latin America, [http://www.ailla.utexas.org/site/la\\_langs.html](http://www.ailla.utexas.org/site/la_langs.html) (last visited January 17, 2010) (noting that Ticuna is a Latin American language spoken by approximately 21,000 people).

<sup>87</sup> See *id.* (noting that Kuna is Latin American language spoken by approximately 50,000 people).

<sup>88</sup> *Niedzwiecki*, 487 N.Y.S.2d at 696.

strued as “requiring a ‘knowing’ refusal”<sup>89</sup> by the defendant, as such an “interpretation would lead to the absurd result that the greater the degree of intoxication of an automobile driver, the less the degree of his accountability.”<sup>90</sup> However, it seems nearly impossible for any individual to determine a defendant’s level of understanding when he or she is potentially too inebriated to legally operate a vehicle, let alone answer questions that will directly affect the defendant’s future freedom and driving privileges. The “mere presence of an interpreter”<sup>91</sup> would *not* have, in fact, “obviated the discriminatory procedure”<sup>92</sup> for this exact reason.

Based on the *Reynolds* decision, it was decided that Reynolds obviously reached the appropriate level of understanding for which he was receiving warnings.<sup>93</sup> However, other than repeatedly warning the defendant in English of the repercussions for refusing a breathalyzer test, what additionally did the officer do to ensure the defendant’s requisite level of understanding? It seems reasonable that stating any warnings to a defendant in his or her native language would serve the equivalent purpose and raise the defendant to a comparable degree of comprehension. One could even argue that this “threshold point of understanding” was not even a requirement of VTL section 1194(2) in the eyes of the court in *Reynolds*.<sup>94</sup> For either interpretation, it is unreasonable to assert that equal protection rights are violated if a translator is not provided to a non-English speaking defendant. Since a recitation of translated warnings to a non-English speaking defendant would be the equivalent action taken in the case of an English speaking defendant, both types of defendants are thus afforded the same rights.

Furthermore, it was also decided in *Garcia-Cepero* that the discrimination between English and non-English speaking defendants is further advanced because non-English speaking defendants are “never” given other sobriety tests available other than breathalyzer tests.<sup>95</sup> Judge Cirigliano made this bold statement in his opinion

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<sup>89</sup> 408 N.Y.S.2d 817, 818 (App. Div. 2d Dep’t 1978).

<sup>90</sup> *Id.*

<sup>91</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 696.

<sup>92</sup> *Id.*

<sup>93</sup> *See Reynolds*, 519 N.Y.S.2d at 428.

<sup>94</sup> *See Garcia-Cepero*, 874 N.Y.S.2d at 693.

<sup>95</sup> *Id.* at 696.

without any support. Are we to believe that at no point has a non-English speaking defendant ever been administered an HGN test?<sup>96</sup>

Issues of equal protection and due process often go hand-in-hand.<sup>97</sup> As such, the issue of procedural due process was also addressed in *Garcia-Cepero*.<sup>98</sup> The Bronx County Supreme Court assessed Garcia-Cepero's case, at length, according to the procedural due process factors established in *Mathews*,<sup>99</sup> and followed by New York courts.<sup>100</sup> The court made it clear, and undoubtedly so, that the facts in support of the first two factors of the test suggested a violation of the defendant's procedural due process rights.<sup>101</sup> However, most, if not all, actions or inactions by police officers could be construed to potentially affect the guilt or innocence of a defendant. For example, neglecting to read a defendant his or her Miranda rights, neglecting to inform a driver of the probable cause for a traffic stop, neglecting to inform a driver of the probable cause for administering a field sobriety test, or neglecting to administer certain sobriety tests completely, would all fall under the same category as Garcia-Cepero's circumstance. Thus any action—either minor or significant—by a police officer would fall under the first factor of the Supreme Court's procedural due process test, in a similar fashion of guilt versus innocence, making the first prong itself almost irrelevant in cases placing police procedure at issue.

The second prong of the federal test to evaluate procedural due process issues can be classified similarly. Just as most, if not all, actions or inactions by a police officer can affect a defendant's potential guilt or innocence, there is almost always a risk—either having an effect on one's finances or one's freedom—in depriving a defendant of such interest, and the degree of such risk is subjective and arbitrary. Granted, there is no question that Garcia-Cepero could have

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<sup>96</sup> A HGN test, also known as a Horizontal Gaze Nystagmus test, “encompasses balance, finger to nose, walking the line and other physical tests, to determine whether [the defendant is] impaired or substantially impaired.” *Id.*

<sup>97</sup> See Pamela S. Karlan, Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment, 33 MCGEORGE L. REV. 473, 474 (2002) (stating that “the relationship between equality and liberty, and more specifically, between the equal protection and due process clauses, is in fact bi-directional.”).

<sup>98</sup> See *Garcia-Cepero*, 874 N.Y.S.2d at 696-98.

<sup>99</sup> See *supra* text accompanying note 30.

<sup>100</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 696-98.

<sup>101</sup> *Id.* at 697.

faced a higher fine or longer imprisonment time had he been convicted.<sup>102</sup> However, how does the court assess some private interest deprivation as causing too high a risk to be considered a violation of procedural due process? Is it relative to the defendant's personal wealth? A \$1,000 fine may be a nominal amount of money to a defendant who earns \$200,000 per year, but a tremendous financial burden to a defendant earning \$25,000 per year. The violation of one's procedural due process rights could then be classified as dependent upon one's wealth. Isn't the purpose of due process to ensure that *all* are given fair notice and a fair opportunity to be heard? Judge Cirigliano said it himself in the court's opinion that "[o]bviously, the government has a paramount interest and obligation in securing for all citizens the right to a fair trial."<sup>103</sup>

The third prong of the Supreme Court's evaluation of procedural due process issues is probably one of the most important prongs of the test, and naturally, the most divisive. As stated before, the government has an interest in protecting its citizens' right to a fair trial and "to insure that the ends of justice are served—that the guilty be punished and the innocent be set free."<sup>104</sup> The Bronx County Supreme Court claimed that in *Garcia-Cepero*'s case, "both the prosecution and/or the defense may have been better served if an interpreter would have been used."<sup>105</sup> An explanation from an interpreter would have purportedly clarified the choices presented to the defendant and perhaps *Garcia-Cepero* would have made a different decision.<sup>106</sup> However, we do not know this for sure. Explaining anything to anyone who is too inebriated to legally operate a vehicle, and expecting a coherent response, is difficult whether they speak English, Spanish, French, Portuguese, or Ticuna.

It is indisputable that in *Garcia-Cepero*, the court provided some valid points regarding the government's interest.<sup>107</sup> However, the court's reasoning with respect to the third prong of the federal test appears to be one-sided.<sup>108</sup> The court, once again, glosses over one of

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 697.

<sup>106</sup> *Id.*

<sup>107</sup> *See id.* at 697-98.

<sup>108</sup> *See id.*

the most important public policies to be addressed.<sup>109</sup> As previously discussed, the costs of obtaining an interpreter for all non-English speaking defendants, faced with the decision of whether or not to take a breathalyzer test could be astronomical and impracticable. Time is of the essence for administering a breathalyzer test.<sup>110</sup> Obtaining an interpreter in a short time span and for *any* language<sup>111</sup> could be costly and infeasible.

This ought to have been greatly considered in *Garcia-Cepero*. Rather, the court reasoned that “employing interpreters to aid in communication in these type of cases does *not* seem like an insurmountable burden when balanced against the defendant’s rights to a fair trial.”<sup>112</sup> Perhaps obtaining a Spanish interpreter would have been a smaller cost in comparison to the defendant’s right to a fair trial in that case, being that there is a large supply, due to the high demand,<sup>113</sup> of Spanish interpreters in the United States. However, because of the court’s brief and incomplete consideration of the financial feasibility of obtaining an interpreter in *Garcia-Cepero*, judicial precedent was established that could wind up costing the government millions of dollars, or put police officers in a position that is impossible to fulfill.

Furthermore, the third prong of the test is difficult to accept as completely reasonable. How can a court quantify the value of a defendant’s right to a fair trial? How can the court quantify the government’s interests, which is supposed to represent the people’s interests? Outside of fiscal considerations, this seems like an unreasonable analysis.

In *Torres*, the Appellate Division, Third Department, held that “[i]t is a well established precept of due process that non-English speaking defendants in criminal actions are entitled to an interpre-

<sup>109</sup> See *id.*

<sup>110</sup> The rate at which alcohol oxidizes in the body depends on factors such as one’s height, weight, gender, and food consumed. Generally, after the consumption of one alcoholic beverage (12 ounces of beer, 6 ounces of wine, or 1.5 ounces of 80-proof liquor), the blood alcohol content of a person peaks within 30 to 45 minutes. See Intoximeters Incorporated, [http://www.intox.com/about\\_alcohol.asp](http://www.intox.com/about_alcohol.asp) (last visited April 22, 2010).

<sup>111</sup> As previously discussed, a police officer could be faced with a situation in which the defendant only speaks an obscure or endangered language. Finding an interpreter immediately, for certain languages, may be impossible.

<sup>112</sup> *Garcia-Cepero*, 874 N.Y.S.2d at 698 (emphasis added).

<sup>113</sup> See Bureau of Labor Statistics, *supra* note 85.



ter.”<sup>114</sup> In *Torres*, however, the issue of the necessity of an interpreter was in reference to the defendant’s guilty plea.<sup>115</sup> From a strictly financial point of view, the potential cost of obtaining an interpreter in *Torres* would not have been great since time was not an issue, as it was in *Garcia-Cepero*. Furthermore, in *Torres* it was decided that the defendant’s due process rights were not violated since the ramifications of pleading guilty were fully explained and demonstrated as understood by the defendant.<sup>116</sup> Once again, this level of understanding would be nearly impossible to demonstrate if an interpreter is provided to an intoxicated defendant.

In *Yellen*, the Richmond County Civil Court stated that “[i]t is a fundamental axiom of our system of jurisprudence that due process of law includes the right to have an adequate interpretation of the proceedings. This would apply to a litigant who does not speak sufficient English.”<sup>117</sup> In that case, it was deemed that an interpreter was necessary to proceed, otherwise it would be a violation of the defendant’s due process rights.<sup>118</sup> However, again, from a strictly financial point of view, obtaining an interpreter in a timely manner was not an issue in *Yellen*.

Had the court in *Garcia-Cepero* delved further into New York case law addressing similar non-English speaking defendant issues, it would have been apparent that *Garcia-Cepero*’s due process rights were not violated. In both *Torres* and *Yellen*, the courts state that a non-English speaking defendant is generally entitled to an interpreter in criminal proceedings; however, both cases address providing an interpreter at a different stage of the criminal justice process. Providing an interpreter earlier in the criminal justice process may avoid later issues, but practicality and monetary issues ought to be considered.

New York is unclear in its case law as to what stage in the criminal justice process it is absolutely necessary to provide a non-English speaking defendant an interpreter in order to uphold one’s fundamental constitutional right to due process. Also, the New York

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<sup>114</sup> *Torres*, 772 N.Y.S.2d at 126 (quoting *Rodriguez*, 633 N.Y.S.2d at 681 (App. Div. 3d Dep’t 1995), *lv denied* 87 N.Y.2d 924 (1996)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Yellen*, 676 N.Y.S.2d at 725.

<sup>118</sup> *Id.* at 726.

courts have yet to seriously consider public policy reasons, such as fiscal responsibility. On the other hand, a large portion of the Supreme Court's standard seems to be irrelevant and meaningless, while the remaining portion is unreasonably subjective.

In the case of *Garcia-Cepero*, although the court's reasoning is flawed in its incomplete analysis, at a minimum, the standard addresses crucial issues with respect to due process and public policy considerations. Perhaps in pursuit of sound reasoning and practical considerations, New York courts should be less dismissive of the public policy issues surrounding procedural due process claims in the context of VTL section 1194. After all, it would be foolish of the justice system to promise something that in certain cases it cannot deliver.

Although VTL section 1194 does not differentiate between English speaking defendants and non-English speaking defendants,<sup>119</sup> the reasoning in *Garcia-Cepero* that the defendant's equal protection rights were violated when he was not provided with a Spanish interpreter<sup>120</sup> is unsound. By providing an interpreter to a non-English speaking defendant, the judicial process then affords such defendants with additional considerations that are not given to English speaking defendants. Furthermore, setting such a precedent creates a slippery slope with respect to determining for what languages will defendants be provided an interpreter and at what cost or impracticability does the government draw the line.

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<sup>119</sup> See N.Y. VEH. & TRAF. LAW § 1194 (McKinney 2006).

<sup>120</sup> See *Garcia-Cepero*, 874 N.Y.S.2d at 695-96.

