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An Impaired State of the Law

WHY NEW YORK'S APPROACH TO LINGUISTIC MINORITIES AND ROADWAY SAFETY IS SHORTSIGHTED

INTRODUCTION

By some estimates, an individual who regularly drinks and drives will have done so 80 times before he or she is arrested for a Driving While Intoxicated (DWI) charge.¹ Given the low probability of being apprehended for a DWI, drunk drivers have little incentive in this regard to obey impaired driving laws, a fact illustrated by the alarming statistic that one in three individuals arrested for a first time DWI offense will be arrested again for another DWI charge.²

The risk to the public cannot be understated. In 2012, 29.1 million Americans admitted that they had driven “under the influence of alcohol” that year.³ Each episode endangered not only the life of the impaired driver but countless other innocent pedestrians, passengers, and motorists. Thus, millions of innocent lives are senselessly put at risk each year. Such prevalence inevitably breeds tragedy. In the United States, 28 people die every day as a result of alcohol-impaired-driving fatalities,⁴ defined as a person killed in a crash involving a driver with a blood alcohol concentration (BAC) of .08 grams per deciliter or higher.⁵ In 2013, there were approximately 10,076 of these accidents.⁶ This figure represents 31% of all motor vehicle fatalities.⁷ Drunk driving, without a doubt, continues to be a lethal public safety concern.

¹ *Sober to Start*, MADD35, <http://www.madd.org/drunk-driving/ignition-interlocks/> (last visited Mar. 27, 2015).

² *Id.*

³ *Drunk Driving Statistics*, MADD35, <http://www.madd.org/drunk-driving/about/drunk-driving-statistics.html> (last visited Mar. 27, 2015).

⁴ See *Drunk Driving Statistics*, FOUND. FOR ADVANCING ALCOHOL RESPONSIBILITY, <http://responsibility.org/wp-content/uploads/2015/03/2013-State-of-Drunk-Driving-Fatalities-in-America.pdf>.

⁵ *Id.*

⁶ *Id.*

⁷ See *id.*

Drunk or impaired driving remains a persistent problem for law enforcement as well. In 2011, over 1 million Americans were arrested for driving under the influence of alcohol or narcotics.⁸ That is more than the total number of Americans arrested for murder, non-negligent homicide, robbery, aggravated assault, burglary, and forcible rape combined that year.⁹ Unlike the occurrence of homicides, assaults, or robberies, victimization through a motor vehicle operated by an intoxicated driver seems to have a particular element of randomness or spontaneity. Accordingly, the onus is on law enforcement and prosecutors to ensure that these impaired drivers get as few opportunities as possible to get behind a wheel. Since the early 1980s, with the passage of The National Minimum Drinking Age Act and the creation of Mothers Against Drunk Driving (MADD), there has been a seemingly unstoppable march in favor of heightened prosecution of motorists who operate their vehicles under the influence of alcohol.¹⁰ Despite such a dogmatic resolve, a series of cases from New York City may test this commitment to justice.

Over the last five years, a line of New York cases, beginning with *People v. Garcia-Cepero*,¹¹ have challenged the constitutionality of the procedure used by the New York Police Department (NYPD) to gauge a DWI suspect's level of sobriety. As the procedure currently stands, if a motorist is stopped for a suspected DWI, he or she will be subjected to a breathalyzer test to measure his or her Blood Alcohol Content (BAC).¹² This breathalyzer test may be administered at the scene of the incident or at one of six Intoxicated Driver Testing Units (IDTU) located throughout the city, with two in Manhattan and one in each of the remaining four boroughs.¹³

Typically, the breathalyzer test is followed by the administration of the Standardized Field Sobriety Tests (SFST), a physical coordination test that has been standard procedure for many police departments around the country since 1981, to identify impaired motor vehicle operators.¹⁴ The SFST is more

⁸ *Crime in the United States 2011, Estimated Number of Arrests: United States 2011*. FBI: FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29>.

⁹ *Id.*

¹⁰ *History Speaks for Itself*, MADD35, <http://www.madd.org/underage-drinking/why21/history.html> (last visited Mar. 27, 2015).

¹¹ See *People v. Garcia-Cepero*, 874 N.Y.S.2d 689 (N.Y. Sup. Ct. 2008).

¹² *Id.*

¹³ *New Rules for DWI Suspects in New York City*, WABC EYEWITNESS NEWS (Dec. 27, 2009), <http://abclocal.go.com/wabc/story?section=news/local&id=7189908>.

¹⁴ JACK STUSTER ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., EVALUATION OF THE EFFECTS OF SFST TRAINING ON IMPAIRED DRIVER ENFORCEMENT, NHTSA.,

commonly known as the coordination test where a police officer asks a motorist suspected of being intoxicated to walk in a straight line, touch his or her nose, stand on one leg, and perform other relatively simple tasks designed to gauge that suspect's sobriety. Unlike the breathalyzer test, the coordination test is not administered to all DWI suspects.¹⁵ Since the administration of the test is contingent on the NYPD officer being able to clearly verbally communicate with the suspect, the test is not offered in situations where the presiding officer is faced with an insurmountable language barrier, and is thus only offered to English-speaking DWI suspects.¹⁶

Accordingly, non-English-speaking defendants convicted of DWIs have recently claimed that the NYPD's procedure violates their equal protection and due process rights under the United States and New York Constitutions.¹⁷ New York courts have previously been inconsistent in their deliberations on the legal claims presented by this class of litigants, particularly in the level of scrutiny they apply to the constitutional challenges levied.¹⁸

Part I of this note will review the constitutional framework under which the recent challenges to the NYPD procedure have been analyzed. Part II will review the relevant case history which gave rise to the legal dilemma addressed by the following parts, namely, the judicial split amongst New York courts where some courts employed a strict scrutiny standard of review in adjudicating the constitutional claims raised against the NYPD protocol,¹⁹ while others adopted a rational basis standard,²⁰ which has traditionally been considered to be a much lower legal threshold for the state to meet.²¹ Next, Part III will discuss and analyze the challenges raised against the NYPD policy under the federal and New York Constitutions. Finally, Part IV will

TRAFFIC SAFETY FACTS RESEARCH NOTE NO. DOT HS 811 455 (May 2011). The SFST was initially developed by the National Highway Safety Administration, which started funding research into the SFST in 1975. *Id.* The SFST is in actuality a series of three separate tests: the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg stand test. *Id.* The SFST is used in all fifty states and has become standard pre-arrest protocol in most police departments. *Id.*

¹⁵ *Garcia-Cepero*, 874 N.Y.S.2d at 692.

¹⁶ *Id.* at 695.

¹⁷ *Id.* at 698; *People v. Perez*, 898 N.Y.S.2d 402, 404 (N.Y. Sup. Ct. 2010); *People v. Molina*, 887 N.Y.S.2d 784, 788 (N.Y. Sup. Ct. 2009); *People v. Burnet*, 882 N.Y.S.2d 835, 838 (N.Y. Sup. Ct. 2009).

¹⁸ *Perez*, 898 N.Y.S.2d at 404; *Molina*, 887 N.Y.S.2d at 788; *Burnet*, 882 N.Y.S.2d at 838; *Garcia-Cepero*, 874 N.Y.S.2d at 692.

¹⁹ *See, e.g., Molina*, 887 N.Y.S.2d at 794

²⁰ *Garcia-Cepero*, 874 N.Y.S.2d at 695-96.

²¹ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

put forward a suggested approach that New York courts can follow, which would allow the NYPD to effectively protect the public from drunk drivers while simultaneously preserving the possibility of future legal safeguards for linguistic minorities. Rather than choose between rational basis review, which often acts as a judicial rubber stamp on government action, or strict scrutiny review, which views the government action in question as inherently suspect,²² New York courts should review challenges to government classifications based on language under an intermediate level of review, also referred to as rational basis plus. Applying an intermediate level of scrutiny would allow the judiciary to engage in the meticulous scrutiny associated with strict scrutiny analysis if it found such scrutiny was warranted. However, it would also allow courts to uphold language classifications which are instituted to fulfill legitimate government objectives, essentially splitting the proverbial difference.

I. CONSTITUTIONALITY OF GOVERNMENT CLASSIFICATIONS BASED ON LANGUAGE

The majority of defendants who have challenged the NYPD procedure have challenged it under both the federal and New York Constitutions. The Equal Protection Clause of the 14th Amendment dictates that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²³

Under the 14th Amendment, the government is constitutionally barred from passing legislation that differentiates between individuals based on so-called suspect classifications, race, religion, and ethnicity, unless it can prove that the classification is narrowly tailored towards the fulfillment of a compelling state interest.²⁴ This exacting, highly scrupulous inquiry is often referred to as strict scrutiny analysis and is only appropriate when a government action restricts a fundamental right or employs a suspect classification. The use of these suspect classifications is so seldom associated with furthering a legitimate government interest

²² See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

²³ U.S. CONST. amend. XIV, § 1.

²⁴ *Clarke v. Jeter*, 486 U.S. 456, 461 (1988); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978); *Korematsu*, 323 U.S. at 216.

that a court reviewing such a classification begins its analysis with the judicial presumption of invalidity.²⁵

Typically, government action which does not infringe on a fundamental right or employ a suspect classification is subject to rational basis analysis.²⁶ In stark contrast to the meticulous scrutiny of a strict scrutiny analysis, under a rational basis analysis, the state need only prove that that the government action in question is rationally related to a legitimate government interest.²⁷ Historically, this standard of review has been extremely deferential to the government and is often met once the government puts forward a plausible correlation between its challenged classification and a public policy concern.²⁸ Whereas government action subject to strict scrutiny begins with a judicial presumption of invalidity, a court reviewing a statute or policy under rational basis review holds no such predispositions.²⁹

When presented with the question of whether a classification based on language warrants strict scrutiny analysis, federal courts have resoundingly answered in the negative. In *Soberal-Perez v. Heckler*, predominantly Spanish-speaking plaintiffs were initially denied various Social Security benefits due to the Secretary of Health and Human Service's failure to offer notices and services in Spanish.³⁰ Plaintiffs sought declaratory relief that this policy violated the Equal Protection and Due Process Clause of the Federal Constitution.³¹ Declining to apply a strict scrutiny analysis, the court upheld the policy under a rational basis review.³²

Hispanics as an ethnic group do constitute a suspect class for the purpose of equal protection analysis. Nevertheless, the conduct at issue here, the Secretary's failure to provide forms and services in the Spanish language, does not on its face make any classification with respects to Hispanics as an ethnic group. A classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English speaking individuals, and not on the basis of race, religion, or national origin. Language, by itself, does not identify members of a suspect class.³³

²⁵ *Bakke*, 438 U.S. at 357-58; *Korematsu*, 323 U.S. at 216.

²⁶ *See Williamson v. Lee Optical*, 348 U.S. 483, 486 (1955).

²⁷ *See id.*; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40. (1985).

²⁸ *See Williamson*, 348 U.S. at 490.

²⁹ *Cleburne*, 473 U.S. at 439-40.

³⁰ *Soberal-Perez v. Heckler*, 717 F.2d 36, 36-37 (1983).

³¹ *Id.* at 37-38.

³² *Id.* at 42.

³³ *Id.* at 41 (internal citations omitted).

In similar letter and spirit to its federal counterpart, Article I § 11 of the New York Constitution stipulates that “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”³⁴ Article I § 11 was expanded by the enactment of Civil Rights Law § 40-c.

1. All persons within the jurisdiction of this state shall be entitled to the equal protection of the laws of this state or any subdivision thereof.
2. No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his civil rights . . . by the state or any agency or subdivision of the state.³⁵

New York courts have held that the guiding inquiry into whether or not state action violates the equal protection clause of the New York Constitution “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.”³⁶ New York jurisprudence would arguably provide more protection to historically disenfranchised demographics such as women and individuals with a mental disability; whereas federal courts have declined to extend strict scrutiny protection to these two groups,³⁷ New York explicitly provides this legal protection in its constitution. Although the New York Constitution explicitly forbids discriminatory state action on the basis of certain enumerated classifications, thus enlarging the set of government classifications considered to be presumptively invalid, New York judges employ the identical strict scrutiny/rational basis analysis as their federal counterparts when faced with a constitutional challenge to a non-enumerated government classification.³⁸

Similar to federal law, the New York Constitution does not list language as a suspect classification.³⁹ Offering slightly more protection to linguistic minorities, New York courts have held that “[a]lthough language by itself does not identify members of a suspect or protected class, it can be a basis of a finding of discrimination based on national origin when it creates a

³⁴ N.Y. CONST. art. I, § 11.

³⁵ N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2014).

³⁶ 8200 Realty Corp. v. Lindsay, 27 N.E.2d 647, 653 (N.Y. 1970).

³⁷ United States v. Virginia, 518 U.S. 515, 532-33 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

³⁸ See, e.g., Hernandez v. Robles, 855 N.E.2d 1, 6 (N.Y. 2006); Maresca v. Cuomo, 475 N.E.2d 95, 98 (N.Y. 1984); Alevy v. Downstate Medical Center, 348 N.E.2d 537, 542 (N.Y. 1976); Neale v. Hayduk, 316 N.E.2d 861, 862 (N.Y. 1974).

³⁹ See N.Y. CONST. art. 1, § 11.

discriminatory result against all persons who do not speak English rather than persons of any particular nationality.”⁴⁰ In line with the general progressive nature that often characterizes the state, New York courts have been sensitive to the fact that classifications based on language, though not explicitly discriminatory, may be implemented in ways that create “discriminatory result[s].”⁴¹ Despite this cognizance, the state’s courts have declined to accept that all non-English-speaking New Yorkers constitute a suspect class entitled to strict scrutiny protection.⁴² Accordingly, at this moment, New York and federal jurisprudence regarding government classifications based on language is essentially identical.

II. CONFLICTING INTERPRETATIONS OF WHETHER LINGUISTIC MINORITIES CONSTITUTE A SUSPECT CLASS

Whether denying a non-English-speaking arrestee the opportunity to take a coordination test violates that arrestee’s rights has not been heavily litigated in federal or state courts. Though the case law is still developing, there have been a number of cases in recent years which have ruled on the issue.⁴³ Originally, when these cases first began reaching the bench, there appeared to be no identifiable trend, with some courts applying the more demanding strict scrutiny analysis, while other courts applied rational basis review.⁴⁴ This inconsistency was most evident in Bronx Supreme Court, which deliberated on the issue four separate times between 2008 and 2010, but reached four different rulings.⁴⁵ This lack of judicial harmony persisted throughout the city until October 2013, when, for the first time, a state appellate court held that the NYPD procedure was to be reviewed under a rational basis analysis.⁴⁶

New York courts first encountered the issue of whether a NYPD officer’s failure to administer a physical coordination test to a non-English-speaking defendant violated that defendant’s constitutional rights under the Equal Protection Clause in

⁴⁰ *Yellen v. Baez*, 676 N.Y.S.2d 724, 726 (N.Y. Civ. Ct. 1997).

⁴¹ *Id.*

⁴² *People v. Salazar*, 973 N.Y.S.2d 140, 144 (N.Y. App. Div. 2013).

⁴³ *See Salazar*, 973 N.Y.S.2d at 144; *People v. Burnet*, 882 N.Y.S.2d 835, 842 (N.Y. Sup. Ct. 2009); *People v. Garcia-Cepero*, 874 N.Y.S.2d 689, 695-96 (N.Y. Sup. Ct. 2008).

⁴⁴ *Garcia-Cepero*, 874 N.Y.S.2d at 695; *Burnet*, 882 N.Y.S.2d at 842-43.

⁴⁵ *Garcia-Cepero*, 874 N.Y.S.2d at 698; *Burnet*, 882 N.Y.S.2d at 844; *People v. Molina*, 887 N.Y.S.2d 784, 794; *People v. Perez*, 898 N.Y.S.2d 402, 408 (N.Y. Sup. Ct. 2010).

⁴⁶ *Salazar*, 973 N.Y.S.2d at 144.

People v. Garcia-Cepero.⁴⁷ There the defendant was arrested after officers observed him driving on the wrong side of the road and was subsequently charged with operating a motor vehicle while under the influence of alcohol.⁴⁸ Although the defense did not raise any constitutional challenges to the NYPD's procedure, the court found that the specific facts at issue "required [the court] to decide whether . . . the New York Police Department's procedure of requiring only a breathalyzer test of non-English speaking individuals while requiring a breathalyzer and a HGN field test of English-speaking individuals, violates the Equal Protection Clauses of the United States Constitution and the New York State Constitution."⁴⁹

The court's eagerness to tackle the issue on its own initiative may make it less surprising to learn that it held the NYPD's procedure violates the Equal Protection Clauses of both the New York and Federal Constitution.⁵⁰ The court found that the policy was "inherently discriminatory against non-English-speaking individuals"⁵¹ and there was "no reasonable or rational basis to differentiate between English speaking and non-English speaking individuals."⁵² The court, however, also noted that it was not the regulation, VTL § 1194(b), which differentiated between English and non-English-speaking individuals, but the practice adopted by the NYPD.⁵³ In fact, the court emphasized that the regulation in question was facially neutral, reading "[e]very person shall . . . submit to a breath test to be administered by the police."⁵⁴

The court reached the opposite conclusion in *People v. Burnet*.⁵⁵ The defendant there was arrested and charged with operating a motor vehicle while under the influence of alcohol and the unlicensed operation of a motor vehicle.⁵⁶ The defendant submitted that he had suffered a violation under the New York and Federal Constitutions' Due Process Clauses due to the NYPD's policy of only administering the coordination test to English-speaking motorists.⁵⁷ The defendant also claimed that his

⁴⁷ *Garcia-Cepero*, 874 N.Y.S.2d at 692.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 696.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 695.

⁵⁴ *Id.* (emphasis removed from original).

⁵⁵ *People v. Burnet*, 882 N.Y.S.2d 835 (N.Y. Sup. Ct. 2009).

⁵⁶ *Id.* at 835.

⁵⁷ *Id.* at 838.

rights had been violated under the Equal Protection Clause due to the NYPD's failure to provide an interpreter during the breathalyzer testing procedure, and thus the evidence should be suppressed.⁵⁸ Although the defendant challenged the NYPD's physical coordination test procedure under the Due Process Clause, the court's holdings are directly applicable.

Reaffirming that a defendant who does not speak English must understand court proceedings in which he or she is involved, the court held that the breathalyzer testing procedure was neither a judicial nor a criminal proceeding, but rather an administrative proceeding.⁵⁹ Hence, there is no fundamental right at stake in the application of the NYPD's DWI psychophysical test.⁶⁰ The court also wisely declined to apply a strict scrutiny review of the NYPD policy, explicitly stating that "[n]either the federal nor the state constitution identifies all persons who do not speak English as members of a suspect or protected class."⁶¹ The court noted that the defendant would need to "demonstrate that the members of this so-called suspect class, non-English speaking criminal defendants, have been the subject of discriminatory behavior based on race, nationality or ethnicity"⁶² in order to succeed on this claim, but failed to do so here.⁶³ Ultimately, the court held that the NYPD practice was rationally related to avoiding confusion, on the part of the officer and the defendant, through the administration of the coordination test.⁶⁴

Yet again, in 2009, the Supreme Court of Bronx County had another opportunity to rule on this issue. In *People v. Molina*,⁶⁵ the defendant was arrested for driving while under the influence of alcohol.⁶⁶ A jury trial found the defendant guilty on the counts of reckless driving and driving while ability impaired by alcohol.⁶⁷ Relying on *Garcia-Cepero*, the defense argued that the NYPD's policy under VTL 1192(1) was facially unconstitutional under the Equal Protection Clause in that it deprived the defendant, and all non-English-speaking motorists, the opportunity to take the physical coordination test.⁶⁸ Departing from the steady

⁵⁸ *Id.* at 837-38.

⁵⁹ *Id.* at 843.

⁶⁰ *Id.*

⁶¹ *Id.* at 842-43.

⁶² *Id.* at 843.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *People v. Molina*, 887 NY.S.2d 784 (N.Y. Sup. Ct. 2009).

⁶⁶ *Id.* at 787.

⁶⁷ *Id.*

⁶⁸ *Id.* at 788.

legal footing of *Burnet*, the court found that “the defendant in this case, a person of Hispanic origin whose primary language is Spanish, is a member of a protected class twice over.”⁶⁹ In an attempt to rationalize its holding with *Burnet*, the court reviewed the NYPD procedure under a rational basis analysis as well and held that that the procedure fails to meet even this legislatively deferential standard of review.⁷⁰

[U]nlike *Burnet*, our facts clearly depict a defendant of Hispanic origin and ethnicity who is discriminated against because of an alleged language barrier and not because of a desire to avoid “confusion and/or complications.” Therefore, even under the rational basis test, the discriminatory procedure due to an actual language barrier or arbitrarily determined language barrier under the facts of our case has no rational basis and violated [the defendant’s] constitutional rights.⁷¹

The court addressed the same issue once again in *People v. Perez*.⁷² The defendant here was arrested for driving through a toll booth without paying the requisite fee.⁷³ After a jury verdict found the defendant guilty of driving while intoxicated, the defendant moved to set aside the verdict on the grounds that his constitutional rights to due process and equal protection under the law had been violated when he was not administered a physical coordination test that would have been administered to an English-speaking defendant.⁷⁴ Rejecting this argument, the court took pains to note that “the defendant’s national origin had no bearing on the highway officer’s actions. For example, for many Hispanics born in the United States, English is their first language or, if not, they nevertheless do understand English. Accordingly, English-speaking Hispanics are offered the coordination test.”⁷⁵ Hence, the court chose to apply “the legitimate governmental purpose test,”⁷⁶ a test closely analogous to the rational basis test, in analyzing the defendant’s equal protection claim.⁷⁷ The court found that the NYPD’s practice was rationally related to avoiding confusion through the administration of the coordination test and the efficient allocation of limited police resources.⁷⁸

⁶⁹ *Id.* at 792.

⁷⁰ *Id.* at 793-94.

⁷¹ *Id.* at 794.

⁷² *People v. Perez*, 898 N.Y.S.2d 402, 404 (N.Y. Sup. Ct. 2010).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 406.

⁷⁶ *Id.* at 407.

⁷⁷ *Id.* at 405-06.

⁷⁸ *Id.* at 407.

In *People v. Pelegrin*⁷⁹ the court reemphasized that under a rational basis standard of review, the NYPD's DWI arrest procedure does rationally relate to a legitimate state interest.⁸⁰ Here too, the defendant was arrested and charged with operating a motor vehicle while under the influence of alcohol or drugs after the police observed him driving erratically.⁸¹ The defendant admitted to having drunk alcohol earlier that night, and a chemical test analysis at the IDTU uncovered that he had a BAC of .13.⁸² The defendant moved to dismiss the charges against him, alleging that the charges are premised on violations of the Equal Protection and Due Process Clauses of the Federal and New York Constitutions.⁸³ The defendant claimed that the NYPD's testing procedure resulted in "two classes of suspects . . . (1) English speakers who are afforded 'two opportunities to show that they are or are *not* intoxicated,' and (2) non-English speakers who are 'limited' to the BAC test."⁸⁴

In contrast to the holdings in *Garcia-Cepero* and *Molina*, the court held that "government actions that classify individuals on the basis of language do not receive heightened scrutiny because such classifications, although inextricably intertwined with ethnicity in the cases of many, is not a classification that is identified as a suspect classification under the controlling case law."⁸⁵ In step with *Burnet* and *Perez*, the court here held that "[a]bsent either intentional discrimination against a suspect class or the implication of a fundamental right, rational basis review applies."⁸⁶

The Honorable Rodrigues-Morick, writing for the court, also expounded on the validity of a possible disparate impact claim.⁸⁷ Noting that a law does not necessarily have to be facially discriminatory to have a discriminatory impact, the court held that the existence of a suspect class can also be proven by demonstrating that "a state actor applied an otherwise facially neutral law or policy in a discriminatory manner and intended to do so."⁸⁸ Ceding that the NYPD's policy was not facially discriminatory, the defendant attempted to make a showing of

⁷⁹ *People v. Pelegrin*, 959 N.Y.S.2d 401 (N.Y. Crim. Ct. 2013).

⁸⁰ *Id.* at 407.

⁸¹ *Id.* at 404.

⁸² *Id.* at 406.

⁸³ *Id.* at 404.

⁸⁴ *Id.*

⁸⁵ *Id.* at 405.

⁸⁶ *Id.* at 405-06.

⁸⁷ *Id.* at 406.

⁸⁸ *Id.* at 405.

discrimination through a disparate impact claim.⁸⁹ In order to make out a successful disparate impact claim, the defendant was required to prove that there was in fact a disparate impact on a given class and that the disparate impact was intentionally orchestrated.⁹⁰ However, the defendant was unable to make the showing of intentionality needed to succeed on the claim.⁹¹ The crux of the defendant's argument was simply that as the city's largest linguistic minority, Spanish-speaking New Yorkers will likely suffer the greatest impact under the current NYPD procedure.⁹² The court found this to be unpersuasive, reaffirming that "standing alone, [such impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny."⁹³

In October of 2013, a state appellate court ruled on the issue for the first time in *People v. Salazar*.⁹⁴ By this time, some New York courts had held that the NYPD practice was subject to strict scrutiny analysis,⁹⁵ while others had held that it was subject to the more deferential rational basis standard.⁹⁶ After a jury trial convicted the defendant of driving while intoxicated, the defendant submitted a motion to set aside the verdict on the grounds that the NYPD's policy of administering a physical coordination test to English-speaking DWI suspects, while not offering the same test to non-English-speaking DWI suspects, violated the Equal Protection and Due Process Clauses of the United States and New York Constitutions.⁹⁷ Granting the defendant's motion, the trial court held that the NYPD's procedure created a "classification predicated upon a person's Hispanic origin and their inability to speak and/or understand the English language and therefore discriminates against primarily Spanish speaking individuals of Hispanic origin"⁹⁸ and dismissed all charges.⁹⁹

Finally offering clarity on the conflicting lower court rulings, the Appellate Division of the First Department expressly rejected the holding of *Molina* and found that the "[lower] court erred in concluding that the defendant's

⁸⁹ *Id.* at 406.

⁹⁰ *Id.*

⁹¹ *Id.* at 406-07.

⁹² *Id.*

⁹³ *Id.* at 406 (quoting *Washington v. Davis*, 426 U.S. 229 (1976)) (alterations in original).

⁹⁴ *People v. Salazar*, 973 N.Y.S.2d 140, 142 (N.Y. App. Div.).

⁹⁵ *People v. Molina*, 887 N.Y.S.2d 784, 794-95 (N.Y. Sup. Ct. 2009).

⁹⁶ *People v. Perez*, 898 N.Y.S.2d 402, 407 (N.Y. Sup. Ct. 2010); *People v. Burnet*, 882 N.Y.S.2d 835, 842-43 (N.Y. Sup. Ct. 2009).

⁹⁷ *Salazar*, 973 N.Y.S.2d 140, 142-43 (N.Y. App. Div. 2013).

⁹⁸ *Id.* at 143.

⁹⁹ *Id.*

constitutional rights to equal protection of the law and due process were violated by the Police Department practice under consideration.”¹⁰⁰ Quoting *Soberal-Perez*, the court held that “language, by itself, does not identify members of a suspect class”¹⁰¹ and that the NYPD procedure was facially neutral in regards to ethnicity.¹⁰² Reviewing the NYPD practice under a rational basis review, the court found the practice to be rationally related to ensuring the reliability of the coordination test and the efficient allocation of limited law enforcement resources.¹⁰³ The court held the New York and Federal Constitutions offer “equivalent constitutional safeguards”¹⁰⁴ and did not conduct a separate inquiry under both.¹⁰⁵

The court did not end its analysis there. Prudently noting that facial neutrality does not preclude the defendant from proving intentional discrimination, the court also dove into an analysis of a potential disparate impact claim.¹⁰⁶ Once again turning to *Soberal-Perez*, the court held that in order to make out a successful disparate impact claim, the defendant must demonstrate that the “decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of’ [and] not merely ‘in spite of’ its adverse effects upon an identifiable group.”¹⁰⁷ *Salazar* represents the current position of New York jurisprudence on the constitutionality of the NYPD practice.¹⁰⁸

III. EVALUATING POTENTIAL CHALLENGES TO THE NYPD PROCEDURE UNDER THE FEDERAL AND NEW YORK EQUAL PROTECTION CLAUSES

With the exception of *Burnet*, which explored whether a defendant may be able to avail himself of strict scrutiny protection if there was a fundamental right at stake,¹⁰⁹ the overwhelming majority of the decisions outlined above focus on the applicability of strict scrutiny protection through the use of a

¹⁰⁰ *Id.* at 9.

¹⁰¹ *Id.* at 10.

¹⁰² *Id.*

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 10.

¹⁰⁷ *Id.*

¹⁰⁸ Daniela Giordano, *Disparity in Police Procedures for Non-English Speaking DWI Suspects: Constitutional Protections for Non-English Speaking Criminal Defendants Falling Second to Governmental Interests*, 30 TOURO L. REV. 1243 (2014).

¹⁰⁹ *People v. Burnet*, 882 N.Y.S.2d 835, 842 (N.Y. Sup. Ct. 2009).

suspect classification.¹¹⁰ Thankfully, this is not the first time a court has been confronted with such a legal dilemma. The Court in *City of Cleburne v. Cleburne Living Center*¹¹¹ was faced with a similarly novel issue when it determined that the total population of Americans who are mentally handicapped cannot constitute a suspect class and are thus incapable of availing themselves of the strict scrutiny standard of review.¹¹² The court held that the municipal ordinance in question, requiring “hospital[s] for the feeble minded” to obtain a special permit was not rationally related to a legitimate state interest because there was no evidence that the group home would pose any danger to the municipality’s legitimate interests.¹¹³

The Court laid out four factors that it used to determine whether or not a specific demographic warranted the designation of a “suspect class.”¹¹⁴ These four factors are (1) whether the disadvantaged group in question has faced a history of discrimination, (2) whether that group has access to the political process, (3) whether the challenged classification is based on an immutable characteristic, and lastly, (4) whether the classifying factor has an impact on an individual’s “ability to cope with and function in the everyday world.”¹¹⁵ A review of the *Cleburne* factors confirms that non-English-speaking individuals do not qualify as a suspect class. Thus, the NYPD practice of only offering the coordination test to English-speaking motorists should not be reviewed under a strict scrutiny analysis.

The first factor, whether or not the purported suspect class has faced a history of discrimination, poses an interesting and informative question in regards to the scope of this proposed suspect class: which individuals are included within it? The notion that the suspect class in question here is comprised of any homogeneous amalgamation of individuals is completely false. The proposed suspect class cannot accurately said to be comprised of all individuals of Hispanic background; a Hispanic New Yorker who is arrested for a DUI would be provided *both* the breathalyzer and coordination test if that individual spoke English. Furthermore, it cannot be accurately stated that the suspect class is comprised of all Spanish-speaking individuals or any other linguistic minority; an individual, of any ethnicity, may

¹¹⁰ See *supra* Part II.

¹¹¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

¹¹² *Id.* at 442-43.

¹¹³ *Id.* at 437.

¹¹⁴ *Id.* at 442-45.

¹¹⁵ *Id.* at 442.

be equally proficient in English and another language and thus would be offered the coordination test. Alternatively, an individual's primary language may not be English, but that individual may nonetheless be able to effectively communicate with an English-speaking police officer, in which case the test should also be offered.

Moreover, different groups of ethnic and linguistic minorities have faced different forms and magnitudes of discrimination at different points in this country's past. Classifying these various demographics into one suspect class on the basis of their shared history of discrimination would require an impermissible stretch of both logic and history and thus cannot be the basis of a suspect class designation.

Discrimination against various ethnic demographics generally manifested itself most prevalently during the epoch in which that demographic was beginning to immigrate to the United States. For example, discrimination against Italian-Americans was pervasive from 1880 to 1920, during which time more than four million Italians migrated to the United States.¹¹⁶ Once they arrived at Ellis Island, more than a third of all Italian immigrants remained in New York City.¹¹⁷ A combination of anti-immigrant sentiment and bustling urban expansion resulted in Italian-Americans being the victims of housing and employment discrimination,¹¹⁸ but by the 1940s, Italian-Americans throughout the country had, in large part, succeeded in assimilating into American society.¹¹⁹ By the onset of World War II, "Italian Americans step[ped] permanently into the center of U.S. cultural life"; over a million Italian Americans enlisted in the armed forces and millions more contributed by working in factories vital to the national war effort.¹²⁰ This service "brought Italian Americans even greater social mobility, more access to education, and a higher

¹¹⁶ *Immigration: Italian, The Great Arrival*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/italian3.html> (last visited Mar. 27, 2015).

¹¹⁷ *A City of Villages*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/italian5.html> (last visited Mar. 17, 2015).

¹¹⁸ *Tenements and Toil*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/italian6.html> (last visited Mar. 17, 2015); *Working Across the Country*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/italian7.html> (last visited Mar. 17, 2015).

¹¹⁹ *A Century in the Spotlight*, LIBRARY OF CONGRESS., <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/italian9.html> (last visited Feb. 28, 2015).

¹²⁰ *Id.*

profile in the nation's popular imagination."¹²¹ As a result, the children and grandchildren of that proud generation saw many more opportunities and far fewer instances of discrimination.¹²²

Discrimination against Chinese immigrants, which was most prevalent from 1849 to 1882, took a different form.¹²³ Unlike the vast majority of Italian immigrants who came to the United States via Ellis Island,¹²⁴ most Chinese immigrants that came to the United States during the second half of the nineteenth century migrated to the West Coast.¹²⁵ Originally attracted by the California Gold Rush of 1849, Chinese immigrants were welcomed by Western industrialists who were enticed by the prospect of a cheap labor force.¹²⁶ Hence, many Chinese immigrants found work as agricultural laborers or on railroad construction crews.¹²⁷ In response to "rising social tensions," California passed a wide range of restrictive measures from 1850 to 1870 aimed at discouraging Chinese immigration, including requiring Chinese immigrants to obtain special business permits.¹²⁸ As the nation fell upon difficult economic times during the 1870s, financial hardship and low job prospects caused "dislike and even racial suspicion and hatred"¹²⁹ of Chinese-Americans by other recent immigrant groups, as well as many Americans, who were now all competing for a limited number of career opportunities.¹³⁰ In some instances there were even anti-Chinese riots. This anti-Chinese sentiment, coupled with the fragile economic climate of the time, tragically led to the passage of the Chinese Exclusion Act of 1882.¹³¹

There was no comparable state action, either state or federal, against Italian or other European immigrants. Furthermore, given that "other immigrants,"¹³² or other predominantly non-English-

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *Rise of Industrial America, 1876-1900: Chinese Immigration to the United States, 1851-1900*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/chinimms/> (last visited Feb. 28, 2015).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Milestones: 1866-1898: Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, <http://history.state.gov/milestones/1866-1898/ChineseImmigration> (last visited Feb. 28, 2015).

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Rise of Industrial America, 1876-1900: Chinese Immigration to the United States, 1851-1900*, *supra* note 123.

¹³² *Id.*

speaking demographics, were a key impetus for the passage of the Chinese Exclusion Act, designating all individuals who do not speak English as their primary language as a suspect class would be an insult to the reasoning behind why suspect classes are formed in the first place: to offer specific, well defined legal protections to an otherwise vulnerable minority group. A plunge into American history will reveal multiple instances of racism and discrimination perpetrated by different groups against different groups. The proposed suspect class of all non-English-speaking individuals is itself capable of being subdivided into numerous other suspect classes,¹³³ some of which may have plausible claims of discrimination perpetrated by other sub-suspect classes.

The first *Cleburne* factor questions whether the group in question has suffered a history of discrimination, a straightforward question that is incapable of a straightforward response. This incongruence should disfavor the application of a strict scrutiny analysis in reviewing the NYPD procedure, as the proposed suspect class that is being discriminated against is more accurately described as a number of distinct suspect classes.

Under the second *Cleburne* factor, the Court questioned whether the proposed suspect class has access to the political process.¹³⁴ The same inherent difficulty in evaluating the first *Cleburne* factor is present in the second factor as well: different linguistic minorities have faced varying degrees of exclusion from the political process.¹³⁵ This recognition led Congress to amend the Voting Rights Act in 1975 to include the minority language provisions embodied in Sections 203 and 4(f)(6).¹³⁶ Prior to the enactment of this amendment, Congress found pervasive voting discrimination against voters who spoke Spanish, various Native American dialects, and various Asian languages:¹³⁷

[The Congress finds that], through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation.

¹³³ See CAMILLE RYAN, LANGUAGE USE IN THE UNITED STATES: 2011, AMERICAN COMMUNITY SURVEY REPORTS 1 (Aug. 2013), available at <http://www.census.gov/prod/2013pubs/acs-22.pdf> (discussing the large number of languages other than English spoken in the United States).

¹³⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 465-66 (1985).

¹³⁵ See *supra* Part III.

¹³⁶ See *Civil Rights Monitor*, LEADERSHIP CONF., http://www.civilrights.org/monitor/vol8_no5_6/art2.html.

¹³⁷ *Id.*

The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.¹³⁸

The amended legislation prohibits any “state or political subdivision”¹³⁹ from only offering voting material,¹⁴⁰ broadly defined to include “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,”¹⁴¹ in solely English, in political divisions where a single linguistic minority represents more than 10,000 individuals, makes up five percent or more of the total voting population, is on an Indian reservation, or has an illiteracy rate that is higher than the national average.¹⁴²

Admittedly, a single piece of legislation cannot cure decades or centuries of voting discrimination. The second *Cleburne* factor, however, does not question whether a certain minority group participates in the political process, but rather whether that minority group has access to the political process. Sections 203 and 4(f)(4) of the Voting Rights Act unambiguously signal the federal government’s intent of bringing formerly disenfranchised groups into the election process. Tangentially, aside from a change in governance, a change in national politics has also facilitated the entry of non-English-speaking voters into the political process. The 2012 election highlighted the critical and growing role that predominantly non-English-speaking voters play in elections, particularly in swing states such as Virginia, Florida, Nevada, and Colorado.¹⁴³ Both campaigns released television commercials in Spanish and made concentrated efforts to woo Spanish-speaking voters.¹⁴⁴

Although the right to vote is arguably the crown gem in a minority group’s struggle to gain access to the political process, it is by no means the sole measure of that access. Further examples of non-English-speaking individuals becoming engaged in the political process can also be found through their membership in various forms of civic society. The barriers that once blocked entry to the political process have been substantially degraded,

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See Elizabeth Hartfield, *Spanish Language Campaign Ad Spending Lags*, ABC NEWS (Oct. 1, 2012), <http://abcnews.go.com/blogs/politics/2012/10/campaign-ad-spending-aimed-at-hispanics-lags/>.

¹⁴⁴ *Id.*

and the second *Cleburne* factor, which probes political access, also suggests that applying strict scrutiny to the NYPD procedure is unwarranted.

The third *Cleburne* factor requires the briefest analysis of the four factors: the ability, or inability, to speak a language is not an immutable characteristic. Virtually any human being is capable of learning a new language. The fact that almost any individual, through reasonable efforts, can remove him or herself from the proposed suspect class, should strongly deter the application of strict scrutiny to review the NYPD procedure. Were a court forced to determine whether or not a plaintiff was in fact a member of the suspect class at the time of the incident or practice in question, both the credibility of the court and judicial efficiency would be tarnished. The mere thought of a court administering some type of English test to determine the validity of a plaintiff's assertion that he or she does not speak the language is cringeworthy. Furthermore, assuming for a moment that all non-English-speaking individuals formed a coherent suspect class, there is little uniformity even amongst this group. The American Community Survey categorizes an individual's English speaking ability in one of four broad categories—very well, well, not well, and not at all¹⁴⁵—again further dividing the proposed suspect class. Ironically, the fact that all the members of this proposed suspect class can remove themselves from the suspect class appears to be the strongest claim of homogeneity that the proponents of applying strict scrutiny against the NYPD procedure can assert.

In contrast to the analysis of the first three *Cleburne* factors, an analysis of the fourth and final *Cleburne* factor, the ability of members of the class to function in the everyday world, suggests that strict scrutiny may be appropriate in reviewing the NYPD procedure. An individual who cannot communicate in the language of his or her host country will have difficulty completing daily tasks such as personal banking and grocery shopping, let alone gaining meaningful employment or receiving a college degree. The vast majority of educational institutions in this country teach in English. The ability to verbally communicate in English is a skill which is a crucial factor towards gaining meaningful employment.¹⁴⁶ In fact, a recent study concluded that the inability to speak English was the single greatest obstacle

¹⁴⁵ Ryan, *supra* note 133.

¹⁴⁶ Barry R. Chiswick & Paul W. Miller, *Occupational Language Requirements and the Value of English in the US Labor Market*, 23 J. POPULAR ECON. 353, 368 (2010).

facing immigrants in regards to societal integration.¹⁴⁷ Thus, of the four *Cleburne* factors, only the fourth suggests that NYPD procedure should be reviewed under strict scrutiny.

Strict scrutiny review is also appropriate when a statute or practice infringes on a fundamental right.¹⁴⁸ But the NYPD procedure in question does not infringe on a constitutional right and thus does not warrant such an analysis.¹⁴⁹ Although “the failure to provide a qualified interpreter in court proceedings would”¹⁵⁰ fall short of the guarantee of due process assured by the Fifth Amendment, the NYPD procedure is “neither judicial nor criminal; it is administrative,”¹⁵¹ and thus does not warrant a strict scrutiny analysis.

Those who view decisions such as *Molina* as a “step in the right direction for courts providing equal protection of the laws to non-English-speaking defendants”¹⁵² posit noble, but shortsighted views on how to best protect the constitutional rights of this vulnerable demographic.¹⁵³ Legal scholars who argue that a strict scrutiny analysis is a silver bullet in regards to protecting the rights of non-English-speaking individuals mistakenly conceive a suspect class comprised of solely Hispanic individuals.¹⁵⁴

To reinforce this finding one needs to look no further than the demographics of New York City which indicate an overwhelming Hispanic population. Hispanics account for approximately 27.1% of the population and, in the Bronx alone, where *Garcia-Cepero*, *Burnet*, and *Molina* were decided, the Hispanic population is over fifty-one percent. These statistics clearly depict an overwhelming need for greater equal protection of the laws. Therefore, the Legislature and the NYPD should develop procedures to protect non-English speakers’ rights.¹⁵⁵

Despite assertions to the contrary, *non-English-speaking* is not synonymous with *Hispanic*.¹⁵⁶ Non-English-speaking is not synonymous with any ethnic or racial group. Justifications for a strict scrutiny analysis that are grounded in fluid demographic

¹⁴⁷ *Immigrant Spouses Could Face English Test*, GUARDIAN (Feb. 21, 2007), <http://www.theguardian.com/politics/2007/feb/21/immigrationpolicy.race>.

¹⁴⁸ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

¹⁴⁹ *People v. Salazar*, 973 N.Y.S.2d 140, 144 (N.Y. App. Div. 2013); *People v. Burnet*, 882 N.Y.S.2d 835, 882 (N.Y. Sup. Ct. 2009).

¹⁵⁰ *Burnet*, 882 N.Y.S.2d at 843; *see also* *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003).

¹⁵¹ *Burnet*, 882 N.Y.S.2d 835, 843; *Salazar*, 973 N.Y.S.2d 140, 146 (2013).

¹⁵² *See*, Brian Shupak, *Supreme Court of New York, New York County-People v. Molina*, 26 TOURO L. REV. 979 (2012).

¹⁵³ *See, e.g., id.* at 991.

¹⁵⁴ *Id.* at 991-92.

¹⁵⁵ *Id.* at 991.

¹⁵⁶ *See* Giordano, *supra* note 108.

statistics are antithetical to the purpose of this timeless legal protection. As Justice Powell observed, “[t]he concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments,”¹⁵⁷ accordingly, any prudent legal rule must look beyond the present composition of facts and consider the implications of that rule on future legal claims.

Upon a cursory review of a DWI defendant’s legal defense, one may reasonably conclude that a court mandate requiring the Atlanta or Reno police department to provide Spanish interpreters for non-English-speaking arrestees would not necessarily impose a substantial burden on those departments. Proponents of this view may find some solace in the fact that aggregately, Spanish-speaking Americans saw the largest gains in the population since 2000.¹⁵⁸ Nevertheless, when represented as a percentage, the “Other Asian languages” and “African languages” categories, which include languages such as Malayalam, Telegu, Amharic, Yoruba, and Swahili, saw increases of more than 100%.¹⁵⁹ The growth of the Spanish-speaking population during the same time period was only 34%.¹⁶⁰ Since 1980, eight other linguistic minorities, including Russian, Persian, and Armenian, have also doubled in size.¹⁶¹ Interestingly, languages that were relatively prevalent before the 1980s, such as Italian, German, Polish, and Greek, are significantly less spoken today.¹⁶² Overall, in 2011, of the 291.5 million Americans age five and over, 60.6 million, or 21% of the population, spoke a language other than English at home.¹⁶³

In regards to the NYPD procedure, any legal standard that is proposed with a specific minority group in mind will not be conclusive. Admittedly, New York City’s demographic distribution is not representative of the entire nation, but the city’s unique degree of diversity can offer an insightful point of analysis.¹⁶⁴ New

¹⁵⁷ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978).

¹⁵⁸ Ryan, *supra* note 133, at 6-7.

¹⁵⁹ *Id.* at 6.

¹⁶⁰ *Id.* at 6-7.

¹⁶¹ *Id.* at 5.

¹⁶² *Id.* at 5-6.

¹⁶³ *Id.* at 2.

¹⁶⁴ See *Court Interpreting in New York: A Plan of Action*, N.Y. STATE UNIFIED COURT SYS., (Apr. 2006), http://www.nycourts.gov/courtinterpreter/pdfs/action_plan_040506.pdf. For societies with linguistic minorities that are relatively few in number and relatively large in size, language barriers tend to pose fewer operational difficulties because, in general, the fewer the number of languages, the easier for courts to provide interpreter services. In New York’s environment of unparalleled linguistic diversity, however, the task of providing interpreting services may be more challenging than for any other judiciary in the nation, if not the world. *Id.* at 1.

York City's population of approximately eight million people is currently more linguistically diverse than many localities throughout the country.¹⁶⁵ There are approximately 168 languages spoken in New York City.¹⁶⁶ Five million of the city's denizens speak a language other than English at home.¹⁶⁷ Even more noteworthy, unlike many municipalities with substantial linguistic minorities, no single linguistic group comprises a majority, more than 50%, of the non-English-speaking population.¹⁶⁸ About a dozen of the languages spoken are among the world's most widely spoken languages, and legal interpreters for these languages can be located with relative ease;¹⁶⁹ however, approximately 150 of these languages are substantially less prevalent, and translation services for these languages are much more difficult to provide.¹⁷⁰

In short, demographics are fluid. As the demographics of a community change, the interpretive needs of law enforcement in that community will also change. Suddenly, the Atlanta and Reno police departments, which accepted the rationale behind employing Spanish interpreters, are now being asked to provide similar interpretive services in Vietnamese and Urdu. The financial burden of employing numerous translators twenty-four hours a day, seven days a week may quite predictably prove to be overwhelming, making it impossible for any police department to guarantee that they will have a capable translator on call for every non-English-speaking motorist who is stopped.

Reviewing the NYPD procedure under strict scrutiny, and subsequently finding it to be unconstitutional, will not only impose a burden on the city's financial recourses, but its administration of justice as well. When an intoxicated Polish, Hindi, or Cantonese-speaking driver is stopped, that driver has a strengthened equal protection claim if the police department in question has instituted a policy of providing interpretive services for only a select number of languages. The Supreme Court similarly held that such a policy "would merely shift the alleged discrimination to all other non-English-speaking groups."¹⁷¹ It

¹⁶⁵ *Id.* "Large metropolitan areas such as New York, Los Angeles, and Chicago generally have large proportions of people who speak a language other than English at home because of the economic opportunities in these places or because they act as gateway points of entry into the country." See also Ryan, *supra* note 133, at 10; *New York City Population 2014*, WORLD POPULATION REP. (Oct. 2014), <http://worldpopulationreview.com/us-cities/new-york-city-population/>.

¹⁶⁶ *Id.* at 1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (1983).

now becomes much more difficult to assert that the police department policy of *not* offering interpretive services for one linguistic minority is rationally related to the goal of the efficient allocation of law enforcement resources, given that the same policy authorizes interpretive services for another linguistic minority. Under a strict scrutiny analysis, such a policy may be difficult to sustain if the classifications based on language become a proxy for classifications based on ethnicity.¹⁷² Considering that it may well be a motorist who speaks Russian, Guajarati, or another language that is not spoken with great frequency outside the native ethnic population who challenges such a policy, the claim that the language classification is in fact being used as a proxy for ethnicity now has even greater merit.

Evidence obtained through a potential constitutional violation is susceptible to a motion to suppress, and any competent defense counsel is likely to submit such a motion.¹⁷³ Additionally, defendants have every incentive to claim that their constitutional rights have been violated while having virtually nothing to lose by filing an additional motion. District Attorneys' offices around the country would be forced to dedicate time and resources to submit timely motions in response, leaving less time and resources for other pending case. Inevitably, some of these claims would be less ingenious than others, and the burden of parsing through these claims to determine if the defendant was in fact unable to speak English and thus have illegally obtained evidence against him dismissed,¹⁷⁴ would fall on courts throughout New York City and other major metropolitan areas. Ultimately, law enforcement, prosecutors, and the courts will be hindered in completing one of their primary objectives—keeping the roadways safe from intoxicated driver.

Thankfully, the NYPD has not gone down this path of ruin, and the current policy only requires providing the physical coordination test in English.¹⁷⁵ Given that the entire non-English-speaking population of New York City cannot be said to constitute a suspect class, the NYPD policy should not be subject to strict scrutiny review. Furthermore, with a backdrop of budgetary

¹⁷² *Id.*

¹⁷³ In New York, the applicable statute is N.Y. CRIM. PROC. LAW § 170.30 (1)(f) (McKinney's 2014). "After arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that . . . [t]here exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged." *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *People v. Salazar*, 973 N.Y.S.2d 140, 144, (N.Y. Sup. Ct. 2013).

constraints, the NYPD policy is rationally related to the legitimate state interests of the efficient allocation of limited law enforcement resources and public safety. New York courts, however, should be cautious not to enact an overly broad judicial doctrine which may deprive non-English-speaking New Yorkers of future legal protections outside of the criminal justice system. Accordingly, New York courts should reserve the option of reviewing a classification based on language under an intermediate standard of review.

IV. A SUGGESTED MIDDLE-OF-THE-ROAD APPROACH

Given that the NYPD policy in question does not employ a suspect classification or infringe on a fundamental right, a strict scrutiny analysis is inappropriate. One cannot deny, however, that there is some specter of injustice at work here, despite the fact that it may be difficult to legally cognize. The NYPD's procedure of not administering the physical coordination test rationally relates to a number of legitimate government purposes.¹⁷⁶ Yet the possibility remains that the government purpose behind a statute that classifies on the basis of language may not be roadway safety or the efficient allocation of police resources. Unfortunately, the possibility remains that such a classification may be motivated by sheer animus.

Although none of the defendants in *Garcia-Cepero*, *Burnet*, *Molina*, *Perez*, *Pelegrin*, or *Salazar* were able to make a showing of intentional discrimination,¹⁷⁷ the possibility of discriminatory application of the procedure is far from foreclosed.¹⁷⁸ Suppose an arresting officer were to make a remark akin to "you're not a real American" and then refuse to administer the coordination test to a DWI suspect. Suppose further that the suspect actually spoke

¹⁷⁶ *People v. Burnet*, 882 N.Y.S.2d 835, 843 (N.Y. Sup. Ct. 2009); *People v. Perez*, 898 N.Y.S.2d 402, 406 (N.Y. Sup. Ct. 2010); *People v. Pelegrin*, 959 N.Y.S.2d 401, 407 (N.Y. Crim. Ct. 2013); *Salazar*, 973 N.Y.S.2d at 144.

¹⁷⁷ See *supra* Part I.B.

¹⁷⁸ Erica Pearson, *NYPD Didn't Provide Translator, Mocked Language and Arrested the Abused in Domestic Violence Calls Involving Spanish-speaking Victims: Lawsuit*. N.Y. DAILY NEWS, (Mar. 21, 2013), <http://www.nydailynews.com/new-york/nypd-failed-spanish-speaking-vics-domestic-violence-calls-suit-article-1.1295531>. New York City Legal Services recently filed a lawsuit against the NYPD on behalf of five immigrant women which alleges that the police refused to provide translation services for the women when they reported incidents of domestic violence. It further alleges that the actions of the police "degrade[e], ridicule[e] and otherwise mistreats limited-English-proficient individuals who request interpreter services, actively demeaning them for their lack of English proficiency." *5 Hispanic Women Sue Over Interpretation in NY*, EPOCH TIMES, (June 26, 2013), <http://www.theepochtimes.com/n3/133075-5-hispanic-women-sue-over-interpretation-in-ny/?sidebar=related-below>.

some English. This hypothetical is far from impractical,¹⁷⁹ and the defendant would still face a very difficult task in making out a claim of intentional discrimination against the NYPD. Under a mere rational basis analysis, a court may be relegated to accepting a farce of a “legitimate state interest.”¹⁸⁰ The courts in *Burnet*, *Perez*, *Pelegrin*, and most recently on appeal, *Salazar*, avoided a judicial misstep by declining to apply the heightened scrutiny analysis,¹⁸¹ but the courts’ decision to apply a mere rational basis review overlooks the reality that there is still a need to offer some form of legal protection to this diverse, vulnerable demographic.

The overriding public safety concerns that are manifest in these cases result in an understandable lack of sympathy for the non-English-speaking DWI defendants; however, it may not always be the rights of a DWI defendant at issue. For example, there has been a growing chorus of voices arguing that the Los Angeles Unified School District should segregate non-English-speaking and English-speaking elementary school students in core classes.¹⁸² Proponents of this view assert that non-English-speaking students deserve particularized attention and that these students’ use of “Spanglish” in the classroom negatively impacts the English comprehension of the other students.¹⁸³ Yet again, the government has articulated a seemingly legitimate purpose, increasing the English proficiency of elementary school students, which is rationally related to a non-suspect classification. Were similar legislation proposed in New York, the proposed segregation of elementary school students should be upheld under the reasoning of *Salazar*, which is heavily grounded in the court’s opinion in *Soberal-Heckler*.

Accordingly, New York courts should limit their holdings so as to not foreclose the possibility of offering linguistic minorities future legal protections. Rather than broadly holding that classifications on the basis of language are to be reviewed under a rational basis analysis, courts should leave the option open to review such classifications under a rational basis plus, intermediate review.

¹⁷⁹ Pearson, *supra* note 178.

¹⁸⁰ *Cleburne*, 473 U.S. at 440.

¹⁸¹ *People v. Salazar*, 973 N.Y.S.2d 140, 144 (N.Y. App. Div. 2013); *People v. Burnet*, 882 N.Y.S.2d 835, 843 (N.Y. Sup. Ct. 2009); *People v. Pelegrin*, 959 N.Y.S.2d 401, 407 (N.Y. Crim. Ct. 2013).

¹⁸² Raul A. Reyes, *Opinion: L.A. Schools Should Not Separate non-English Speaking Children*, NBC LATINO (Nov. 4, 2013), <http://nbclatino.com/2013/11/04/opinion-l-a-schools-should-not-separate-non-english-speaking-children>.

¹⁸³ *Id.*

The United States Supreme Court has faced similar dilemmas in the past.¹⁸⁴ When confronted with the prospect of applying strict scrutiny against a local zoning ordinance that discriminated against homes for the mentally challenged, the Court engaged in a particularly “probing inquiry”¹⁸⁵ of the local ordinance in question but invalidated the statute on rational basis grounds.¹⁸⁶ As Justice Marshall, writing the concurring opinion, pointed out,

[T]he Court’s heightened-scrutiny discussion is even more puzzling given that Cleburne’s ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with [strict] scrutiny [U]nder the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation.¹⁸⁷

Although writing critically of the Court’s rationale, Justice Marshall’s criticisms articulate precisely why an intermediate scrutiny analysis would be appropriate to review the proposed Los Angeles school segregation plan. The touchstone of a rational basis plus review is a “probing inquiry”¹⁸⁸ or “searching analysis”¹⁸⁹ into the articulation of a government purpose that is typically associated with a strict scrutiny analysis,¹⁹⁰ not an inquiry that is typically associated with the deferential standard articulated in *Williamson v. Lee Optical of Oklahoma*.¹⁹¹ As imperfect and imprecise as it may be, intermediate review has become an integral means by which courts protect the rights of vulnerable minority groups that cannot avail themselves of strict scrutiny review. Accordingly, an intermediate scrutiny analysis is the appropriate standard of review for government classifications that differentiate on the basis of language.

The Court acted in a similar fashion in *U.S. v. Virginia*,¹⁹² when it held that Virginia Military Institute’s (VMI) male only admissions policy, which had been in place since its inception in 1839, violated the Equal Protection Clause of the 14th Amendment.¹⁹³ VMI asserted that its male only educational

¹⁸⁴ See *Cleburne*, 473 U.S. at 458; *United States v. Virginia*, 518 U.S. 515, 539 (1996); *Romer v. Evans*, 517 U.S. 620, 210 (1996).

¹⁸⁵ *Cleburne*, 473 U.S. at 458.

¹⁸⁶ *Id.* at 449-50.

¹⁸⁷ *Id.* at 458.

¹⁸⁸ *Id.*

¹⁸⁹ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982).

¹⁹⁰ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹⁹¹ *Williamson v. Lee Optical*, 348 U.S. 483, 486-88 (1955).

¹⁹² 518 U.S. 515 (1996).

¹⁹³ *Id.* at 519.

environment was essential to its goal of creating “citizen-soldiers,”¹⁹⁴ and that, were it forced to admit women, the program would be so drastically altered that it would be unable to continue its mission.¹⁹⁵ Additionally, VMI also claimed that the availability of a male only educational setting contributed to the diversity of educational choices within the state.¹⁹⁶

Although tenuous, there does appear to be some correlation between the state’s use of a gender classification and its purported goals, enough of a correlation to satisfy the barebones rational basis review established in *Williamson*.¹⁹⁷ Private schools and religious schools still regularly continue to offer single-sex educational settings, suggesting that these institutions, and the students who attend them, see the educational benefits of these settings. The continued success of these educational settings also suggests that there is a market for single-sex education; hence, one is justifiably perplexed over why the goal of enhancing the diversity of educational options is considered insufficient by the Court, which held that VMI’s male only policy was not rationally related to its stated objectives.¹⁹⁸ This perplexity is addressed if one accepts that rational basis plus review serves as the Court’s coping mechanism for situations when it is unable to offer a vulnerable minority group the suspect class designation it desires, but still recognizes the pressing need to offer that group greater legal protections.

Similarly, in *Romer v. Evans*,¹⁹⁹ Colorado voters passed an amendment to the state constitution via a statewide ballot referendum which forbade any form of “legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their ‘homosexual, lesbian, or bisexual orientation, conduct, practice or relationships.’”²⁰⁰ The state alleged that the reasoning behind the amendment was to place gays and lesbians on an equal legal footing as all other individuals within the state, but upon remand, a state court held the amendment to be in violation of the federal Equal Protection Clause.²⁰¹ Applying a strict scrutiny analysis, the court found no compelling state interest.²⁰²

¹⁹⁴ *Id.* at 521.

¹⁹⁵ *Id.* at 540.

¹⁹⁶ *Id.* at 535.

¹⁹⁷ *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955).

¹⁹⁸ *Virginia*, 518 U.S. at 520, 539.

¹⁹⁹ 518 U.S. 620 (1996).

²⁰⁰ *Id.* at 620.

²⁰¹ *Id.* at 626.

²⁰² *Id.* at 627.

The United States Supreme Court affirmed the ruling on a different rationale.²⁰³ Declining to hold sexual orientation as the basis of a suspect classification, the court once again claimed to apply a rational basis review.²⁰⁴ Yet again, rather than simply hold that the amendment was or was not rationally related to Colorado's claimed purpose, Justice Kennedy chose to dive into the rationale behind the amendment, stating that the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained"²⁰⁵ and that the "sheer breadth [of the amendment] is so discontinuous with the reasons offered for it"²⁰⁶ that the motivation for its enactment is nothing but pure animus.²⁰⁷ This seems to be a departure from the Court's position in *Williamson*, where it stated that a "law need not be in every respect logically consistent with its aims to be constitutional."²⁰⁸ Again, recognizing that the state action in question is not subject to strict scrutiny because it does not classify on the typical suspect classifications of race, religion, or ethnicity,²⁰⁹ the Court conducted a particularly expansive rational basis review, ultimately finding the amendment unconstitutional.

CONCLUSION

It is not the accuracy of the Court's "probing inquiry"²¹⁰ that is at issue here, but rather its appropriateness in the case at hand. In *Cleburne*, *U.S. v. Virginia*, and *Romer*, the Court formally declined to extend the legal protection of a suspect class designation on the basis of mental handicap, gender, or sexual orientation.²¹¹ Despite this legal formalism, there appears to be recognition by the Court that these minority groups are being discriminated against. By following a similar doctrinal approach, New York courts should ensure that the NYPD IDTU policy, one of only a few tenable options to effectively enforce drunk driving laws in such a diverse metropolitan area, remains in place while also guaranteeing that linguistic minorities are not handicapped in future equal protection claims. Using an intermediate scrutiny approach would allow the

²⁰³ *Id.* at 626.

²⁰⁴ *Id.* at 632.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955).

²⁰⁹ *See Korematsu v. United States*, 323 U.S. 214 (1944).

²¹⁰ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985).

²¹¹ *U.S. v. Virginia*, 518 U.S. 515, 532-33 (1996); *Romer v. Evans*, 517 U.S. 620, 630-31 (1996).

court to conduct a more searching analysis, without making language classifications presumptively invalid.

Recently, there has been a national dialogue on policing, particularly as it impacts communities with substantial minority populations. Much of this dialogue has been focused on New York City and the NYPD. The NYPD protocol which this note examines is arguably offensive to many New Yorkers who speak a language other than, or in addition to, English, not because they are likely to be directly impacted by it, but because it denotes a preference for one language over another. This discontent should not, standing alone, hinder law enforcement officials from keeping the public safe from intoxicated drivers who are selfish enough to repeatedly endanger the lives of others. This discontent should not, however, be completely marginalized, as it represents a concern that generations of legal and socioeconomic progress, which at times have been begrudgingly slow and hard fought, are taking a step back. Accordingly, New York courts should be mindful that legal doctrine adopted today in the name of public safety may have drastically unintended consequences in the future and is not easily rewritten.

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