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HERNANDEZ V. NEW YORK: COURTS, PROSECUTORS, AND THE FEAR OF SPANISH*

Juan F. Perea**

[Introduction]

In the Spring of 1992, Los Angeles exploded in some of the worst urban violence in our century. The final toll counted over fifty dead, hundreds hurt and wounded, and hundreds of millions of dollars worth of property damage. This tremendous loss of life and property begins to measure the rage and the lost hope in East Los Angeles. Although the causes of the rioting are complex and of longstanding, its catalyst was a jury verdict in which virtually no one be-

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2. See, e.g., Alvin E. Bessent, Li's Great Divide; Poll on Race Relations Finds Pessimism, and a Chasm, NEWSDAY, May 17, 1992, at 5, 18, 51.
3. See Cornel West, Learning to Talk of Race, N.Y. TIMES, Aug. 2, 1992 (Magazine),

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A nearly all-white jury acquitted four white police officers in the face of seemingly incontestable videotaped evidence of excessive force used against Rodney King. The common perception was that an all-white jury let the white police off. The jury's verdict lacked legitimacy because its composition lacked legitimacy. The aftermath of the verdict is a forceful reminder that the appearance of justice matters. Whether or not justice was done in the case, the appearance of justice was absent. In the wake of the Los Angeles riots, issues of jury legitimacy are being considered with grave seriousness by the courts.

Recently, a series of Supreme Court decisions has, at least formally, ended race discrimination in the selection of petit juries, the panels which decide the guilt or innocence of a criminal defendant. The Court's decision in *Batson v. Kentucky*, and its progeny, prohibit peremptory challenges based on race by any party in a trial. Under

4. There have been other instances of violent and non-violent outcry when unrepresentative, all-white juries have acquitted white or Latino police officers charged in the deaths of African-American males. See William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 152-53 ("[T]he Court has to be aware of the fact that defense peremptories are a serious threat to public confidence in the system among minority citizens."). Indeed, the upcoming trial of William Lozano, a Miami police officer charged with two counts of manslaughter in the deaths of two black men, raises the same issues of the legitimacy of jury verdicts and the appropriateness of the composition of the jury that will decide his guilt or innocence. See generally THE KERNER REPORT, supra note 3, at 299-301. Describing Blacks' distrust of the police and the justice system and recommendations for reform, the Kerner Commission wrote that:

We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders. The quality of justice which the courts dispense in time of civil crisis is one of the indices of the capacity of a democratic society to survive.


6. See discussion of recent Supreme Court decisions infra Part I.A.

Batson, prosecutors must offer a "race-neutral" reason when they use peremptories to challenge minority jurors.

The Court’s recent decision in Hernandez v. New York\(^8\) considered whether exclusion from a petit jury because of bilingualism and arguably associated traits, traits closely intertwined with Latino\(^9\) national origin, violated the Equal Protection Clause.\(^{10}\) The Hernandez Court allowed the peremptory exclusion of bilingual Latinos from juries considering Spanish-language testimony. At a time when the Court has prohibited the overt use of race as a basis for peremptory challenges, it is ironic that the Court has permitted the exclusion of prospective jurors for reasons closely linked with their national origin.

The Hernandez opinion reveals how poorly the justice system handles questions of language difference. These questions are raised in Hernandez through the presence, in the original trial, of many Spanish-speakers: a Spanish-speaking defendant; several Spanish-speaking witnesses; an interpreter to make the testimony of these witnesses accessible to the courts and to the jurors not excluded; and two bilingual jurors who are excluded from the jury because of their ability to understand the Spanish-speaking witnesses. The Hernandez opinion reveals that the Court’s discourse and its understanding with respect to the ethnic and linguistic differences between Americans are inadequate for the Court to render appropriate decisions when it considers discrimination based on these traits.

In this Article, I argue that the peremptory exclusion of bilingual jurors is not “race-neutral.” The Hernandez Court should, therefore, have concluded that their exclusion violated the Equal Protection Clause. Attorneys and courts should be concerned about guaranteeing that courtroom interpretations are accurate renditions of a witness’s

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10. This appears to be the Court’s first decision in many years to consider the constitutionality of exclusion from jury service because of ethnic origin or its related traits. The last time the Court considered this issue directly was in Hernandez v. Texas, 347 U.S. 475 (1954), in which the court held that the systematic exclusion of Mexican-Americans from all jury service violated the equal protection clause. Hernandez v. Texas resolved the issue of systematic exclusion from all jury service, including jury venires, grand juries, and petit juries. The issue presented in Hernandez v. New York is the different issue of the exclusion of Latinos from petit juries through a prosecutor’s use of peremptory challenges.
testimony. Instead, however, their focus is on a far less important issue, whether bilingual jurors will promise uncritical adherence to the official interpretation. Bilingual jurors may facilitate accurate fact-finding because of their awareness of possible errors in the interpretation of different-language testimony into English. Such errors are common in courtroom interpretations. Yet the Hernandez Court, rather than address the problems of ascertaining correct meaning when testimony must be interpreted, instead opted to allow the exclusion of those jurors who might be able to identify such problems of inaccurate interpretation.

Part I of this Article sets forth the past and current state of jury selection law and its application to race and ethnicity. Against this background, the Article discusses the decision in Hernandez. The next section describes the major role that race and ethnicity have always played in lawyers’ decisions regarding peremptory challenges. The application of Batson to peremptories directed at Latino jurors demonstrates the often illusory nature of the “race-neutral” standard.

Part II illustrates why the Court must expand its understanding of racial bias to include bias because of language difference, and why the exclusion of bilingual jurors is not “race-neutral.” The complexities and ambiguities of meaning inherent in language are compounded in the interpretation process. These ambiguities suggest that too much faith in the accuracy of the “official interpretation” may be misplaced. Against this background it becomes clear that the questions the prosecutor asked the bilingual prospective jurors in Hernandez are inherently biased. I argue that bilingual and monolingual prospective jurors are not similarly situated with respect to these questions, which are therefore not “race-neutral.” Furthermore, prosecutors and courts seem to draw incorrect, adverse inferences from bilingual jurors’ responses to these questions.

Part III discusses some of the challenges, real and perceived, that bilingual jurors present in the courtroom. Many courts’ treatment of only the official interpretation, but not the source language, as evidence has adverse legal and social consequences for persons who speak languages other than English. Courts seem to fear that the presence of bilinguals on juries will result in a loss of control. In Hernandez, the prosecutor feared that bilingual jurors would somehow wield “undue influence” in the jury room. This section ends with an evaluation of several proposed solutions to the problem posed in Hernandez.

Part IV considers some of the broader social harms created by
Hernandez. I discuss what the Court plurality describes as a "harsh paradox" facing American bilinguals. The paradox is that assimilated Latino citizens, those who know English as well as Spanish, may be excluded from juries precisely because of their assimilation. Lastly, I conclude that Hernandez creates potential harms to the public community, to the Latino community and to the judicial system itself. By facilitating the exclusion of bilingual jurors in certain cases, the Court has made juries less representative of the public and the Latino community. At a time when courts are demonstrating heightened concern about the representation of racial and ethnic groups on juries, the Hernandez decision represents an ironic step backward toward less representative juries. The Court has also undermined the legitimacy of the judicial system, since that legitimacy rests in part on decisions made by juries that are truly representative of their communities.

I. RACE AND ETHNICITY IN JURY SELECTION

A. The Supreme Court’s Decisions

In its decisions on the Sixth Amendment right to a jury trial, the Court has held that the Amendment guarantees a defendant’s right to a jury venire selected in a manner free from racial prejudice. The Court has also held, however, that the Sixth Amendment provides no guarantee that the petit jury will be representative of the community or that it will contain members sharing the defendant’s race or ethnicity. More recently, in Holland v. Illinois, the Court concluded that the Sixth Amendment did not require that the jury

11. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.
12. Holland v. Illinois, 110 S. Ct. 803, 807 (1990) ("The fair-cross-section venire requirement is obviously not explicit in [the text of the Sixth Amendment], but is derived from the traditional understanding of how an ‘impartial jury’ is assembled. That traditional understanding includes a representative venire, so that the jury will be, as we have said, ‘drawn from a fair cross section of the community.’") (quoting Taylor v. Louisiana, 419 U.S. 522, 527 (1975)); Taylor, 419 U.S. at 527; cf. Strauder v. West Virginia, 100 U.S. 303 (1879) (prohibiting the systematic exclusion of blacks from jury service under the Equal Protection Clause of the Fourteenth Amendment).
13. See Holland, 110 S. Ct. at 816 (1990) (Marshall, J., dissenting); Duren v. Missouri, 439 U.S. 357, 364 n.20 (1979) (the fair cross section "requirement does not mean ‘that petit juries actually chosen must mirror the community’") (quoting Taylor, 419 U.S. at 538); Taylor, 419 U.S. at 538 ("W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").
venire, nor the petit jury, represent a fair cross-section of the community from which the venire was drawn. The effect of Holland was to make the Equal Protection Clause of the Fourteenth Amendment the only constitutional vehicle for a challenge to the ultimate composition of the petit jury.

Although race-based exclusion from jury venires was, and is, prohibited under the Sixth Amendment and the Equal Protection Clause, until 1965 the Court had permitted litigants to use their peremptory challenges to exclude prospective jurors from the petit jury for any reason, including race or ethnicity. In Swain v. Alabama, the Court held that the Equal Protection Clause prohibited prosecutors from systematically excluding prospective jurors from petit juries because of their race. The burden of proof established in Swain, however, required defendants to establish that prosecutors had systematically excluded prospective jurors by race in many cases, a burden the Batson Court later described as "a crippling burden of proof."

Batson v. Kentucky states the basic principle that prosecutors may not use peremptories to exclude members of racial groups and sets forth a framework for challenging a prosecutor's use of peremptories under the Equal Protection Clause of the Fourteenth Amendment. The Batson court prohibited prosecutors from using peremptory challenges to exclude prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially

15. Justice Scalia wrote, for the majority:
A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury . . . .

. . . .
The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).

Holland, 110 S. Ct. at 806-07; see also The Supreme Court-Leading Cases, 104 HARV. L. REV. 129, 168-78 (1990).

16. See Hernandez v. Texas, 347 U.S. 475, 482 (1954) (finding that systematic exclusion of Mexican-Americans from all jury service violates equal protection); Norris v. Alabama, 294 U.S. 587, 589, 598 (1935) (finding that systematic exclusion of blacks from all jury service within anyone's recollection violated equal protection clause). See generally Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 CORNELL L. REV. 1, 81-95 (1990) (excellent discussion of transition from Norris to Swain; the article presents a convincing exposition of white racism exercised through all-white juries against black defendants).


to consider the State's case against a black defendant." Under *Batson*, the defendant must make out a prima facie case of discrimination by the prosecutor. If the defendant does so, then the prosecutor must articulate a "race-neutral" reason justifying his peremptory challenges against a juror or group of jurors. If the prosecutor's reason is deemed credible by the trial judge, then the equal protection challenge fails, since the defendant has failed to show discriminatory intent on the part of the prosecutor.

In more recent decisions, the Court has clarified some of the questions that *Batson* left unanswered. In *Powers v. Ohio*, the Court described the *Batson* right as the right of an individual juror "not [to] be excluded from [a petit jury] on account of . . . race." 

The *Powers* court thus made clear that the *Batson* right belongs to the excluded jurors, and not to the defendant making the challenge. Eliminating the apparent requirement from *Batson* that the defendant and the excluded prospective jurors be of the same race, the Court allowed a white defendant to challenge the exclusion of blacks from the jury.

In *Hernandez*, the Court signalled an extension of *Batson* and *Powers* by stating that it would prohibit exclusion from a petit jury on the basis of national origin, in addition to race. In *Edmonson v.*

19. *Id.* at 89.

20. The Court stated the following elements of a defendant's prima facie case: first, the defendant must show that he is a member of a cognizable racial group and that the prosecutor used peremptory challenges to remove from the venire members of the defendant's race; second, the defendant is entitled to rely on the fact that peremptory challenges permit discrimination by those who want to discriminate; finally, he must show that these facts and other circumstances raise an inference that the prosecutor intended to discriminate against certain members of the jury venire because of their race. *Id.* at 96.

21. *Id.* at 97.


24. *Id.* at 1369.

25. The Court also decided, however, that defendants have third-party standing to raise the rights of prospective jurors allegedly excluded from the petit jury because of their race. *Id.* at 1370-74. *See generally* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is It, Anyway?*, 92 COLUM. L. REV. 725, 725-26 (1992).

26. *See supra* note 20 and accompanying text (discussing racial identity between the defendant and excluded prospective jurors as an element of defendant's prima facie case under *Batson*).


29. *Id.* at 1864, 1872-73 (finding use of peremptory challenges to exclude Latinos because of their ethnicity would violate the Equal Protection Clause). Such an extension of *Batson* and *Powers* would fit within well-established principles of equal protection doctrine.
Leesville Concrete Co., the Court extended the prohibition against race-based peremptory challenges to private litigants in civil actions. Most recently, the Court held that criminal defense attorneys, like prosecutors, may not use peremptory challenges to exclude potential jurors because of race.

The Court’s recent decisions, taken together, establish a certain symmetry with respect to both civil and criminal actions. Both private litigants and the parties to a criminal action are prohibited from exercising peremptory challenges based on race. Peremptory challenges are still available, but they must be justified by reasons a court will accept as “race-neutral.” Hernandez establishes that ethnicity and national origin, like race, will not be accepted as “race-neutral” reasons for a peremptory challenge. The further scope of permissible and impermissible reasons for peremptory challenges awaits definition through further litigation.

B. The Hernandez v. New York Decision

Hernandez involved the constitutionality of a prosecutor’s use of peremptory challenges to exclude two bilingual jurors from the jury considering the case of Dionisio Hernandez. Hernandez was tried, and later convicted, on two counts of attempted murder and possession of a weapon. During jury selection, the prosecutor used peremptory challenges to exclude two bilingual, Latino jurors from the jury. After these and other challenges, no Latino jurors remained on the jury that convicted Hernandez.

The prosecutor offered two reasons for rejecting these two jurors. First, he felt “very uncertain” that they would be able to listen to and accept the interpreter’s rendition of testimony given by Spanish-speaking witnesses. Despite these prospective jurors’ assurances to the trial judge that they would adhere to the interpreter's version of the testi-

32. See supra note 29 and accompanying text.
33. See Marcia Coyle, Jury Case May Spark More Suits, NAT'L J., June 29, 1992, at 1, 12 (comments of Professor Alschuler, predicting “litigation forever” over what constitutes a prima facie case of discrimination in this setting and what constitutes a “race-neutral” reason for a peremptory strike).
34. Hernandez's attorneys also attempted to argue, unsuccessfully, for a rule requiring de novo appellate review of a trial court's rejection of a Batson claim. Hernandez, 111 S. Ct. at 1870.
mony, the prosecutor “didn’t feel that they could.” Second, the prosecutor objected to their demeanor during their responses to his questions:

[W]hen I asked them whether or not they could accept the interpreter’s translation of it, I didn’t feel they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury. I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it.

The prosecutor also argued that he had no motive to exclude Latinos from the jury, since all of the complainants and all of the civilian witnesses were Latino.

The defense raised Batson objections to these peremptory challenges of the bilingual jurors. The trial court accepted the prosecutor’s explanation for the peremptory challenges as “race-neutral.” Furthermore, the trial judge accepted the prosecutor’s explanation of the absence of any discriminatory motive, since the Latino jurors could as easily sympathize with the Latino victims of the assault as with the Latino defendant. Accordingly, the trial court rejected the defense’s Batson objection and allowed the trial to proceed with no Latino jurors. A divided New York Court of Appeals affirmed the trial court’s judgment. A divided Supreme Court also affirmed the trial court.

A four-person plurality of the Court, in an opinion authored by Justice Kennedy, concluded that the prosecutor did not use peremptory challenges in a discriminatory manner.

35. Id. at 1864-65.
36. Id. at 1865 & n.1.
37. Id.
40. None of the remaining jurors appeared to be identifiably Latino, judging from their surnames and the absence of further challenges.
41. Hernandez, 552 N.E.2d 621.
42. Hernandez v. New York, 111 S. Ct. 1859 (1991). Four separate opinions were filed by the Justices, a plurality opinion authored by Justice Kennedy, a concurring opinion by Justice O’Connor, a dissenting opinion by Justice Stevens, and a statement in dissent by Justice Blackmun.
Applying *Batson*, the plurality concluded that the reasons offered by the prosecutor for challenging the two bilingual jurors were race-neutral. According to the plurality, these reasons were the jurors’ bilingual ability together with their specific responses and demeanor, which caused the prosecutor to “doubt their ability to defer to the official translation of Spanish-language testimony.” The plurality described the classification wrought by the prosecutor as follows:

The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during voir dire would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos.

Although the plurality acknowledged that the prosecutor's reasons “might well result in the disproportionate removal of prospective Latino jurors,” it reasoned that such disproportionate impact alone would not violate the Equal Protection Clause. Such evidence of disproportionate impact should be given "appropriate weight" in deciding whether a prosecutor acted with discriminatory intent. But the plurality deferred to the trial court's determination of whether the prosecutor's reasons were pretexts for forbidden intent to discriminate.

The plurality also stated, however, that a prosecutor's use of peremptories to exclude Latinos “by reason of their ethnicity” would violate the Equal Protection Clause. Similarly, the plurality suggested that the case would be “quite different,” and the prosecutor's actions presumably unconstitutional, had his reason been that he “did not want Spanish-speaking jurors.” The plurality recognized that several of the Court's precedents establish the principle that the disproportionate impact of state action, without a showing of discriminatory intent, does not violate the Equal Protection Clause. See, e.g., *McClesky v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976).

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43. *Id.* at 1872-73.
44. *Id.* at 1866-68.
45. *Id.* at 1867.
46. *Id.*
49. *Id.* at 1864; see also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991) (describing rational exploration of juror biases, "with respect for the dignity of persons, without the use of classifications based on ancestry or skin colors").
“[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.”

In a concurring opinion, Justice O'Connor, joined by Justice Scalia, expressed the view that this case should be seen as a straightforward application of *Batson*. According to the concurrence, since Hernandez failed to show that the prosecutor discriminated intentionally against the bilingual jurors on the basis of national origin, Hernandez's *Batson* claim should fail. The concurrence apparently rejected all arguments that peremptories based on traits correlated with national origin would violate equal protection: "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."

In a dissenting opinion joined by Justice Marshall, Justice Stevens reiterated his view that a significant disproportionate impact is itself evidence of discriminatory purpose. Furthermore, according to Justice Stevens, a substantial disproportionate impact can violate equal protection even if the governmental actor's subjective state of mind was benign and sincere. The Court erred, in his view, by focusing solely on the prosecutor's state of mind rather than on what happened as a result of his actions. Justice Stevens would have found a violation of equal protection in *Hernandez* for three reasons: (1) because of the inevitable disqualification of a disproportionate number of Spanish-speaking prospective jurors; (2) because "[a]n explanation that is 'race-neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice"; and (3) because less drastic means could have satisfied the prosecutor's interests.

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51. Id.
52. Id. at 1873-75 (O'Connor and Scalia, JJ. concurring).
53. Id. According to Professor Martha Minow, the dissenters' refusal to recognize that certain characteristics can function as proxies for race "illustrates the quality of legal reasoning that separates that which is inextricably connected." Martha Minow, *Equalities*, 88 J. PHIL. 633, 635 (1991).
55. *Hernandez*, 111 S. Ct. at 1876.
56. Id. at 1877.
57. Id. Justice Blackmun also filed a statement in dissent joining just Part II of Justice Steven's dissenting opinion.
C. *Ethnicity and Jury Selection: A Long History of Bias*

Lawyers for both prosecution and defense have long treated stereotypes and myths about ethnic groups as facts that justify the removal of group members from juries through the use of peremptory challenges.\(^58\) Most lawyers are white and male, with little real knowledge of ethnic groups different from their own.\(^59\) Their reliance on stereotypes is not surprising. What is surprising is how recently lawyers were willing publish their, and others’, prejudices as guidelines for jury selection.

Some prosecutors have written candidly about their search for jurors who, fairly or otherwise, will vote to convict. One Chief Prosecutor counsels, in a training manual for young prosecutors, "[y]ou are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree."\(^60\) This prosecutor gives the following advice: "You are not looking for any member of a minority

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\(^{58}\) Prior to the extensive use of peremptory challenges for the purpose of removing members of minority groups, state statutes often prohibited non-whites from serving on juries. In this manner, blacks were excluded under the Black Codes from jury service. See Colbert, *supra* note 16, at 43. Such statutes were found to violate the Equal Protection Clause of the Fourteenth Amendment in *Strauder v. West Virginia*, 100 U.S. 303 (1879).

\(^{59}\) A few examples make the point. A recent report estimated that the Hispanic population of the United States numbers about 20.8 million, or about 8.4 percent of the total population. See U.S. DEP’T OF COMMERCE, SERIES P-20, NO. 449, *THE HISPANIC POPULATION IN THE UNITED STATES* (1991). Yet a recent study showed that less than one percent of the attorneys in the 151 largest American law firms were Latino. See Linda E. Davila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403, 1404 (1987). A similar disproportion exists within the federal and state judiciary. A recent report shows that out of 711 Federal District and Court of Appeals Judges, 29 judges were Hispanic, a percentage of 4.1 per cent. Thirteen of these federal judges were from the District of Puerto Rico, and all of these judges, predictably, were Hispanic. Excluding these 13 judges from the total, then in the continental United States, 16 of 711, or 2.2 per cent of federal judges are of Hispanic origin. The percentage of white, non-Hispanic Federal District and Court of Appeals judges was 631 of 711 judges, 89 per cent of the total. See ANNUAL REPORT ON THE JUDICIARY EQUAL OPPORTUNITY PROGRAM FOR THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 1991 (Preliminary Edition). My thanks to Ms. Dolores Atencio, Esq., President of the Hispanic National Bar Association, who made these statistics available to me.

\(^{60}\) Jon Sparling, *Jury Selection in a Criminal Case* (unpublished manuscript, on file with the Hofstra Law Review). Prosecutor Sparling was Chief Prosecutor in the Criminal District Court of Dallas County, Texas. I am indebted to Professor Albert Alschuler of the University of Chicago Law School for kindly providing me with a copy of the Sparling manuscript. See also James W. Bouska, *Selecting a Jury, in THE PROSECUTOR’S DESKBOOK* 426, 427 (Patrick F. Healy & James P. Manak eds., 2d ed. 1977) ("your purpose in selecting the jury is to choose the twelve jurors most likely to return the verdict of 'guilty'.")
group which may subject him to oppression—they almost always empathize with the accused . . . . Minority races almost always empathize with the Defendant."\textsuperscript{61}

Other commentators have been more specific in offering guidance about the traits of "minority races" and persons of different national origins. One writer cites the following jury selection rules regarding the national origins and racial traits of jurors:

It has been suggested that those with the certain following national backgrounds will respond more readily to an emotional appeal by a defendant in a criminal case and, if other factors are equal, would not be desirable jurors from a prosecution standpoint: Irish, Jewish, Spanish or other Latin-American, Italian, all Slavic races, and, generally, all southern Europeans . . . . On the other hand, it is said that among those who will less readily respond to an emotional appeal and who will be more responsive to a prosecutor's appeal to enforce the law is the Nordic type: German, Scandinavian or English . . . . Personally, I give a lot of weight to the rule and would prefer a German or Scandinavian juror over some other juror, if other factors are consistent with such a choice.\textsuperscript{62}

Melvin Belli has a slightly different formulation of the rule, from the 1982 edition of his treatise \textit{Modern Trials}:

It is said that the Irish, the Italians, the Jews and the French, those of Yugoslavian extraction, Negroes (the latter because of their supposed animosity toward the status quo) are all good plaintiff's jurors. The "wise men" advise plaintiff to beware of the English, Scandinavians and Germans. The supposed phlegmatic, stolid, conservative and law-abiding races (I) are defendant's civil and prosecution's criminal jurors.\textsuperscript{63}

Although Belli appears to express some skepticism about the rule, which also stereotypes Italians, he nevertheless deems the rule impor-
tant and current enough to include in his treatise as recently as 1982.

An even more recent statement of the race and national origin jury selection rules appeared in 1986, and continued to appear unrevised in the 1992 supplement, six years after Batson:

Stereotypically, people from Mediterranean populations are considered desirable as jurors for the plaintiff. Those of Italian, Spanish, and French descent are thought to empathize more readily with the human and emotional side of a lawsuit. Also, those of Slavic, Irish and Mexican descent, as well as American blacks, are thought to fall into this stereotypical category. Persons of German, Scandinavian, Swedish, Finnish, Dutch, Nordic, Scottish, Asiatic and Russian heritage tend to be stereotypically better for the criminal prosecution. Law and order is highly regarded among these groups.64

The advice to attorneys in treatises, handbooks, and practice manuals has been remarkably clear and consistent: Use your peremptories to keep minorities of undesirable racial or national origin groups off your jury if you represent the government. Only jurors of English, Scandinavian, and German descent (all likely to be white) are conservative, law abiding, and likely to uphold law and order.65 Only such jurors can be trusted to uphold the government’s position.

Not all lawyers likely paid attention to these race and national-origin jury selection rules, and some lawyers probably recognized the racism underlying them. However, such race and national origin rules appear in recognized publications as rules of decision regarding the use of peremptories as recently as 1982 and 1992. These recent, frequent statements of the race and national origin rules suggest how widespread, accepted, and inherent in the jury selection process the consideration of race and national origin has become.

Racism and the assumptions we make, conscious or unconscious, about people of different race or national origin have not changed significantly.66 Although the verbal command of Batson was to eliminate consideration of race and ethnicity from the jury selection pro-

65. The excerpt from Jury Selection: Strategy and Science, adds Asian and Russian national origins as preferred origins for the prosecution.
cess, its implementation has been very weak. Prosecutors and other litigants need only articulate a so-called “race-neutral” reason for exercising peremptory challenges. As Justice Thurgood Marshall wrote, “Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.”

Justice Marshall’s insight is especially apt in cases that involve the issues of language and bilingualism presented in Hernandez. Judges and lawyers represent a fairly homogeneous group, very few of whom are bilingual or know anything about bilingualism. Under these circumstances, as occurred in Hernandez, a prosecutor can sincerely believe that a juror’s bilingual ability will interfere with his or her ability to judge fairly the evidence presented at trial. Similarly, a judge who is not bilingual or who has no understanding or appreciation for bilingualism is not in any position to evaluate critically the prosecutor’s stated reason or to determine its possibly pretextual nature. The Court’s willingness to rely on the trial court’s determination of the credibility of the prosecutor’s reason is misplaced in a case like Hernandez.

D. Batson-Style Equal Protection and Latino Ethnicity

Despite the “race-neutrality” mandated by Batson and its progeny, Batson has been a resounding disappointment for Latino jurors and the Latino community. It has created a procedural side-show, a promise of equal protection devoid of substantive content. Batson and its progeny have created ostensibly fair rules governing the jury selection game (i.e., that no party shall discriminate in jury selection), while the rules are remarkably easy to evade and the nature of the game—discriminatory jury selection—has not changed at all. Commentators have remarked on the emptiness of the Batson promise.

67. See infra notes 71-96 and accompanying text.
69. See statistics cited infra text accompanying notes 206-08.
70. I do not mean to suggest that no monolingual judges will be able to appreciate the inextricable proxy relationship between different-language ability and different national origin, but only that most monolingual judges will not appreciate it. Several of the judges and Justices involved in the Hernandez case appreciated the relationship well. See People v. Hernandez, 552 N.E.2d 621, 628-29 (N.Y. 1990) (Kaye, J., dissenting); Hernandez v. New York, 111 S. Ct. at 1875 (Blackmun & Stevens, J., dissenting).
71. See supra notes 11-33 and accompanying text.
72. See, e.g., John H. Blume, Racial Discrimination in the State’s Use of Peremptory Challenges: The Application of the United States Supreme Court’s Decision in Batson v.
The promise is empty because many courts refuse to find that defendants have made out a prima facie case of discrimination that requires the prosecution to explain the reason for the peremptory exclusion of a juror. Even when a court does find that a defendant has made out a prima facie case, many trial courts automatically accept the prosecutor's "race-neutral" explanations without critical evaluation.

With respect to Latino people, a variety of so-called race-neutral reasons have been offered by prosecutors and accepted by the courts. For example, some courts have held that a defendant who relies solely on an excluded juror's Latino surname fails to make out a prima facie case under Batson. In one case, the court concluded that no prima facie case had been made out based on excluded-juror Sanchez's name. The court, finding no proof of her ethnicity, characterized her as "simply a woman with a [H]ispanic name." Remarkably, the same court relied on the fact that some people with Latino surnames, but with no other proof of their ethnicity apparent, remained on the jury to rebut any inference of discrimination on the part of the prosecutor. In short, a Latino surname is not sufficient evidence of Latino ethnicity for the defendant, but it is sufficient evi-
dence of ethnicity for the prosecutor. Another court concluded that three excluded jurors with Spanish surnames were only “apparently of Mexican American heritage,” and that their exclusion was insufficient to establish a prima facie case.79 Judicial reluctance to recognize that a Spanish surname may be a close proxy for Latino national origin, therefore, helps make Batson a meaningless form of equal protection for Latino jurors.

In several cases the courts have misconstrued language-based reasons as “race-neutral” when upholding the exclusion of Latino jurors from juries. In one case, a Latino juror was successfully excluded because he might have difficulty understanding questions, “a problem possibly compounded by his highly perceptible accent.”80 Accent, however, bears no relation to comprehension.81 The court’s acceptance of this reason as “race-neutral” merely demonstrates either ignorance about language difference or bias against a Spanish accent.82 During a subsequent colloquy, the prosecutor admitted that this juror “obviously understood the questions.”83 Thus, the prosecutor’s stated reason for excluding the juror was pretextual. The court nevertheless permitted this juror to be excluded. In another case, a prosecutor admitted that he “struck those venire persons with Hispanic surnames because they spoke Spanish and he did not.”84 Although the defendant’s attorney joined in a Batson objection raised by counsel for another defendant, the court concluded that the issue was not preserved for appellate review. Despite the obvious bias of the prosecutor, which even the Hernandez court might find violative of

79. Bueno-Hernandez, 724 P.2d at 1133-35. In a related set of circumstances, a defendant’s prima facie case under Batson failed because the court concluded that one juror, Betty Groover Garcia, was not Latino because her maiden name was Groover. Aguilar v. State, 826 S.W.2d 760, 762 (Tex. Ct. App. 1992). On the other hand, the court concluded that Margaret Searcy Bautista, apparently similar to prospective juror Groover in having married a Latino man, was Latino for purposes of rebutting the inference of discrimination by the prosecutor. Id. at 763.


81. See Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329 (1991) (demonstrating the excellent comprehension and verbal performance of Manuel Fragante, who had a Filipino accent).

82. Bias against persons whose languages or accents differ from those of the majority has very long historical roots in this country. See generally Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 MINN. L. REV. 269 (1992).

83. Gonzalez, 538 A.2d at 216.

the Equal Protection Clause, the Texas court makes a procedural judgment which forecloses a challenge to the prosecutor's conduct.

Some courts also have accepted a prospective Latino juror's Catholic religion as a "race-neutral" reason. Catholicism, like language, is an inherent part of Latino ethnicity. Therefore, can function as a close proxy for Latino ethnicity and should not be considered a neutral reason for excluding a juror.

Another problem with the Batson framework is that many courts accept the notion that if one or two Latinos or persons of color are left on a jury, this fact rebuts any inference of discrimination by a prosecutor who peremptorily challenges other prospective minority jurors. Some courts have determined that a prima facie case is made out only when "all members of the defendant's race have been excluded from the jury." The problem with this formulation is that it converts Batson into an equal protection guarantee only with respect to the minimal number of minority jurors left on a jury. Prosecutors are left free to challenge any number of minority jurors, as long as one or two are left on the petit jury. As one court has recognized, the fact that Latinos were not substantially underrepresented, with respect

87. *See* JOAN W. MOORE, MEXICAN AMERICANS 84-85 (1970) ("Most Mexican Americans consider themselves Roman Catholics ... probably no less than 95 percent of the total population of Mexican Americans in this country" are Catholic); Kyriakos S. Markides & Thomas Cole, Change and Continuity in Mexican American Religious Behavior: A Three-Generation Study, in THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY 402, 402-07 (Rodolfo O. De la Garza et al. eds., 1985) (eighty to ninety percent of Mexican Americans are Catholic; "In this overwhelmingly Catholic ethnic group, religious affiliation is a dominant force in the maintenance of ethnic identity ... ").
88. Belief in Catholicism is certainly not limited to Latinos, and such beliefs could be a proxy for other ethnic identities—say Italians, or Irish Catholics. While religious belief is an imperfect proxy for a particular ethnic identity, courts should recognize that a religious reason may be a mere pretext for the exclusion of a person because of his or her ethnicity. The use of peremptories because of religion may be just as offensive as their use directly because of race or ethnicity. One court, in dicta, wrote that the exclusion of prospective jurors because of their Jewish identity would violate the Equal Protection Clause under Batson and its progeny. See United States v. Greer, 939 F.2d 1076, 1085 (5th Cir. 1991), cert. denied, 61 U.S.L.W. 3600 (U.S. Mar. 2, 1993)
to their proportions in the community, does not mean that *Batson* has not been violated. Prosecutors may still be discriminating with respect to those jurors challenged even if a few minority jurors are left on a panel. Commentators have criticized acceptance of the theory that no racial or national origin discrimination has occurred when a minimal number of minority jurors remain on a jury as a license for prosecutors to discriminate with respect to the minority jurors excluded.91

Not all courts have applied *Batson* to prospective Latino jurors with such little effect. Several courts have found that defendants have successfully established prima facie cases under *Batson* and have required prosecutors to articulate "race-neutral" reasons for excluding Latino jurors. Some courts have also found violations of *Batson* where other courts have not.93

Many courts, however, apply the *Batson* "race-neutrality" standard in a way that facilitates discrimination based on language and national origin differences. Indeed, it is ironic that courts have found characteristics such as Latino surnames, accents, and bilingualism to be "race-neutral" when the Equal Employment Opportunity Commission and some courts have found discrimination on the basis of these same traits to constitute national origin discrimination in employment under Title VII of the Civil Rights Act of 1964.94 Discrimination on


91. Alschuler, *supra* note 73, at 171 (when a prosecutor fails to challenge all potential minority jurors, the number who can be challenged increases, without explanation); Raphael, *supra* note 72, at 311 (1989).


94. See 29 C.F.R. Part 1606 & § 1606.1 (1992) (EEOC Guidelines on Discrimination Because of National Origin, prohibiting, among other things, discrimination because of "physical, cultural or linguistic characteristics of a national origin group" and because of "marriage
the basis of language differences often serves as a proxy for discrimination on the basis of national origin. After Hernandez, the only Latino jurors not subject to peremptory challenge because of their bilingualism, in cases in which Spanish-language testimony will be offered, are Latinos who are monolingual in English.

One reason why the Batson, and now Hernandez, standards for "race-neutrality" permit so much discrimination is the overly narrow interpretation of "race-neutrality" and lingering ambiguity over what the Court means by "race." Since neither bilingualism nor demeanor are the same as race, then governmental decisions based on these characteristics can correctly, if rather woodenly, be labelled "race-neutral," meaning "not the same as race." Since Latinos are a group defined by certain national origins and encompassing many races, one could correctly state that language discrimination affecting Latinos, among others is "race-neutral." One could argue that since language discrimination affects Latinos of different national origins, races, and colors—black, brown, beige, and white—such discrimination must be independent of national origin, race, or color. Prosecutors will always

to or association with persons of a national origin group" or "because an individual's name or spouse's name is associated with a national origin group."); see also, e.g., Fragante v. City of Honolulu, 49 Fair Empl. Prac. Cas. (BNA) 437, 439 (9th Cir. 1989) (disapproving of non job-related discrimination because of accent), cert. denied, 494 U.S. 1081 (1990); Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988) (finding that restriction on employees' use of Spanish in the workplace violated Title VII), vacated as moot, 490 U.S. 1016 (1989); Matsuda, supra note 81 (disapproving of courts' theoretical prohibition on accent discrimination which courts do not enforce to benefit victims of such discrimination).

95. See Perea, supra note 82, at 331-40, 357-60.

96. Jurors who are monolingual in Spanish will not qualify for jury service by virtue of 28 U.S.C. § 1865(b)(2)-(b)(3) (1988), which requires proficiency in English to qualify for Federal jury service. Jurors who are bilingual may be peremptorily excluded under Hernandez in cases in which testimony will be interpreted. Latino jurors who are monolingual in English, could, under current law, be challenged peremptorily for any "race-neutral" reason.

97. See Hernandez, 111 S. Ct. at 1872. The Hernandez Court recognized the ambiguity surrounding its conception of race when it stated, "W[e] do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes." Id. The Court's reference to a "concept of race," and its acknowledgement that the term "race" is subject to the Court's definition of its breadth and meaning, supports the view that race is, in fact, a social and judicial construction. The court's recent interpretation of "race" according to its study of authorities and knowledge prevailing during the nineteenth century, knowledge different from what we rely upon today, also demonstrates the judicial construction of "race." See Saint Francis College v. Al-Khazraj, 481 U.S. 604, 610-13 (1987); see also Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. REV. 915, 924-26 (1989).

98. This is precisely the understanding of "race-neutrality" offered by Justices O'Connor and Scalia in their concurrence. See Hernandez, 111 S. Ct. at 1873-75.
be able to argue that language is not the same as race, and therefore the exclusion of potential jurors based on language-related reasons is "race-neutral."

This overly narrow conception of "race-neutrality" fails to take into account the significant degree to which bilingualism and national origin are linked. According to one recent study of Spanish/English bilingualism, approximately seventy-seven percent of Latinos speak Spanish. Approximately sixty-six percent of Latinos are bilingual in Spanish and English, and thus are vulnerable to peremptory exclusion from juries considering Spanish-language testimony.

The Hernandez plurality stated that the case would be "quite different" if the prosecutor had explained that he did not want Spanish-speaking jurors. Yet the prosecutor's discomfort with bilingual jurors and their demeanor is equivalent to not wanting two-thirds of American Latinos because of their ethnic characteristics. Because of its failure to recognize that bilingualism is not "race-neutral," the Hernandez court has facilitated a common form of national origin discrimination.

II. INTERPRETATIONS, MEANING, AND BILINGUALISM

A. Meaning and the Interpreter's Voice

English-language interpretations of different-language testimony are important courtroom procedures that make such testimony meaningful to English-speakers. Since most jurors in most jurisdictions are likely to be monolingual English speakers, official interpretations are also necessary to conduct fair and meaningful trials. A problem arose in Hernandez, however, because of the relationship between bilingual prospective jurors and the official interpretation.

In Hernandez, the prosecutor asked whether bilingual jurors could adhere to the interpreter's "official" version of the testimony of Spanish-speaking witnesses. Implicit in the prosecutor's concern is the possibility that the interpreter's "official" version of Spanish-language testimony will be materially different from the actual Spanish-language testimony. If the interpreter's version of the testimony was


100. Hernandez, 111 S. Ct. at 1872-73.

101. This statement assumes that jurors' bilingualism and their demeanor are linked. I think they are linked and I discuss this connection infra Part II.B.
identical in content to the Spanish-language testimony, then there would be no problem: whether in Spanish or English, everyone would be getting the same content, with bilingual jurors getting a double dose.

The prosecutor's concern, then, must be based on one or both of two fears. First, that the interpreter's version of the testimony will differ materially from the actual testimony, so that bilingual jurors will hear and rely upon a different version of the testimony than monolingual English-speaking jurors. Second, assuming that the interpreter's version is faithful to the original Spanish-language testimony, bilingual jurors could claim that the Spanish-language testimony was different from what the interpreter said it was, and so undermine potentially the jury's deliberations.102

All attorneys should be concerned about the accuracy of interpretations of testimony in languages other than English. The question is whether the removal of bilingual jurors is an appropriate response to the possibility of inaccuracy in an interpretation. If we assume that court interpreters are always accurate in their interpretations, then there is no problem of varying meanings to be concerned about, and no reason to remove a bilingual juror.

There is evidence, however, that because of the great difficulty of their task, interpreters frequently may not be accurate. The concern about accuracy may be somewhat lessened in the federal courts, where certified interpreters must pass successfully a rigorous certification exam that requires high levels of competence.103 In many state courts, however, there is no analogous requirement of competence and entirely inadequate interpretation will often result from the haphazard appointment and qualification of courtroom interpreters.104 Further-

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102. This fear may be the basis for the prosecutor's concern that a bilingual juror may exert "undue influence" in the jury room, discussed infra Part III.C.

103. See 28 U.S.C. § 1827(b) (1988); see also SUSAN BERK-SELGSON, THE BILINGUAL COURTROOM 34-40 (1990) (describing the Court Interpreters Act of 1978 and certification procedures under the Act; as of February, 1986, only four percent of those taking the exam had passed the entire exam).

104. See generally ROSEANN D. GONZÁLEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY, AND PRACTICE 47-55 (1991) (describing pervasive inadequate or nonexistent interpretation services in the state courts); Charles M. Grabau & David-Ross Williamson, Language Barriers in our Trial Courts: The Use of Court Interpreters in Massachusetts, 70 MASS. L. REV. 108, 110 & n.5 (1985) ("Although official interpreters were used in several courts, . . . trial judges used their discretion to permit 'procedure clerks,' court officers, attorneys, local residents, friends and relatives of defendants, a transportation officer, a court advocate, a witness assistant, a teacher, a nun, a secretary of the Supreme Judicial Court, and finally a court janitor to interpret in the proceedings."); Bill Piatt, Attorney as
more, certain kinds of errors and modifications of a witness’s meanings are inherent in the interpretation process, even among the most highly qualifies interpreters.

In the course of interpretations, courtroom interpreters regularly engage in self-correction, as a witness’s meaning becomes more apparent. When bilingual attorneys are present in the courtroom, these attorneys will often question the accuracy of an interpretation of a witness’s testimony. I do not question the good faith of interpreters, but several characteristics of their work have been proven to change the nature of courtroom proceedings and the meanings and perceptions of participants in these proceedings.

Professor Berk-Seligson’s extensive study of the ways in which interpreters influence courtroom proceedings reached several significant conclusions. Unlike the image or desire that court interpreters function invisibly and mechanically in interpreting testimony, Berk-Seligson found that interpreters play a far more active role in the courtroom than the court system recognizes. Interpreters often interrupt the usual question-and-answer dialogue of the courtroom by asking attorneys and witnesses for clarification of unclear questions and answers. Interpreters challenge and correct attorneys as they...

Interpreters: A Return to Babble, 20 N.M. L. REV. 1 (1990) (describing ethical conflicts and compromised quality of client representation when courts require bilingual attorneys to act as interpreters for their clients).

For a recent example of the often "ad hoc" manner in which interpreters are appointed, see State v. Lee, 512 A.2d 525 (N.J. Super. Ct. 1986) (Lee Kim, victim, complaining witness and defendant’s sister sworn in as Korean-language interpreter for corroborating witness during grand jury proceedings; although court acknowledged this procedure was defective, defendant’s conviction upheld because of failure to object timely to potentially biased interpretation).


106. BERK-SEIGSON, supra note 103, at 78. The frequency with which this occurs suggests the very regular possibility of misinterpretation, or at least the possibility of varying interpretations, of the same phrase. While the courts have not perceived the questioning of the interpreter’s rendition of testimony by bilingual attorneys as inappropriate in any way, they have perceived the same questioning by bilingual jurors as highly problematic, as demonstrated by the citation in Hernandez of the Perez case. See Hernandez, 111 S. Ct. at 1867 n.3.

107. See generally BERK-SEIGSON, supra note 103.

108. This idea is well expressed in the rules of the Texas Judiciary Interpreters Association: “The interpretation shall be conducted in the first and second person, as if the interpreter did not exist.” The Association Rules are reprinted in BERK-SEIGSON, supra note 103, at 60.

109. Id. at 54.

110. Id. at 71-76.
ask questions of witnesses.111 If a witness gives a nonsensical answer to an attorney’s question, interpreters may attempt to explain such answers and clarify the situation, rather than simply interpret the witness’s testimony. Interpreters do this to distance themselves from the witness’s nonsensical response, which, if simply interpreted faithfully, might raise questions about the interpreter’s skill in interpreting either the question or the response.112 Such instances reveal that the court interpreter has his or her own credibility and persona before the court, and that interpreters, like anyone else, will act to preserve their credibility. This becomes problematic when it materially alters the content of courtroom proceedings.

In addition to altering the flow and content of courtroom proceedings, interpreters can also subtly alter the meaning of witnesses’s testimony through their linguistic choices. For example, an interpreter’s use of the passive voice is a linguistic mechanism that can be used to avoid blame and de-emphasize the responsibility of a party with whom an interpreter may empathize.113 Interpreters generally lengthen testimony when they convert Spanish into English, changing what is originally a powerful speech style into a powerless one, by adding verbal hedges, hesitations and polite forms.114 This may affect the jury’s perception of the witness.115 Alternatively, interpreters often shorten witness testimony, sometimes by omitting precisely these linguistic forms. By omitting the verbal pauses and hesitation of a witness, an interpreter controls whether a witness’s testimony appears unsure and uncertain or not.116

Accordingly, “the interpreter often plays a decisive role in controlling the speech of witnesses or defendants who are testifying on the stand.”117 Requests for clarification regularly made by interpreters alter the relationship between an interrogating attorney and a witness, and may change a jury’s perception of both the attorney and the witness. Furthermore, the interpreter’s linguistic decisions alter the meaning of testimony given by witnesses. Far from being an invis-
ble, mechanical producer of certain meaning from another language to
English, the interpreter is a human participant and a shaper of the
meanings given to testimony in languages other than English. This
variability proven to inhere in the interpretation process should make
us wary, then, about attributing finality and certainty to the official
interpretation of testimony.

Since the interpreter's humanity and subjectivity render her a
participant and a variable in the ultimate results in the courtroom, it
is important to note that there are several built-in conflicts between
an interpreter's ethical duties and completely faithful interpretation of
a witness's testimony. I have already noted an interpreter's under-
standable reluctance to interpret faithfully an incoherent response by a
witness, and by so doing appear herself to be incoherent or incompe-
tent. Other conflicts between duty and truth appear in the ethical
codes governing interpreters.

Under the ethical guidelines for interpreters provided to the Unit-
ed States District Courts by the Administrative Office of the United
States Courts, interpreters sign a written oath which states that each
interpreter "will familiarize [her]self with the case as much as possi-
bile prior to going into the courtroom . . . [and] will study the indict-
ments or charges to avoid possible interpretation problems during
formal court proceedings."
118 The ethical code for interpreters thus
requires that an interpreter study, without any supervision, and prior
to the trial, materials such as the case file, pleadings, and the indict-
ment. Interpreters in the federal courts will thus arrive at a trial with
whatever preconceptions and impressions of guilt or innocence they
derive from the available case materials. As discussed above, inter-
preters have a variety of linguistic devices available to them to ex-
press meaning in ways that either emphasize or de-emphasize indi-
vidual responsibility.119 An interpreter cannot remain neutral after
reading a case file, without cautionary instruction about the actual
meaning of indictments and other documents in a criminal case file.
All attorneys, and in particular defense attorneys, should be extremely
cconcerned that interpreters' conclusions drawn from case files may
influence their manner of interaction and interpretation with attorneys

118. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SUGGESTED
INTERPRETER'S WRITTEN OATH, reprinted in BERK-Seligson, supra note 103, at 227. How-
ever, at least two state ethical codes for courtroom interpreters, those of Texas and New
Jersey, impose no such requirements. Id. at 229-38 apps. 4 & 5.
119. See supra notes 113-17 and accompanying text.
Other provisions of ethical codes for interpreters also create the potential for discrepancies in meaning between what a witness says and an interpreter conveys. The federal ethical code requires interpreters to "speak in a clear, firm, and well modulated voice." Some state ethical codes contain a similar requirement. Suppose that a witness speaks in a muddled, weak, and poorly modulated voice. The interpreter's ethical code will require her to convey the testimony in a manner that conflicts dramatically with the demeanor of the witness, which may alter the jury's perception of the witness.

This section demonstrates that interpreters are active participants in legal proceedings, and that their personal biases and professional requirements may result in interpretations conveying meanings different from those intended or stated by witnesses. Under these circumstances one can question the wisdom of relying solely on an "official interpretation" as the definitive rendition of a witness's testimony. All of the parties in a trial should be concerned about the faithful rendering of a witness's meaning.

Even the linguistically simpler process of transcribing a witness's testimony in one language is often prone to discrepancies between the testimony and the transcript. Courtroom reporters alter the meaning of witness testimony. As one scholar of courtroom reporting has

120. To some extent, this concern may be ameliorated by the professionalism and the professional standards required of interpreters, at least in the federal courts. Experienced, federally certified interpreters may learn, through experience, the significance of pleadings and the trial process.

121. BERK-SELIGSON, supra note 103, at 227.

122. The Texas ethical code prescribes that "[d]uring cross-examination, the interpreter speak in a loud, clear voice, so that he/she may be properly heard in the whole room." Id. at 231.

123. For example, Professor Berk-Seligson cites an example of a drug trial in which the defense attorney, not trusting the services of the federally certified and court-affiliated interpreter, hired his own interpreter instead. The trial court, concerned about the possibility of a mistrial over the quality of the defense's interpretation, assigned its own interpreter to act as a check on the defense's interpreter throughout the trial. In this example, all the parties, including the trial judge, seemed acutely aware of the possibilities of interpreter error or bias. See id. at 48.


[In any movement from the oral to the written, certain discrepancies between the original event and its written representation are bound to occur, discrepancies which are traceable not merely to inherent differences between spoken and written language, but in the case of court reporting, to the cultural and professional climates in which reporters do their jobs . . . .]
concluded, "the written record of trials continues to be something
more and something less than what happened."125

The official transcript of the oral argument before the Court on
the Hernandez case provides a good example. In an early colloquy
between Kenneth Kimerling, appellate attorney for Hernandez, and
one of the Justices, the Justice stated, according to the official tran-
script: "[I]f the prosecutor thinks that some particular perspective [sic]
juror will not abide by the translation of the language and yet speaks
the language, I think it's quite remarkable to say that there cannot be
a peremptory challenge, maybe even a challenge for cause . . . ."126

As a reader of the official transcript, I have several ways to
interpret the obviously incorrect reference to a "perspective juror." Should I assume, since I am reading the official transcript, that the
Justice actually said "perspective," instead of "prospective"? If I ac-
cept the version of the Justice's statement in the Official Transcript, I
must then make the uncomfortable assumption that the Justice does
not know the difference between "perspective" and "prospective," and
my view of this Justice is slightly diminished. Or should I make the
more obvious and plausible assumption that, despite its presence in
the official transcript, the word "perspective" attributed to the Justice
was an error made by the certified court reporter in transcribing the
Justice's statement? I will trust my instincts and believe that the court
reporter made a mistake.

There are several other apparent errors by the certified court
reporter in the official transcript.127 These errors exist even though

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[Some discrepancies] because they are not obvious, escape either concern or
correction. These deviances from reality take the form, for example, of grammar
that is "cleaned up" for one speaker but not another; dialect that is sanitized so
that speakers from Boston, the Bronx, Iowa, India, and South America all "sound"
alike on paper . . . . Because discrepancies of these and other types are unrecog-
nized, they continue unabated, unstudied, and unregulated in the court reporting
profession . . . .

Id. at 203-04.
125. Id. at 204.
(emphasis added).
127. See id. at 5, 6 ("a finding of intention discrimination"), 7, 9, 11, 31 ("if it actual
happened"), 33 ("the facts compelled a result from the result"), 41 ("emigration" instead of
"immigration"). While some of these errors are probably simple typos, others raise questions
about what the Justices meant, and render incoherent the meaning of sections of the tran-
script. Should I assume that the Justices and attorneys practicing before them are inarticulate,
or rather, that the court reporter made errors in transcribing the oral argument? I have no
doubt that the errors are errors made by the court reporter in transcription.
everyone was speaking a single language, English, and despite undoubtedly qualified and certified court reporters. Should a reader of the official transcript, created by a certified court reporter and clothed with all its indicia of authority, suspend critical judgment in order to adhere to the transcript? Or is it more reasonable, appropriate, and meaningful for a reader to use his or her good judgment to question obvious or likely errors? As I discuss in the next section, these are the issues inherent in the prosecutor's questioning of the bilingual jurors that he excluded from the jury.

B. The Trouble with the Question

Accordingly, since the complex processes of interpretation, and even common courtroom reporting, generate ambiguities of meaning and inaccuracies in the rendition of testimony, litigants and judges should be cautious about overly rigid adherence to the "official" interpretation of a witness's testimony. Yet it was exactly such rigid adherence to the official interpretation that the prosecutor demanded of the bilingual prospective jurors in Hernandez. The jurors' hesitation in affirming uncritical adherence to the official interpretation became the reason for their dismissal from the jury. This section explores the trouble with the prosecutor's question.

The first problem with the prosecutor's question to the bilingual jurors, "whether or not they could accept the interpreter's translation?"128 is that, as a fundamental matter, it is the wrong question for the prosecutor and courts to ask. Attorneys and courts should be concerned about guaranteeing that courtroom interpretations are accurate and faithful to the meaning of a witness's testimony. Yet the prosecutor and the courts focus on a far less important issue, whether the jurors will promise uncritical adherence to the official interpretation.

An inquiry into the nature of the less important question, whether bilingual jurors will promise to adhere to the official interpretation, reveals that it is neither "race-neutral" nor appropriate. The allegedly race-neutral reason offered by the prosecutor for rejecting two Latino jurors was that he felt "very uncertain that they would be able to listen and follow the interpreter."129 According to the transcript of the bench hearing on the Batson challenge, the prosecutor asked these

129. Id.
jurors the following: "whether or not they could accept the interpreter's translation" of Spanish-language testimony. In response to the question, the jurors responded first that they would try to, and later affirmed to the judge that they could, listen to the interpreter.

The prosecutor's question asks whether or not the bilingual jurors can accept the interpreter's rendition of Spanish-language testimony. The question is asked in the abstract, before any proceedings have begun and before the interpreter's skill level and accuracy are evident. The question cannot really be answered in the abstract. To answer the question, one must have some assurance that the interpretation will be faithful to the testimony and correct. Although courts and attorneys assume routinely that interpretations will be correct, prospective jurors may not be familiar with the interpreters' oaths, interpreters' levels of competency, and other reasons to believe in their accuracy. Absent such assurances, one must pledge allegiance to a potentially false interpretation, which is not in anyone's interest.

The prosecutor's question to these bilingual jurors, whether or not they could accept the interpreter's rendition of Spanish-language testimony, cannot really be answered as asked. To answer yes to this question, the bilingual juror must know that the interpreter will interpret a witness's testimony correctly, a factual premise entirely absent from the question. A bilingual juror who understands the non-English source language of a witness will hear two versions of the evidence, the witness's version (version one) and the interpreted version (version two), response by response. More precisely, then, the prosecutor's question asks that the juror promise to accept version two in its entirety as the authoritative version of the evidence, regardless of the juror's understanding of version one. If version two turns out to be identical to, or in material respects very close to version one, then after the evidence is presented, it should not be difficult to accept the official interpretation.

130. Id. Unfortunately, no transcript exists of the voir dire, so this form of the question is the prosecutor's own characterization of it, and not the actual question asked.

131. Id. at 5-6.

132. If the prosecutor's question to the bilingual prospective jurors is interpreted as a demand that they ignore entirely the Spanish-language testimony and hear and understand only the English-language interpretation, then substantial linguistic evidence suggests that compliance with the prosecutor's request would be impossible. For a thorough discussion of this aspect of the problem and of the linguistic evidence, see Ramirez, supra note 9.

133. See supra notes 103-17 and accompanying text. There is ample reason to question the accuracy of this assumption.
But suppose that the interpreter makes a serious error in interpreting essential testimony from Spanish to English. Should a bilingual juror, very possibly the only person aware of the error, accept that erroneous translation? And in the abstract, how can a juror know whether an interpreter will be right or wrong? The unknown probability of interpreter error makes an unhesitating yes answer extremely difficult for a conscientious bilingual juror to give. Indeed, one of the excluded jurors in the *Hernandez* case explained in an interview that “[t]he problem . . . is that if there were a discrepancy in the Spanish and English, I wouldn’t know how to deal with it.”

In a sense, the interpreter is like a witness before the court testifying about what a Spanish-speaking witness has said. Like witnesses at a trial, the interpreter is sworn to interpret faithfully, i.e., to tell the truth in English about what a witness has said in Spanish. With this understanding of what the interpreter does, the prosecutor’s question to the bilingual jurors can be understood as the question, Do you promise to believe what the interpreter says, regardless of your own understanding of the witness’s testimony?

An analogous question to a monolingual, English-speaking juror might be as follows. Assume that the jurors have no knowledge of witness X, and that the following question is asked entirely in the abstract, before any proceedings have begun. A juror is asked, Will you accept the testimony of witness X as true? As asked, the question is unanswerable for a conscientious juror. Without listening to and observing the witness, and without knowing the testimony of other witnesses and the other evidence introduced at the trial, an unhesitating yes answer would probably be evidence of bias and irresponsibility. A more conscientious answer to the question would be something like “I can’t answer that,” or “I don’t know,” or “it depends on the full circumstances.”

But the question itself is inappropriate, because it requires a juror to commit him or herself to believe certain facts (those contained in the testimony of witness X) to be true, before there is any reason or evidence to believe that they are true or not. And the *Hernandez* prosecutor’s question is inappropriate for exactly the same reason. It

134. Ramirez, supra note 9, at 31.
135. See supra note 118 and accompanying text (“I will interpret accurately and faithfully to the best of my ability. I will convey the true meaning of the words, phrases and statements of the speaker . . . .” ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SUGGESTED INTERPRETER’S WRITTEN OATH, supra note 118, at 227).
requires a bilingual juror to commit him or her self to believe what is offered by the interpreter as true, before there is any basis for the belief. This is the complexity faced by bilingual jurors, and only these jurors, when confronted with the prosecutor’s question.

Returning to the question posed to the bilingual jurors, a yes answer to the prosecutor’s question could result from a conscious choice to resolve any potential discrepancies between the testimony and the interpretation by attempting to pay the most attention to the interpreted version of the testimony. Such a conscious choice, however, requires thought, takes time, and will cause some hesitation in producing a response. Accordingly, the hesitation relied upon by the prosecutor, and the Court, as a reason in addition to bilingualism for the exclusion of these jurors, in fact results directly from their bilingualism and the unsuspected complexity of the question faced by bilingual jurors.

This discussion illustrates that monolingual English-speakers and bilingual Spanish and English speakers are not similarly situated with respect to responding to the prosecutor’s question with an unhesitating yes. Jurors who have no understanding of a different language, and who therefore have no choice other than to rely on the official interpretation, can easily respond yes to the prosecutor’s question. Jurors who are able to understand both the non-English source language and the translation face a different and more difficult question: whether they will either ignore any differences between the original and the interpretation, or recognizing the differences, whether they will promise to resolve them in favor of the interpreter’s version.

Another problem with the question is that it treats the interpretation as a single, unified whole when it is more appropriate to consider it as a sequence of interpretations of each response by a witness. It is entirely possible for an interpretation to be mostly accurate with a few inaccuracies. By treating the interpretation as a whole and in the abstract, the courts are able to leap from considering the real problem, how to deal with possible discrepancies in meaning between the interpretation and witness testimony, to redefining the problem as one of the juror’s willingness or not to accept the whole interpretation. The focus is shifted from the problem of ascertaining meaning into a problem of juror conduct and cooperation, which is resolved with adverse consequences for bilingual jurors.

The prosecutor converts a complexity inherent in bilingualism, the resolution of potentially conflicting meanings of a witness’s testimony, into an unsupported concern about juror competence and will-
ingness to follow instructions. The prosecutor’s brief to the court argues that the two jurors were challenged because they indicated that their knowledge of Spanish might interfere with their responsibility as jurors to accept the official translation of Spanish-language testimony.\textsuperscript{136} The prosecutor then argued that:

The difficulty expressed by the jurors implicated two related concerns: their ability to follow the trial court’s instructions to accept the official interpretation and to decide the case upon the evidence available to their fellow jurors; and the fear that these jurors might act as unsworn witnesses and have an improper influence on their fellow jurors.\textsuperscript{137}

The prosecutor turned the complexity faced by the bilingual jurors in the Hernandez case into a parade of horribles. The complexity faced by bilingual jurors is essentially limited to resolving possibly inaccurate renditions of witness testimony, in those hopefully few cases in which there are significant discrepancies between interpretation and testimony. This complexity, argued the prosecutor, leads to the worst sort of concerns about jurors: inability or unwillingness to follow the trial court’s instructions, inability to decide the case based on the evidence presented at trial, and the specter of improper influence in the jury room.\textsuperscript{138}

The courts adopt the prosecutor’s characterizations and treat bilingual jurors as though their bilingualism rendered them incompetent or unwilling to fulfill their responsibilities as jurors. The New York Court of Appeals wrote the following, in denying the appellant’s Batson challenge the exclusion of the two bilingual jurors:

These jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony . . . . the prosecutor’s belief was that the two Spanish-speaking jurors might be unable or unwilling to accept

\textsuperscript{137} Id. at 17.
\textsuperscript{138} The prosecutorial parade of horribles misses some important facts. First, the jurors testified to the trial judge that they would adhere to the official interpretation. Second, the prosecutor’s argument distorts the fact that Spanish-language testimony of a witness is the evidence presented at trial, even if courts appear reluctant to deem it so. See infra Part III.A. The official interpretation of this evidence makes the evidence accessible to English-speakers. One could easily dismiss the prosecutor’s allegations as mere argument, except that these allegations appear to have been largely accepted by every court that decided this case.
the evidence properly submitted to them by the court. The essence of this case [is about] the ability of these jurors—or any sworn jurors no matter their race or ethnic similarities—to decide a case on the official evidence before them, not on their own personal expertise or language proficiency.139

Following the prosecutor’s lead, the court too has strayed far from the problem presented—resolution of potentially conflicting meanings—into the realms of juror competence and responsibility, and in a manner that reflects negatively on bilingual jurors.

The Supreme Court also appears to have adopted the prosecutor’s unfounded concern about the competence and cooperation of bilingual jurors in subtle ways. During the oral argument of the case, one Justice stated that: “If the prosecutor thinks that some particular perspective [sic] juror will not abide by the translation of the language, and yet speaks the language, I think it’s quite remarkable to say that there cannot be a peremptory challenge, maybe even a challenge for cause . . . .”140 Although, in context, this observation could be a hypothetical, it could also refer to the case presented. If so, then this Justice has translated the original “difficulty” presented by the prosecutor’s question into a juror’s refusal to abide by the interpretation. Far from refusing to accept it, the Hernandez jurors attested to their willingness to abide by the interpretation.

The Court characterized the classification created by the prosecutor’s conduct as follows: “[T]hose whose conduct during voir dire would persuade him they might have difficulty in accepting the translator’s rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos.”141 Again, the Court focuses

140. Official Transcript at 4, Hernandez v. New York, 111 S. Ct. 1859 (1991) (No. 89-7645). Although the full text from which I quoted contains just one misperceived word ("perspective" instead of "prospective") the official transcript has a number of such errors. These errors exist even though everyone was speaking a single language, English, and despite the undoubtedly qualified and certified court reporters. Should we rely on an official transcript of oral argument that doesn’t make sense? See supra notes 124-27 and accompanying text.
141. Id. at 1867. This characterization is reminiscent of the much-criticized miscomprehension of the issue in General Electric v. Gilbert, 429 U.S. 125 (1976). There the court characterized an employer’s disability insurance plan, which provided no coverage for pregnancy and its associated disabilities, as creating a non-discriminatory classification between pregnant and non-pregnant persons. Since, so described, both classes contained women, the Court was able to conclude that there was no sex discrimination wrought by the plan. The court’s overly formalistic treatment of the plan was promptly, and expressly, overruled by
on a generalized "difficulty in accepting the translator's rendi-
tion." What this description misses is that monolingual English-
speakers and bilingual Spanish and English speakers are not similarly
situated with respect to the classification.

This expanding scope of problems that the prosecutor and the
court associate with bilingual jurors has stigmatizing implications for
these jurors. The "difficulty accepting" the interpretation is not, as
construed by the courts, resistance, lack of cooperation, or lack of
juror competence. It is the same difficulty that would be faced by any
juror forced to affirm his or her belief in the truth of certain facts
before any of the facts are in evidence. Rather than characterizing the
bilingual jurors as deficient, and subject to exclusion from a jury, the
courts should understand that perhaps these jurors, and the many
other bilingual jurors like them, might be responding in a conscien-
tious way to a complex question that monolinguals assume to be
straightforward.

III. LANGUAGE DIFFERENCE, BILINGUALISM,
AND CONTROL IN THE COURTROOM

A. The Marginalization of Spanish Speakers in the Courtroom

Many courts' current manner of handling Spanish-language testi-
mony has stigmatizing implications and adverse legal consequences
for Spanish-speaking people. If a witness testifies in Spanish, only the
English interpretation is deemed evidence. The official record will
contain only the English interpretation, which becomes the only re-
cord of what was said in all subsequent appellate proceedings. No
record, written or taped, is usually made of the original Spanish-lan-
guage testimony. It is not deemed to exist for any official purpose. In
fact, the Spanish-language testimony is the evidence, and the inter-
pretation is a necessary rendering, hopefully accurate, of the evidence
into English. By not treating the Spanish-language testimony as the

formalistic classification in Gilbert, the Hernandez Court ignores the unique nature of the
"difficulty accepting" the interpretation faced by bilinguals.

142. Hernandez, 111 S. Ct. at 1867

143. BERK-SELIJON, supra note 103, at 31, 200-02; see also GONZÁLEZ ET AL., supra
note 104, at 54. For cases in which defendants have complained about the absence of some
record of Spanish-language testimony to enable a meaningful challenge to the accuracy of
F.2d 368, 370 (1st Cir. 1975); Gonzales v. State, 819 P.2d 1159, 1161 (Idaho Ct. App.
Evidence, the court system has marginalized and stigmatized witnesses who speak Spanish.

The fact that Spanish-language testimony is not deemed evidence also has adverse legal consequences for Spanish-speaking Americans. Since, typically, no official record is ever made of Spanish-language testimony, it is usually impossible to challenge effectively the accuracy of an English interpretation of Spanish-language testimony. The original Spanish-language testimony can never be checked after it is uttered, at any level of the court system.

In at least one state, tape recordings are made of all testimony, in whatever languages it is offered. The simple tape recording of all witness testimony makes a substantive appellate challenge to the accuracy of an interpretation possible. In State v. Mitjans, for example, an audio tape was made of the trial. In Mitjans, the court-approved interpreter, from a very different background than the witness, was alleged to have omitted several phrases from a key aspect of the witness's testimony. The appellate court held that these errors of misinterpretation, together with other errors in the trial, "denied the appellant his right to a fair trial." This was, however, overturned on appeal to the State Supreme Court which found the translation to be essentially accurate. The proper substance of a legal challenge to an incorrect interpretation, as illustrated in Mitjans, would be the fidelity of the interpretation to the Spanish-language original. Since the Spanish-language original is usually not preserved, such an intuitively reasonable legal challenge is rarely possible.

Instead, some courts apply meaningless standards when the accuracy of an interpretation is challenged. One such standard is the test of "sufficient comprehensibility," that is, whether the interpretation was "incomprehensible," "unintelligible," or otherwise "could not be understood." This standard is problematic for several reasons.

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144. At least two courts have commented on the near-impossibility of appellate challenge to the accuracy of an interpretation. See United States v. Anguloa, 598 F.2d 1182, 1185 n.3 (9th Cir. 1979) (recognizing that "there is an inherent difficulty in attempting to evaluate the accuracy of interpretations on appellate review" because the transcript contains only "the questions in English and the answers after they have been translated into English."); Gonzalez, 819 P.2d at 1161.
145. 394 N.W.2d 221 (Minn. Ct. App. 1986), rev'd, 408 N.W.2d 824, 831 (Minn. 1987) (reversed based on the higher court's conclusion that, "the translation was on the whole adequate and accurate").
146. Mitjans, 394 N.W.2d at 227.
147. Id. at 227-28.
148. Mitjans, 408 N.W.2d at 831.
149. See, e.g., State v. Casipe, 686 P.2d 28, 32-33 (Haw. Ct. App.) (stating that "the
First, an inquiry into whether the interpreter was intelligible does not address the relevant question, whether the interpreter accurately conveyed the testimony of the witness. If a witness utters incomprehensible testimony, then an interpreter should provide an accurately incomprehensible interpretation. So a standard based on comprehensibility may result in a judgment of “inaccurate interpretation” in cases in which an interpreter was accurate. Because of their professionalism and ethical requirements, interpreters will be extremely reluctant to appear incomprehensible or incompetent, even if that is the nature of the testimony uttered. Accordingly, an interpretation will very rarely be sufficiently incomprehensible to justify serious appellate review of an allegation of inadequate interpretation. Other courts have used a standard which purports to measure the overall adequacy of the interpretation in the absence of a record of the original source testimony.

Some courts have used a standard based on comprehensibility of the testimony, surrendering to the interpreter the ability to convey the original testimony, even if that testimony is, to begin with, incomprehensible. If a witness utters incomprehensible testimony, then an interpreter should provide an accurately incomprehensible interpretation. So a standard based on comprehensibility may result in a judgment of “inaccurate interpretation” in cases in which an interpreter was accurate. Because of their professionalism and ethical requirements, interpreters will be extremely reluctant to appear incomprehensible or incompetent, even if that is the nature of the testimony uttered. Accordingly, an interpretation will very rarely be sufficiently incomprehensible to justify serious appellate review of an allegation of inadequate interpretation. Other courts have used a standard which purports to measure the overall adequacy of the interpretation in the absence of a record of the original source testimony.

150. See supra note 112 and accompanying text.

151. Another requirement imposed by the courts is that an attorney raise a contemporaneous objection to the accuracy of an interpretation during the trial. The difficulty with such a standard is that it imposes on the parties to any trial a duty to be able to understand the original testimony in the source language. Without such understanding, it will be impossible to make a contemporaneous objection to the quality of the translation. In practice, such understanding will only be available in cases in which the attorneys happen to be bilingual, the attorneys have hired their own interpreters to interpret for them, or if a court has, in its discretion, ordered that an interpreter be available to a party. See generally BERK-SEJOGSON, supra note 103, at 201-18. See supra note 112 and accompanying text.

152. See e.g., Valladares v. United States, 871 F.2d 1564, 1566 (11th Cir. 1989); State v. Mitijans, 408 N.W.2d 824, 831 (Minn. 1987) (bilingual police officer, not certified to interpret, found to have provided an interpretation to defendant that was “on the whole adequate and accurate”); see also State v. Torres, 368 S.E.2d 609, 611 (N.C. 1988) (finding no error in using court-appointed, but uncertified, interpreter found to have “sufficient command of the English language” to act as interpreter, based on prior performance in several
Many courts, including the federal courts, refuse to deem non-English testimony as evidence in a trial. Since different-language testimony is not considered evidence in a trial, such testimony is usually not preserved in any way. The failure to preserve testimony in non-English languages makes impossible meaningful appellate review of the accuracy of interpretations. The absence of meaningful appellate review in such cases raises serious constitutional questions under the Fourteenth Amendment.\footnote{153}

**B. Language and Control in the Courtroom**

One of the themes underlying the *Hernandez* decision is the perceived need for judges and prosecutors to control the information received by jurors through adherence to the official interpretation of different-language testimony. Another theme in *Hernandez* appears to be a fear and misunderstanding of bilinguals and some perceived loss of control resulting from their presence on a jury. The fear is evident in the prosecutor’s concern that bilingual jurors might exert an “undue influence” on other jurors. The fear is also evident in Justice Kennedy’s plurality opinion, where the Justice purports to illustrate “the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony.”\footnote{154}

Without explaining precisely its view of “the sorts of problems” presented, the *Hernandez* Court quotes a passage from the opinion in criminal cases, passing a course in interpreting, conversing for several years in English, and taking community college courses in English). Such qualifications fall very far short of the certification requirements for interpreters in the federal courts. See *Berk-Seligson*, supra note 103, at 36-40; cf. *United States v. Da Silva*, 725 F.2d 828, 831 (2d Cir. 1983) (finding that native Portuguese speaker, who also spoke Spanish, found to have “sufficient” mastery of Spanish such that an interpreter certified to interpret Spanish was deemed adequate).\footnote{153}

The Court has recognized the importance of meaningful appellate review of criminal convictions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment in its decisions dealing with the access of indigent persons to the criminal justice system. See *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (holding indigents entitled to assistance of counsel for first appeal of right after conviction); *Griffin v. Illinois*, 351 U.S. 12, 16-18 (1956) (plurality opinion) (holding that in criminal trials a state can no more discriminate on account of poverty in access to adequate appellate review than on account of religion, race, or color); see also *Wayne R. LaFave & Jerold H. Israel*, *Criminal Procedure* § 26.1(a) (1985) (noting that the right of the defendant to appeal is provided for in most state statutes or constitutions); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) (advancing arguments in favor of the right to appeal a criminal conviction based on the constitutional guarantee of due process of law).

*But see* *Ross v. Moffitt*, 417 U.S. 600 (1974) (holding state has no obligation to provide counsel for discretionary appeals).\footnote{154}

United States v. Perez. The Court quotes an exchange between a bilingual juror, the trial judge, and the interpreter and allows readers to draw their own inferences about the "sort of problems" that may arise:

In Perez, the following interchange occurred:

Dorothy Kim (Juror No. 8): Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado [sic]. You say that is a bar.

The Court: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me—

Dorothy Kim: I understood it to be a restroom. I could better believe they would meet in a restroom rather than a public bar if he is undercover.

The Court: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the—

Dorothy Kim: I understand the word La Vado [sic]—I thought it meant restroom. She translates it as bar.

Ms. Ianziti: In the first place, the jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.

Dorothy Kim: You're an idiot.

Upon further questioning, "the witness indicated that none of the conversations in issue occurred in the restroom." The juror later explained that she had said "'it's an idiom'" rather than "'you're an idiot,'" but she was nevertheless dismissed from the jury.156

What sort of problems, then, arise when a juror "fails to accept" the official interpretation? First, a bilingual juror who understands testimony in the witness's language, may disagree with the interpretation of the testimony and may find errors in the interpretation. Juror Kim did nothing more than to ask the judge whether she could ask a question about the interpretation, which had left her unsure about what the witness meant. The trial judge responded by proposing that, at the conclusion of a witness's testimony, jurors could ask the judge any questions they had about discrepancies between the interpretation and the witness's testimony and the judge would decide which questions warranted clarification.157 Finally, as a result of the juror's efforts, the misunderstanding was clarified: "none of the conversations

155. 658 F.2d 654 (9th Cir. 1981).
156. Hernandez, 111 S. Ct. at 1867, n.3 (citing United States v. Perez, 658 F.2d 654, 662-63 (9th Cir. 1981)).
157. Perez, 658 F.2d at 662-63.
in issue occurred in the restroom.”\footnote{158} As a result of her efforts, everyone in the courtroom, her fellow jurors, the attorneys, and the judge, had a better understanding of what the witness meant.\footnote{159}

The Hernandez Court used this excerpt from the Perez case to suggest that bilingual jurors will make trouble on juries and disrupt judicial proceedings. According to the Court, it was juror Kim’s “failure” to accept the interpretation that caused problems. The Court thus suggested that bilinguals will be belligerent and will not behave properly on juries. The Court also treated the question at issue in Perez rather misleadingly. These sorts of problems arise, the Court tells us, when a juror “fails to accept the official translation of foreign-language testimony.”\footnote{160} So characterized, it is the juror’s “failure to accept” the interpretation, rather than possible errors or ambiguities in the interpretation, that presents problems for the courts.

But why should anyone in the courtroom, jurors, judge, attorneys, or parties, accept an incorrect or potentially incorrect rendering of a witness’s testimony? Errors in interpretation can cut either way, for or against the prosecution or the defendant, for or against both parties in a civil lawsuit. Despite the evidence of and probability of errors in a process as difficult as interpretation, the Court wants to believe in the certitude of the “official interpretations.”

The vital issue here is not the suggested belligerence and uppity nature of bilingual jurors. It is whether the Court cares more about adherence to an “official” interpretation than about the accuracy of that interpretation. The Court’s position is clearly to favor adherence to the official interpretation, rather than discovery of the truth. This adherence to form over substance, where substance is the meaning of testimony, the core of what witnesses provide to judicial proceedings, is wrong.

It is easier for the federal courts to make Juror Kim, and essen-

\footnote{158. Id. at 663.}

\footnote{159. There is a factual dispute about whether Kim called the interpreter an idiot. The judge was unaware that Kim may have said this until the court reporter informed him later of the remark. Walker’s study demonstrates that court reporters don’t always get it right. See supra notes 124-27 and accompanying text. When interviewed by the trial judge, Kim said that she said “it’s an idiom.” In any event, whether she actually called the interpreter an idiot or not has no relevance with respect to the issue of how the Supreme Court uses her case as an example. For another discussion of the Court’s use of the Perez case, see Minow, supra note 53, at 642; see also Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 WM. & MARY L. REV. 1201 (1992).}

\footnote{160. Hernandez, 111 S. Ct. at 1867 n.3.}
ially all other bilingual jurors, scapegoats for an interpreter’s possible interpreting errors than to deal forthrightly with the errors. The Court’s theory appears to be to eliminate the bilingual messenger in order to eliminate potential problems in the interpreted message. But the problems of differing meanings, particularly when dealing with interpreted testimony, do not disappear merely by dismissing those jurors in a position to question the accuracy of the meaning rendered in interpretation. Rather, the problems remain, but the courts appear to have decided to pretend that they do not exist. Perez can be seen as a juror’s genuine search for the truth, which after all, is the function of the jurors.

C. The Alleged “Undue” Influence of Bilingual Jurors

The prosecutor in Hernandez voiced his concern that bilingual jurors would have an “undue influence” over the jury’s deliberations. Although the Court did not discuss this particular issue at length,\(^\text{161}\) the result in Hernandez lends some legitimacy to the prosecutor’s expressed concern. Attorneys may fear sincerely that a bilingual juror’s ability to understand, or misunderstand, testimony in its original source language will result in the juror’s “undue influence” in the jury room. I believe that such fear, although sincere, is exaggerated. Bilingualism is not the sort of knowledge that has been found to be an “undue” or “extraneous” influence in jury deliberations under Rule 606(b) of the Federal Rules of Evidence.\(^\text{162}\) Furthermore, a bilingual’s knowledge of another language is different in kind, and operates within a much narrower scope relative to the substance of a trial, than the kinds of specialized knowledge which routinely form the basis for peremptory challenges.

The development of what constitutes an undue or external influence upon a jury’s deliberations has been codified in Rule 606(b) of the Federal Rules of Evidence and explained in cases interpreting the Rule.\(^\text{163}\) Rule 606(b) provides, in pertinent part:

\[\text{161. In a revealing example of its fear of language difference, the Court appears to accept that if different-language testimony is in a rare language, unlike Spanish, then a juror who also knew the rare language would almost automatically wield “undue influence” and presumably would be excludable. Id. at 1868.}\]

\[\text{162. Although Rule 606(b) deals with the competence of jurors to testify and impeach a verdict after they deliberate and reach it, rather than with challenges during voir dire or during trial, this rule, and cases interpreting it, appear to be the principal context in which evidence law deals with undue or extraneous influence.}\]

\[\text{163. Tanner v. United States, 483 U.S. 107, 115 (1987); Sigler v. McCormick, 967 F.2d}\]
[A] juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes.\footnote{164}

The Rule states limited exceptional circumstances in which a juror may testify: “[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.”\footnote{165}

The Rule thus creates an internal/external distinction. Jurors may not testify regarding the internal debates within the jury or about the perceived or known state of mind of any juror. This part of the Rule is supported by public policies favoring the secrecy and finality of jury verdicts.\footnote{166} Under Rule 606(b), jurors may not testify about arguments made by jurors, the influence of a juror or jurors on other jurors, the improper motives or bias of a juror, a juror’s failure to understand the evidence introduced at trial, or a juror’s failure to understand the judge’s instructions.\footnote{167}

Jurors may, however, testify regarding “extraneous prejudicial information” or “outside influences” that inappropriately influence a jury’s deliberations.\footnote{168} This part of the Rule is supported by a defendant’s Sixth Amendment right to be able to confront all witnesses against him. Prejudicial external information not properly introduced into evidence during a trial and considered only during jury deliberations deprives a defendant of his right to question and confront the external information.\footnote{169}

Matters deemed to be extraneous or outside influences usually include occurrences or influences beyond normal courtroom proceedings.\footnote{170} There are many examples of such occurrences: prejudicial statements made by a bailiff to a jury member; discussion of newspaper articles about a case; or counsel’s comments during deliberations

164. FED. R. EVID. 606(b).
165. Id.
167. 6A JAMES WM. MOORE & JO DESHA LUCAS, MOORE’S FEDERAL PRACTICE §§59.08[4], 59-136 to 59-137 (2d ed. 1991); Note, supra note 166, at 420-21.
168. See supra note 165 and accompanying text.
170. MOORE & LUCAS, supra note 167, at §§59.08[4], 59-136 to 59-139.
per reports on the trial in the jury room; threats, bribery, or other forms of jury tampering; and unauthorized experiments or investigations of facts by jurors that are discussed in the jury room. All of these examples involve jury discussions or influences on the jury that were not properly introduced into evidence during the trial. A juror’s bilingualism, in contrast, involves only the ability to understand the evidence properly introduced during trial in two languages.

Let us assume that the highly improbable happens. After Hernandez, some court somewhere allows a bilingual juror to survive a peremptory challenge in a case in which different-language testimony, which the bilingual juror understands, will be introduced through an interpreter. If our hypothetical case goes to the jury, then the only way that a bilingual juror’s interpretation or misinterpretation of different-language testimony could properly be the subject of a juror’s testimony to impeach the jury’s verdict would be if the bilingual juror’s bilingualism could appropriately be deemed “extraneous prejudicial information” or an “outside influence.”

The cases interpreting Rule 606(b) suggest that this would be an inappropriate conclusion. If a bilingual juror misinterprets or distorts a witness’s testimony during deliberations, this is no different from any misinterpretation of the evidence or of the judge’s instructions. Monolingual, English-speaking jurors misunderstand or distort testimony and are not thought to present a danger to the functioning of the jury system. Indeed, jurors may drink to excess, fall asleep, and snort cocaine without impeaching the validity of the verdict they reach. All of the above behaviors, under Rule 606(b) and the cases, would “inhere in the verdict” and jurors would be incompetent to testify about them. One court, considering the validity of a jury verdict reached through deliberations in Spanish, though the evidence was introduced in English, concluded that “[w]hether the jury deliberated in Spanish or English would undoubtedly require an inquiry into the jury’s deliberations and thought processes that courts should not undertake.” So a prosecutor’s fear that a bilingual person would assert, during deliberations, that a witness said, or did not say, certain things would be incompetent evidence for the purpose of

171. Id.
172. See supra note 163 and accompanying text.
174. See supra note 163 and accompanying text.
impeaching a jury verdict. Of course, if a bilingual person asserts correctly the testimony of a witness, this presents no problem.

Accordingly, a prosecutor’s fear that a bilingual juror would somehow present an “undue influence” over other members of the jury is not a permissible objection under Rule 606(b).\textsuperscript{176} Bilingual jurors will have whatever influence or lack of influence they will have, just like any other juror. The only difference between a bilingual juror and a monolingual juror is that the bilingual juror will have an additional way of understanding or misunderstanding the evidence introduced at trial. But Rule 606(b), and court interpretations of the Rule and its supporting policies, render verdicts immune from impeachment on this basis.\textsuperscript{177}

In its brief to the court, the prosecution made the following additional argument in support of its contention that bilinguals will unduly influence a jury:

The prosecutor’s concern in this case that the two [bilingual] jurors in question might unduly influence the jury is very similar to the legitimate concern a party might have that doctors serving as jurors might unduly influence a jury making a complex medical determination; that psychiatrists or psychologists serving as jurors might unduly influence a jury determining an insanity defense; or that accountants serving as jurors might unduly influence a jury in a tax evasion trial.\textsuperscript{178}

The prosecutor’s argument is flawed. In each of the examples cited by the prosecution, the concern is that a juror with extensive, post-graduate training in a professional discipline, M.D. degrees for doctors and psychiatrists, Ph.D. degrees for psychologists, and C.P.A. certification for accountants, will unduly influence a jury. Note that in each example, the post-graduate study is directly related to the substantive legal issues and conclusions that the jury will have to make in the hypothetical case. Furthermore, in the prosecutor’s hypothetical exclusions, professionals would only be excluded from that small

\textsuperscript{176} Id.

\textsuperscript{177} See Tanner, 483 U.S. at 119-21; United States v. Sjeklocha, 843 F.2d 485, 488 (11th Cir. 1988).

\textsuperscript{178} Brief for Respondent at 19, Hernandez v. State, 552 N.E.2d 621 (N.Y. 1990) (No. 89-7645), aff’d in part, 111 S. Ct. 1859 (1991). The prosecutor’s brief cites no authority directly for these propositions, but cites a related case, United States v. Rodriguez, 859 F.2d 1321 (8th Cir. 1988), cert. denied, 489 U.S. 1058 (1989) (upholding peremptory challenge to remove a pharmacist, because of the possibility that the pharmacist might form an independent opinion on narcotics charges at issue in the case).
subset of cases in which their professional knowledge was at the heart of the substance of the case. In contrast, bilinguals can now be excluded from every case, on every subject and regardless of the legal substance of the case, if they can understand non-English testimony that will be offered.

Although bilinguals possess knowledge of another language, knowledge probably not possessed by most other jurors, bilingualism is significantly different from the kinds of knowledge that the prosecutor describes as the basis for his concern about "undue influence." Most bilingualism in the United States results from a person's birth into a family in which the primary language spoken is not English. Most American bilinguals become bilingual by first acquiring the non-English of their families, and then by learning English to adapt to the mainstream of American society. American bilingualism is largely involuntary, and results directly from the circumstances of one's birth.179

In the vast majority of instances, then, bilingualism is a birthtrait that is inextricably tied to national origin. In the cases most common in the United States, Spanish-language ability and SpanishEnglish bilingualism are inextricably interwoven with Latino or Hispanic origin. Unlike discrimination on the basis of professional education, discrimination on the basis of a trait closely linked with national origin, a suspect basis for a classification, should violate the Equal Protection Clause.180 Discrimination against certain persons because of their birth traits, such as skin color, national origin, and language is pervasive. Courts should, therefore, be much more suspicious of claims of undue influence grounded in birth traits, than of such claims grounded in advanced education.181

179. See infra Part IV.A. for a further discussion of American bilingualism.

180. See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954) (concluding that systematic exclusion of Mexican Americans from jury service in Texas violated equal protection); cf. Hernandez, 111 S. Ct. at 1872 (plurality opinion recognizes that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.").

181. If bilingualism is considered specialized knowledge which justifies the removal of bilinguals from juries, then we must consider, on exactly equal terms, the following: that white skin could provide disqualifying specialized knowledge about being white in America; that being female could provide disqualifying knowledge about being a woman in America; and that black or brown skin could provide disqualifying specialized knowledge about being African-American or Latino in the United States. Batson and its progeny prohibit exclusion because of race and skin color. Yet, with respect to other traits, if the "specialized knowledge" that we each have as a result of our births and upbringing is sufficient to constitute an "undue influence" over a jury, I know of no one who could ever serve on a jury.
Bilingualism is also different from the kinds of specialized knowledge listed by the prosecutor because of the limited scope of application of knowledge of another language. The reason for excluding doctors, psychiatrists, and others in cases whose substance involves their particular training is that their knowledge allows them to make independent conclusions and judgments about the validity of evidence properly introduced during a trial. Their knowledge and training allows them to evaluate the evidence and the substance of a trial independently, and in ways which are beyond the control of the attorneys trying the case.

In contrast, the bilingual’s knowledge operates within a much more limited scope with respect to the full substance of a trial. A bilingual will be able to understand what a witness said in the original source language and will be able to detect discrepancies between that testimony and the interpretation of the testimony. The bilingual’s knowledge permits him to know what the witness said and to serve as a check on the accuracy of an interpretation. Knowledge of what a witness said in a non-English language will often be knowledge of much lesser scope than knowledge that would permit a juror to independently evaluate the substance and legal conclusions at the heart of a trial.

An attorney’s legitimate concern that all jurors decide a case based on the same facts, with all jurors knowing what is said, can be addressed by requiring bilingual jurors to raise any concerns about errors in the interpretation at the conclusion of a witness’s testimony. Such concerns could be raised with the trial judge, as the court suggested in the Perez case, providing an opportunity for the parties, the court, and the interpreter to assist in the accurate resolution of questions regarding what a witness said and preserving the issue for appeal. Furthermore, the trial court could then instruct the jury that only the resolved, decided version of what a witness said could be considered by the jury in its deliberations. Such a procedure serves the goals of achieving identity of knowledge for all jurors, of enhancing the accuracy of interpretations, and of preserving the representativeness of juries by retaining bilingual jurors.

The prosecutor’s reliance on examples involving persons with advanced degrees is revealing for another reason. Why would such persons have an undue influence on a jury? One reason is that, rightly or wrongly, such persons will have more social status and clout in the jury room. Less educated jurors may (or may not) be intimidated by the greater book-learning of some of their fellow jurors.
The power and prestige element of "undue influence" is not likely to be present in the case of a bilingual jurors. In this society, greater knowledge of certain languages does not confer prestige. Indeed, it is quite the opposite. Those who stray from English, or who speak it with certain accents different from those of the majority, are likely to become the focus of discrimination and distrust. Jurors from the majority culture may be more likely to discount and pay less attention to the statements of bilingual jurors than to others who they perceive to be more like themselves. It is ironic that prosecutors worry about too much influence from bilingual jurors.

Furthermore, assuming that bilinguals will have "undue influence" in the jury room is a conclusion that can be reached only if we take the cultural influence of English-speaking, mostly monolingual members of the dominant culture as the benchmark for "neutrality" or the appropriate level of "due influence." In fact, for monolingual, English-speaking Anglo jurors to be deemed the benchmark for "neutrality" when sitting in judgement of Spanish-speaking defendants and witnesses who are linguistically, ethnically, and culturally different from them is simply not believable. The English-speaking dominant culture is not "neutral" any more than any other culture is "neutral." Bilingual jurors will have whatever degree of influence they will have, just as monolingual and English-speaking jurors currently have. Exaggerated fears of the "undue influence" of bilingual Latino jurors reflects the distrust and prejudice directed at those who differ not in competence or ability to serve as jurors, but in language.

183. Legal history provides ample support for this proposition. See Perea, supra, note 82; see also FRANCOIS GROSJEAN, LIFE WITH TWO LANGUAGES 62-67 (1982) ("Bilingualism is treated as a stigma and a liability in the United States, whereas in many European and African countries it is considered a great asset.").
184. See generally RENATO ROSALDO, CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS 21, 39 (1989) ("Such terms as objectivity, neutrality, and impartiality refer to subject positions once endowed with great institutional authority, but they are arguably neither more nor less valid than those of more engaged, yet equally perceptive, knowledgeable social actors"); "It is marvelously easy to confuse 'our local culture' with 'universal human nature.'") (emphasis in original); cf. Gerald Torres and Kathryn Milun, Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case, 1990 DUKE L.J. 625, 630 (1990) ("By imposing specific 'ethno-legal' categories such as 'Tribe' on the Mashpee, law universalizes their story. This universalizing process eliminates differences the dominant culture perceives as destabilizing. . . . [T]he inability of the law to hear, or equally to weigh, culturally divergent versions of 'the truth' should be examined to help us understand how social knowledge is constructed.").
D. An Evaluation of Proposed Solutions

Ultimately, the courts must recognize that the core problem presented in the Hernandez case is not who sits on the jury, for all competent jurors should sit, but rather the problem of ascertaining meaning when a witness testifies in a language other than English. The problem posed is how the courts will deal with discrepancies in meaning, when they arise, between the official interpreter’s version of testimony and the testimony itself. The solution endorsed by the result in Hernandez is to remove the bilingual messengers of a message the courts apparently do not want to hear. That message is that the official interpretation may not always be entirely reliable or worthy of unquestioning adherence. But permitting the removal of bilingual jurors only removes the messengers. The Hernandez solution does absolutely nothing to correct the problem, which is the manner in which courts resolve discrepancies in meaning.

There are several other ways of addressing the problem perceived by the Court in Hernandez. The dissenting Justices in Hernandez offer one proposal. Under this proposal, when a witness testifies in a language other than English, only the official interpreter would hear the different-language testimony. Using headphones, only the official interpretation of the testimony would be transmitted to bilingual jurors, therefore eliminating the jurors’ ability to hear the different-language version of the testimony. All jurors, if such a scenario were to be implemented, would hear only the English-language version of the testimony. Furthermore, since headphones and microphones are used regularly in courtrooms already, this proposal would be relatively easy and inexpensive to implement.

There are several problems with this proposal that lead me to reject it. Despite its attractiveness to at least three dissenting Justices, it is a proposal that does not solve the true problem in the case, the problem of resolving potentially conflicting meanings. The forced exclusive reliance on an official interpretation, whether through the

185. 111 S. Ct. at 1877 n.3 (Stevens, Marshall, and Blackmun, JJ., dissenting).
186. Id.
187. Id.; see, e.g., United States v. Crump, 934 F.2d 947, 952 n.4 (8th Cir. 1991) (describing the court’s efforts to make headphones available to the press to facilitate comprehension of taped evidence); United States v. Morales-Diaz, 925 F.2d 535, 539 (1st Cir. 1991) (approving defendant’s use of headphones to hear simultaneous interpretation from English to Spanish); see also Ramirez, supra note 9, at 56 n.106 (collecting cases in which such technology is currently in use).
use of headphones or other means, eliminates conflicting meanings not by resolving them to ascertain the most correct meaning, but by eliminating the possibility that errors in the interpretation will be detected by bilingual jurors or anyone else in the courtroom. Any interpretation errors that occur will remain uncorrected. This proposal, while providing only one version of the evidence for the jurors to consider, does nothing to ensure that that version is correct. The proposal enforces the court’s, the interpreter’s, and monolinguals’ control over the proceedings, but fails to ensure accuracy or provide any jury check on the interpreter’s work.

Furthermore, the proposal stigmatizes bilingual jurors and the different languages of our citizenry. It isolates Spanish-speaking jurors, witnesses, and parties by suggesting that their primary language has no place in the courtroom; their language must first be rendered into English before a jury can hear it. It is a further confirmation of the message sent by the courts’ treatment of Spanish-language testimony as non-evidence, non-testimony. The message, again, is that Spanish, and other American languages, do not belong in the courtroom.

Another solution would be to permit bilingual jurors to raise material questions of misinterpretation during the course of the trial by discreetly advising the trial judge of concerns about the interpretation. In Perez, a similar procedure was suggested by the trial judge, who proposed that jurors could raise questions about the interpretation at the conclusion of a witness’s testimony. Even the Hernandez plurality suggests this solution as a possibility. Questions of meaning could be resolved during the trial, with participation of the parties and counsel. Both parties could have an opportunity to object to the resolution of the question concerning an interpretation and preserve the issue for appeal. The trial judge could then instruct

188. 658 F.2d 654, 662 (9th Cir. 1981).
189. 111 S. Ct. at 1868 ("Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the translation during the course of trial.").
190. In Puerto Rico, where all the sitting judges and most attorneys, parties, witnesses, and jurors are likely to be bilingual in Spanish and English, the courts routinely appear to use the bilingual persons present in the courtroom as checks on the accuracy of an interpreter’s rendition of testimony. See United States v. Boria, 371 F. Supp. 1069, 1070 (D.P.R. 1973), aff’d, 518 F.2d 368 (1st Cir. 1975). In Boria, the district court wrote:

Under the present system everyone in the Courtroom can hear what is being said and what is being translated and if there is any discrepancy between what is being said and what is being translated, the matter can be immediately corrected and the parties have the opportunity to object to any part of the translation. The interpreter
the jurors that only the agreed-upon meaning could be used in their deliberations. Although this proposal might result in a more active role for bilingual jurors than for other jurors, this role may be seen as part of accurate fact-finding. The identification and resolution of conflicts of meaning between an interpretation and a bilingual juror’s understanding of the original testimony resolves only the question of what a witness actually said during testimony.\textsuperscript{191}

Such a solution offers several advantages. It promotes the representative character of the jury through the retention of bilinguals, many of whom will be Latino. It furthers the principal purpose of the trial, which is to ascertain the facts and meanings from the evidence presented at trial. It avoids the \textit{Hernandez} solution of permitting the exclusion of certain ethnic groups because of their language abilities. It avoids stigmatizing bilingual and Latino jurors and their communities. It also enhances the traditional role of the jury as a check on the abuse of governmental power, in this case exercised through the official court interpreter.\textsuperscript{192} For all of these reasons, the retention of bilingual jurors, coupled with a procedure designed to make possible the resolution of possible conflicts in meaning between testimony and interpretation enhances the legitimacy of the trial process.

Court recognition that a language-based reason for excluding a juror is not “race-neutral,” but rather often functions as a close proxy for national origin, would reduce arbitrary and unconstitutional exclusion of jurors. The \textit{Hernandez} Court came close to such recognition when it stated that prosecutorial challenges based on Spanish-language ability may be found to violate equal protection.\textsuperscript{193} More generally,
court recognition of other proxies for different national origin, such as surname and accent, would reduce litigant conduct that should be prohibited by the Equal Protection Clause. Even such recognition, however, still vests prosecutors with enormous discretion to discriminate based on a prospective juror's hesitation, lack of eye contact, or demeanor. Indeed, as long as these reasons are considered acceptable by the courts when minority jurors are challenged, it is difficult to imagine a situation in which an attorney could not find some characteristic or behavior of a witness which would fail to justify a peremptory challenge under current standards.

The best response to the potential for discrimination inherent in the peremptory challenge is to eliminate it altogether. A number of scholarly commentators have advocated its partial or complete elimination. By eliminating the peremptory challenge and allowing only a challenge for cause, we will preserve more of the representativeness on juries that results from current jury selection procedures. The Court has made clear that while selection procedures for the jury venire must be free from racial discrimination, litigants are not entitled to any particular representation on petit juries considering their cases. The elimination of peremptories does not require any particular racial composition of a particular jury. At the same time, it prevents the elimination of whatever diversity or representation was on the jury as a result of unbiased procedures.

Ending the use of peremptory challenges as vehicles for discrimination and enhancing the representativeness of juries, and the ensuing increase in the perception of fairness and legitimacy of jury verdicts, are the most important benefits that will result from abolishing peremptories. Another important benefit is that the procedural “side-show” created by Batson and its progeny will be eliminated, thus reducing the amount of litigation of the issue of the “race-neutrality” of all the reasons that may be offered to justify peremptory challeng-

194. See supra text accompanying notes 34-42.
195. See, e.g., Alschuler, supra note 73, at 208-11; see also Batson v. Kentucky, 476 U.S. 79, 102-08 (Marshall, J., concurring). See generally Pizzi, supra note 4, at 144-47. Some commentators have advocated abolishing or limiting drastically only the state's peremptory challenges, while preserving the defendant's right to use peremptory challenges. See, e.g., VAN DYKE, supra note 62, at 222; Toni M. Massaro, Peremptories or Peers?, 64 N.C. L. REV. 501, 560-61 (1986) (advocating abolition of state's peremptory challenges, but not defendant's).
196. See discussion supra notes 12-13 and accompanying text.
197. Van Dyke has demonstrated how current jury selection procedures are not, in fact, as neutral as one might suppose. See VAN DYKE, supra note 62 (especially chapters 2, 4-6).
es. Attorneys will no longer use their creative skills concocting “race-neutral” reasons to exclude jurors by race or nationality. Judges will no longer have to rule, with greater or lesser care or interest or consistency, on the ostensible validity of a litigant’s stated reason for excluding someone from a jury.

The actual implementation of Batson and its progeny, and the mostly disappointing judicial acquiescence in trivial, incoherent, allegedly “race-neutral” reasons for excluding jurors, trivializes and demonstrates disrespect for jurors. Acceptance of the kinds of reasons too frequently accepted as “race-neutral”—demeanor, dress, accent—demonstrates a casual acceptance of discrimination in its many covert forms, and breeds cynicism and distrust of the judicial system. Rather than discredit juries, the judicial system, and the Equal Protection Clause through the artful lawyerly manipulation of Batson-style equal protection, the courts should abolish peremptory challenges. This solution to the endemic problem of discrimination, given structured life through Batson and “race-neutrality,” would eliminate some of the form and clothing now available to disguise discrimination in jury selection.

IV. THE BROAD HARMs OF HERNANDEZ

A. The “Harsh Paradox” of Bilingualism in America: Assimilate and Face Exclusion from the Society of Jurors

After the Hernandez court decided that the exclusion of the bilingual jurors in the case was “race-neutral,” it mentioned a “harsh paradox” faced by bilingual jurors. In its view, the paradox is that “one may become proficient enough in English to participate in trial . . . only to encounter disqualification because he knows a second language as well.” The Court, however, appears not to have understood either the extent of the harshness or the extent of the discrimination sanctioned by its decision.

The Court’s decision is based on an apparent understanding of bilingualism as proficiency in English plus knowledge of a second language. This understanding, although perhaps technically cor-

198. See generally Pizzi, supra note 4, at 138-44.
199. See supra notes 71-91 and accompanying text; see also Alschuler, supra note 73, at 209.
201. Id. (citation omitted).
demonstrates a profound misunderstanding of how bilingualism occurs in this country, and of its essential intertwining with national origin and ancestry. Bilingualism in the United States typically occurs because of one's birth into a family in which the language spoken at home is not English. Most American bilinguals become bilingual as a result of learning and speaking a primary language other than English at home from early childhood, and later learning English to deal with the majority, English-speaking society. The later acquisition of English, for someone whose primary language is not English, is a necessary condition for success in this country, given the predominance of English-language schools, colleges, and workplaces. The acquisition of English is virtually inevitable as a result of powerful social, educational, and economic incentives. The acquisition of English for someone of different primary language is also an affirmative expression of desire to participate in the mainstream of American society. The bilingualism that results among Latino citizens of this country is thus different from mere knowledge of two languages, as the Court plurality characterized it. It is the direct result of a birth-trait, birth into a household where the primary language is not English, and the acquisition of English in order to participate in mainstream society. Furthermore, this bilingualism is fairly prevalent. According to the 1990 Census, approximately 31.8 million persons over the age of five, approximately fourteen percent of the total population, spoke a language other than English in their homes.

202. This understanding is similar to dictionary definitions of bilingualism. See, e.g., RANDOM HOUSE COLLEGE DICTIONARY 133 (1982) (defining bilingualism as the ability "to speak two languages with nearly equal facility").
204. Estrada, supra note 99, at 390.
205. Just as English-speaking ability has not made a critical difference in promoting the large-scale participation of African-Americans in the economic mainstream of society, neither does it make such a difference for most Latinos. The barriers to full participation because of discrimination on the basis of national origin, language, color, or accent still exist in full measure.
206. Telephone interview with Ms. Stephanie Profit of the Census Regional Office in Atlanta (the 1990 census data in this paragraph was not yet published officially at the date
sons speaking Spanish in their homes was 17.3 million, approximately 7.5 percent of the total population over five years old. The 1990 data suggests that approximately fifty-six percent of persons speaking all languages other than English in the home, approximately 7.7 percent of the American population aged five and over, are bilingual. By my estimate, about fifty-two percent of those speaking Spanish at home are bilingual.\textsuperscript{207} A 1984 study, based on 1975 census data, concluded that sixty-six percent of Latino persons in the United States were bilingual.\textsuperscript{208} By all of these measures, the percentage of bilingual persons in the United States is substantial. After Hernandez, all of these persons are subject to peremptory exclusion from juries that consider testimony from a witness who speaks a non-English language that the prospective juror also speaks.

So the harsh paradox goes like this: A Latino child, raised in a Spanish-speaking family, and born a citizen of the United States, learns Spanish as his first language. In school he learns English, to survive in school and to prepare for the future in his predominantly English-speaking world. He masters English and becomes bilingual. Knowing English, he can participate more fully in society. Living in an area where a substantial proportion of Latinos live, he is called for jury service in a case in which Spanish-language testimony will be offered. Knowing English, he meets the statutory requirements for qualification as a juror.\textsuperscript{209} Knowing Spanish, he is likely to be excluded from the jury.

The price the bilingual juror pays for learning English and assimilating into the majority society is peremptory rejection from a jury in which he might be called upon to decide the guilt or innocence of one of his peers. He had no real choice about whether to learn English, for he must either assimilate or face extremely limited social and economic options. Unlike his fellow citizens born in Eng-

\textsuperscript{207} I calculated these estimates by subtracting the number of persons who identified themselves as "not speaking English very well" from the number of persons who identified themselves as speaking languages other than English in their homes. Since people who do not speak English very well may still be bilingual to some degree, my estimates probably underestimate the true number.

\textsuperscript{208} Estrada, supra note 99, at 389-90.

\textsuperscript{209} See 28 U.S.C. § 1865 (1988), which provides, in pertinent part, that any person shall be qualified to serve on grand or petit juries unless he: "(b)(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; (3) is unable to speak the English language . . . ." Id. United States citizenship is also a requirement for federal jury service. Id. § 1865(b)(1).
lish-speaking households, he may not sit on the jury because his lan-
guage abilities make the prosecutor and perhaps the court, uncomfo-
table. This form of unequal treatment, based on the Latino juror's lan-
guage abilities, which are based on his birth, does not offend equal
protection, according to the Hernandez plurality.

The wrong in this picture is that the prospective Latino juror,
having made the effort to join the mainstream like his fellow citizens,
is declared an outsider through state action, by both the prosecutor
and the courts. The Court has made clear that the Batson right is a
right held by the prospective juror "not to be excluded from . . . [a
petit jury] . . . on account of his or her race." The Court has rec-
ognized the injury of stigma and dishonor suffered by jurors who are
peremptorily excluded because of their race. Exactly the same
stigma and dishonor are suffered by bilingual jurors who are peremp-
torily excluded because of a unique characteristic of their ethnicity
and their birth.

B. The Extinction of the Representative Jury:
Justice and the Excluded Latino Community

Courts "personify and create identities throughout the law." Through their decisions and language, courts play a fundamental role
in the definition of our public community. The law is "a way . . . of defining roles and positions from which, and voices with
which to speak . . . . It is one of the forms in which a culture lives
and changes . . . ." The law defines which values, among compet-
ing ones, are important. The law also defines membership in,
and exclusion from, the public community.

211. Id.; see also Underwood, supra note 25, at 725. Professor Underwood writes:

The exclusion of jurors by reason of race is pernicious and harmful in many ways.
We care about it not only because it harms the jurors themselves, and does vio-
lence to democratic ideals, but also because it stigmatizes the entire excluded
group, impairs public confidence in the judicial system and may affect some ver-
dicts . . . . But it is important to remember that the primary victim of discrimina-
tion is the person actually excluded by reason of race.

Id. at 727. Despite her understanding of these issues, Underwood fails to see that exactly this
injury is inflicted upon bilinguals because of the Hernandez decision. See id. at 766-68.

212. JOSEPH VININO, LEGAL IDENTITY 145 (1978).
213. JAMES B. WHITE, HERACLES' BOW 205 (1985).
214. id.
215. id. (the law is "a set of resources for claiming, resisting and declaring signifi-
cance").
216. See, e.g., Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856) (holding that
Professor Vining has accurately identified the doctrine of standing, the judicial decision whether to allow a person to be heard in a court, as a very important legal definition of identity. A court's decision that an individual has standing, that he or she possesses a legal identity to which a judge will listen, functions as an important statement of that individual's membership in the public community. Indeed, it is a membership of the most precious kind, for if a judge will listen, then there is a chance that the judge will transform one's values, expressed in the form of legal argument, into public values and endow them with binding significance. Yet, courts may also fail to grant legal identity or to recognize important public values in cases in which they should.

The Supreme Court has recognized the right to participate in jury service as an important public value. In its recent jury selection decisions, the Court has emphasized the importance of citizen participation in the process. In Powers v. Ohio, the Court wrote:

The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. "One of [the jury system's] greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."

Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people. Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

The Court's language demonstrates at least a rhetorical recognition of the important multiple functions of the jury within the American justice system. From the point of view of a criminal defendant, the jury introduces the sense of the community as a potential check

African Americans were not citizens of the United States and therefore Dred Scott lacked standing to sue.

217. See Vining, supra note 212, at 6-8.

218. Id. at 174 (describing the special place of courts in defining public values and the significance that accrues from a judicial decision to grant standing).

219. Id.

on the abuse of governmental power. Furthermore, since no single juror can be impartial, a large and heterogeneous jury satisfies the need for balanced, "diffused impartiality." From the point of view of the community, citizen participation on juries interjects the values of the community into determinations of guilt or liability. Functioning as representatives of and participants from the community, a jury has the potential to enhance public confidence in, and public willingness to accept, the outcomes of trials. The presence of a jury, therefore, may make difficult trial decisions more acceptable to the public.

The perception of impartiality and public confidence engendered by citizen participation on juries has important consequences for judges and courts. Since determinations of guilt or liability are typically made by juries, judges are insulated from the uproar and politics surrounding controversial jury determinations. Citizen participation enhances the legitimacy of court proceedings and public respect for court judgments. In this way, juries help preserve the credibility and the power of courts. Jury service also helps educate the jurors and the public about the functioning of the courts.

The jury both represents and functions as a metaphor for the community. The Court's decisions regarding who may serve on juries, who may not, and for what reasons, thus define the community of individuals who may make important public decisions: jury verdicts of guilt, innocence, or liability. To the extent that we vest the Court's view of what constitutes the relevant, responsible, decision-making community with legitimacy, we allow the Court to define our community.

How, then, do we assess Hernandez from the point of view of the public community in general, and the Latino community in particular? Many cases involving Spanish-language testimony will be brought against Spanish-speaking defendants when crimes are commit-

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221. Massaro, supra note 195, at 511.
222. Id. (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
224. Id.
225. Id. at 513-14. The aftermath of the verdicts rendered in the case of the police officers accused of excessive violence against Rodney King illustrates the point well. While the jury was subject to enormous criticism after rendering their verdict, the presiding trial judge was subject to none. One judge was criticized, however, for his decision to change the venue of the trial from Los Angeles to Simi Valley.
226. Id. at 515.
ted in areas with a large percentage of Spanish-speaking citizens. Juries from which bilingual jurors have been peremptorily excluded cannot be deemed representative of communities in which large numbers of Spanish-speaking and bilingual people live. In an increasingly diverse society in which many parties in a trial may be Spanish-speaking, such as in the Hernandez trial, the absence of bilingual Latino jurors, now facilitated by the Court’s decision, raises serious questions about whether Latinos will ever be fairly represented on juries and whether Latino litigants can ever receive a trial by a jury of their peers.

Like decisions denying standing, which deny the actor’s legal identity and his ability to be heard, the Hernandez decision allows litigators to exclude bilinguals, encompassing many Latino Americans, from a highly visible public forum, the jury. The easy exclusion of bilinguals from juries facilitates the perception that they do not form any important part of our public community. Furthermore, by denying them the equal protection right to be visible, responsible jurors, a right routinely associated with whites, the Court perpetuates and encourages the view that Latinos do not really belong within the community that exercises power on juries. By allowing their exclusion from the community of jury decision-makers, the Court also reinforces the outsider status of Latinos.

The discrimination endorsed by Hernandez thus harms the community, and particularly the Latino community, in several ways. First, the membership of Latinos, many of whom are bilingual, in the public community of jury decision-makers is deemed expendable and not worthy of equal protection. Second, because juries are not truly representative of their respective communities, serious questions about the legitimacy of jury verdicts and the judicial process have been and will continue to be raised.227 As the aftermath of the Rodney King

227. See Minow, supra note 53, at 641 (the plurality’s view “neglects the perspective of Latinos in the community who may view participation in the trial as more than an expression of sympathies that can be canceled out and instead as a matter of participation in governance and in judgment of the conflicts within their community”); see also VAN DYKE, supra note 62, writing:

The underrepresentation of nonwhites on juries can have a profound effect on the strength of the jury system and the criminal justice system in general. Discrimination bred by prejudice has contributed to widespread mistrust by black people of most of the (white dominated) institutions of power, and most particularly the agencies of law enforcement.

Id. at 32. See generally Martha Minow, From Class Actions to Miss Saigon: The Concept of Representation in the Law, 39 CLEV. ST. L. REV. 269, 290-93 (1992).
verdict demonstrated, the perception of illegitimacy in jury verdicts can produce profound discontent and social disarray.

Another harm, related to the perception of illegitimacy in verdicts rendered by unrepresentative juries, is the loss of an entire sector of human experience and judgment through the exclusion of bilingual, mostly Latino jurors. As Justice Marshall wrote in *Peters v. Kiff*:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.228

By facilitating the exclusion of bilinguals, and hence many Latinos, from jury service, the Court has effectively removed their unique experience and knowledge from the reservoir of experience available on juries, despite the presence of many bilingual Latinos in the community. Although one cannot accurately make the generalization that all members of a group will think alike, or evaluate evidence alike, this should not obscure the fact that differences between individuals in cultural heritage, upbringing, language, race, or religion will yield differences in world view. Such differences may make a difference in the evaluation and interpretation of facts, and ultimately in the conclusions reached by juries. Various studies conducted of jury composition demonstrate that when the percentage of minorities on juries increases, the rate of convictions decreases.229 This does not mean that more racially and culturally diverse juries are less impartial than less diverse ones. Rather, such studies show that different types of people may evaluate evidence differently. Many attorneys know this intuitively, and for this reason we have the racial and national origin rules for the use of peremptories,230 and the frequent use of peremptories by prosecutors to exclude members of minority groups from petit juries.

The Supreme Court has recognized the potential unfairness to a

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230. See supra notes 58-68 and accompanying text.
defendant tried by a jury from which his peers have been systematically excluded. In \textit{Hernandez v. Texas},\(^{231}\) the Court upheld a Mexican-American defendant’s right, under the Equal Protection Clause of the Fourteenth Amendment, “to be indicted and tried by juries from which all members of his class [persons of Mexican descent] are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent.”\(^{232}\) The case provides an example of how cultural knowledge, and its presence or absence on a jury, can make a difference in the evaluation of evidence.

The story of the case goes like this:

A man named Hernandez got into a fight in a bar with another Mexican and killed him. In his defense Hernandez argued that his victim had given him “el \textit{ojo},” the eye. With Mexicans barred from petit juries in the South Texas of the time, the argument meant little to the Anglo jurors . . . .

“Anglos have a big thing about eye contact being something positive. You can take a man’s measure by making eye contact . . . . Hell, in the Mexican community eye contact can kill you. It sends the other guy a message that says what the hell are you lookin’ at, and if you don’t like it, do something about it. In a bar that can lead to a killing. But if you don’t know that you can’t relate to what it means. And unless jurors understand the difference between \textit{el ojo} and eye contact, the defendant is not being tried by a jury of his peers.”\(^{233}\)

Without the cultural knowledge possessed by Mexican Americans, Hernandez’s attempt to explain his behavior would fall on utterly deaf judicial and jury ears. And although such cultural knowledge would not excuse Hernandez’s behavior in our justice system, such knowledge at least provides a framework that makes an understanding of his behavior, and perhaps mitigation, possible.\(^{234}\)

Interestingly, the very different significance of eye contact in the

\(^{231}\) 347 U.S. 475 (1954).

\(^{232}\) \textit{Id.} at 482.

\(^{233}\) \textit{THOMAS WEYR, HISPANIC U.S.A.} 83 (1988) (Comments of Gilbert Pompa, former assistant attorney general in charge of the Community Relations Service of the Justice Department); \textit{see also} Minow, \textit{supra} note 53, at 642-43.

\(^{234}\) One commentator has, for this reason, proposed a cultural defense, that takes into account the cultural meaning of a killing. \textit{See}, \textit{e.g.}, \textit{Note, The Cultural Defense in the Criminal Law, 99 HARV. L. REV.} 1293 (1986). Evidence of such meanings could be taken into account in assessing a defendant’s state of mind and possibly mitigating the severity of an offense.
Anglo and Mexican cultures provides an interesting angle on the prosecutor's peremptory challenges in *Hernandez v. New York*. The axiom that, “Anglos have a big thing about eye contact being something positive”\(^{235}\) is amply borne out. The prosecutor explains his use of peremptories against the prospective Latino jurors in part because of “their lack of eye contact . . . .”\(^{236}\) The prosecutor’s inference from their lack of eye contact is distrust and disbelief that these jurors would follow the official interpretation, despite their assurances to the judge and to him that they would. In cultural context, however, looking away from the prosecutor may have been an expression of respect for him and for the court, an expression of discomfort at unfamiliar proceedings, or perhaps even a desire to avoid giving the prosecutor “el ojo.” Yet the prosecutor’s “big thing about eye contact” allows him and the courts to draw only a negative inference about these Latino jurors in *Hernandez v. New York*.

V. CONCLUSION

If we view *Hernandez* as a decision that, in part, defines our public community, then the decision defines our community far too narrowly. *Hernandez* excludes bilingual Americans from juries considering testimony offered in languages understood by these Americans. Bilinguals are thus excluded from performing an important, highly visible public service routinely associated with community membership. And the basis for their exclusion, their language abilities, are traits closely intertwined with their national origin. The Court’s acquiescence in the exclusion of bilinguals from the jury contrasts sharply with its oft-stated rhetoric prohibiting the exclusion of jurors because of race.

Many courts, including the federal courts, remove the Spanish voice from Latino witnesses by deciding that their testimony is not evidence. *Hernandez* removes from juries the hearing and the understanding of many Spanish-speaking potential Latino jurors. Decisions like *Hernandez*, finding “race-neutrality” when there is none, perpetuate an empty discourse of equal protection.

This empty discourse is not cost-free. It removes from the judicial system one of its pillars of legitimacy, the representative jury. Considering the consequences of not attending to perceptions of fair-

\(^{235}\) Weyr, *supra* note 233, at 83.

\(^{236}\) *Hernandez*, 111 S. Ct. at 1865 n.1 (citing the Joint App.).
ness and justice, most recently and vividly demonstrated during the riots in Los Angeles, the Court should reconsider whether its cramped conception of "race-neutrality" serves the appearance of justice in a nation that, increasingly, looks and sounds different from what the Court thinks.