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Understanding Testimony: Official Translation and Bilingual Jurors in *Hernandez v. New York*

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UNDERSTANDING TESTIMONY: OFFICIAL TRANSLATION AND BILINGUAL JURORS IN *HERNANDEZ v. NEW YORK*

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility.[1]

I. INTRODUCTION

A recent United States Supreme Court decision, *Hernandez v. New York*,[2] raises interesting questions about the ability of bilingual persons to serve as jurors. The *Hernandez* Court, applying *Batson v. Kentucky*,[3] which prohibits the discriminatory use of peremptory challenges[4] based on the juror's race, upheld as racially

1. Hernandez v. New York, 111 S. Ct. 1859, 1872 (1991).

2. 111 S. Ct. 1859 (1991).

3. 476 U.S. 79 (1986).

4. In its pure form, a peremptory challenge is "one exercised without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965). Peremptory challenges are provided for by statute in every state. *Id.* at 217. Nothing in the Constitution guarantees a right to peremptory challenges. *See, e.g.*, Stilson v. United States, 250 U.S. 583, 586 (1919).

neutral the exclusion of two bilingual Hispanic jurors[5] over the defendant's claim that exclusion on the basis of Spanish-language ability constituted a violation of the Equal Protection Clause.[6] The jurors were stricken based on the prosecutor's asserted fear that they would not be able to accept the official translation of Spanish-language testimony. The prosecutor's race-neutral explanation rested on three claims: first, the jurors' hesitation and lack of eye contact in response to his questions about their ability to extend unqualified acceptance to the court interpreter's translation;[7] second, his uncertainty over which jurors were Hispanic; and third, his asserted lack of motive to exclude Hispanics from the jury.[8]

Applying a "clearly erroneous" standard of review,[9] the *Hernandez* plurality[10] refused to overturn the state trial judge's determination that the prosecutor's explanation was not a pretext for racial discrimination.[11] Justice Kennedy's opinion for the Court did, however, recognize that bilinguals can perform a valuable function by bringing the two language "communities" they inhabit closer together.[12] It also exhibited an awareness of the relationship between language and concepts of culture, personhood, and com-

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5. The prosecutor challenged all the Hispanic potential jurors." People v. Hernandez, 552 N.E.2d 621, 621 (N.Y. 1990), *aff'd sub nom.* Hernandez v. New York, 111 S. Ct. 1859 (1991). Three of the challenged jurors were the only members of the venire with definite Hispanic surnames. 111 S. Ct. at 1865. The ethnicity of the other challenged juror was deemed uncertain by the New York Supreme Court, Appellate Division, in People v. Hernandez 140 A.D.2d 543, 543 (2d Dep't 1988), *aff'd*, 552 N.E.2d 621, *aff'd sub nom.* Hernandez v. New York, 111 S. Ct. 1859 (1991), although Hernandez contended that the fourth challenged juror was Latino. Brief for Petitioner at 3, Hernandez v. New York, 111 S. Ct. 1859 (1991) (No. 89-7645). Hernandez did not raise his claim of discrimination with respect to two of the excluded jurors with brothers who had been convicted of crimes. 111 S. Ct. at 1864.

6. Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991).

7. *Id.* at 1864-65. Although the jurors' answer was that they could accept the official translation, the prosecutor felt the jurors would not be able to view the "interpreter as the final arbiter of what was said by each of the witnesses" and that "they would have an undue impact on the jury." *Id.*

8. *Id.* The prosecutor maintained that he would have no reason to exclude Hispanics from the jury because the defendant, the victims, and the main witnesses were all Hispanic. *Id.* at 1864-65.

9. *Id.* at 1871.

10. Justice Kennedy delivered the opinion of the Court. He was joined by Chief Justice Rehnquist, and Justices White and Souter. *Id.* at 1863. Justice O'Connor, joined by Justice Scalia, concurred in the judgment. *Id.* at 1873 (O'Connor, J., concurring). Justice Blackmun dissented, as did Justice Stevens, who was joined, in a separate opinion by Justice Marshall. *Id.* at 1875 (Stevens, J., dissenting).

11. 111 S. Ct. at 1869.

12. *Id.* at 1872.

munity.[13] The Court declared that its decision "does not imply that exclusion of bilinguals from jury service is wise or even constitutional in all cases."[14] In fact, the Court suggested a procedure to avoid excluding bilingual jurors: permit Spanish-speaking jurors to advise the judge in a discreet way of any concerns with the translation during the trial.[15]

Part Two of this Note presents pertinent Sixth Amendment and Equal Protection concerns regarding jury selection. Next, Part Three argues that, because the standard of review virtually ties appellate courts' hands in all but the most blatant instances of discrimination, it is incumbent upon trial courts to recognize the harm of such exclusions and safeguard against them. Part Four introduces modern theories of language and its relationship to knowledge and perception. It argues that, in accordance with the ideal that an impartial jury be drawn from a fair cross-section of the community,[16] bilinguals form a valuable interpretive community that should not be excluded from jury service. It argues further that the decision to exclude a juror due to a perceived inability to accept the official translation is not only a highly subjective criterion, but is based on an outmoded understanding of language and may sacrifice basic rights of the jurors[17] and the defendant[18] for the sake of securing acceptance of the "official translation."[19] Finally, Part Five proposes a method for implementing Justice Kennedy's suggestion of juror participation and concludes that it is a viable alternative to outright exclusion.

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13. "Language permits an individual to express both a personal identity and membership in a community and those who share a common language may interact in ways more intimate than those without this bond." *Id.* at 1872.

14. *Id.* The significance of such statements by the *Hernandez* plurality is highlighted by contrast to the concurrence of Justice O'Connor, who stated, "[T]he plurality opinion goes farther than it needs to in addressing the constitutionality of the prosecutor's asserted justification for his peremptory strikes." *Id.* at 1873. She asserted, "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." *Id.* at 1874.

15. *Id.* at 1868.

16. *See infra* part II.A.

17. Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991) (extending the right not to be excluded from a jury on the basis of race to jurors).

18. *See infra* notes 48-56 and accompanying text (discussing defendant's right not to have jurors excluded on the basis of race); *infra* note 40 and accompanying text (discussing defendant's right not to have jurors excluded on the basis of their membership in various distinctive groups).

19. *Hernandez*, 111 S. Ct. at 1868.

II. HISTORICAL BACKGROUND

A. The Sixth Amendment Cross-Section of the Community Requirement

The Sixth Amendment mandates that a criminal defendant be tried by "an impartial jury."[20] Over the years courts have interpreted this to require that the jury be drawn from a fair cross-section of the community.[21] The Supreme Court, extending the cross-section requirement of the Sixth Amendment to the states in *Taylor v. Louisiana*,[22] defined the function of the jury as to "guard against the exercise of arbitrary power—to make available the commonsense judgment of the community."[23] It concluded that "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."[24] The Court did not require that the composition of each petit jury actually mirror the make-up of the community, only that various distinctive groups in the population not be systematically excluded from the jury pool.[25]

In *Peters v. Kiff*,[26] the Court recognized that the harm from systematic exclusion of any large and identifiable segment of the community transcends the issue of race.[27] The effect of systematic exclusion 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."[28] The Court explained that ex-

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20. U.S. CONST. amend. VI. The Sixth Amendment provides, in 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." *Id.*

21. The Court first articulated the representative quality of the jury in the context of an Equal Protection claim in Smith v. Texas, 311 U.S. 128, 130 (1940), declaring, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Id.* One of the Court's first expressions of the cross-section requirement came in Glasser v. United States, 315 U.S. 60, 86 (1942), where it stated that the jury should not be "the organ of any special group or class" and warned officials composing lists of potential jurors against making selections "which do not comport with the concept of the jury as a cross-section of the community." *Id.*

22. 419 U.S. 522 (1979).

23. *Id.* at 530.

24. *Id.*

25. *Id.* at 538.

26. 407 U.S. 493 (1972) (holding that a criminal defendant of any race has standing to challenge the system used to select the jury on due process grounds).

27. *Id.* at 503-04.

28. *Id.* at 504.

clusion "deprives the jury of a perspective on human events that may have unsuspected importance" in a trial.[29]

As interpreted by the Supreme Court, the Sixth Amendment fair cross-section requirement is somewhat broader in scope than the Equal Protection Clause regarding the nature of the groups it protects from exclusion. For example, the Court has used the cross-section requirement to prohibit the exclusion of women[30] and daily-wage earners[31] from the jury pool. The Equal Protection Clause has thus far been held only to prohibit peremptory challenges on the basis of race.[32]

The Court held, in *Holland v. Illinois*,[33] that the fair cross-section requirement of the Sixth Amendment does not prohibit discriminatory use of peremptory challenges.[34] Rather, it merely requires that the jury pool be assembled from a cross-section of the community.[35] However, it seems illogical that the Sixth Amendment would forbid the exclusion of protected, distinctive groups from the jury pool, but then allow members of the same distinctive group to be excluded with peremptory challenges simply because of their membership in that group.[36] As the dissent in *Holland* remarked, "A defendant's interest in obtaining the 'commonsense judgment of the community' is impaired by the exclusion from his jury of a significant segment of the community; whether the exclusion is accomplished in the selection of the venire or by peremptory challenges is immaterial."[37]

The argument is not that a defendant has a right to a jury that reflects every distinctive group in society. It is, instead, that purposeful exclusion of jurors because of their membership in a distinctive group, regardless of the method, denies the defendant the *possibility* of a fair cross-section of the community.[38]

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29. *Id.*

30. Ballard v. United States, 329 U.S. 187 (1946).

31. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

32. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 111 S. Ct 1364 (1991).

33. 110 S. Ct. 803 (1990).

34. *Id.* at 806.

35. *Id.*

36. *Cf.* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 162 (1977)(noting that, because of their ability to turn a representative jury into a nonrepresentative one, challenges should be viewed skeptically).

37. 110 S. Ct. at 816 (Marshall, J., dissenting) (quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1979)).

38. *Id.* at 817.

State courts are, of course, free to construe their own state constitutional protections more expansively than the Court interprets parallel or textually identical provisions of the federal Constitution.[39] Thus, some state courts have held that the use of peremptory challenges to exclude potential jurors on the basis of race and various other grounds such as national origin, religion, or sex, violates the cross-section requirement of their state constitutions.[40]

B. Peremptory Challenges and the Equal Protection Clause

The Supreme Court considered the discriminatory use of peremptory challenges in the 1965 case of *Swain v. Alabama*.[41] In that case, Swain claimed the prosecutor's use of six peremptory challenges to exclude every black juror violated the Equal Protection Clause.[42] Despite the fact that no black had served on a jury in the county for at least fifteen years,[43] the Court rejected Swain's Equal Protection claim because he did not show that the prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be,"[44] was responsible for removing blacks from the venire.[45]

The *Swain* decision was widely criticized for the heavy burden it placed on defendants attempting to prove discriminatory use of peremptory challenges.[46] In the twenty-one years following the decision only two defendants successfully established a prima facie

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39. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (discussing the "new federalism").

40. *See* People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978) (prohibiting exclusion on "racial, religious, ethnic, or similar grounds"); Riley v. State, 496 A.2d 997, 1012 (Del. 1985) *cert. denied*, 478 U.S. 1022 (1986) (prohibiting exclusion of jurors solely on the basis of race); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (prohibiting peremptory challenges of "distinctive racial groups" on the basis of race); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979) (prohibiting exclusion based on "sex, race, color, creed or national origin"); State v. Gilmore, 511 A.2d 1150, 1159 (N.J. 1986) (prohibiting exclusion on the basis of "race, color, creed, national origin, or ancestry"); State v. Aragon, 784 P.2d 16, 20 (N.M. 1989) (adopting the rationale of *Wheeler*); *see also* State v. Superior Court, 760 P.2d 541, 546 (Ariz. 1988) (prohibiting discriminatory exclusion of a member of "any substantial and identifiable class of citizens" based on the Sixth Amendment of the U.S. Constitution).

41. 380 U.S. 202 (1965).

42. *Id.* at 221.

43. *Id.* at 205.

44. *Id.* at 223-24.

45. *Id.*

46. *See* Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 13 n.69 (1988)(listing various criticisms of *Swain*).

showing of discriminatory use of peremptory challenges.[47] Finally, in 1986, the Court in *Batson v. Kentucky*,[48] lightened *Swain's* evidentiary burden by allowing a defendant to establish an Equal Protection violation based on the prosecutor's use of peremptory challenges at the defendant's trial alone rather than on a history of systematic exclusion.[49]

Under *Batson*, a defendant must first make a prima facie showing that the prosecutor has used peremptory challenges to exclude potential jurors on the basis of their race.[50] The burden then shifts to the state to come forward with a race-neutral explanation for excluding the jurors.[51] This explanation need not rise to the level of a challenge for cause,[52] but it must be related to the particular case.[53] Finally, the trial court will determine if the defendant has met the burden of proving purposeful racial discrimination.[54]

Because the trial court in *Batson* had flatly rejected the defendant's objection to the removal of all blacks from the jury, the question of the appropriate standard of review of a trial court's determination on discriminatory intent was not directly before the Court.[55] However, the Court did treat the matter of a prosecutor's discriminatory intent as a factual inquiry, indicating that because it would largely be a credibility determination, the trial court's finding would be entitled to great deference on review.[56]

Like *Swain*,[57] the *Batson* decision has been the subject of much criticism, beginning with the separate opinions of Justice Marshall[58] and Chief Justice Burger.[59] On the one hand, Chief Justice Burger argued that Equal Protection analysis is simply inap-

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47. *See* Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky: *A Promise Unfulfilled*, 58 UMKC L. REV. 361, 365 (1990) (citing State v. Brown, 371 So. 2d 751, 754 (La. 1979); State v. Washington, 375 So. 2d 1162, 1164-65 (La. 1979)).

48. 476 U.S. 79 (1986).

49. *Id.* at 96.

50. *Id.* Originally, under *Batson* the defendant had to prove that he or she was a member of the same cognizable racial group whose members were excluded. *Id.* However, in Powers v. Ohio, 111 S. Ct. 1364 (1991), the Court held that a defendant of any race has standing to raise the equal protection rights of an excluded juror. *Powers*, 111 S. Ct. at 1373.

51. *Batson*, 476 U.S. at 97.

52. *Id.*

53. *Id.* at 98.

54. *Id.*

55. *See id.* at 100.

56. *Id.* at 98 n.21.

57. 380 U.S. 202 (1965).

58. 476 U.S. 79, 102 (1986) (Marshall, J., concurring).

59. *Id.* at 112 (Burger, C.J., dissenting).

plicable[60] to peremptory challenges because peremptory challenges "are often lodged of necessity, for reasons 'normally thought irrelevant to legal proceedings or official action, namely the race, religion, nationality, occupation or affiliations of people summoned for jury duty.' "[61] The Chief Justice praised the peremptory challenge because it " 'allows the covert expression of what we dare not say but know more often than not is true.' "[62] In other words, it allows attorneys to act on stereotypes without having to articulate them.[63]

By contrast, Justice Marshall argued that the decision did not go far enough.[64] He contended that, "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[65] Because of the inherent potential for racial exclusion using peremptory challenges, Justice Marshall offered an alternative solution: eliminate the peremptory entirely from criminal cases.[66]

In assessing lower courts' implementation of *Batson*, many critics have reiterated Justice Marshall's concerns, particularly that prosecutors will easily be able to assert a race-neutral reason for exclusion. One commentary notes that in practice "trial judges accept virtually any explanation offered."[67] Examples of accepted reasons include: the potential juror did not have enough eye contact with the prosecutor;[68] the potential juror made too much eye contact with the prosecutor;[69] the prosecutor did not like the jurors' behavior or appearance;[70] the prospective jurors lived in the same or similar neighborhood as the defendant;[71] and the prospective juror had a poor attitude.[72] Additionally, one commentator has suggested that "because the prosecutor's credibility is an important factor in the trial judge's determination, *Batson* findings al-

60. *Id.* at 123.

61. *Id.* (quoting Swain v. Alabama, 380 U.S. 202, 220 (1965)).

62. *Id.* at 121 (quoting Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 553-54 (1975)).

63. Id.

64. 476 U.S. at 102-03 (Marshall, J., concurring).

65. *Id.* at 106.

66. *Id.* at 107.

67. Serr & Maney, *supra* note 46, at 43.

68. United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987).

69. United States v. Mathews, 803 F.2d 325, 331 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988).

70. United States v. Allen, 666 F. Supp. 847, 853 (E.D. Va. 1987); United States v. Biaggi, 673 F. Supp. 96, 105 (E.D.N.Y. 1987).

71. Taitano v. Commonwealth, 358 S.E.2d 590, 592-93 (Va. Ct. App. 1987).

72. United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987).

most always are upheld by higher courts."[73] Others conclude that the protection offered by *Batson* has been "largely illusory"[74] and, like Justice Marshall,[75] advocate eliminating peremptory challenges to avoid potential racial discrimination.[76]

III. *HERNANDEZ v. NEW YORK*: A BARRIER OR A BRIDGE?

In assessing Hernandez's *Batson* claim, the Court refused to disturb the trial court's finding that the prosecutor's explanation was not race based.[77] Despite the fact that ninety-six percent of Hispanics in Brooklyn, where the trial took place, speak Spanish[78] and the possibility that a high percentage of bilingual jurors would hesitate when asked if they could accept the interpreter as "the final arbiter" of what was said, the Court found that it is ultimately the prosecutor's *intent*, not the disparate impact of the exclusionary criterion that matters.[79]

The Court stated that "nothing in the prosecutor's explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury."[80] The defendant must be able to show a discriminatory intent in the prosecutor's explanation *itself* for the explanation to fail the race-neutrality test. As the literature on *Batson* demonstrates, attorneys who are aware of the *Batson* requirements will seldom proffer an expla-

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73. M. Elizabeth Kirkland, Comment, *Rebutting the Inference of Purposeful Discrimination Under Batson v. Kentucky*, UMKC L. REV. 355, 359 (1989).

74. McMillian & Petrini, *supra* note 47, at 371; *see also* Kirkland, *supra* note 73, at 367 (concluding that discriminatory uses of peremptory strikes persists, unabated by *Batson*); Serr & Maney, *supra* note 46, at 62-63 (arguing that, although it is still too early to conclude that *Batson* is a total failure, its implementation so far has been a failure).

75. *Batson*, 476 U.S. at 107.

76. *See, e.g.*, McMillian & Petrini, *supra* note 47, at 374; Rosemary Purtell, Comment, *The Continued Use of Discriminatory Peremptory Challenges After* Batson v. Kentucky: *Is the Only Alternative to Eliminate the Peremptory Challenge Itself?*, 23 NEW ENG. L. REV. 221, 257 (1988); Marvin B. Steinberg, *The Case for Eliminating Peremptory Challenges*, 27 CRIM. L. BULL. 216, 227 (1991). *Cf.* Robert W. Rodriguez, Note, Batson v. Kentucky: *Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755, 793-94 (1988) (advocating a reduction in the number of peremptories allowed and an expanded voir dire to better determine challenges for cause).

77. 111 S. Ct. at 1867.

78. Brief for Petitioner at 10, Hernandez v. New York, 111 S. Ct. 1859 (1991) (No. 89-7645).

79. *Hernandez*, 111 S. Ct. at 1867-68.

80. *Id.* at 1868.

nation that exhibits overt discriminatory intent.[81]

Once a prosecutor comes forward with a race-neutral explanation, the court must still determine if the stated reason is a mere pretext for racial discrimination.[82] The Court treats this as a "pure issue of fact, subject to review under a deferential standard."[83] The demeanor of the attorney is said to often be "the best evidence"[84] for this determination.[85] Because only the trial court can observe the demeanor of the attorney, the deferential review standard applies.[86]

The Court acknowledged that the prosecutor's proffered reason may have been a pretext because "it would be common knowledge in the locality that a significant percentage of the Latino population speaks fluent Spanish."[87] But, applying the "clearly erroneous" standard of review, the Court did not effectively inquire into the possibility of a pretext.

Singling out only certain jurors for special questioning designed to evoke a specific response is a factor tending to show that a proffered race-neutral explanation is pretextual.[88] Yet the *Hernandez* Court did not mention the lack of evidence that the prosecutor asked non-Hispanic jurors about either their Spanish

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81. *See, e.g.*, Serr & Maney, *supra* note 46, at 59 (noting that virtually all published opinions in which the prosecutor failed to articulate acceptable reasons applied *Batson* retroactively to cases tried, but not decided, prior to the *Batson* decision's release); *supra* notes 67-72 and accompanying text.

82. *Hernandez*, 111 S. Ct. at 1868.

83. *Id.* at 1869.

84. *Id.*

85. *Id.* This conclusion is arguable. It seems odd that if two prosecutors were to exclude jurors under the same circumstances, and for the same stated reasons, one of them would lack discriminatory intent because she calmly gives her explanation, whereas the other, who appears nervous or stumbles over his words, would not. The only difference between the two cases is the attorney's ability to appear calm.

86. *Id.*

87. *Id.* at 1868. Courts have recognized that because language ability is so closely related to race, language-based classifications may sometimes serve as proxies for race-based distinctions. *See, e.g.*, Yu Cong Eng v. Trinidad, 271 U.S. 500, 514 (1926) (holding that a statute which prohibited keeping business records in certain languages violated the equal protection and due process rights of Chinese merchants because the vast majority of them spoke only Chinese); Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986) (applying strict scrutiny to a voter fraud investigation because it targeted voters who requested bilingual ballots, had recently registered to vote, and who were foreign born and noting that "persons of different nationalities are often distinguished by a foreign language"); Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 (9th. Cir. 1988)(arguing that because language is an "identifying[] characteristic," English-only rules which have a negative effect on bilinguals "may be mere pretexts for intentional national origin discrimination").

88. State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988).

language ability or their ability to accept the official translation.[89] Moreover, the question posed to the Hispanic jurors was an inherently difficult one, practically mandating a hesitant or even a negative response. In effect, the Spanish-speaking jurors were asked to promise unconditional acceptance of the official English interpretation even if it differed clearly and significantly from what they heard the witness say in Spanish.[90] Nonetheless, the Court noted that "[t]he trial judge in this case chose to believe the prosecutor's race-neutral explanation"[91] and then refused to overturn the trial court because it was not " 'left with the firm conviction that a mistake ha[d] been committed' " in this case.[92]

The emphasis on the subjective intent of the prosecutor, especially given the requirement that the defendant somehow demonstrate that intent to the trial judge, not only places a heavy burden on the defendant, but ignores the possibility of unconscious racism in either the prosecutor or the judge. We live in a modern, pluralistic society that condemns overt racism. Consequently, many of these attitudes will be repressed and disguised.[93] Charles Lawrence explains:

> [R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race dependant ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race

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89. *Cf.* People v. Hernandez, 552 N.E.2d 621, 628 (N.Y. 1990) (Kaye, J., dissenting), *aff'd sub nom.* Hernandez v. New York, 111 S. Ct. 1859 (1991). At the trial, defense counsel objected generally to the exclusion of Latino jurors and charged that the prosecutor feared Hispanics would be sympathetic to the defendant, an objection which, the trial court found, lost force since the victims were Hispanic as well. *Hernandez*, 111 S. Ct. 1865. The defendant proffered no additional evidence of discriminatory intent. *Id.* The lesson for defense counsel is that, even where peremptory challenges have a discriminatory impact, in the face of a proffered non-racial reason, the burden of production falls on the defendant.

90. The potential jurors were not presented with any option if they had a difficulty with the translation. *Hernandez*, 111 S. Ct. at 1868.

91. *Id.*

92. 111 S. Ct. at 1871 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The Court appears to admit the difficulty of establishing a judicial mistake when it cites Norris v. Alabama, 294 U.S. 587 (1935), as an example of how incredible the evidence must be to establish an erroneous conclusion by the trial court. *Hernandez*, 111 S. Ct. at 1871. In *Norris*, uncontroverted testimony established that no black had served on any jury in Jackson County, Alabama within the memory of witnesses who had lived there all their lives. 294 U.S. at 591.

93. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987).

relations has had on the individual and collective unconscious.[94]

A standard that requires proof of discriminatory intent cannot begin to address the problem of unconscious racism. The ease with which a prosecutor may proffer an explanation that does not demonstrate discriminatory intent combined with a standard of review that generally leaves the trial court's findings untouchable affords little appellate protection against the discriminatory use of peremptory challenges.

The *Hernandez* Court offered little guidance to trial courts on what factors tend to indicate a discriminatory intent. It did however, note that, "If a prosecutor's explanation for the exclusion results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination."[95]

Additionally, despite the Court's hands-off approach, the case offers valuable insights as to why excluding bilingual jurors may not be wise. For example, along with his recognition of the importance of language to concepts of personhood and community[96] Justice Kennedy realized that it "is a harsh paradox that one may become proficient enough in English to participate in a trial, only to encounter disqualification because he knows a second language as well."[97] He also offered an alternative to excluding bilingual jurors—the trial court should permit them to discretely inform it of any difficulty with the translation.[98] The alternative was backed by the observation that insistence on striking Spanish-speaking jurors despite this measure would be a factor for the trial court to consider in assessing the discriminatory intent of the prosecutor's peremptory challenge.[99] Efforts such as these indicate that, although the Court is unwilling to find peremptory challenges of bilingual jurors unconstitutional, *per se*, it expects trial courts to diligently guard against discriminatory language-based exclusions.[100]

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94. *Id.* at 323.
95. 111 S. Ct. at 1868.
96. *See supra* note 13.
97. 111 S. Ct. at 1872.
98. *Id.* at 1868.
99. *Id.*
100. Justice Stevens, with whom Justices Blackmun and Marshall agreed, simply found the prosecutor's explanation insufficient to dispel the "inference of existing racial animus" inherent in the challenge. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

This view comports with *Powers v. Ohio*,[101] in which the Court found that the individual juror, not just the defendant, has a legal right not to be excluded from a jury on the basis of race.[102] Writing for the Court, Justice Kennedy highlighted the important role juries play in our society. He noted that, "[W]ith 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."[103] The harm from discriminatory exclusion is not limited to the defendant. It extends to the excluded juror and her perceptions of the judicial system, undermining her belief in its fairness; the remainder of the jury might well lose confidence in a system that tolerates discriminatory exclusions; and ultimately, the entire community might suffer diminished respect for the criminal justice system.[104]

A recent study of voluntary excuses from jury duty based on economic hardship provides some tentative empirical support for the theory that discrimination results in loss of confidence in the legitimacy of the jury system.[105] Past research had revealed that, after voir dire, the economic excuse is the most significant determinant of ultimate jury composition.[106] In this study, researchers looked at a variety of factors including race, sex, economic status, ethnic background, and language to ascertain the structural causes for these self-imposed juror exclusions.[107]

Among their findings were: white and English-speaking jurors are more likely to request economic excuses regardless of their actual financial situation;[108] jurors who are less fluent in English are more likely to be excused for failure to meet the English competency requirement for jury service;[109] and jurors who speak English at home are more likely to request economic excuses than non-En-

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101. 111 S. Ct. 1364 (1991).

102. *Id.* at 1370.

103. *Id.* at 1369.

104. *Id.* at 1368-69.

105. Hiroshi Fukurai & Edgar W. Butler, *Organization, Labor Force, and Jury Representation: Economic Excuses and Jury Participation*, 32 JURIMETRICS J. 49 (1991).

106. *Id.* at 51-53.

107. *Id.* at 53.

108. *Id.* at 67. This could be explained by the fact that, in addition to financial hardship, many white and English-speaking potential jurors perceive jury duty to be a nuisance rather than a democratic privilege and therefore intentionally avoid service with economic excuses. *Id.*

109. *Id.* at 64.

glish speakers.[110] Although no definitive causal relationship was established for the last finding, the researchers suggested that the reasons might be that potential jurors who lack English-language ability are unfamiliar with the jury system and feel a greater obligation to participate in the process.[111]

Given the long history of racial discrimination that led to the *Batson* decision, this study poses a dual irony: On one hand, it suggests a certain cynicism among those who are familiar with, and have thus seen discrimination at work in the system.[112] They do not share the democratic view that jury service is a right and a privilege of citizenship.[113] On the other hand, it shows that the system is structurally biased against those persons who want to participate in what they see as a civic responsibility and are willing to serve in spite of potential economic hardship. Whatever the reason, it seems that language-based exclusions not only result in disproportionate jury representation, but that they tend to discourage participation by those who still see the democratic ideal as a possibility.

Because of its reluctance to interfere with and articulate criteria to assist lower courts in determining discriminatory intent, on one level, the *Hernandez* opinion appears to raise a barrier to the full inclusion of minority jurors. Yet, at a more fundamental level, the Court's expression of the valuable role bilinguals play in bridging language communities sends a message to lower courts that they should guard against such exclusions to prevent language from becoming a source of cultural division.

IV. Language Communities, Objectivity, and Interpretation

A disturbing theme running through *Hernandez*, and possibly the reason the Court's opinion seems so equivocal, is the notion that jurors must adhere to the "official translation." Unexamined, it reasserts itself throughout all three opinions. Justices Kennedy and O'Connor both agree that the prosecutor's concern over a bilingual juror's hesitancy to accept the official translation is a nonracial basis for exclusion.[114] Justice Kennedy goes so far as to sug-

110. *Id.*
111. *Id.*
112. *Id.* at 60 n.18.
113. *Id.* at 50.
114. 111 S. Ct. at 1867-68. Justice O'Connor appears to draw a strict line between lan-

gest that this corresponds to a challenge for cause.[115] Conversely, Justice Stevens' opinion ignores the issue, except to suggest that less drastic means than juror exclusion are available, including his "even more effective solution"—employing a translator who, alone, hears and simultaneously translates the witness's words, thus preventing the jury from hearing anything but the official translation.[116]

The assumption that a juror must be able to accept the "official translation" and that a bilingual juror's perceived inability to accept the official translation is a sufficient reason for exclusion implies that some jurors will be able to "accept" an official translation or record in a way that others will not, and that the acceptance of an official interpretation will lead to greater objectivity in judgment. However, much modern language theory recognizes that observers (readers, listeners, jurors) do not simply objectively perceive the world around them; rather they "shape facts . . . according to their own preconceived categories."[117] In this sense, all observers are actually interpreters.[118] To say that no interpretation

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guage and race, asserting that this justification, while, perhaps, "acting like" a race-based strike, is "*not* based on race." *Id.* at 1874 (O'Connor, J., concurring).

115. *Hernandez*, 111 S. Ct. at 1868.

116. *Id.* at 1877 n.2 (Stevens, J., dissenting). Actually, this solution masks a great deal of violence. It would literally force the jury to adhere to the "official translation" by physically separating and silencing the voice of the witness, and deafening the jury to it. It disempowers jurors and ignores their function as fact finders by denying them the autonomous use of an important sensory avenue by which they make credibility determinations—voice pitch, speech rate, intensity, tone volume, hesitation, and so forth. *Cf.* Capt. Jeffrey D. Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct*, 134 MIL. L. REV. 173, 175 (1991) (discussing paralinguistic studies on listeners' perceptions of speaker credibility and persuasiveness).

117. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 445 (1987) (discussing developments in twentieth century linguistics).

118. *See id.* at 454 (After about 1970, "scholars began to argue that neither scientific nor nonscientific disciplines could gain access to objective truth, but instead could only provide interpretations of 'texts.' ").

For example, in the field of literary criticism, a movement called "reader-response" criticism emerged in the 1970s which "focuses on what the texts do to—or in—the mind of the reader, rather than looking at a text as something with properties exclusively its own." ROSS C. MURFIN, JOSEPH CONRAD, HEART OF DARKNESS: A CASE STUDY IN CONTEMPORARY CRITICISM 140 (1989). Stanley Fish, a leading reader-response critic argues that there is no such thing as an objective text and that the text is really a product of interpretation. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 16-17 (1980). Hans-Georg Gadamer, a hermeneuticist, asserts that "the being of a work of art . . . must be perceived by the spectator to be actualized . . . [and] all literary works of art are actualized only when they are read." HANS-GEORG GADAMER, TRUTH AND METHOD 164 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev.

can be completely objective does not mean that everybody is free to give *any* meaning to a given text or dialogue, but that "there is no objective description of reality separate from our conceptual schemes."[119] In the context of jury selection, it has been recognized that "people do have their own perspectives—based on their different lives—and . . . only by balancing these perspectives can we hope to achieve [the] impartiality"[120] required by the Sixth Amendment.[121]

Language and ethnicity are closely related factors in forming cultural perspectives and establishing distinctive interpretive communities. For example, Edward Sapir observed that "no two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached."[122] Although the degree and manner in which language shapes consciousness are matters for intense debate[123] current lin-

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ed., The Crossroad Publishing Corp. 1991) (1960). He further notes that, "[r]eading with understanding is always a kind of reproduction, performance, and interpretation," *id.* at 160, and argues that "the interpreter [may not] speak of an original meaning of the work without acknowledging that, in understanding it, the interpreter's own meaning enters as well," *id.* at 576.

119. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1131 (1989). Winter's position is actually on the side of the larger philosophical debate which holds that certain universal conceptual schemes transcend language and shape our conception of the world. *Cf.* WILLARD VAN ORMAN QUINE, WORD AND OBJECT 75 (1960) ("[W]e may meaningfully speak of the truth of a sentence only within the terms of some theory or conceptual scheme.")

120. VAN DYKE, *supra* note 36, at 12.

121. *See supra* part II.A.

122. EDWARD SAPIR, CULTURE, LANGUAGE AND PERSONALITY 69 (1964).

123. Linguist Benjamin Whorf maintained that language is not only related to culture but could actually mold the thought of its habitual users. BENJAMIN LEE WHORF, *Language, Mind and Reality*, *in* LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF 252 (John B. Carroll ed., 1956). The Whorfian notion of linguistic relativism has been subject to much criticism, and is today largely discredited, at least in its extreme form. However, the original popularity of Whorf's work did much to spur study and debate over the precise nature of the connection between language, culture, and conceptualization. *See* PAUL HENLE, LANGUAGE THOUGHT AND CULTURE 23 (1966) (finding Whorf's evidence "striking" yet questioning just how much it shows); JULIA M. PENN, LINGUISTIC RELATIVITY VERSUS INNATE IDEAS (1972) (providing a critical historical account of the Sapir-Whorf hypothesis and the studies that followed its articulation). Others maintain that "language and culture are inseparably interrelated," Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 896 (1986), and that "[c]onceptualization on any considerable scale is inseparable from language," QUINE, *supra* note 119, at 3. *But see* DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION at xviii (1984) ("Language is not a screen or filter through which our knowledge of the world must pass."); DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme*, *in* INQUIRIES INTO TRUTH AND INTERPRETATION 183-98 (1984).

guistic thought recognizes that "each language is constituted by, expresses, and reproduces a particular intelligibility."[124] In other words, each language represents only one of an infinite number of possible understandings.[125]

If all observers are interpreters, the exclusion of bilinguals simply closes off one perspective, thereby limiting the interpretive base of the jury. Impartiality, in these terms, is based on a reflection of "the range of the community's attitudes."[126] The Court's effort to secure acceptance of an "official translation" at the expense of excluding this minority perspective conflicts with the ideal of a jury drawn from a representative cross-section of the community, that "essential component of the Sixth Amendment right to a jury trial."[127] Far from protecting the hypothetical objectivity of the "official translation," exclusion invites an imbalanced and partial interpretation.[128]

In this view, the official translator is incapable of rendering a completely objective interpretation. In an extensive study of court interpreters, Susan Berk-Seligson observes that:

> Whereas court personnel assume that the interpreter is nothing short of a machine that converts the . . . foreign language testimony of non-English speaking witnesses into English for the benefit of the court, the output of the machine is by no means perfect, nor can it ever be, because of the problems inherent in the interpreting process.[129]

For instance, interpreters sometimes make "pragmatic" alterations of the testimony by making it either more or less polite, more or

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124. Richard Hyland, *Babel: A She'ur*, 11 CARDOZO L. REV. 1585, 1594 (1990).

125. *Id.*

126. VAN DYKE, *supra* note 36, at 18.

127. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

128. *Cf.* Commonwealth v. Soares, 387 N.E. 2d 499, 515 (Mass. 1979) (arguing that since "[n]o human being is wholly free of . . . interests and preferences," it is "the very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations," that helps to ensure impartiality). The California Supreme Court made the point in a slightly different context in People v. Wheeler, 583 P.2d 748 (1978), when it explained:

> [T]he primary purpose of the representative cross-section requirement . . . is to achieve an overall impartiality by allowing the interaction of diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold these very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority.

Wheeler, 583 P.2d at 761.

129. SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM 2 (1990).

less formal, by introducing hedges, or by changing the tense of the verb.[130] According to Berk-Seligson, professional interpreters pay slight attention to the problems of pragmatic alterations,[131] yet pragmatic alterations affect the listener's perception of the witness's truthfulness, persuasiveness, intelligence, and competence.[132] Berk-Seligson also asserts that "an interpreter who has either unconscious or conscious biases can take full advantage of such linguistic mechanisms to suit her own purposes, and . . . the interpreter's interpretations can and do . . . slant what a speaker is trying to say."[133]

The Court's suggestion that jurors must be able to confirm, without hesitation, their acceptance of the official translation or risk exclusion[134] implies that the official translation warrants such deference, and that it is generally more accurate than the bilingual juror's understanding. But, what assurances do we have of the official translation's accuracy? One possibility might be certification that court interpreters meet minimum training and competency standards. For instance, federal certification as a court interpreter requires that a person pass an examination covering both written and oral language skills.[135] The test is rigorous: it has a ninety-six percent failure rate.[136] As of 1986 the United States had only 200 active federally-certified interpreters.[137] Very few states have comparable certification programs.[138] Consequently, few courts have any real control or knowledge about the quality of the interpreters

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130. *Id.* at 194-95.

131. *Id.* at 2.

132. *Id.* at 196.

133. *Id.* at 2-3.

134. *Hernandez*, 111 S. Ct. at 1868.

135. The Federal Court Interpreters Exam is mandated by the Court Interpreters Act, 28 U.S.C. § 1827 (1978). *See* BERK-SELIGSON, *supra* note 129, at 36.

136. BERK-SELIGSON, *supra* note 129, at 36.

137. Carlos A. Astiz, *But They Don't Speak the Language* JUDGES J., Spring 1986, at 32, 35.

138. California and New York have such programs. William E. Davis, *Language and the Justice System: Problems and Issues*, 10 JUST. SYS. J. 353, 360 (1985). Others are being contemplated by Florida, Illinois, Iowa, Minnesota, New Jersey, and Utah. BERK-SELIGSON, *supra* note 129, at 40.

Florida's Racial and Ethnic Bias Study Commission found that most of Florida's 39 judicial circuits lack any training or certification criteria for interpreters, leaving the selection of qualified interpreters to the discretion of the trial judge. FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, REPORT AND RECOMMENDATIONS 14 (Dec. 11, 1991). The Commission concluded that this is one reason the needs of Florida's linguistic minorities have not been met. *Id.* at 18.

they use.[139]

Once the trial has ended, few means are available to verify the accuracy of courtroom translations because court proceedings are transcribed as if everything had originally been said in English; no record of the foreign language testimony remains.[140] Not only does this make it virtually impossible to prove any error in the translation on appeal, but it makes it difficult to ensure a high-quality interpretation[141] since translations are effectively not subject to review.

Jurors who speak the same language as the witness and who can hear the unmediated version of the testimony may be better equipped than those who are not part of the language community to understand what the witness is trying to convey.[142] If provided with the opportunity to direct the attention of the court to questionable translations, such jurors may, in fact, serve as a check on the quality of the official translation.

Indeed, one of the jury's primary functions as a fact finder is to evaluate the witness's credibility, an evaluation which necessarily depends, in part, on the witness's use of language. The use of language is one reason we have a rule against hearsay.[143] The hear-

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139. The possibility that a witness testifying in a foreign language will understand English sufficiently to correct any errors the interpreter makes is rare. It also has certain inherent problems. Consider what happened during a Cuban immigrant's trial on felony automobile tampering charges: The defendant, who claimed not to speak English, testified in Spanish. When the interpreter incorrectly relayed his answers, he shouted, "I didn't say that!" The jury convicted him, and he was later indicted on perjury charges for claiming he spoke only Spanish. *Lapse into English Helps Land Spanish-Speaker Behind Bars*, MIAMI HERALD, Feb. 8, 1992, at 11A.

140. BERK-SELIGSON, *supra* note 129, at 200.

141. *Id.*

142. *See Developments in the Law—Race and The Criminal Process*, 101 HARV. L. REV. 1472, 1559 (1988) (arguing that "[an] all-white jury simply may not understand the language involved in the case and may act on this misunderstanding to the detriment of the minority defendant" and "that when white jurors are unable to understand the testimony of minority defendants, they may conclude that the defendants are ignorant or unable to speak 'English' and therefore more likely to be guilty.")

In a related context, the Dade County School Board, in Miami, Florida, recently hired bilingual psychologists to test children for learning problems. The reason they gave for this is that when a psychologist does not speak the language of the child and is forced to use a translator, the psychologist runs the risk of misreading the student's behavior as a learning problem. Such misread behavior includes a child's lack of eye contact that may be read as disrespectful or inattentive but is in fact a culturally correct way for a child to relate to adults. Charisse L. Grant, *School Board to Find Psychologists to Help Kids in Their Native Tongues*, MIAMI HERALD, Nov. 7, 1991, at 4B.

143. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

say rule excludes out-of-court statements to give the trier of fact "the benefit of having the declarant before it, under oath, and subject to contemporaneous cross-examination,"[144] thus enabling the juror to put a proper value on the testimony.[145] In this evaluative process "T [the trier of fact] must . . . ask whether W [the witness] by use of this sentence means to convey to T what T would have meant if T had used the same words. If not, just what does he mean to convey? The answer will depend upon T's deduction as to W's use of language."[146] If T, the juror, and W speak the same language, T will be better able to evaluate W's use of language.

V. An Alternative to Juror Exclusion

The trial court in *Hernandez* used the most restrictive means to guard against the perceived problem of a bilingual juror failing to accept the official version of foreign language testimony. It excluded the juror. To ensure that the jury includes a range of perspectives, a trial court should employ a nonrestrictive, nondiscriminatory alternative to exclusion if one is available. This Section explores Justice Kennedy's suggestion in *Hernandez* that jurors be allowed to inform the court of a difficulty with translation, rather than be excluded.[147]

The Court cites *United States v. Perez*[148] to demonstrate the type of problem that might arise when a juror fails to accept the official translation of foreign language testimony.[149] In *Perez*, the following exchange took place:

> 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 understand 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

Fed. R. Evid. 802.

144. Michael H. Graham, Evidence 62 (2d ed. 1989).

145. Edmund M. Morgan, Basic Problems of Evidence 243 (1963).

146. *Id.*

147. 111 S. Ct. at 1868.

148. 658 F.2d 654 (9th Cir. 1981).

149. *Hernandez*, 111 S. Ct. at 1867 n.3.

> 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.[150]

After further questioning, the witness indicated that none of the conversations at issue had occurred in the restroom.[151] Ms. Kim was later dismissed from the jury because the judge believed "Kim had formed an opinion about the course of events at issue and had developed feelings of anger for either the defendant, the prosecution or the proceedings in general."[152]

The *Perez* juror was not dismissed because she had a difference of opinion about the translation but, as the *Perez* court stressed, due to "the form and procedure of Kim's conduct and the trial court's perception that Kim was both angry and opinionated."[153] Only *after* the outburst did the trial court instruct the members of the jury on what to do if they detected a discrepancy in the translation. The judge explained that any juror who understood the testimony of Spanish-speaking witnesses to differ from the interpreter's translation should bring the matter to the court's attention at the conclusion of the witness's testimony.[154]

It is possible that the juror may in fact be correct in his or her understanding and, through the proper procedure, may clarify a

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150. *Hernandez*, 111 S. Ct. at 1867 n.3 (1991) (quoting United States v. Perez, 658 F.2d 654, 662 (9th Cir. 1981)).

151. *Perez*, 658 F.2d at 663.

152. *Id.* at 663. The *Perez* case itself demonstrates how interpretation through a third party may affect a credibility determination. The trial judge did not hear Dorothy Kim call the interpreter "an idiot." He was later told this by the court reporter (presumably the same reporter who prepared the official transcript quoted by the Court in *Hernandez*). *Perez*, 658 F.2d at 663. Kim claimed her statement was not "you're an idiot," but, "it's an idiom." *Id.* Thus, even though the parties to the exchange were speaking the same language, the judge was forced to rely on an interpreter, the court reporter, for the content of Kim's statement, which he found "disturbing." *Id.* at 663. Although the judge's decision to dismiss Kim did not turn on this factor alone, it certainly played a part in his decision. Quite possibly, Kim did *say* "it's an idiom" and the court reporter *heard* "you're an idiot;" nothing suggests that either of them misrepresented the facts as they perceived them. The point, however, is that the trial judge interpreted the events based on the reporter's interpretation, which may itself have been incorrect.

153. *Perez*, 685 F.2d at 663.

154. *Id.* at 662-63.

misleading translation. This happened in *Santana v. New York City Transit Authority*.[155] In *Santana*, a Spanish-speaking woman sued for injuries she sustained when the subway car in which she was riding stopped suddenly.[156] When asked how quickly the train stopped, the plaintiff's answer, as translated by the interpreter, was that the train stopped as if it had bumped into something.[157] A bilingual juror who was familiar with the dialect spoken by the plaintiff, believed that she had really meant that it felt as if the train had crashed rather than merely bumped into something.[158] In a note, he asked permission to meet with the judge on this matter. At a subsequent meeting with the judge, the interpreter, the court reporter, and counsel, the juror explained his difficulty with the translation. After the trial resumed, the plaintiff was questioned again. It was revealed that she had meant that the train had felt as though it had crashed, rather than bumped into something.[159]

The *Santana* case demonstrates that a policy seeking to exclude those who speak the same language as the witness, may exclude the very people who will be able to understand the testimony more accurately. It also illustrates a procedure that minimizes disruption and allows the trial to proceed with a record that more closely reflects the statements of the witnesses.

For such an optimal result, jurors must be properly instructed. For example, they may be instructed that if they disagree significantly with a translation, they may, when the witness is finished testifying, bring the matter to the attention of the court by explaining the nature of the difference in writing and giving it to the court officer. The court, after consulting with counsel beyond the hearing of the jury, could then seek to clarify the testimony by questioning the witness or, if there is an objection, the court may seek first to explore the nature of the difficulty further by meeting with the court interpreter, counsel, and the juror in chambers.[160] If

155. 505 N.Y.S.2d 775 (Civ. Ct. 1986).

156. *Id.* at 777.

157. *Id.*

158. *Id.*

159. *Id.* at 778.

160. Compare this procedure to other recommended procedures for jurors to propose questions for the witness: United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986); United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir. 1979); State v. Le Master, 669 P.2d 592, 597 (Ariz. App. 1983); Rudolph v. Iowa Methodist Medical Ctr., 293 N.W.2d 550, 556 (Iowa 1980); Rood v. Kansas City, 755 P.2d 502, 505 (Kan. 1988); State v. Johnson, 784 P.2d 1135, 1144-45 (Utah 1989). *Cf.* Mark A. Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U.L. REV. 221, 223 (1990). Judge Frankel,

the court poses further questions to the witness, counsel should have an opportunity to ask follow-up questions.

A written inquiry procedure decreases the risk of a prejudicial question or statement during the proceedings.[161] To avoid interrupting the flow of the questioning, jurors would be allowed to express their concerns only at the end of the witness's testimony.

Potential objections to such an active role of the jury might include diminished judicial efficiency, or that jurors will become advocates as opposed to fact-finders. However, proponents of a more active jury, who would permit jurors to ask questions of the witnesses through the court in compliance with specific instructions, argue that the concept of the jury as a responsible decision maker is advanced by permitting jurors a more active role.[162] Moreover, they report that trials are not lengthened significantly,[163] that jurors generally do not become advocates,[164] and

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explains the procedure by which he allows jurors to ask the witness questions as follows:

> If the [juror questioning] procedure is approved [by counsel], the jury is given a preliminary instruction on the subject of asking written question. After each witness is questioned, the jurors are asked if they wish to ask the witness a written question. If a juror raises her hand, she is provided with pencil and paper. Questions are reviewed with counsel outside the hearing of the jury. If there are minor problems with the form of the question, a revision is developed in consultation with counsel. If no objections are sustained, I put the question or questions to the witness. Each lawyer is then given the opportunity to ask follow-up questions. In the event an objection is sustained, a brief explanation is generally given to the jury. Objecting counsel is given the opportunity to make a record of the objection outside the presence of the jury at the next available recess.

Id. at 223.

161. *See United States v. Perez*, 658 F.2d 654 (9th Cir. 1981). After juror Dorothy Kim voiced difficulty with the translation, the trial judge explained, "We are obviously going to break down if individual jurors want to ask questions of the interpreter or the witness directly. . . . Some of those questions may be what the law declares to be incompetent. That would result in prejudicial error either to the defendant or to the government." *Id.* at 663.

162. Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U.L. REV. 190, 206 (1990); *see also* United States v. Callahan, 588 F.2d 1078, 1086 (1979) ("If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. . . . Trials exist to develop truth."); Louisville Bridge & Terminal Co. v. Brown, 277 S.W. 320, 322 (Ky. 1925) (stating that the practice of jurors asking questions of the witnesses is "likely to aid the jury in finding out and learning the real facts and especially enabling them to understand the evidence that is being given."); Frankel, *supra* note 160, at 225 (jury questioning "enhances the rational aspects of the jury's fact-finding role"); Scott J. Silverman & Jonathan T. Colby, *Expanding the Role of Jurors in Florida Courts*, FLA. B.J., Oct. 1991, at 32, 35 ("Since trials exist to develop the truth, questions submitted by jurors could aid in that quest. Answers to questions posed by jurors could make the jurors more informed, and a well-informed jury serves the cause of justice.").

163. *See* Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 L. & HUM. BEHAV. 231,

that a more active jury is more effective.[165]

The procedure outlined above gives jurors a judicially-sanctioned channel in which to direct frustration or confusion caused by a discrepancy between what their senses tell them and what they are told by the official translator.[166] The added benefit is that it obviates the potential that the bilingual juror may have an undue influence on the rest of the jury by presenting an alternative version of the testimony that is at odds with the official translation.[167] If the jury is properly instructed to raise difficulties with the translation at the end of the witness's testimony, then a bilingual juror will have no need, during deliberation, to say "the witness really said X even though the translator said Y." This matter will already have been dealt with during the trial itself.

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255 (1988) (study of 67 trials in Wisconsin circuit courts revealing that juror questioning did not substantially slow trials); *see also* REPORT OF COMMITTEE ON JURIES OF THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT 55-58 (1984), *excerpt reprinted in* 73 ILL. B.J. 155 (1984) (out of 26 trials where jurors were permitted to ask questions, jurors chose not to ask any questions in nine trials, asked only three or fewer questions in 15 trials, asked 40 questions in one trial and 56 in another); Friedland, *supra* note 162, at 218 (citing Root, *Judge Will Allow Questions by Jurors*, PITT. PRESS, Sept. 6, 1984 (noting a judge found no increase in length of trials when jurors were allowed to ask questions)).

164. Frankel, *supra* note 160, at 222. Judge Frankel bases this conclusion on his ten years of experience allowing witnesses to ask written questions of witnesses. *Id.*

165. Franklin Delano Strier, *Through the Jurors' Eyes*, 74 A.B.A. J., Oct. 1, 1988 at 79, 80-81 (in a survey of 2,533 jurors asking what changes would make the evidence clearer to the jury, the most frequent suggestion was to allow jurors to ask questions of the parties with court approval). Although lawyers participating in a study of 67 trials in Wisconsin circuit courts indicated that juror questions did not raise significant issues at trial, the jurors were more confident that they had sufficient information to reach a responsible verdict. Heuer & Penrod, *supra* note 163. Additionally, according to the study, lawyers found that the jurors' questions provided useful feedback about the jurors' perceptions of the trial and that the trial was not significantly slowed by the questions. *Id.* The lawyers did not feel that the questions interfered with their trial strategy or prejudiced their clients. *Id.*

166. The trial court should instruct the jury in appropriate procedure *any* time a witness will testify through an interpreter, regardless of what languages the court or counsel believe the jurors understand. This is for two reasons. First, a juror may not be sufficiently proficient in a language to be considered "bilingual," but may understand just enough of the witness's testimony, as relayed directly by the witness, to sense a conflict between the "official version" and the witness's version. Second, stereotypes are often wrong. For example, the blond-haired, blue-eyed juror with the light complexion whom no one even thought to ask, may turn out to be quite well-versed in Spanish, Japanese, or even sign language. Either one or both of these considerations may have been at work in the case of Dorothy Kim, the *Perez* juror. *See* United States v. Perez, 658 F.2d 654 (9th Cir. 1981).

167. Some might argue that, just as physicians can be excluded from medical malpractice trials, or psychologists should not sit on juries where the defendant's sanity is an issue, so too should bilingual jurors be excluded where foreign language testimony will be given. The analogy, however, is flawed; professionals excluded on the basis of their specialized knowledge do not generally represent a unique cultural viewpoint or one in danger of being marginalized by the majority community.

VI. CONCLUSION

Willingness to exclude jurors to ensure the acceptance of an official translation that remains largely unverifiable reflects a preference for an "official translation" at the expense of an accurate one. Whatever its intent, the exclusion of language groups has a disparate impact on minority groups. Criteria such as hesitation and eye contact are too vague and subjective to protect against the discriminatory exclusion of ethnic minorities from juries.

In the *Hernandez* case, excluding bilingual jurors on the basis of their ability to defer to the official translation was, at worst, a pretext for racial and ethnic discrimination. At best, it was a misguided effort to preserve the supposed objectivity of the testimony. In fact, no univocal understanding of testimony is possible or desirable, since all observers interpret their experience. Rejecting the interpretive community formed by a language group closes off a valuable cultural perspective. Rather than excluding jurors who form part of an interpretive community, courts should instruct them on how to properly handle a perceived difference between the testimony and the translation.

The American jury is an institution of democracy and justice; impartiality is an essential precondition to its legitimacy. But a jury is impartial only if it reflects the range of values of the community from which it is drawn.[168] The cross-section requirement aims at unbiased inclusion of the broad range of the community's attitudes and cultures.[169] Because they constitute a significant part of our modern communities we cannot, at the same time, exclude language cultures, and expect to maintain the impartiality and integrity of the jury. Although perhaps blinded in its misguided effort to preserve a chimerical official translation, the *Hernandez* court recognized the value of bilinguals as inhabitants of two language communities and the danger of permitting language to become a source of division.[170]

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168. VAN DYKE, *supra* note 36, at 12.
169. *Id.* at 18.
170. *Hernandez*, 111 S. Ct. at 1872.
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