

## PEREMPTORY CHALLENGES: LESSONS FROM HERNANDEZ V. TEXAS

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### INTRODUCTION

What insights can a close study of *Hernandez v. Texas* contribute to current debates about the use of peremptory challenges to strike non-whites from venires? In light of the Supreme Court's recent ruling in *Thomas Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Hernandez v. New York*, 111 S.Ct. 1859 (1991), analysis of the defense's and prosecutor's lines of reasoning in *Hernandez v. Texas*, as well as analysis of evolution in the Court's understanding of the concept, "race," pre- and post-Hernandez is warranted.

In *Miller-El*, the Court held that the defendant should have been issued a certificate of appealability to review the denial of his habeas appeal. While it did not comment on the merit of his case, the Court did discuss evidence he presented demonstrating that the prosecutor's peremptory challenges were based on race. In some ways, the Court stepped back to 1935 when, in *Norris v. Alabama*, 294 U.S. 587 (1935), it rejected the common practice of accepting jury commissioners' assertions that they did not intend to discriminate as evidence of non-discrimination. Instead, the Court ruled that discrimination could be shown through a pattern of the absence of blacks from juries. That is, they ruled on the result of selection procedures, even if the procedures, themselves, were facially neutral. In subsequent decisions (for example, *Swain v. Alabama*, 380 U.S. 202, 1965), the spirit of *Norris* was ignored. It wasn't until *Batson v. Kentucky*, 476 U.S. 79 (1986) that the Court developed more reasonable criteria for determining

whether peremptory challenges are used unconstitutionally. If the defendant is part of a recognizable group and can make a prima facie case that jurors were struck for race-based reasons, then the burden of proof shifts to the prosecution to provide a race-neutral explanation. Yet, in case after case, appeals courts assumed that lower courts made the correct determination in balancing evidence of discrimination against prosecutorial explanations. In essence, *Batson* often operates to return us to the pre-*Norris* era, when a prosecutor's word that he didn't intend to discriminate was trusted. The Miller-El case both clarifies and enforces *Batson*. However, two key questions remain.

First, the question raised in *Hernandez*—whether race and nationality can be construed similarly under the auspices of the Equal Protection Clause—remains salient. In 1991, in *Hernandez v. New York* the Court ruled that peremptory challenges may be used to strike bilingual venirepersons so long as this is not based on race. Yet it evaded the opportunity to define the term race, while insisting that the EPC protected only racial discrimination. However, in a recent 2003 case, *Rico v. Leftridge-Byrd*, the defendant asserted a *Batson* claim based on his ethnicity (Italian). The lower courts accepted the claim, but the key question was not decided, as the state Supreme Court upheld the trial court's factual determination that discrimination was not a factor and the Circuit court agreed. Here, *Hernandez v. Texas* is instructive. The lawyers in *Hernandez* struggled with the relationship between race and ethnicity, as well as with their applicability to the Fourteenth Amendment. They offered nuanced arguments that should be revisited by the Court, today, in considering *Batson* claims.

Second, what if there is no evidence of prosecutorial malfeasance and yet a pattern of exclusion can be demonstrated? Again, *Hernandez v. Texas* can inform the debate. Although it dealt with people who were not black, prejudicial attitudes influenced the seating of Mexican Americans on juries. Such attitudes were based on things “other than race,” but that served as proxies for race. How can we justify allowing peremptory challenges based on subjective judgments that may be consciously or unconsciously racially rooted? Here, the Sixth Amendment guarantee of an impartial jury drawn from a fair cross-section of the community may be a better basis than the Equal Protection Clause from which to defend fairness in the jury system. How do the rules governing drawing jury pools determine outcomes that are continually unrepresentative of the community? How could this be remedied? These issues raise the larger question of whether systems allowing peremptory challenges are so flawed as to interfere with the delivery of justice.

Our two concerns—that discriminatory effects can occur without conscious intent and that the Courts have based their decisions on a limited, and not clearly articulated conception of race, are intertwined. While the technical legal issues faced by the Court in *Hernandez v. Texas*, *Hernandez v. New York* and *Miller-El v. Cockrell* are different, the issues they deal with are remarkably and unfortunately enduring. What is race and what serves as proxies for race? Should unrepresentative juries be recognized as discriminatory even if no intentional discrimination can be identified as causing the underrepresentation? Is the traditional deference accorded to prosecutors and trial courts’ reasoning for excluding certain jurors part of systemic discrimination against minorities’ participation? In what other ways is the system of justice inflected by common sense notions of racial import?

In this paper, I discuss two contemporary jury discrimination cases-- *Hernandez v. New York* and *Miller-El v. Cockrell*—in light of the landmark *Hernandez v. Texas*. I focus on four areas: 1) the debate over whether intent to discriminate is more probative of discrimination than the result of an unrepresentative jury; 2) how to assess the credibility of prosecutors' reasons for striking jurors and the role of deference to trial courts in evaluating their credibility; 3) the import of jury selection rules in creating systemic discrimination; and 4) the significance and limitations of the definition of race implicit in the Court's decisions. This discussion is an attempt to think beyond precedence and legal tradition. It is not meant to be a roadmap to legal change—it is far too impractical for that. Rather, it simply aims to provide a critique of the Court's jurisprudence and a view of legal doctrine from outside of the discipline and to suggest alternative pathways for conceiving of rights and fairness in jury selection. The lawyers for *Hernandez* persuasively articulated one alternative fifty years ago. Their voices can illuminate contemporary problems with confidence in the jury selection system.

## **THE QUESTION OF INTENT**

The intent of the prosecutor or jury commissioner has long been the acid test in jury discrimination cases. In 1935 in *Norris v. Alabama* the Supreme Court reviewed the evidence and judged the lower court's findings for the first time in a jury bias case. The Court declared that prima facie discrimination could be shown through a pattern of the absence of blacks from petit juries, not just jury pools. Once this was established, the burden shifted to the state to provide a convincing explanation for the underrepresentation of blacks. Evidence of systematic exclusion was the standard for scrutiny (e.g., no names of African Americans on jury rolls). In contrast to past cases, declarations that jury commissioners did not intend to discriminate were

not accepted as proving nondiscrimination. The Court ruled on the results of the process, rather than the stated intent of the prosecutors and jury commissioners.

In 1965 in the next landmark case on jury bias, *Swain v. Alabama* recognized the use of peremptory challenges to exclude African Americans as unconstitutional. However, it held that petitioners must prove a pattern of systematic exclusion, not only discrimination in their particular case. *Batson v. Kentucky* remedied this by ruling that defendants only had to show that discrimination was a factor in their own trial, rather than having to prove a history of systemic discrimination by shifting the evidentiary burden to the prosecution once the defendant established a prima facie case of bias.

*Batson* developed criteria for determining whether peremptory challenges were used unconstitutionally. First, the defendant must make a prima facie case that discrimination was possible. The prosecution then must offer explanations for their strikes that are racially neutral. Finally, the judge must decide whether any discrimination is purposeful. That is, he must evaluate the persuasiveness of the prosecution's reasons for striking venire members. Yet in case after case, appeals courts assumed that lower courts made the correct determination in balancing evidence of discrimination against prosecutorial explanations. In essence, court decisions were thrown back to the late 1920s and early 1930s when the prosecutor's word that they didn't intend to discriminate was trusted.

The prosecutor in *Hernandez v. New York* offered a "neutral" explanation for the strike—that the potential juror's ability to understand testimony in Spanish may undermine his ability to abide by

the interpreter's version of the testimony. The prosecutor noted that the jurors in question looked away from him and answered hesitantly that they would try to abide by the official interpretation. The Court accepted this reason, noting that he divided the jurors into two categories: those who convinced him they would accept the translator's version and those who would not, and that both categories could include Latinos and non-Latinos. This argument is reminiscent of earlier arguments that there are qualified and non-qualified venirepersons and that the Mexican Americans on the venire just happened not to be qualified. For instance, in *Lugo v. Texas* (decided three years after *Norris*) the sheriff testified, "I know as a fact of my own knowledge that the majority of the Mexican population of this county are unable to speak intelligently in English and are unable to read and write the English language."<sup>1</sup> Based on this subjective judgment, the Texas Court of Criminal Appeals refused to overturn the trial court's finding of fact.

The Court has long focused on the prosecutors' and other state officials' "demeanor" and "state of mind." Returning to *Hernandez v. New York*, the Court noted that the prosecutor offered a reason for his challenges without being prompted to do so, which seemed to demonstrate his good will in the Court's eyes. Could it conversely have demonstrated his heightened awareness of race? If this standard had been applied by the court in *Hernandez v. Texas*, the testimony of the jury commissioners that they did not intend to discriminate but rather chose the most qualified jurors, would be considered race-neutral.

The defense suggested that this standard could exclude *all* bilingual people from serving on juries. Even if this were true, the Court countered, this would not be enough to trigger an Equal

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<sup>1</sup> *Lugo v. Texas*, 124 SW2d 344 (1938) at 348.

Protection issue because “An argument relating to the impact of a classification does not alone show its purpose. Equal protection analysis turns on the intended consequences of government classification.”<sup>2</sup> This is precisely the Achilles’ Heel of the way *Batson* has been interpreted. Any explanation by the prosecutor, as long as it does not specifically mention race, is deemed race-neutral.

In its decision the Court quoted *Arlington Heights v. Metropolitan Housing Development Corporation* as authoritative: “Proof of racial discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”<sup>3</sup> But how does one gauge intention? At one point the prosecutor in *Hernandez* said that he was not even certain whether the jurors in question were Hispanic and didn’t notice how many Hispanics were on the venire. This appears disingenuous, considering the context of his claim. He stated: “Your honor, my reason for rejecting the -- these two jurors -- I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.”<sup>4</sup> He invoked their ethnicity while simultaneously denying knowledge of it. It could be argued that the prosecutor offered race-neutral reasons for his strikes because of his heightened awareness that race could play in the trial.

In an attempt to deny the possibility that he had predisposed ideas that Hispanics would be less likely to convict, a common perception, he further claimed that since the defendant and the

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<sup>2</sup> *Hernandez v. New York*, 361.

<sup>3</sup> *Ibid*, 360, quoting *Arlington Heights v. Metropolitan Housing Development Corporation* (429 U.S. 252, 264-265, 1977). It is interesting to note that the Court depended on reasoning in a case decided *prior* to *Batson*.

<sup>4</sup> *Ibid*, 356.

witnesses were Hispanic, he would have no motive to exclude Hispanics from the jury. This misapplies *Batson* and its progeny in two ways. First, in focusing on the defendant, it glosses over whether the right of the potential jurors not to be excluded from the opportunity to serve on a jury has been improperly denied. As Melilli argues, *Batson*'s often overlooked significance lies in the fact that it shifted the focus of efforts to secure rights from the defendant to prospective jurors. Second, it ignores subsequent decisions that expand *Batson*, including *Powers v. Ohio*, which allows third parties to lodge *Batson* claims on behalf of allegedly excluded jurors. His invocation of the race of the parties involved suggests that he does, indeed, take race into consideration. It means that race matters. In essence, because *Batson* realigns our concern with the juror, rather than the defendant, the prosecutor's explanation of motive moot.

The Court concluded that while the challenges "may have acted like strikes based on race, but they were not based on race. 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. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is."<sup>5</sup> Yet, the Court in *Batson* noted "Circumstantial evidence of invidious intent may include proof of disproportionate impact... We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'"<sup>6</sup> Despite *Batson*'s stand on race-based peremptory challenges, in its interpretation, courts have returned to the pre-*Batson* era in subsequent cases.

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<sup>5</sup> Ibid, 1873-75.

<sup>6</sup> *Batson v. Kentucky*, 93, quoting *Washington v. Davis* 426 US 229 (1976) at 242.



Justice Stevens differs with the Court's interpretation of Batson. In his dissent, he counters, "If any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, 'the Equal Protection Clause would be but a vain and illusory requirement.'" <sup>7</sup> He argues that once a prima facie case is made, "unless the explanation provided by the prosecutor is sufficiently powerful to rebut the prima facie proof of discriminatory purpose," the fact of discrimination rests. That is, he places a greater burden on the prosecution to provide a convincing explanation. He continues, "the Court has imposed on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate. Neither Batson nor our other equal protection holdings demand such a heightened quantum of proof." <sup>8</sup>

The Court did, however, admit that disproportionate impact is relevant to the identification of the prosecution's discriminatory intent. Moreover, they admitted that language ability could be a pretext for race-based challenges and that in an area with a large Latino population, this could exclude a large percentage of jurors. They even noted that there could be less-impacting alternatives, such as permitting Spanish-speaking jurors "to advise the judge in a discreet way of any concerns with the translation." <sup>9</sup>

The test of whether there are alternatives to striking a juror is worthy of consideration. In his dissent, Justice Stevens firmly stated, "An explanation based on a concern that can easily be

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<sup>7</sup> *Hernandez v. New York*, 377, quotes omitted.

<sup>8</sup> *Ibid*, 378.

<sup>9</sup> *Ibid*, 364.

accommodated by means less drastic than excluding the challenged venireperson from the petit jury will also generally not qualify as a legitimate reason.”<sup>10</sup> In this case, he suggests simultaneous translation as an easy fix. Yet despite the Court’s admissions, they still conclude that “in the absence of exceptional circumstances, we would defer to state-court factual findings.”<sup>11</sup>

## QUESTIONS OF CREDIBILITY AND DEFERENCE

This tradition of deference to trial courts, combined with the ways in which the Court evaluates the prosecutor’s credibility, has severely limited the success of *Batson* challenges. Yet, as Justice Kennedy, writing for the majority in *Miller-El v. Cockrell* noted, “Deference does not imply abandonment or abdication of judicial review.”<sup>12</sup>

In *Hernandez v. New York* the Court once again accorded deference to the stated intent of the prosecutor. “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”<sup>13</sup> The Court depends on the subjective impression the prosecutor has of the potential juror. They note, “In the typical peremptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor’s state of mind based on demeanor and

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<sup>10</sup> *Ibid*, 376.

<sup>11</sup> *Ibid*, 366.

<sup>12</sup> *Miller-El v. Cockrell*, 340.

<sup>13</sup> *Hernandez v. New York*, 360.

credibility lies ‘peculiarly within a trial judge’s province.’<sup>14</sup> Why is this the “best evidence?” Are lawyers not paid to convince judges and juries of the truth of their argument? A good lawyer must be persuasive. In many senses, lawyering is a type of acting—so a prosecutor’s demeanor may be the least helpful piece of evidence in evaluating the truth of his claims. In his dissent, Justice Stevens argues that the best evidence of discrimination is “what actually happened,” that is, the outcome of jury selection—the composition of the jury versus the composition of the venire.<sup>15</sup>

In *Miller-El v. Cockrell*, the Court reviewed its decision in *Hernandez v. New York* and then conducted a lengthy discussion of step three of Batson’s framework. Quoting *Purkett v. Elem*, they note “At this stage, ‘implausible or fantastic justifications may (and probably will) be found top be pretexts for purposeful discrimination.’ ...Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.”<sup>16</sup> This stance cedes the ground of truth to the intuition of prosecutors. Unless there is direct evidence of invidious use of the strike, their explanation can be weak and still be accepted. Based on the standard that pretexts are identified only when “fantastic,” it is very unlikely that any savvy prosecutor will provide such reasoning. The “fantastic” standard excludes the possibility that race and class are articulated and that class-based reasons, such as neighborhood residence or employment status can operate to disproportionately exclude racial minorities. Similarly, having

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<sup>14</sup> Ibid, 365.

<sup>15</sup> Kenneth Melilli, “Batson in Practice: What We Have Learned About Batson and Peremptory Challenges,” *Notre Dame Law Review* 71 (1995-96): 447-503. Melilli also suggests that this is the most convincing method used to establish a *prima facie* case of discrimination.

<sup>16</sup> *Miller-El v. Cockrell*, 339, quoting *Purkett v. Elem*, 514 U.S. 765 (1995) at 768.

a personal relationship with someone who was convicted for a felony can disproportionately exclude minorities, given their overrepresentation in the nation's prisons.

Other seemingly race-neutral explanations for strikes appeal to "common sense." But often this conventional wisdom is racially inflected.<sup>17</sup> It is possible that the prosecution and judges do *not* intentionally discriminate but make discriminatory judgments reflecting social "common sense." In his concurrence in *Batson*, Justice Marshall argues, "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported."<sup>18</sup> In support of this supposition, Juan Perea cites a recent example of a case in which the prosecutor struck a venireperson who had a heavy accent because he did not think he would be able to understand the proceedings.<sup>19</sup>

In *Hernandez v. New York*, Justice Stevens similarly points out, "The Court overlooks, however, the fact that the 'discriminatory purpose' which characterizes violations of the Equal Protection Clause can sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign."<sup>20</sup> "Seat-of-the-pants

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<sup>17</sup> Charles Lawrence, "The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism," *Stanford Law Review* 39 (1987):317-388.

<sup>18</sup> *Batson v. Kentucky*, 106.

<sup>19</sup> Juan F. Perea, "*Hernandez v. New York*: Courts, Prosecutors, and the Fear of Spanish," *Hofstra Law Review* 21 (1992):1-61, 17-18. Perea offers several examples of recent cases where other ostensibly race-neutral reasons were given for striking Latino venirepersons that acted suspiciously like strikes based on race. These included the prospective juror's Catholicism and ironically, the idea that having a Hispanic surname does not mean that the venireperson necessarily was Latino.

<sup>20</sup> *Hernandez v. New York*, 377.

instincts,” in Justice Marshall’s words, are often based on conventional wisdom inflected by social prejudices.

Whether or not the prosecutor intends to stack the jury, the result of an unbalanced jury is to undermine confidence in the outcome of the trial and the legal system.<sup>21</sup> There are decades of cases where deference was shown to prosecutors’ explanations, resulting in either the wholesale exclusion of minorities or only nominal inclusion.

## SYSTEMIC QUESTIONS

Justices Marshall and Stevens highlight the possibility that discrimination can result without invidious intent. Discriminatory notions ingrained in society can produce systemic structures of discrimination. These structures continue to produce unrepresentative juries long after the initial invidious intent has been forgotten. For example, real estate covenants are now illegal, but America’s neighborhoods largely remain segregated along racial lines.<sup>22</sup>

In *Hernandez v. Texas*, the Court declared, “But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years.”<sup>23</sup> However, the absence of minorities can *seem* to be mere chance, or at least not the result of purposeful discrimination, because the way the system is structured militates against

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<sup>21</sup> Hiroshi Fukurai, Edgar W. Butler, and Richard Krooth, *Race and the Jury: Racial Disenfranchisement and the Search for Justice* (New York: Plenum Press, 1993).

<sup>22</sup> See Thomas Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton: Princeton University Press), 1996, for an excellent analysis of the impact of racial covenants on continuing inequality.

<sup>23</sup> *Hernandez v. Texas*, 482.

a representative petit jury. Focusing on the intent of the prosecutor helps to construe discrimination as a tort, rather than as unconscious or systemic.<sup>24</sup> It delegitimizes a focus on the rules for juror selection. Yet rules are never neutral; they always advantage some and disadvantage others. In redistricting, for example, districts are drawn by legislatures and usually advantage the incumbents—the very people responsible for setting the rules. Even apart from invidious intent, rules unintentionally still create winners and losers and can have disproportionate impact on certain groups.

Fukurai and Krooth examine every stage leading up to the seating of a jury and detail the ways in which the system misses or dismisses potential jurors who are minorities.<sup>25</sup> This includes the use of voting rolls instead of lists that would encompass a wider range of citizens, the granting of hardship deferments, which disproportionately affects minority participation, and minorities' lower response rate to juror summonses and lack of follow-up by the state, jury qualification processes, and voir dire itself, all which may not be purposeful but which result from historical economic and educational disenfranchisement and which conspire to skew the racial makeup of the jury.

In *Hernandez v. New York* the court accepted the prosecution's reason for striking bilingual jurors as legitimate because jurors it has been accepted practice to allow striking people with knowledge beyond what is presented as evidence. Applying this practice to bilingual jurors, however, serves to eliminate diversity from the jury and to create a racially unbalanced jury. It also casts doubt on the ability of bilingual speakers to exercise good judgment, while at the same

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<sup>24</sup> See Lawrence.

<sup>25</sup> Fukurai and Krooth, chap. 6.

time assuming that monolingual jurors hearing testimony given in English will not make errors in interpreting the information. It presumes that English speakers will make more reliable jurors and that the interpretation of the non-Spanish speaking majority is the neutral standard by which to judge. Given that most people who are bilingual in English and Spanish are Latino, it casts doubt on their ability to responsibly exercise the rights of citizenship. Finally, it upholds the status quo by reinforcing the underrepresentation of Latinos on juries.

The Court has not recognized that language ability maps race because they refuse to admit that Latinos often experience discrimination very similar to racial discrimination based on the fact that they are seen by the majority as part of a subordinate group. Therefore, their exclusion of bilingual venirepersons can appear neutral. In fact, judges have been reluctant to extend the umbrella of the Equal Protection Clause to groups other than African Americans and women. While they often distinguish cognizable groups (as in *Hernandez v. Texas*), they don't require heightened scrutiny to be applied to them beyond the limits of a particular case. In this way, the system protects white dominance by appealing to "neutral" principles. Underlying the Court's confidence in the prosecutors' statements and demeanor is the assumption that he or she will not even unconsciously be discriminatory. It also assumes that a majority-white jury will be able to comprehend the life experiences of defendants and victims who may be very different from them. Finally, it presumes that the selection procedures that produced the jury are neutral.<sup>26</sup> It camouflages white dominance of the system by presenting white people's assumptions, experience and the distinctions they use to structure the rules as unbiased.

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<sup>26</sup> See Jeffrey Abramson, *We, the Jury: the Jury System and the Ideal of Democracy* (New York: Basic Books, 1994), chap. 13 and Fukurai et al., *Race and the Jury*.

Prosecutors in *Hernandez v. Texas* claimed to have race-neutral reasons for excluding Mexican Americans. Yet the Court concluded that the result—an all-white jury pool—“bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.”<sup>27</sup> When dealing with discrimination that is invisible because it is ingrained in the system of rules, only the composition of the jury should qualify as evidence of a fair system.

## QUESTIONS OF RACE

In *Hernandez v. New York* the Court stated, “In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes.”<sup>28</sup> Here, they admit the complexity and imprecision of race, but refuse to engage in a substantive discussion of it. This evasion is a serious abdication of responsibility. How can judges make decisions about the neutrality of explanations for strikes when the very terms they are judging are not defined?

I would argue that language ability is frequently used as a proxy for race. The Court notes that language constitutes “membership in a community,” that is, that Spanish-speakers could be construed as a cognizable group, fulfilling the first test of a *Batson* claim. Further, they admit, “It 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

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<sup>27</sup> *Hernandez v. Texas*, 482.

<sup>28</sup> *Hernandez v. New York*, 371.



analysis.”<sup>29</sup> Yet they conclude, “But that case is not before us.” Given other discrimination cases regarding the use of Spanish in the workplace, this is a flagrant omission.

A deeper discussion of “race” would include speaking a foreign language when that language is a primary language as a marker of difference and would examine when that difference creates a situation of *de facto* discrimination.<sup>30</sup> In *Hernandez v. Texas* the Supreme Court presaged *Batson* by agreeing with defense attorney Carlos Cadena that exclusion on the basis of distinctions other than race can deprive a group of equal protection, and acknowledged that community prejudices change, as do the groups needing protection. Chief Justice Warren explained that “When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.”<sup>31</sup> The justices accepted the evidence Cadena offered that people of Mexican descent were treated as a distinct class.

One way to determine whether a group is treated differently is to study the social order of the community. In *Hernandez v. Texas*, attorney Carlos Cadena did just this. Cadena held that “persons of his national origin” were “intentionally, arbitrarily and systematically” excluded from jury selection. He used the phrase “national origin” in lieu of race because only “black” and “white” were recognized as races, but he showed that “national origin” operated to exclude in the same way as race. For example, people frequently contrasted “Mexicans and whites,” but not “Germans and whites” suggesting that the distinction was rooted in race, not ancestry. He also

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<sup>29</sup> *Ibid*, 371.

<sup>30</sup> Perea, 17-18.

<sup>31</sup> *Hernandez v. Texas*, 478.

provided evidence that the state and federal governments distinguished “Mexicans” from “Negroes” and “whites,” and differentiated people of Mexican descent from other whites. The federal census bureau compiled statistics on “Spanish speaking persons,” the category “Mexican” was used by the Selective Service in World War II, and the Texas Department of Health distinguished them in a separate category from whites. He also showed that Mexicans experienced *de facto* segregation in schools, restaurants, public swimming pools and even in the bathrooms in the very courthouse in Jackson County in which the case was originally tried.<sup>32</sup>

If the *Hernandez v. New York* Court was to model itself after its predecessor in *Hernandez v. Texas*, it would consider such sociological evidence to determine whether language use is melded with notions of race. For example, they could engage in a discussion of the role of continual immigration to the U.S. from Latin America in fueling discrimination against Spanish-speaking people. Or they could consult experts on the sociopolitical aspects of bilingualism.<sup>33</sup> They would note and puzzle over the fact that the federal census includes a separate, non-racial category for “Hispanics,” the only such category, and try to determine its import. Although today there is greater recognition of the complexity of race, enduring notions of Latinos’ racial difference is betrayed by the curious category “non-Hispanic whites” in many governmental and sociological studies.

In one way, however, both Courts were similar. They both deferred the central question: whether Latinos constitute a racial group. Although the Court’s decision in *Hernandez v. Texas* was based

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<sup>32</sup> U.S. Supreme Court, *Records and Briefs, Pete Hernandez, Petitioner vs. the State of Texas* (Washington: Judd and Detweiler, Printers, 1953), 38-40.

<sup>33</sup> See, for example, Ronald Schmidt, *Language Policy and Identity Politics in the United States* (Philadelphia: Temple University Press), 2000.

on the recognition that people of Mexican descent were a distinct class, it declined to rule on whether they constituted a race. While the case has been interpreted to extend the Equal Protection Clause to national origin groups, the Court insisted on using the term “class” (meaning “category”), rather than “race,” to refer to this cognizable group. Thus, it did not extend the mantle of protection to all Latinos. Instead, it returned them to a time in which each defendant must prove that he is part of a cognizable group that experienced discrimination. While it did say that the Equal Protection Clause could cover groups that have “other differences from the community norm,” it fostered an erasure of race that continues to affect the prospects for Latinos’ participation on juries, today. Indeed, in the post-*Batson* era, it can be very difficult for Latinos to prove discrimination in jury selection. Because their racism they encounter is bound up with cultural difference, it seems less invidious than discrimination based solely on skin color. Its complexity makes it harder to prove.

Scholars have shown that race is a social construction and that its contours constantly change.<sup>34</sup> I have argued elsewhere that “Latino” is a racialized ethnic group.<sup>35</sup> This category includes cultural artifacts such as language and religion and encompasses people of many national origins and colors. While a Latino who was born in the U.S. and looks white may be less likely to experience discrimination, they can instantly become racialized when speaking Spanish. Just as race and ethnicity were once joined for non-whites,<sup>36</sup> today, language is often a significant marker of racial difference. Because Latinos are “in-between” black and white, they often

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<sup>34</sup> Michael Omi and Howard Winant, *Racial Formation in the United States* (New York: Routledge), 1994.

<sup>35</sup> Clare Sheridan, “Contested Citizenship: National Identity and the Mexican Immigration Debates of the 1920s,” *Journal of American Ethnic History* 21 #3 (Spring 2002), 3-35.

<sup>36</sup> See Mae Ngai, “The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924,” *Journal of American History* 86 (June 1999), 67-92.

experience discrimination based on race, but that experience is not recognized as discrimination due to the traditional conception of “race” meaning either black or white. Since their experience of discrimination as a group is not recognized as racial discrimination, their claims are treated on the individual level. In *Hernandez v. New York*, the Court reflects this common understanding by pointing to the particular circumstances of the trial. The legal system sanctions what types of discrimination are deemed permissible and impermissible. While the system reflects the social order, it also helps to define and legitimate it. Thus, once it recognized that a cognizable group is treated differently, a responsible Court *would* tackle the larger issue of what constitutes race.

## CONCLUSION

In the majority’s decision in *Miller-El*, the Court noted that “even though the prosecution’s reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and base on racial consideration.”<sup>37</sup>

One can imagine many explanations that appear neutral but are selectively applied. In a thorough review of all cases raising *Batson* inquiries between 1986 and 1993, Kenneth Melilli analyzed the reasons given and found that the majority of them are stereotypes of people in cognizable groups. Indeed, he notes that “evaluating people on the basis of stereotypes is an inherent aspect of the peremptory challenge system.”<sup>38</sup> Moreover, most would be allowed as challenges for cause. Thus, he argues, using peremptory strikes for such people should be disallowed. In his dissent in *Hernandez v. New York*, Justice Stevens concurs. “If the prosecutor’s concern was valid and substantiated by the record, it would have supported a challenge for cause.” He

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<sup>37</sup> *Miller-El v. Cockrell*, 343.

<sup>38</sup> Melilli, 447.

continues, arguing for a significant change in the system of challenges. “The fact that the prosecutor did not make any such challenge...should disqualify him from advancing the concern as a justification for a peremptory challenge.”<sup>39</sup> Melilli concludes that retaining a system with peremptory challenges is antithetical to outlawing racial discrimination in jury selection.

Melilli found that in 78% of the cases in which a prima facie case was made, the prosecutor’s explanation for exercising the strike was accepted as race-neutral.<sup>40</sup> Only 17% of blacks and 13% of Hispanics making *Batson* claims were successful despite the fact that 62% of blacks and 66% of Hispanics were able to make prima facie cases that they may have been discriminated against. To echo the *Hernandez v. Texas* Court, the gap between the *prima facie* case and their ability to prove it is too large to be “mere chance.”<sup>41</sup>

Melilli details 49 cases (of 191) in which prosecutor’s explanations were rejected because they were based on stereotypes of other groups that the potential jurors belonged to. Several of these, such as residence in a high crime area, could be proxies for race. In looking at the entire set of cases, he found that over 52% were based on group stereotypes and close to 4 % on the subjective judgments of prosecutors. The remaining 43% could be addressed by challenges for cause.<sup>42</sup> He objects to those based on group stereotypes because they deny individuals the right to participate on juries. The system of peremptory challenges operates, he argues, to seat favorable jurors. But the role of the state should be to create fair and impartial juries, not juries

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<sup>39</sup> *Hernandez v. New York*, 379.

<sup>40</sup> Melilli, 461, Table E-1.

<sup>41</sup> *Ibid*, 463, Tables E-2 and E-3.

<sup>42</sup> *Ibid*, 497, Table III-R.

that tend to be favorable to one or the other side.<sup>43</sup> Melilli concludes that a system in which challenges for cause were the only option, making them more meaningful, would capture the legitimate concerns of both parties and would eliminate pretextual ones based on group stereotypes or subjective assessments by the prosecution.<sup>44</sup>

Justice Marshall also strongly advocated eliminating peremptory challenges. He declared in his concurring opinion in *Batson*, “The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.”<sup>45</sup> Marshall noted that often *prima facie* cases are not even made unless the challenges are “flagrant.”<sup>46</sup> Moreover, even when a defendant is able to establish a *prima facie* case, it is difficult for trial courts to rebut facially neutral reasons for the strikes. He noted that reasons such as a juror seeming uncommunicative or having a son the same age as the defendant were accepted at face value. He prophetically warns, “If such easily generated explanations are sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial groups, then the protection erected by the Court today may be illusory.”<sup>47</sup>

The most promising grounds for eliminating peremptory challenges may be the Sixth Amendment, rather than the Equal Protection Clause. The Sixth Amendment guarantees that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” The term “impartial” has subsequently been interpreted to refer to a “fair cross-section” of the community, though the Court noted in *Holland v. Illinois* that it does not require the actual composition of the

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<sup>43</sup> Ibid, p. 499.

<sup>44</sup> Ibid, 496-487.

<sup>45</sup> *Batson v. Kentucky*, 102-3.

<sup>46</sup> Ibid, 105.

<sup>47</sup> Ibid, 106.

petit jury to be representative of different groups in the community.<sup>48</sup> Despite this ruling, it seems that a focus on the rights of potential jurors, rather than defendants, requires a reexamination of the Sixth Amendment guarantee. One year after the decision in *Holland*, the Court held in *Powers v. Ohio* that *Batson* did, indeed, apply to the right of jurors not to be excluded from the possibility of serving on a jury. It further held that the defendant could make a *Batson* claim regarding the exclusion of black members of the venire even though the defendant, himself, was white.<sup>49</sup> Melilli argues that *Batson* caused a largely unrecognized sea-change in focusing on the right of prospective jurors to serve, rather than on the rights of the defendant. He offers *Powers v. Ohio* as evidence that the logical conclusion flowing from *Batson* is the right of potential jurors to have a genuine opportunity to serve on a jury.

Indeed, a case could be made that over history, the Court has progressively expanded its understanding of bias in jury selection. It has extended its reach at each stage, recognizing different forms of bias and methods of exclusion. If Melilli's argument that *Batson* has shifted the focus from the Equal Protection rights of defendants to the Sixth Amendment rights of prospective jurors is correct, then a rethinking of the Court's current position is in order. To some extent, the Court has recognized that it has made this shift in focus, yet it repeatedly returns to language of intent and Equal Protection vis-à-vis defendants.

A focus on the rights of potential jurors, however, requires a more thorough analysis of methods of exclusion and creative thinking about ways to ameliorate non-representative juries. As notions of race evolve, it also requires a rethinking of what constitutes racial discrimination. Finally, as

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<sup>48</sup> *Holland v. Illinois*, 110 S.Ct. 803 (1990), 816.

<sup>49</sup> *Powers v. Ohio*, 111 S.Ct. 1364 (1991), 1374.

the focus shifts from the defendant to the juror, the terrain of the debate must move from purposeful discriminatory intent to disproportionate effect. Reflecting our discussion of systemic bias, Justice Stevens concludes, “The line between discriminatory purpose and discriminatory impact is neither as bright nor as critical as the Court appears to believe.”<sup>50</sup>

The Court objects that allowing examination of disproportionate effect would flood the system with *Batson* claims, causing chaos and undermining the purpose of the peremptory challenge. In their concurrence, Justices O’Connor and Scalia insist, “Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all. The peremptory challenge is, “as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.”<sup>51</sup> This is precisely where the peremptory challenge fails. The Court has chosen to limit its usage only on the grounds of race and gender. It has created a system where challenges to it are frequent, but has made it nearly impossible for defendants to prove their *Batson* claims. As Melilli concludes, “A system which...seeks to accommodate both the inherent aspects of the peremptory challenge and the scrutiny of anti-discrimination laws is one which seeks a middle ground which either does not exist or is impossible to locate.”<sup>52</sup> The two purposes simply can not coexist.

In his decision in *Batson*, Justice Powell worried that confidence in the justice system has been undermined. Indeed, the legitimacy of a democratic system of justice rests on the confidence of its citizens in its fairness. In recent years, that confidence has eroded along racial lines. The use

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<sup>50</sup> *Hernandez v. New York*, 377-78.

<sup>51</sup> *Ibid*, 374, quoting *Lewis v. United States*, 146 U.S. 370 (1892).

<sup>52</sup> Melilli, 483.



of peremptory challenges plays a large role in this perception. The opportunities to both serve on a jury and to be judged by a jury that has been chosen fairly may improve citizens' confidence in the system, but only if we recognize that discrimination can take many forms and is accomplished through many methods. The current crisis of legitimacy in the judicial system around racially charged cases suggests that we need to have a national conversation about bias recognizing that non-representative juries are inimical to justice.