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**THE WRONG MESSAGE
AT THE WRONG TIME**

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by

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THE WRONG MESSAGE AT THE WRONG TIME

In its 1991 *Hernández v. New York*¹ opinion, the United States Supreme Court dealt the cause of bilingualism a serious setback. In that case the Court confronted the question of whether prosecutors could eliminate from jury service persons who prosecutors "feel" might not abide by the official interpretation of the testimony of witnesses who do not speak English. A plurality² of the Court held that unless the accused persuades the trial judge that the prosecutor removed these individuals, known as venirepersons, on account of their race or ethnicity, their removal from the case would not violate the Equal Protection Clause.³

The Court's holding is wrong for a number of reasons. First, the Court prescribed the wrong remedy for correcting inaccuracies by court interpreters. Disqualifying from jury service individuals who can call attention to such inaccuracies does not advance a trial's goal of searching for the truth.

Second, the Court's decision lends support to a deeply embedded but disturbing belief that retaining a language in addition to English threatens to undo the fragile bonds that bind our society. America is one of the few developed nations in which mastery of a foreign language is viewed with suspicion. This is especially true if the speakers acquired their foreign language skills from their families rather than through formal study. To these speakers, the Court's decision is but another painful reminder of how proficiency in another language is a liability, not an asset.⁴

The Court's decision, moreover, ignores demographic reality. In the last thirty years, America has become an increasingly multicultural and multilingual society. Positive relations among the different cultural and linguistic groups require a respect for differences that is not reflected in the Court's opinion. Neither does the opinion evidence an awareness that in an increasingly interconnected world our capacity to influence events will be materially enhanced by our ability to draw on the rich inventory of languages many Americans command. As the Twentieth Century draws to a close, our insistence on viewing foreign language proficiency with suspicion bears renewed examination.

Finally, the standard which the Court said the accused must meet guarantees that most defendants will be unsuccessful in challenging the state's use of peremptories to exclude venirepersons who happen to know the language spoken by non-English speaking witnesses. Since many, if not most, of these venirepersons will be members of minority groups, the Court's holding will ensure the disproportionate exclusion of members of

these groups from participating in an important community function — determining the guilt or innocence of those charged with crimes.⁵

THE WRONG REMEDY

Presumably, the justification for *Hernández* is the view that in arriving at their verdict jurors should employ a common fund of information. Under our adversary system, it is up to the parties to bring all helpful information to the trier of fact; it is up to the judge, upon motion of the opposing party, to delete from the information all data which under the rules of evidence are inadmissible.

The insistence on a common fund has been expressed in various ways. Jurors, for instance, are told to avoid news accounts of the trial, are routinely instructed to refrain from discussing the case with anyone until they begin deliberations (and then to discuss the case only with their fellow jurors), and, if they have heard about the case prior to trial, to set aside any impressions they may have formed about the case.

Underlying the common fund view is the assumption that in an adversary system the parties are entitled to challenge and test the information upon which the jury will rely. Jurors who use information "outside the record" become in essence untested evidentiary sources. It is for this reason that some jurisdictions have disapproved or discouraged experiments by jurors.⁶

In the context of *Hernández*, it is apparent that jurors who insist on relying on their own interpretation of what a non-English speaking witness says pose a serious challenge to the idea of having jurors rely on a common fund of information. Presumably, such jurors should not serve on the jury; they have announced their intention not to abide by the evidence presented in the case.

That, however, was not the situation presented in *Hernández*. In response to the prosecutor's questions, the venirepersons said that they "would try" to abide by the interpreter's interpretation.⁷ When questioned by the judge, they said that they "could."⁸ The prosecutor nonetheless struck them peremptorily because he "just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it."⁹ But as defense counsel pointed out, any honest venireperson would have answered the prosecutor's questions in the same way.¹⁰ Without knowing anything about the interpreter's ability to interpret accurately, they could only promise to try to abide by the interpreter's interpretation.

That, of course, raises a troubling question. If a bilingual juror believes that an official interpretation is wrong, why should the presumed error be ignored? If in fact the interpreter is wrong, *Hernández* would require the bilingual juror to ignore the error and refrain from bringing it to the attention of the other jurors. It would seem that interests in accurate fact finding would dictate a different rule: one that would not disfavor the selection of bilingual jurors who can bring to the judge's attention serious errors in interpretation.¹¹ As Justice Stevens noted in his dissent, bilingual jurors should be instructed to bring to the judge's attention any disagreements they have with the translation so that any disputes can be resolved by the judge.¹²

Empowering bilingual jurors to raise such errors would not necessarily be unduly disruptive. In trying criminal cases, I have occasionally objected to an official interpretation. Usually, the result is a concession of error by the interpreter. Only in a few instances, have my objections resulted in replacing the interpreter. And even then, there was no need to declare a mistrial. The hearing proceeded but with a qualified interpreter.¹³

Hernández, however, precludes the use of bilingual jurors in identifying errors in interpretation. To avoid peremptory removal, bilingual venirepersons must convince the prosecutor that they will abide by the official interpretation even if they believe the interpreter to be wrong. By compounding rather than solving the problem of interpretation, *Hernández* is a bar to accurate fact finding.

PEREMPTORY CHALLENGES AND MINORITY GROUPS

By virtue of the Sixth Amendment, an accused is entitled to trial by jury in all prosecutions for non-petty offenses.¹⁴ These offenses can be punished by more than six months incarceration.¹⁵ Many jurisdictions exceed the constitutional command by providing jury trials also for offenses punishable by lesser periods of time. But whether for petty or non-petty offenses, the justifications for trial by jury are the same: to protect the accused, in the Court's words, from the "overzealous prosecutor" and the "biased judge."¹⁶

Requiring prosecutors to persuade jurors of the accused's guilt beyond a reasonable doubt helps dissuade prosecutors from bringing unfounded charges. But interposing community members between the state and the accused does not mean that the accused is entitled either to a jury that mirrors the community racially or that is biased in the accused's favor. The prosecution as well as the accused is entitled to an impartial jury.

Jurisdictions employ a variety of methods to achieve an impartial jury. Venirepersons may be excused from jury service for "implied bias" if they are related to the parties or the victim, or have an interest in the outcome of the trial.¹⁷ They may also be excused "for cause" if for some reason they cannot be impartial to one of the parties.¹⁸ Challenges for cause require the moving party to persuade the trial judge that the venireperson is biased. The judge will base the ruling on the evidence produced at the examination of the venireperson and on the arguments of counsel.

Finally, venirepersons can be removed "peremptorily." Many jurisdictions permit each side to eliminate prospective jurors without having to state a reason.¹⁹ Peremptory challenges are limited in number, often varying with the gravity of the offense charged.²⁰ Challenges for cause, on the other hand, are limitless.

Nothing in the Constitution, however, requires the states or the federal government to provide peremptory challenges. Since challenges for cause are limitless, the appropriate use of these challenges should result in forming an unbiased jury. Peremptory challenges nonetheless date back to the earliest days of the common law and probably stem from the adversarial nature of common law trials.²¹ Since to prevail parties must persuade jurors to accept their version of the events at issue, parties have an interest in removing venirepersons for real as well as imagined bias.

Suspicious about a venireperson's impartiality may not rise to the level of cause. They may be based on the "hunches" and "feelings" trial lawyers develop. While there may be value in giving effect to these suspicions,²² a system which does not require an explanation for the use of peremptories can be misused to exclude disfavored groups from jury service.

The United States Supreme Court has made it clear that prosecutors may not use peremptories to exclude African Americans²³ and Mexican Americans²⁴ from juries on account of their race or ethnicity. But the Court has failed to fashion an effective remedy. Indeed, in its first foray into the area, the Court produced an opinion that actually advanced, rather than restrained, the improper use of peremptories. In *Swain v. Alabama*²⁵ the Court held that to make out a constitutional claim against the misuse of peremptories it was not sufficient for the accused to demonstrate that the prosecutor had eliminated all minority venirepersons. Instead, the accused would have to show that a prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners

and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries."²⁶

It took the Court over twenty years to acknowledge the "crippling burden of proof" *Swain* imposed on the accused. In *Batson v. Kentucky*²⁷ the Court replaced *Swain* with new standards. Today, the accused can make out a prima facie case of purposeful discrimination by relying solely on the evidence of the prosecutor's conduct at the trial. No longer must the accused offer evidence of the prosecutor's conduct at other trials. Now, evidence that the prosecutor struck minority venirepersons at the accused's trial can give rise to an inference that the prosecutor impermissibly struck them on account of their race or ethnicity.²⁸ Once the accused makes this showing, the "burden shifts" to the prosecution to come forward with a "neutral explanation" for removing the minority venirepersons.²⁹ After the trial judge has heard from both sides, the judge must then decide whether the accused has carried the burden of proving that the prosecutor removed the minority venirepersons on account of their race or ethnicity. If the judge agrees with the accused, the judge will grant the accused's motion for a mistrial; if not, jury selection will be completed or, if finished, those selected will be sworn as jurors.³⁰

Because the *Swain* standards could not be met, their replacement by *Batson's* seemed like a sensible approach to the exclusion of racial and ethnic minorities from jury service. *Batson*, however, does not provide an effective remedy for a number of reasons.

First, the Court insists that the accused persuade the trial judge that the prosecutor removed minority venirepersons because the prosecutor wanted to prevent minorities from serving on the jury.³¹ Requiring proof that a person acts purposely is not novel in the law, especially criminal law. In homicide prosecutions, for example, the state can prove that a killing was murder by evidence that the accused intended to take the life of the victim.³² But murder, which is the most heavily punished crime in most jurisdictions, can also be proved by evidence that the killer was aware that it was practically certain that his conduct would result in the victim's death. Indeed, in common law jurisdictions the state need only prove that the killer was aware that his conduct posed a substantial risk of death to the victim.³⁴

Lesser states of mind, however, will not do for the Court. Knowing that one's use of peremptories will exclude minority venirepersons from jury service is not enough. Though the harm to the accused and the excluded venirepersons is the same, the accused will lose under the Court's formulation unless the accused persuades the trial judge that the prosecutor was

motivated by a desire to remove minority venirepersons because of their race or ethnicity.³⁵

Second, the Court has imposed seemingly unusual and unjustifiable limitations on the value of the accused's evidence of intentional discrimination. In a sharp departure from the customary use of circumstantial evidence, the Court seems to believe that, as a matter of equal protection law, the exclusionary effect of the prosecutor's use of peremptories can never establish the prosecutor's impermissible motive.³⁶ Since only in the rarest of cases will a prosecutor admit removing venirepersons on account of their race or ethnicity, defendants will have no choice but to rely on the circumstances attending jury selection to prove the impermissible motive. In all cases the evidentiary centerpiece will be the prosecutor's use of peremptories to remove some or all of the minority venirepersons. If, as a matter of equal protection doctrine, the trial judge cannot use this evidence to conclude that the prosecutor acted impermissively, then defendants can expect to lose their challenges to the prosecutor's use of peremptories.³⁷

Third, the Court has placed the burden of persuasion on the wrong party. Though the Court has not defined the precise standard by which the accused must persuade the trial judge that the prosecutor acted impermissibly, it is clear from the opinions that it is the accused who bears this burden.³⁸ Why this should be so has never been explained by the Court. Presumably, the Court intuitively relied on the principle that allocates to the party who has the burden of pleading a fact (here, that the prosecutor acted impermissively) the additional burdens of producing evidence of that fact as well of persuading the factfinder of the existence of the fact.³⁹ But that is not the only allocative principle. Another, for example, provides that where the facts with regard to an issue lie peculiarly within the knowledge of a party, that party has the burden of proving that issue.⁴⁰ Since a prosecutor best knows why he removed a minority venireperson, applying this rule would require the prosecutor to persuade the trial judge that he did not remove the prospective juror simply on account of race or ethnicity.

Allocating the burden of persuasion on the issue of motive is crucial in challenges to the prosecutor's use of peremptories. Because prosecutors will offer race-neutral reasons for removing minority venirepersons, judges will rule for defendants only if they disbelieve the prosecutor's explanations. Since judges are unlikely to disbelieve representatives of the state who regularly appear before them, the most that defendants can hope for is placing the judges in a position where they simply do not know who to believe. This condition, known as equipoise in the law, means that the party with the burden of persuasion on the issue will lose. Allocating to prosecutors the risk of non-persuasion on the issue of motive would require them to persuade the judges

of the truth of their race-neutral explanations or risk a mistrial.

Allocating the risk of non-persuasion to prosecutors would not be unfair, since it is they who best know the reasons for striking minority venirepersons.⁴¹ More importantly, allocating the burden to prosecutors would finally put some teeth, though not many, into the anti-discrimination laws if the Court is truly serious about preventing the exclusion of minorities from jury service.⁴²

THE POTENTIAL EFFECTS OF *HERNÁNDEZ*

In *Hernández* the accused argued that because Spanish-language ability bears a close relationship to ethnicity in New York, where the case was tried, the peremptory removal of bilingual venirepersons was tantamount to removal on account of ethnicity.⁴³ The Court declined to address the argument. The Court did concede, however, that removal of bilingual venirepersons who the prosecutor felt would not abide by the official English translation "might well result" in the disproportionate removal of Latino venirepersons.⁴⁴ But in view of its equal protection position, the Court held that such an effect would not render their removal unconstitutional; the accused still has to prove that the prosecutor's true motive was to prevent bilingual Latinos from serving on the jury.⁴⁵ Thus even if foreign language proficiency correlated perfectly with ethnicity, under the *Batson* standards such statistical perfection would be of scant use to the accused. The problem, then, is not the degree of correlation but the Court's use of standards far removed from the realities of the courtroom.

Data from the 1990 Census provide a rough indication of the potential exclusionary effects of the Court's *Hernández* decision. These data indicate that as of the time of the census, one in [?] persons residing in the United States spoke English as well as another language. The data also show that [??] of these bilinguals claimed an ethnic background that qualifies for protection under the Equal Protection Clause.⁴⁶ It is these ethnic bilinguals, the pool eligible for peremptory removal under *Hernández*, who are the focus of this article.⁴⁷ As of 1990, they numbered [?].

The actual number subject to removal, while lower, cannot be known. Available data, for example, do not show the probability that an ethnic bilingual will be called for jury service. Nor do the data disclose the percentage of ethnic bilinguals who would meet jurisdictional requirements for jury service. Neither do the data show the probability that in a given trial a non-English speaker will be called as a witness. Nor do the data show that in such a trial an ethnic bilingual called for jury service will

understand the language spoken by a non-English speaking witness.

The point, though, is not the difficulty in arriving at precise figures. Thin as the *Batson* protection may be, the Court has now stripped it of members of ethnic groups whose members happen to know or understand the language of a non-English speaking witness.

A better measure of the *Hernández'* harmful effects is the decision's inevitable impact not only on ethnic bilinguals but on all ethnic minorities whose group identity is inextricably bound to a language other than English.⁴⁸ To Chicanos, for example, Spanish is central to the concept of who they are.⁴⁹ In assessing *Hernández'* effects, it is quite unimportant that some Chicanos are monolingual English speakers. What matters is that other Chicanos can be barred from jury service because of their proficiency in the language parents or grandparents spoke. They need not know Spanish to appreciate their membership in a broader community with shared grievances and common aspirations. To such groups, language is inseparable from identity. To slight the language is to devalue the speakers and their descendants.⁵⁰

An awareness of the close tie between ethnicity and language is not limited to members of linguistic minorities. Texas Anglo politicians, for example, understood the intimate connection well. When they finally had to campaign for the Mexican American vote, they used to stress how their daughters, whom we could not date, were "taking Spanish." [change to "their children were 'taking Spanish.'"]

Excluding bilinguals of color from jury service may be especially offensive to groups who view the retention of ancestral tongues as a way to fend off majoritarian cultural hegemony. The need to retain a separate identity is perhaps strongest among those groups of Americans who have been denied full entry into the mainstream on account of their color and ethnicity. The need may be especially pronounced among Native Americans, Chicanos, and others whose ancestors found themselves in this country as a result of conquest or annexation. Thus to Mexican Americans the English Only movement is but the latest in a long line of efforts by some to keep them in a state in which their interests are subordinated to those of the dominant group.

Growing up in South Texas we knew as kids that the "no speaking Spanish on the playground" rule had a pedagogical purpose. But we also appreciated the sinister ends it served. To communities such as ours, *Hernández'* meaning is unmistakable: because of who we are linguistically and ethnically, we are placed once more in a disfavored position; this time our language is used to deny us equal entry into the jury box.

Hernández exacts other costs as well. It reinforces an almost uniquely American provincialism that holds that the retention of native languages (other than English) is bad. This attitude probably stems from fear that a multilingual, multicultural society cannot long endure; that ethnic conflicts and rivalries are certain to tear the nation apart.

While conflicts in other societies support this view, evidence for it is strikingly lacking in our own. Our history is replete with examples of acts of heroism and sacrifice by Americans from linguistic groups denied full citizenship. Mexican Americans were the most decorated group in World War II even though they often communicated only in Spanish.⁵¹ A division of Japanese Americans that fought in Europe was the single most decorated division in the war, even though many members were as comfortable with Japanese as with English. The Japanese Imperial Army was unable to crack the "secret" code of American forces whose commanders had the foresight to use Navajos in key communications positions.⁵³ Tellingly, the greatest threat to the Republic has come, not from linguistic minorities, but from native English speakers mainly of English stock who wore the Confederate gray.

The lack of evidence notwithstanding, we continue to indulge our fears. An unfortunate result is our propensity to see proficiency in a foreign language as a liability rather than a gift.⁵⁴ We may admire the multilingual abilities of Europeans but view American children who start school knowing only a foreign language as problem children. Rather than help them retain this asset, we immerse them in programs designed to convert them into monolingual English speakers and thinkers in the shortest time possible.⁵⁵ In the process we strip them of an asset and a sense of self that would serve them and us well. The fact is that we were and are a multicultural, multilingual society that draws much of its strength from its diversity. Exploiting this strength fully will require a respect and tolerance for differences which we have yet to achieve.

The fact is also that we live in an increasingly interdependent world in which effective communication is essential to success in economic, diplomatic and other spheres. Our ability to compete in this new world can only be enhanced if we allow ourselves to preserve and draw on the rich inventory of languages many Americans speak. But capitalizing on this asset will require a change in our attitude toward foreign language proficiency. Supreme Court decisions such as *Hernández* do not help.

LEGISLATIVE REMEDIES

While one can always hope, there *is* no reason to believe that the Court will mend its ways and add the teeth necessary to make *Batson* challenges effective.⁵⁶ At the time *Batson* was decided, Justices Brennan and Marshall were still on the Court. They had yet to be replaced by Justices Souter and Thomas. Though Justice Thomas was not yet on the Court when *Hernández* was decided, Justice Souter was, and he voted with the plurality to uphold the peremptory removal of the bilingual jurors. Perhaps most dismaying, the three Justices most likely to appreciate the harmful effects of *Hernández* voted to uphold the peremptory removal of the bilingual jurors. Justice Kennedy, who wrote the plurality opinion, Chief Justice Rehnquist who joined him, and Justice O'Connor who concurred, are from Western states with large Spanish speaking populations.⁵⁷ Obviously, the necessary teeth will have to be supplied by Congress and the state legislatures.

One solution would be for legislators to place on prosecutors the burden of persuading the trial judge that their removing members of protected groups from venires was not prompted by the venirepersons' ethnicity. Because ethnicity and foreign language proficiency can correlate highly, in those circumstances the prosecutors must also bear the burden of convincing the trial judge that their strikes were not prompted by the venirepersons' ethnicity. Legislators should also make clear that judges are free to consider the disproportionate effects of a prosecutor's strikes of minority venirepersons as circumstantial evidence of intentional discrimination.

If the administration of peremptory challenges proves too cumbersome,⁵⁸ another solution would be to abolish them altogether.⁵⁹ Justice Marshall favored this approach, even though it would also strip the accused of the challenge.⁶⁰ As between the accused and the state, he argued, "[T]he scales are to be evenly held. We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the State to eliminate the defendant's peremptory as well."⁶¹

1. ___ U.S. ___, 111 S.Ct. 1859 (1991).
2. Joining Justice Kennedy in the plurality opinion were Chief Justice Rehnquist, and Justices White and Souter. Justice O'Connor, who was joined by Justice Scalia, concurred in the judgment affirming the judgment of the New York Court of Appeals. Justices Blackmun and Stevens filed separate dissents; Justice Marshall joined Justice Stevens' dissent.
3. Although *Hernández* was a criminal case, the effect of excluding minorities from juries – whether on account of their race or foreign language proficiency – is the same on the excluded venirepersons irrespective of whether the case is criminal or civil, or the excluding party the state or the accused, or a civil plaintiff or defendant. Because *Hernández* dealt with exclusion by prosecutors, this essay takes that perspective. But the arguments against prosecutorial abuse of peremptory challenges apply as well to all parties to a jury action, whether criminal or civil.
4. Indeed, as even the plurality concede, "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." *Hernández v. New York*, supra note 1, at 1872.
5. This essay focuses on the negative effects of excluding distinct groups, especially bilinguals of color, from jury service. There are, in addition, positive reasons for *including* distinct groups on juries. These include the need to counterbalance biases and to view the evidence from multiple as well as different perspectives. Inclusion is believed by some to further the search for the truth. For an excellent summary and discussion of these factors, see Kristine Rollinson, "The Racial Use of Peremptory Strikes," on file with *The Stanford Law and Social Policy Review*.
6. C. McCormick, *McCormick on Evidence* § 217 (3d ed. 1984).
7. *Hernández v. New York*, supra note 1, at 1864-1865.
8. *Id.*
9. *Id.*
10. *Id.* at 1867.
11. Accurate interpretation may require more than a literal rendition into English. Communication is not limited to language; it includes modulations in voice, gestures, and other factors. See, e.g., Berk-Seligson, "The Importance of

Linguistics in Court Interpreting, 2 La Raza Law Journal 14, 17-18 (1988). These factors are beyond the scope of this essay.

12. Hernández v. New York, supra note 1, at 1877.

13. Since the adversarial system of trials depends on party initiative to generate the information presented to the fact finder, a neutral judge to screen the information, and an impartial jury to weigh it, the interrogation of witnesses by jurors would seem to pose great threats to the system's integrity. Yet, all jurisdictions that have considered the issue have allowed jurors to ask questions. *Alien v. Texas*, 807 S.E. 2d 639, [cite page] (Texas Court of Criminal Appeals 1991). To prevent undue harm to the parties, jurors must usually present their questions in writing to the judge, who then screens them. Issues of admissibility are resolved outside the presence of the jury before the judge asks the questions of the witness. *Id.* at [cite page].

If the adversarial system can accommodate jury questioning without apparent damage, then more so can it tolerate jurors' challenges to the accuracy of an interpreter's translation. My experience is that a short interrogation by the judge in the presence of the jurors will generally suffice to clear up questions regarding the accuracy of the translation.

14. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

15. *Baldwin v. New York*, 399 U.S. 66 (1970).

16. *Duncan v. Louisiana*, supra note 14, at [cite page].

17. See, e.g., California Civil Procedure Code § 229.

18. See, e.g., California Civil Procedure Code §225(b)(1).

19. See, e.g., California Civil Procedure Code §226(b).

20. See *id.* at § 231.

21. *Swain v. Alabama*, 380 U.S. 202, [cite page] (1965).

22. It far from clear that peremptories actually help the party exercising them. In an experiment that compared the votes of jurors with those of venirepersons eliminated by peremptories, researchers found that prosecutors had not improved their positions and that defense lawyers were only marginally better off than if they had selected the jurors randomly. Zeisel and Diamond, "The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal Court," 30 *Stanford Law Review* 491, 513-518 (1978). [check accuracy of note language with the article]

23. *Batson v. Kentucky*, 476 U.S. 79, [cite page] (1986). It is not necessary for the accused to be a member of a recognized minority group in order to challenge the prosecutor's use of peremptories. "[B]ecause racial discrimination in the selection of jurors 'casts doubts on the integrity of the judicial process,' * * * and places the fairness of a criminal proceeding in doubt", a white defendant has the same right as a defendant of color to object to the prosecutor's conduct. *Powers v. Ohio*, _ U.S. __, 111 S.Ct. 1364, [cite page] (1991). Moreover, because the constitutional rights of the excluded venirepersons are implicated as well, even a party to a civil action has standing to complain about the opposing party's removal of minority venirepersons. "[D]iscrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination -in a criminal trial." *Edmonson v. Leesville Concrete Co.*, _ U.S. __, 111 S.Ct. 2077, [cite page] (1991). The Court, however, has not decided whether the prosecution can object to the accused's use of peremptories to remove minority venirepersons on account of their race. That question is now before the Court. *State v. McCollum*, 26 Ga. 473, 405 S.E. 2d 688, cert. granted, _ U.S. __, 112 S.Ct. 370 (1991) [get correct cite (name) for the Georgia case].

24. [cite case][also cite any additional groups that have been protected by the Court (as well as the cases protecting them)].

The Court's stated aim in *Batson* was to prevent prosecutors from achieving an end closed to the state. "Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson v. Kentucky*, 476 U.S. 79, at [cite page] (1986).

Although the defendant in *Hernández* was Latino, the prosecutor argued that the defendant's ethnicity was not the reason for striking the Latino venirepersons. Since the crime victims in the case were also Latino, the prosecutor argued that he had no motive to remove Latino venirepersons. *Hernández v. New York*, *supra* note 1, at 1865.

25. 308 U.S. 202 (1965).

26. *Id.* at [cite page].

27. 476 U.S. 79 (1986).

28. *Id.* at [cite page].

29. *Id.* at [cite page]. Some reasons will not qualify as a "neutral explanations" as a matter of law. "[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race

on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race. * * * Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in individual selections." *Id.* at [cite page].

30. *Id.* at [cite page]. Justice Stevens does not agree with the plurality's formulation of the *Batson* standards. To him, the accused's prima facie case gives rise to an inference that the prosecutor acted impermissively. That inference entitles the accused to win the *Batson* challenge, unless the prosecutor's explanation "is sufficiently powerful to rebut the prima facie case of discriminatory purpose." *Hernández v. New York*, supra note 1, at 1876. Only then would Justice Stevens require the accused to prove that the prosecutor's explanation is but a pretext for intentional discrimination. *Id.*

31. *Id.*

32. See, e.g., American Law Institute, Model Penal Code §§ 210.1-210.2; California Penal Code §§ 187-188.

33. See, e.g., American Law Institute, Model Penal Code 210.2(a).

34. See, e.g., California Penal Code § 188.

35. *Batson v. Kentucky*, supra note 27, at [cite page].

36. Citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the plurality stated, "[D]isparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, but it will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry. An argument relating to the impact of a classification does not alone show its purpose." *Hernández v. New York*, supra note 1, at 1867 (1991). Later, however, the Court appeared to retract this declaration when it stated that "a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination." *Id.* at 1873. Which principle controls is not clear.

37. Where the substantive law requires a party to prove that another acted purposely, that proof may consist of direct or circumstantial evidence. For example, direct evidence that a killing was intentional may consist of the accused's confession that he intended to take the life of the victim. Where direct evidence is unavailable, the prosecution may rely on such circumstantial evidence as the accused's presence at the crime scene or ownership of the lethal weapon. While circumstantial evidence may not as convincing as direct evidence, that

difference may be taken into account by the fact-finder in determining whether the requisite state of mind has been established. In the absence of overriding policy considerations, however, that difference does not justify a rule, such as the Court's, precluding the use of the effect of the prosecutor's strikes in establishing the requisite state of mind.

38. *Hernández v. New York*, supra note 1' at 1866; *Batson v. Kentucky*, supra note 27 at [cite page].

39. C. McCormick, supra note 6 at §337 (3d ed. 1984).

40. *Id.*

41. "Knowing" whether one's motive was to remove venirepersons on account of their race presupposes a self-awareness of racial motives that may be non-existent, or at least not as deep as one might think. As Justice Marshall emphasized, a chief danger of *Batson* is that the unconscious racism of both prosecutors and trial judges will remain undetected despite their best intentions to comply with the law. *Batson v. Kentucky*, supra note 27, at [cite page] (concurring opinion). For a discussion about the degree to which all of us are subject to unconscious racism, see Lawrence, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 *Stanford Law Review* 317 (1987).

42. There is an additional reason why *Batson* is not an effective bar to the intentional removal of minority venirepersons. A reviewing court cannot disturb the trial judge's finding that the prosecutor did not impermissively discriminate unless the finding is clearly erroneous. *Hernández v. New York*, supra note 1, at 1869 (1991). Since the trial judge's finding will be based in part on the judge's assessment of the prosecutor's credibility, including the prosecutor's demeanor, applying a deferential review standard in effect insulates the trial judge's finding from appellate scrutiny. Thus, even if appellate judges do not find a prosecutor's race-neutral explanations convincing, that skepticism will not result in setting aside the trial judge's finding.

43. *Hernández v. New York*, supra note 1, at 1866-1867.

44. *Id.*

45. *Id.*

46. For a list of groups protected from peremptory removal by the Equal Protection Clause, see supra notes 23-24.

47. Non-ethnic bilinguals who also speak the language of non-English speaking witnesses can also be challenged under *Hernández*. Indeed, one of the bilingual venirepersons struck by the prosecutor in *Hernández* may not have been a Latino. See *People v. Hernández*, 528 N.Y.S. 2d 625, 626 (1988). [check accuracy of this statement and cite] As discussed, excluding bilinguals who are not minorities also exacts significant costs. They too are prevented from bringing to the judge's attention error in the official translation.

48. Although the relationship between language and ethnicity is in some senses obvious, it can be quite complex. Not all Latinos, for example, will be equally offended by the idea that some Latinos can be peremptorily removed on account of their Spanish proficiency. The degree of the offense may depend on such factors as national origin, region, proficiency in English and Spanish, the number of generations a family has lived in the United States, and the extent to which a particular individual believes that he or she has been assimilated into the mainstream culture.

49. Even the plurality in *Hernández* was willing to recognize that in a given locality Spanish is the language "used to define the self." *Hernández v. New York*, supra note 1, at 1868.

50. For example, Mexican Americans protested a 1960s TV program that caricatured them as speakers of English with a heavy Spanish accent. The fact that many Mexican Americans spoke flawless English helped spur the protest. Mexican Americans felt that it was inaccurate to portray all Mexican Americans as "incompetent" English speakers. Mexican Americans, including those who did not speak Spanish, also believed that it was nonsensical to trivialize a fellow American of Mexican origin who spoke Spanish and English, albeit with an accent. Moreover, many were offended by what they considered to be an unfair attack on a trait exhibited by many fellow Mexican Americans, namely, speaking English with a Spanish accent.

51. [cite]. "Mexican Americans have received proportionately more Medals of Honor than any other ethnic group." National Council of La Raza, "The State of Hispanic America," quoted in "Latino Leader Calls for Aggressive Attack on Inequalities," *San Francisco Chronicle*, p. [cite page], February 7, 1992.

52. [cite][check with Bill King.]

53. [cite][check with Yvonne Nakahagashi who just got a book on the subject.]

54. See Kenji Hakuta, "Bilingualism as a Gift", Working Paper Series No. 32, Stanford Center for Chicano Research (Spring 1991).

55. See Kenji Hakuta, "Distinguishing Between Proficiency, Choice, and Attitudes in Questions about Language for Bilinguals", Working Paper Series No. 33, Stanford Center for Chicano Research (Summer 1991).

56. One commentator found that no North Carolina defendant won a *Batson* claim" five years after the decision was announced. Schwartz, "[cite article Laura gave me]," 60 No. Carolina Law Review [initial page number], 1549 (1991).

57. Chief Justice Rehnquist and Justice O'Connor are from Arizona. Justice Kennedy is from California. [check their bios] In addition to the Spanish-speaking, both states have large populations who speak languages other than English and Spanish.

58. To one commentator, *Batson's* symbolic but ineffective opposition to racial discrimination comes at a high price: "In the brief period since *Batson* was decided, hundreds of reported appellate cases and a larger number of trial court hearings have confirmed William Pizzi's observation: 'If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would difficult to find a better starting point than *Batson*.' *Batson* has imposed heavy administrative costs for one apparent reason: The Supreme Court sought to manifest its symbolic opposition to racial discrimination while doing as little as possible to alter the peremptory challenge." Alshuler, "The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts," 56 University of Chicago Law Review 153, 199 (1989), citing Pizzi, "*Batson v. Kentucky: Curing the Disease but Killing the Patient*," Supreme Court Review 97, 155 (1987).

59. Any limitations on the use of peremptories undermine their original purpose: to allow parties to remove venirepersons without explanation. Although *Batson* may not provide excluded groups much protection, the fact that the decision does sanction challenges to the use of peremptories obviously makes them something less than true peremptories. The additional restrictions suggested in this essay make the case for retaining peremptories even less appealing.

60. *Batson v. Kentucky*, supra note 27, at [cite page] (concurring opinion).

61. *Id.* at [cite page].