WHEN MARIA SPEAKS SPANISH: *HERNANDEZ*, THE NINTH CIRCUIT, AND THE FALLACY OF RACE NEUTRALITY

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Introduction

Juror number eight, Maria Garcia, answers with a heavy Spanish accent, "I think so." The prosecutor raises his eyebrows as though already announcing victory. A faint yet apparent smirk appears on his face. He will wait no longer—and so, he strikes, "Your Honor, the State asks that juror number eight be excused."

The defense counsel, although outraged, keeps her composure and raises her voice, "Objection your Honor. The prosecution is challenging this juror because the juror and the defendant are both Latino. As is clear from the record, this juror stated that she thought she would be able to follow the Spanish language translation. The prosecutor has already eliminated two other Spanish speaking Latino jurors—is that not enough of an indication of his true intentions?"

Apparently insulted at the defense's suggestion, but before the judge ruled on the objection, the prosecutor interrupts, "Your Honor, the challenge to this juror has nothing to do with the race of the juror. I hope that defense counsel is not suggesting that there is a right to be on a jury—clearly she is wrong. Rather, I felt that this juror would be unable to follow the official translation of the Spanish language testimony. Moreover, the Supreme Court in Hernandez v. New York clearly sanctions the State's actions today."

As the judge thinks about both party's arguments, he considers the issues of race, of equality, of justice—yes, even the

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peremptory strike itself. And Maria? She lowers her head. She waits. . .waits. . . .

Jurors like Maria are at the center of the debate in one of the most critical issues affecting Latinos: their disproportionate exclusion from juries. The Court has historically struggled with the issue of race in the jury selection process.[1] In trying to address the problem of racial discrimination in jury selection, the Court eliminated a prosecutor's racially discriminatory use of peremptory challenges to exclude jurors.[2] As Justice Marshall points out, however, the standard articulated in *Batson* gave prosecutors wide discretion unchecked by practical means.[3] Unfortunately, Marshall's prophesy is exemplified by the Court's decision in *Hernandez v. New York.*[4]

Hernandez v. New York is wrongly decided because it fails to take into account the effects of racism in our justice system, the anti-immigrant hysteria gripping the country, and the practical effect on Latinos. The irony of *Hernandez* is that Latinos, while trying to engage in on of the most fundamental aspects of democratic self government and carry out their civic duty, are excluded from the process due to a legal fiction that the Court has termed "race-neutrality." Under this view, "race-neutral" justifications must be void of any specific racial reference. The problem with this analysis is that the Court underestimates the resourcefulness of attorneys to hide their true intentions by providing perhaps false, though certainly "race-neutral" reasons for their use of discriminatory peremptory strikes. Thus, the decision marks a historical precedent that denies Latinos participation in one of the most important aspects of American self government: the ability to serve on juries.

The Ninth Circuit's interpretation, however, may have monumental implications for the Latino community and our ability to participate in the jury selection process. A split in the Circuit courts may prompt the Supreme Court to reconsider the *Hernandez* issue again. The split in the Circuits may come about be-

1. *See* Strauder v. West Virginia, 100 U.S. 303 (1879), the first case to hold that the racial discriminatory exclusion of jurors violated the Fourteenth Amendment of the U.S. Constitution; *see also* Batson v. Kentucky, 476 U.S. 79 (1986), where Justice Marshall points out in his concurring opinion that the historical misperceptions of Black jurors are "crudely stereotypical" and in many ways, "hopelessly mistaken notions" that have pervasively plagued the court system. *Id.* at 104.

2. *Batson,* 476 U.S. at 79.

3. Justice Marshal warned in his concurrence that the decision would not end racial discrimination because it would be difficult to assess the prosecutor's motives in excluding a juror. *Id.* at 102.

4. The Court held that the prosecutor's reason for dismissing the jurors was race neutral—based not on the jurors' Latino race, rather, based on their inability to accept the official court translation of the Spanish-Language testimony. 500 U.S. 352, 361 (1991).

cause the Third Circuit's *Pemberthy v. Beyer* decision has followed, and in fact, extended the *Hernandez* reasoning.[5] The Ninth Circuit's position on this issue is especially important since this circuit has expressed concern over the prosecutor's stated "race-neutral" reasons in several of its decisions. Thus, if the Ninth Circuit decides to protect Latinos' arbitrary exclusion from jury pools, the Court may be compelled to reconsider their decision in *Hernandez*.

Although many authors have written very insightful articles on *Hernandez* and *Batson*, they proposed solutions that were idealistic, impractical and did not specifically address the issue of Latino exclusion. Further, there is no published article focusing on the Ninth Circuit's interpretation and possible future decisions on *Hernandez*. Given its strategic importance, the Ninth Circuit's view may have a significant impact on Latino participation in the jury selection process throughout the country. For all of these reasons, this Comment adds a missing, yet relevant, dimension to further the discussion of *Hernandez* and address the disproportionate exclusion of Latino jurors from the jury selection process.

Part I of this Comment examines the jury selection process and the development of the common law surrounding the discriminatory use of peremptory challenges. Part II analyzes *Hernandez* and the Court's view on nonrace-based reasons for striking jurors. Part III critically examines the effect of *Hernandez* and *Pemberthy*-like decisions on the Latino community. Part IV considers the Ninth Circuit's present and possible future interpretation of *Batson* and *Hernandez*. Finally, I conclude by proposing two practical solutions for addressing the shortcomings of *Hernandez:* creating procedural safeguards and acknowledging unconscious racism.

First, I propose that courts throughout the country incorporate procedural safeguards that include expanding the amount of time necessary to conduct voir dire. This safeguard not only allows the judge to determine whether an attorney is making race-based peremptory strikes, but also allows a party to create a record that may later be critical in overturning an erroneous holding on appeal. Second, I suggest that judges acknowledge the societal influences that contribute to their judicial decisions. Judges may realize that *Hernandez* is more than just an unfortunate disproportionate exclusion of Latinos if they acknowledge that the perceptions one has about race are socially constructed. Further,

5. The Third Circuit court held that valid concerns about the ability of a juror to understand a foreign language constituted legitimate reasons for exercising a peremptory strike. *Pemberthy*, 19 F.3d 857 (3rd Cir. 1994).

these perceptions about racial minorities are often hidden in our unconscious belief system which guides our decision making capabilities. Thus, acknowledging the misperceptions about Latinos that are hidden in one's unconscious belief system will help society understand why the Court's attempt at eliminating racial discrimination in the jury selection process in *Hernandez* fails and results in the unjust exclusion of a significant portion of Latinos in the United States.

I. Challenging The Racial Use of Peremptory Strikes

The modern development of the common law of jury selection illustrates a society, as well as a court, struggling with the issue of race.[6] In an attempt to deal with this issue, the Supreme Court has resolved to follow a theory of colorblind constitutionalism.[7] Thus, the *Hernandez* "race-neutral" standard is consistent with the Court's overall view of the role of race in our court system and in our society.[8] The Court's colorblind analysis in *Hernandez* illustrates a court trying to eliminate the evils of racism in the jury system through a modest procedure that results in the disproportionate exclusion of Latinos.[9] However, ignoring the fact that racism is still prevalent in our court system only perpetuates the problem of racial discrimination. Latinos like Maria find no comfort in knowing that the Court believes racism does not exist in the jury selection process, especially when they are being systematically precluded from full participation in society.[10] Attorneys and judges are not shielded from the prejudices that surround them. [11] In fact, they too are affected by the social norms that often drive our conscious and unconscious deci-

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6. *See* Sherry L. Johnson, *The Language and Culture (not to say race) of Peremptory Challenges*, 32 Wm. & Mary L. Rev. 21 (1993). Arguing that the defendant's race-based exclusion from the jury selection process denies her the equal protection of the laws. This exclusion can be traced to the Court's inability to address the friction between juror participation and the attorney's historically uninhibited use of peremptory strikes.

7. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* Critical Race Theory, 257, 268-69 (1995). The Court's view of color-blind constitutionalism has as it's ends to create a society in which race is irrelevant. This view has disturbing results because it ignores the historical social creation of race and denies the existence of racism.

8. *See* Susan N. Herman, *Why the Court Loves Batson: Representation Reinforcement, Color Blindness, and the Jury*, 67 Tul. L. Rev. 1807, 1813 (1993).

9. *Id.*

10. *See* Barbara D. Underwood, *Ending Race Discrimination in the Jury Selection: Who's right is it anyway?*, 92 Colum. L. Rev. 725 (1992).

11. For example, 52% of respondents to a Los Angeles Times Poll said that a "good" amount of crime in the streets was caused by illegal immigrants. Dave Lesher, *O.C. Residents Call Migrants a Burden*, L.A. Times (Orange County Ed.), Aug. 22, 1993, at A1.

sions.[12] The anti-immigrant hysteria that has stirred the emotions of many people may be driving, at least in part, the xenophobic English-only movement.[13] As a result, Maria, and bilingual Latinos like Maria, are the victims of the discriminatory use of peremptory challenges all across the country while the Court remains [color] blind. Whether intentional or unintentional, the Court's inability to deal with the issue of race in the jury selection process, as it affects people like Maria, leaves much to be desired.

The story begins in 1879 with the Court's decision in *Strauder v. West Virginia*.[14] The plaintiff was an African-American man who appealed a murder conviction.[15] Justice Strong's opinion is the first to hold that the state violates a criminal defendant's constitutional rights to equal protection when the state excludes a juror because of his race.[16] As Justice Strong points out:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or rather, selected without discrimination against his color, and a Negro is not, the latter is equally protected by the law with the former.[17]

The Court did not base its reasoning on the right of the juror not to be excluded, but the Court did stress that it would not allow the "brand" of inferiority that the law places on the juror when he is excluded because of his race.[18] Thus, the Court developed a standard under the Equal Protection Clause that interpreted the Fourteenth Amendment broadly to include the right of a defendant not to have members of his race excluded.[19] Although the rights of the defendant were the central focus of the Court's holding in *Strauder*, an equally pressing issue regarding the rights of the juror still remained open. As Professor Underwood points out, *Strauder* marks a historic precedent and creates a theme that focuses attention on the rights of the excluded jurors. [20]

Although *Strauder* gave a glimmer of hope to the otherwise bleak future for racial minority jurors and defendants, it was an

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12. For a detailed analysis of the effect of unconscious racism in our every day decision making process, see Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).
13. *See* Rey M. Rodriguez, *The Misplaced Application of English-Only Rules in the Workplace*, 14 CHIC.-LAT. L. REV. 67 (1994).
14. 100 U.S. 303 (1879).
15. *Id.*
16. *Id.* at 310.
17. *Id.* at 309.
18. *Id.* at 308.
19. *Id.* at 310.
20. For a detailed and well thought out analysis of this issue, see Underwood, *supra* note 10.

issue the Court would not revisit with any real significance until 1965, in *Swain v. Alabama*.[21] *Swain*, unfortunately, did not rid the jury selection system of racial discrimination—it reinforced it. The Court held that it was "permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations. . . ."[22] The Court sanctioned the prosecutor's use of race-based peremptory challenges based solely on hunches, looks, or the belief of the juror's likely partiality to a particular defendant.[23] The Court ruled that the systematic exclusion of African Americans from the jury list with peremptory strikes violated the Equal Protection Clause of the Fourteenth Amendment. However, the defendant must prove purposeful discrimination by showing that the prosecutor in the case at hand had, over a period of time, excluded African Americans on the basis of race.[24] Although prosecutors in that jurisdiction had excluded every African American juror since 1950, the defendant failed to show that the prosecutor had purposefully and discriminatorily used his challenges in this particular case.[25]

In the years that followed, *Swain* came under tremendous attack by students and professors, dissenting opinions, and ultimately by the Supreme Court itself in *Batson v. Kentucky*.[26] The Court seemed to give meaning to the original intent of *Strauder* with its holding in *Batson*.[27] In *Batson*, the prosecutor used his peremptory challenges to strike all four African Americans on the venire. The defendant in *Batson* was an African American who was charged with second degree burglary and receipt of stolen goods. As a result of the prosecutor's systematic exclusion of African American jurors, an all white jury which ultimately convicted the defendant, was selected.

The Court overruled *Swain* and held that racial discrimination in jury selection violated the equal protection rights of the defendant, the rights of the juror, and harmed society at large.[28] Although explicitly overruling *Swain* with the decision in *Batson*, the Court used similar *Swain* reasoning in *Hernandez*.[29] The

21. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).
22. *Id.* at 223.
23. *Id.* at 220-22.
24. *Id.* at 227.
25. *Id.*
26. Johnson, *supra* note 6, at 28-29.
27. In *Strauder* the Court tried to eliminate the purposeful exclusion of juror's that were members of the same race as the defendant. *Strauder*, 100 U.S. at 303 (1879).
28. *Batson*, 476 U.S. at 86-87.
29. The Court took a step back to *Swain* when it required a plaintiff to show purposeful intent to discriminate. Moreover, the Court determined that evidence of disproportionate exclusion was not dispositive. Although *Batson* allowed plaintiffs

Court established the following procedural safeguard in evaluating jury discrimination cases: (1) the defendant must establish a prima facie case by showing that the prosecutor used peremptory strikes on the basis of race; (2) after the defendant's prima facie showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for the use of the peremptory challenge; and (3) if the prosecutor articulates a race-neutral explanation for the use of the peremptory, the defendant must prove purposeful racial discrimination as the basis for the peremptory challenge.[30]

While the holding, on its face, seemed to solve the problem of racial discrimination in jury selection,[31] in its application, the standard allowed significant leeway to the prosecutor in articulating the race-neutral reason for striking a juror.[32] In fact, Justice Marshall in his concurring opinion foresaw the problem that would inevitably develop: "Any prosecutor can easily assert a facially neutral reason for striking a juror, and trial courts are ill equipped to second-guess those reasons."[33] By adopting this vague and misunderstood standard, one is merely creating an "illusory"[34] protection in the guise of addressing the problem of the racially discriminatory uses of peremptory challenges.[35] Additionally, the Court left open and would not address the issue of juror rights until its decision in *Powers v. Ohio*.[36]

The Court appeared to make important strides in the elimination of racial discrimination in jury selection and in the reaffirmation of juror rights in its *Powers* decision.[37] The Court reasoned in a *Strauder* and *Batson*-like manner[38] that the exclusion of jurors through the racially discriminatory use of peremptory challenges created a badge of inferiority, "[a] venire person excluded from jury service because of race suffers a profound

to base their evidence on the case at hand, the *Hernandez* Court requires plaintiffs to go inside the head of prosecutors and somehow determine whether they are engaging in purposeful racial discrimination. Hernandez v. New York, 500 U.S. 352, 360.

30. *Batson,* 476 U.S. at 96.

31. The Court requires the neutral explanation to relate to the particular case to be tried, and the reasons must be clear and reasonably specific explanations. *Id.* at 98 n.20.

32. *See* Douglass Blake Dykes, *Articulation of Non-Race Based Reason for Peremptory Challenges After Batson v. Kentucky*, 17 AM. J. TRIAL ADVOC. 245 (1993).

33. Unfortunately, Marshall's prophesy is played out with severe effects on the Latino community in *Hernandez*, 500 U.S. at 352.

34. *Id.*

35. Professor Herman suggests that the Court is simply reacting towards the Court's inability to rid the jury selection process of racial discrimination. Susan H. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1813-14 (1993).

36. 499 U.S. 400 (1991).

37. *Id.*

38. *Strauder*, 100 U.S. at 303.

personal humiliation heightened by its public character."[39] The Court held that a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. In addition, the Court held that the defendant can raise a third party equal protection claim if a juror is excluded by the prosecution because of race.[40]

Powers is of particular interest because it centered the discussion of racial discrimination in jury selection on the juror. The Court made it clear that it was the right of a juror not to be excluded from jury selection because of her race.[41] Unfortunately, this was a short lived promise that the Court was simply unable to keep.[42] Although *Powers* seemed to signal the Court's commitment to the equal protection rights of jurors, in less than two months, the Court created one of the most formidable barriers to Latino jury participation with its decision in *Hernandez v. New York.*[43]

II. *HERNANDEZ V. NEW YORK:* THE LEGAL FICTION OF RACE NEUTRALITY

Although the Court has made an attempt to rid the jury selection process of racial discrimination through its colorblind notions of fairness,[44] it has, nevertheless, failed miserably to protect the rights of Latinos.[45] The exclusion of a large segment of the Latino community from the jury selection process sends a message of entitlement to white America that linguistic differences are justifiable reasons for the exclusion of Latinos. Moreover, it also sends a message of "otherness" and places a badge of inferiority on Latinos.[46] As a result of its quest for racial neutrality, the Court in *Batson,* but to a larger extent in *Hernandez,* failed to heed Justice Marshall's warning.[47] Instead, the Court

39. *Powers,* 499 U.S. at 413.

40. *Id.* at 413-14.

41. *Id.*

42. Johnson points out that *Power's* ambitious promise of protecting the juror from exclusion on the basis of their race was short lived in light of the *Hernandez* decision. *Supra* note 6, at 39-40.

43. 500 U.S. at 360.

44. The Court has set a string of precedents that promulgate a notion of race neutrality beginning with *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978) and ending with the recent decision in *Adarand v. Pena,* 115 S.Ct. 896 (1995), Herman, *supra* note 35, at 1825 n.71.

45. *See* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service,* 1993 WIS. L. REV. 761.

46. Similar to Chief Justice Warren's characterization of African-Americans with respect to segregation laws in *Brown v. Board of Education,* the Court in *Hernandez* stamped a badge of inferiority on Latinos with respect to jury selection. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

47. *Hernandez,* 500 U.S. at 352.

created a legal fiction[48] that severely restricts Latino participation in the jury selection process.

Hernandez is also significant as an equal protection case. The Court has clearly set out the standard that in order for a defendant to establish racial discrimination, that defendant must prove discriminatory intent.[49] In fact last term, the Court reaffirmed this holding in *Adarand Construction Co. v. Pena*.[50] Unfortunately, the Court fails to believe that a disproportionate impact on a community is enough to establish a claim of racial discrimination.[51] However, this exclusion must be looked at in the context of a society that has compromised the lives of immigrants in an effort to maintain the status quo.[52] Thus, the Court fails to distinguish the forest from the trees when it ignores the thousands of Latino jurors excluded because of their ability to speak Spanish. To what extent the Court will be willing to stand idly by and allow the systematic exclusion of Latino jurors remains to be seen.

As a result, the *Hernandez* Court has taken a step back toward a stronger acceptance of the *Swain* rationale.[53] Like *Swain*, the Court in *Hernandez* requires that the defendant prove purposeful discrimination in his particular case.[54] The party must do so by pointing to the subjective intent of the prosecutor.[55] However, as Professor Bell and the *Batson* dissent point out, "The very purpose of Batson . . . was to avoid this onerous and obviously unmeetable burden by presuming that the unexplained disparity is invidious even without evidence of discriminatory intent."[56] The fact that there is a disproportionate impact on a community justifies a closer look. The Court in *Hernandez* instead of remedying this problem, trivialized its importance and ignored its relevance.[57] Dionisio Hernandez, as a result, was simply brushed aside.

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48. By legal fiction, I mean to refer to the race neutrality principal the Court has adopted in allowing prosecutors to purportedly justify their discriminatory use of peremptory challenges while maintaining a sense of exculpatory relief.

49. Korematsu v. United States, 323 U.S. 214 (1944).

50. 115 S.Ct. 2097 (1995).

51. *See* Washington v. Davis, 426 U.S. 229 (1976). *See also* David G. Savage, *High Court Rejects Racial Challenge to L.A. "Crack" Cases*, L.A. TIMES, May 14, 1996, at A1 (rejecting a disproportionate prosecution claim of black defendants).

52. *See* Catherine L. Merino, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L. J. 409 (1988).

53. The *Hernandez* decision is troubling because it required the petitioner to prove that the prosecutor acted with intent to discriminate-an argument rejected in *Batson*. DERRICK BELL, RACE, RACISM AND AMERICAN LAW, 338 (3d ed. 1992).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Hernandez*, 500 U.S. 352, 371 (1991).

Dionisio Hernandez is a Latino male, who was living in Brooklyn, New York.[58] Hernandez was charged and convicted on two counts of attempted murder and two counts of criminal possession of a weapon.[59] At his trial, Hernandez objected to the discriminatory exclusion of four Latino jurors.[60] He then moved for a mistrial "based on the conduct of the District Attorney."[61] Specifically, Hernandez appealed the exclusion of two Latino jurors.[62] The prosecutor did not wait for a ruling on the *Batson* claim. Instead, the prosecutor explained:

> *I felt there was a great deal of uncertainty* as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, and *I didn't feel*, when I asked them whether or not they could accept the interpreter's translation of it, *I didn't feel* that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter and *I feel* that in a case where the interpreter will be for the main witness, they would have an undue impact upon the jury.[63]

The prosecutor emphasized what he *"felt,"* but ignored what, as he put it, was their final answer--that they would follow the Spanish language translation.[64] Based on this interchange, the trial court denied Hernandez' motion for a mistrial.[65] As a result, Hernandez was convicted.[66]

A. *The Opinions of the Court*

The *Hernandez* plurality opinion, authored by Justice Kennedy, held that the prosecutor did not use his peremptory strikes to exclude the Latino jurors because of their race.[67] The Court believed the prosecutor simply categorized the jurors into two sections: those that would have difficulty in accepting the Spanish language translation of the court interpreter, and those that would not.[68] Furthermore, the prosecutor's actions were not discriminatory because both sections could include Latinos.[69]

In addition, the Court refused to accept the argument that the disproportionate impact of Latinos justified a conclusion that

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58. *Id.* at 355.
59. *Id.*
60. *Id.* at 356.
61. *Id.* at 357.
62. *Id.* at 356.
63. *Id.* at 356-57 (emphasis added).
64. *Id* at 357.
65. *Id.*
66. *Id.* at 355.
67. *Id.* at 371.
68. *Id.* at 361.
69. *Id.*

the prosecutor had the intent to discriminate against them.[70] Thus, as long as the prosecutor states, not proves, a race neutral justification, the prosecutor has met his burden.[71] Only if the discriminatory intent is inherent in the prosecutors explanation, will the reason offered be deemed race neutral.[72]

After articulating its reasoning and holding, the Court attempted to narrow the scope of its decision. The Court stated that for some ethnic groups, proficiency, like skin color, "should be treated as a surrogate for race under the equal protection analysis."[73] They also stated that the prosecutors must look at the surrounding circumstances and the particular jurors involved because striking all who speak a given language, without more, may be pretext for racial discrimination.[74]

Justices O'Connor and Scalia wrote separately to put an exclamation point on their belief that the plaintiffs must prove discriminatory intent and not merely disproportionate impact.[75] They made it very clear that, "[n]o 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."[76] Justice O'Connor stated that allowing disproportionate impact claims in the voir dire context threatens to turn the case into a disparate impact trial similar to the Title VII claims.[77] In addition, the concurrence stated that allowing disparate impact claims would result in "unacceptable delays in the trial process."[78] Therefore, in their view, the prosecutor acted with full backing of the Constitution, even if a disproportionate number of Latinos were excluded.

The dissent, which included Justices Stevens, Blackmun, and Marshall, challenged the plurality and the concurrence. Justice Stevens, joined by Marshall, criticized the plurality's focus on the subjective state of mind of the prosecutor because it raises the level of proof required for a party to prove racial discrimination.[79] As Justice Stevens explained, the judge must evaluate the

70. *Id.* at 362.

71. *Id.* at 360.

72. *Id.*

73. The Court did not specify which ethnic group it was referring to but did point out that laws prohibiting the keeping of records in a language other than English and laws prohibiting grade schools from teaching languages other than English violated equal protection principles. *Id. at* 371.

74. *Id.*

75. *Id.* at 375 (O'Connor, J., concurring).

76. *Id.*

77. *Id.*

78. *Id.* at 374.

79. *Id.* at 378 (Stevens, J., dissenting).

claims of the parties through objective evidence including evidence of disparate impact.[80] As Justice Stevens points out:

> [t]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is . . . dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect.[81]

Additionally, Justice Stevens rejected the prosecutor's "race neutral" justification because he believed that it was a proxy for racial discrimination.[82] For these reason, Justices Stevens and Marshall dissented.[83]

B. *Criticism of Hernandez*

There are three major concerns with *Hernandez*: (1) the Court's colorblind view ignores today's reality, (2) the Court reverts to a *Swain* analysis that establishes an impossible burden for plaintiffs to meet, and (3) the Court seems misinformed about bilingualism. Cumulatively, these concerns prove fatal to the *Hernandez* decision and therefore require, reconsideration.

The first concern is the Court's colorblind analysis. This standard creates the illusion of protection while maintaining the central problem of modern racial discrimination—its covertness.[84] There are at least two possible outcomes from the Court's colorblind analysis. On the one hand, justice prevails when a juror's race is not taken into account in striking her from the venire. On the other hand, justice does not prevail when a prosecutor uses language as a proxy for racial discrimination and eliminates that juror from the venire. The question then becomes to what extent is one willing to allow the exclusion of jurors from the venire? I would argue that any exclusion, especially the exclusion of a historically marginalized community, deserves the strongest condemnation. The Court's response to this concern is to suggest that it is a questions of credibility and demeanor, best left to the judgment of trial judges.[85] This response, however, fails to see the core concern: any exclusion based on race should be eliminated from our jury selection process. Moreover, one would expect the Court not to sacrifice the

80. *Id.* at 377.
81. *Id.* at 378 n1.
82. *Id.* at 379.
83. *Id.*
84. Lawrence, *supra* note 12.
85. Hernandez, 500 U.S. at 365.

rights of a defendant and a juror in lieu of rigid rules of procedure when the facts point toward racial discrimination. Thus, the Court has fallen prey to the classic criticism of form over substance—unfortunately opting for form.

Additionally, from a purely pragmatic point of view, the Court's colorblind doctrine that requires prosecutors to state race neutral reasons for striking venire persons, when applied, fails to address the issue of racial discrimination in jury selection. Practical experience strongly suggests that the prosecutor is not going to stand up in a court of justice and articulate a racially discriminatory reason for excluding the jurors. Yes, I am suggesting that the prosecutor will lie and state reasons that are wholly unrelated to the race of the juror. While one would hope that prosecutors comply with their ethical duty to state their true motivations, one should not be naive about the realities of society. Too often the Court confuses ideal versus reality and favors the appearance of justice over just results.[86] The Court in *Hernandez* has once more put forth a theory of colorblindness that results in perhaps the appearance of justice. However, in reality, this appearance is simply that, an appearance—not justice.

Second, the Court's continued support of the intent requirement in proving racial discrimination in the jury selection is flawed. The concurrence wanted to reaffirm this point, but was unable to get two other Justices to join. This second concern in *Hernandez* is particularly alarming, though not surprising,[87] because it suggests that the Court's intent requirement for proving racial discrimination in the jury selection context is once more moving toward an acceptance of a *Swain*-like rule.[88] As Justice Stevens points out in the dissent, the petitioner is forced to somehow know what subjective reasons the prosecutor has for striking the jurors.[89] This is an unjustifiable burden to meet because the petitioner can only guess what the subjective motivations are or point toward actual strikes against Latinos. However, these alternatives have already been rejected by the Court. Thus, the Court's current reasoning denies the petitioner the ability to challenge the prosecutor's strike by objective evidence, the unjustified exclusion of other Latino jurors.

86. Cheryl I. Harris, *Civil Rights Lecture*, UCLA School of Law, Fall 1995.

87. *See* Washington v. Davis, 426 U.S. 229, 239-40 (1976). *See also*, Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264 (1977); Mass v. Feeney, 442 U.S. 256, 279 (1979).

88. The Court in *Hernandez*, like in *Swain*, seems to suggests that even the exclusion of all Latino and African-American jurors would not violate the juror's rights. The defendant is required to prove purposeful racial discrimination. *Hernandez*, 500 U.S. at 369-72; Swain v. Alabama, 380 U.S. 202, 226-27 (1960).

89. *Hernandez*, 500 U.S. at 377.

Moreover, the problem with the Court's analysis is that it is inconsistent with the Court's holding in the Title VII employment discrimination arena. As Justice O'Connor points out the Court has allowed the use of statistical data to prove purposeful discrimination in Title VII actions. In *Hernandez*, the Court is stating, in effect, that intentional discrimination means one thing in this area of law, and it means quite another thing in this other area of law. This thinking is inconsistent and therefore should be reconsidered.

Third, the Court in *Hernandez* misunderstood how to evaluate issues involving bilingual jurors. In fact, when it comes to understanding bilingualism, our justice system is ill informed on the interpretation of psycholinguistic evidence[90] and the handling of the issue of language in general.[91] The Court is misguided in its approach to this issue. It is impossible for any individual to simply deactivate the comprehension and retention of testimony they hear in their native language.[92] Yet, the Court based its decision on the inability of a bilingual juror to perform the task that the prosecutor asked: to follow the interpreter's translation of the Spanish language testimony. As a result of this misunderstanding of bilingualism, the Court proffered a confusing opinion[93] that forces bilingual jurors to perform impossibilities. At the same time, the Court allows prosecutors to articulate a "race neutral" reason as a justification for excluding bilingual jurors. The Court, thus, unjustifiably creates a double standard for bilingual and non-bilingual jurors due to a misunderstanding of bilingualism. Hence, the Court should re-evaluate its reasoning due to its failure to fully understand what it was asking bilingual jurors to do.

C. The Post-Hernandez Circuit Decision: *Pemberthy v. Beyer*

The post-*Hernandez* era has resulted in only one major circuit court decision, *Pemberthy v. Beyer*.[94] Unfortunately, the Third Circuit illustrates how *Hernandez* authorizes the exclusion of Latinos from the jury selection process. As such, it is important to understand the reasoning of the Circuit Court.

90. Ramirez, *supra* note 45, at 771.

91. Juan Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 Hofstra L. Rev. 1, 3 (1992).

92. Ramirez, *supra* note 45, at 777.

93. Although the Court did not intend to overrule *Batson*, the confusing nature intrinsic in the opinion forces one to believe that it signals a trend to racial neutrality in the jury selection cases. *See* Cheryl A. O'Brien, *Constitutional Law-Hernandez v. New York: Did the Supreme Court Intend to Overrule Batson's Standard of 'Racially Neutral?'* 15 W. New Eng. L. Rev. 315 (1993).

94. 19 F.3d 857 (3rd Cir. 1994).

In *Pemberthy*, the defendant was charged for conspiracy to distribute and possession with intent to distribute one ounce or more of cocaine, simple possession of cocaine, possession of cocaine with intent to distribute, and theft of services. During voir dire, the prosecutor excluded five Latino jurors based on their ability to speak the Spanish language and the prosecutor's belief that they would be unable to follow the official court translation of the Spanish language testimony. In the opinion by Judge Alito, the court held that the prosecutor could use language based peremptory challenges, although not for discriminatory purposes.[95] The court reasoned that not all language based peremptory challenges are discriminatorily used.[96] Furthermore, the court explicitly held that language based peremptory challenges do not receive heightened scrutiny.[97]

Pemberthy therefore, illustrates how far circuit courts will go in allowing Latino jurors to be excluded. The Court stated in *Hernandez* that the exclusion of the bilingual jurors may not be wise, nor constitutional in all cases.[98] For example, if the bilingual juror's ability to speak another language is treated as a "surrogate for race," the Court will not allow for their exclusion.[99] In *Pemberthy*, the court also states that bilingual jurors may only be excused if there is Spanish language testimony that may be central to the case.[100] Thus, these decisions suggest that future courts must define the allowable *Hernandez* "language as a surrogate for race" analysis and perhaps define *Pemberthy's* "language as central testimony" analysis.

III. THE SIGNIFICANCE OF *HERNANDEZ* AND *PEMBERTHY* FOR LATINOS

Hernandez and *Pemberthy* have a significant impact on the Latino community: they place a badge of inferiority on Latinos.[101] One must consider the Court's decisions, not in a vacuum, but rather, in the context of a society struggling with the issues of race. The notions of color blindness fail to recognize the clear historical patterns of discrimination in the United States. Thus, one must understand race as a socially constructed

95. *Id.* at 873.
96. *Id.* at 871.
97. *Id.*
98. Hernandez v. New York, 500 U.S. 352, 371-72 (1991).
99. *Id.*
100. *Pemberthy*, 19 F.3d at 857.
101. The Court in *Strauder* and in *Powers* discuss the brand of inferiority and the profound personal humiliation that jurors face when they are excluded because of their race. *See infra*, notes 18, 39.

phenomenon that has historically served to subordinate racial minority groups while maintaining white supremacy.[102]

To understand this analysis, one must begin with the community itself. The Latino community is the fastest growing racial minority group in the United States.[103] The current U.S. population is comprised of approximately 73.6 percent White, 12 percent African American, 10.2 percent Latino, 3.3 percent Asian, and .7 percent Native American.[104] California has a current Latino population of approximately 30 percent.[105] The projected numbers are even more telling for the future of Latinos in this country. For example, Latinos will be the nation's largest minority group by the year 2009.[106] California is projected to have a Latino majority by the year 2040.[107] The percentage of Latinos is also expected to increase throughout the United States by the year 2050: 52.8 percent will be White, 24.5 percent Latino, 13.6 percent African American, 8.2 percent Asian, and .9 percent Native American.[108] Although these are conservative estimates,[109] they clearly indicate that Latinos will play an increasingly important role in society's future.

However, Latinos have not necessarily been greeted warmly. In California, for example, there is a thriving anti-immigrant sentiment.[110] The recent immigrant beating that was captured on live television exemplifies the attitudes many feel, especially in law enforcement, toward immigrants.[111] Such immigrant bashing is the likely result of the anti-immigrant rhetoric that propelled California's Proposition 187 into law.[112] Immigrants are perceived as dangerous criminals who are here to take advantage of the system.[113] This current anti-immigrant hysteria has spread to the national level. Our "leaders" in Congress took note and soon

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102. Kimberly Crenshaw, et al., Critical Race Theory, xxiii (1995).

103. Latinos are currently growing at an estimated 900,000 a year. Robert A. Rosenblatt, *Latinos, Asians to Lead Rise in U.S. Population*, L.A. Times, Mar. 14, 1996, at A1.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *See* Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 Chic.-Lat. L. Rev. 1 (1995).

111. Erik Malnic, *Deputies' Clubbing of 2 Suspects Taped*, L.A. Times, Apr. 2, 1996, at A1.

112. Cervantes, *supra* note 110.

113. Robert Garcia, *Crime & Justice: Latinos and Criminal Justice*, 14 Chic.-Lat. L. Rev. 6, 8 n.7 (1994).

thereafter proposed their own "immigration reform."[114] It is nothing new, however, for Congress to step in and "solve" the problem of immigration.[115] However, as so often is the case, the rights of immigrants are set aside—marginalized once again.[116]

The role of Latinos in the criminal justice system is also relevant to this discussion. Race plays an important role in the criminal justice system, especially in the capital offense cases.[117] In homicide cases, for example, prosecutors were fourteen times more likely to ask for special circumstances for Latino offenders than offenders who were charged with having killed a Latino.[118] These statistics suggest a criminal justice system that undervalues the lives of Latinos when compared to that of non-Latino defendants. Again, placing an inferior value on the lives of Latinos sends a message of "otherness" to the community.

A related issue is the participation of Latinos as judges in the criminal justice system. There are only 16 out of 711, or 2.2 percent, Latino Federal District and Court of Appeals Judges in the continental United States.[119] These are key figures when one considers the court's inability to understand the issues of bilingualism that are so important to this community.[120] Moreover, the low number of Latinos in the judiciary may also be symptomatic of institutionalized barriers that prevent Latinos from attaining such positions.

Thus, it is in this context that *Hernandez* and *Pemberthy* can be seen as a continued attempt to place a badge of inferiority and continue the racial subordination of the Latino community. Although not all Latinos speak Spanish, the ability to speak Spanish, however, bears a very close relationship to being Latino.[121] In fact, many scholars have suggested that this constitutes discriminatory intent, and therefore should be unconstitutional.[122] The *Hernandez* and *Pemberthy* decisions, when applied, result in a significant reduction in the number of

114. Sam Fulwood III, *Gingrich Sees OK on Illegal Immigrant Bill*, L.A. TIMES, May 6, 1996, at A17 (proposing an immigration reform package that would deny public education to the children of undocumented immigrants).

115. In 1954, for example, Congress authorized operation "Wetback" whereby 800 boarder patrol persons were organized to selectively set up road-blocks and conduct raids on various employers to reduce the amount of immigrants in United States. ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY, 69-71 (1964).

116. Cervantes, *supra* note 110.

117. Garcia, *supra* note 113, at 14 n.53.

118. *Id.*

119. Perea, *supra* note 91, at 12 n.59.

120. *See* Miguel A. Mendez, *Hernandez: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193 (1992).

121. *See* Underwood, *supra* note 10; *see* Ramirez, *supra* note 45; *see* Perea, *supra* note 91; *see* Mendez, *supra* note 120.

122. Perea, *supra* note 91.

Latinos participating in the jury selection process because there is this close connection between Latino ethnicity and being bilingual.[123] Therefore, it is critical that one be particularly attentive to this "close relationship" argument because the Court left the door partially open with respect to this argument.[124] The key question to determine is to what extent the ability to speak Spanish and race need to be related in order to establish racial discrimination.

There is an irony in the Court's decision. On the one hand, Latinos are told that they may participate in all aspects of the institutions of American self government,[125] and on the other hand, they are placed in a special category of exclusion because of their ability to speak another language. While our legal system values jurors with a diversity of experiences to evaluate all of the facts, it also requires that one leave all preconceived ideas behind.[126] However, the Court has placed a badge of inferiority on Latinos for not being able to do the impossible, namely, disregard the Spanish language testimony for that of the official translator.[127] This comparison between preconceived ideas and a Latino's ability to speak Spanish is unintelligible because preconceived ideas are derived from perceptions or misperceptions about the way things are in the world. Whereas a Latino's ability to speak Spanish is merely an attribute that affects their particular experience.

Additionally, individuals who speak a foreign language have historically been discriminated in the same way as those belonging to an ethnic or racial group.[128] The overlap is tricky because race and bilingualism have such a close relationship to one another.[129] The skeptical need only imagine how it feels to be told "shut up, no Spanish is allowed here . . . you are in America now" during recess at school; the feeling of inferiority when suspended from a class after speaking Spanish to a friend; and the piercing eyes and the disgusted expression of the grocery clerk while waiting in line. Yes, the skeptical may formulate legal fictions that try to distinguish bilingualism from being Latino. However, when one considers the social context, the legal fiction of race neutrality that the Court in *Hernandez* promulgated creates a badge of inferiority for Latinos.

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123. Ramirez, *supra* note 45, at 763 n.5.

124. Hernandez v. New York, 500 U.S. at 371 (1991).

125. Underwood, *supra* note 10.

126. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and the Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992).

127. Ramirez, *supra* note 45, at 771-73.

128. *Pemberthy*, 19 F.3d at 871.

129. *See* Ramirez, *supra* note 45, at 763 n.5.

IV. The Ninth Circuit's view

It is critical that one focus attention on the Ninth Circuit because it encompasses many of the western states that have a high population of Latinos.[130] The Ninth Circuit, however, has not directly addressed the issue of excluding jurors on the basis of their bilingual ability. Given its more liberal leaning, it is important to analyze *Hernandez* in the context of the Ninth Circuit. The Ninth Circuit interpretation may result in split circuit decisions, thereby making it more likely for the Court to address the *Hernandez* issue once more. Moreover, as I will address, there are indications from some cases that the Ninth Circuit is concerned with the prosecutor's stated "race-neutral" reasons. Therefore, the Ninth Circuit interpretation may have monumental implications for the Latino community and our ability to participate in the jury selection process.

The Court in *Hernandez* created a legal fiction of "race neutrality" that allows prosecutors to state practically any reason for excluding jurors, so long as the reason is not facially discriminatory.[131] One must therefore, start by analyzing the reason that the circuit court has identified as "race neutral" to see the arbitrariness of this legal fiction. This analysis would of course be incomplete without also pointing out the unacceptable "race neutral" reasons. Finally, one must look at the significance of the Circuit courts' decisions as a possible guide to the Ninth Circuit's future interpretation of *Hernandez.*

A. *Acceptable Race-neutral Reasons*

Although the Ninth Circuit has allowed valid race-neutral justifications since *Hernandez*,[132] there is cause for alarm in the

130. Rosenblatt, *supra* note 103.

131. *Hernandez*, 500 U.S. at 359.

132. *See* United States v. Monroy-Salazar, No. 95-50098 U.S. App. LEXIS 1629 (9th Cir. Jan. 18, 1996)(striking a black juror based on her age and her perceived hearing problems); United States v. Devine, No. 95-30014 1996 U.S. App. LEXIS 635 (9th Cir. Jan. 5, 1996)(striking a Native American juror on the basis that the prosecutor had prosecuted a person with the same last name and the same town as the juror); Hernandez v. Lewis, No. 94-17063 U.S. App. LEXIS 36963 (9th Cir. Dec. 14, 1995)(accepting the five reasons articulated by the prosecution: 1. poor employment, 2. overenthusiastic responses suggested that she was too eager to serve on the jury, 3. juror's age suggested she would be overly sympathetic to young defendants, 4. inability to stay alert, 5. failure or juror to disclose information); Jones v. Gomez, 66 F.3d 199 (9th Cir. 1995)(expressing juror's reluctance to serve); United States v. Benyamen, No. 93-50738 1994 U.S. App. LEXIS 31368 (9th Cir. Nov. 1, 1994)(existing family connections with members who use drugs); United States v. Quijada-Castillo, No. 93-10380 1994 U.S. App. LEXIS 24420 (9th Cir. Sep. 2, 1994)(wearing a T-Shirt and a goatee suggested no sympathy toward the prosecution); United States v. Thornton, No. 93-10660 1994 U.S. App. LEXIS 24382 (9th Cir. Sept. 1, 1994)(juror's belief that brother had been unfairly convicted); United States v. Koon, 34 F.3d 1416 (1994)(inconsistently answered and made favorable statement regarding the

way the court has reasoned and accepted some of the prosecutor's race-neutral reasons. In fact, in one of the most recent decisions, *United States v. Bauer*,[133] the prosecutor's reason articulated and accepted insults the very purpose of *Batson*.[134] The prosecutor used two peremptory challenges to strike out Native American jurors from the venire. The court held that the prosecutor's "educated hunches" were sufficient to satisfy *Hernandez'* race-neutral reason.[135] The court reasoned that the race-neutral justifications are not required to be plausible—merely that they be facially valid.[136]

Bauer is not only disturbing because it indicates the court's view on the legitimate non-race based reason, but more importantly, it exemplifies the leniency that the court gives prosecutors.[137] The case implies that a prosecutor may even lie, so long as the reason articulated is facially valid.[138] This is merely allowing the court to put on blinders as to the reality of discrimination in the jury selection process.[139] In fact, this suggests that the

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press' coverage of the Rodney King case); Thompson v. Hatcher, No. 93-16856 1994 U.S. App. LEXIS 35710 (9th Cir. Aug. 10, 1994)(prior to *J.E.B,* the juror did not fit the desired profile, namely, older males); United States v. Risher, No. 89-50302 1994 U.S. App. LEXIS 21159 (9th Cir. Aug. 2, 1994), *cert denied*, 115 S.Ct. 264 (1994)(being uniquely forgiving); Benson v. Marshall, No. 93-16520 1994 U.S. App. LEXIS 14154 (9th Cir. May 24, 1994)(juror's brother had been prosecuted by the prosecutor's office); Shaw v. Hames, No. 93-35995 1994, U.S. App. LEXIS 12339 (9th Cir. May 11, 1994)(not telling the truth to the prosecution); United States v. Valenzuela, No. 92-50541 1994, U.S. App. LEXIS 3929 (9th Cir. Feb. 24, 1994)(existing criminal record); United States v. Lions, No. 91-50620 1994, U.S. App. LEXIS 1574 (9th Cir. Jan. 18, 1994)(having intense experience with people who had drug interaction); United States v. Gutierrez, No. 92-10314 1993, U.S. App. LEXIS 30547 (9th Cir. Nov. 17, 1993)(having a soft spoken personality); United States v. Childs, 5 F.3d 1328 (9th Cir. 1993)(showing hesitancy to questions); United States v. McGee, No. 92-10405 1993, U.S. App. LEXIS 23132 (9th Cir. Sept. 7, 1993)(prior criminal record); United States v. Daly, 974 F.2d 1215, 1219 (9th Cir. 1992)(loner personality); United States v. Power, 881 F.2d 733 (9th Cir. 1989)(fidgeting and inattentiveness); United States v. Lorenzo, 995 F.2d 1448 (9th Cir. 1993)(inattentiveness); United States v. Vasquez-Lopez, 22 F.3d 900 (9th Cir. 1993)(juror's inattentiveness); United States v. Greyeyes, No. 92-10065 1994, U.S. App. LEXIS 4334 (9th Cir. 1993)(watching too much of their favorite program, "the People's Court"); United States v. Rojas, No. 92-10057 1993, U.S. App. LEXIS 1470 (9th Cir. Jan. 21, 1993) (juror's debilitating injury); Malone v. Rowland, No. 968 F.2d 1221 1992, U.S. App. LEXIS 16620 (9th Cir. 1992)(prosecuted family members of the juror).

133. 1996 U.S. App. LEXIS 1448 (9th Cir. 1996).

134. Batson wanted to remove "hunches" or arbitrariness from playing a role in the prosecutor's use of peremptory challenges when they had as their intent to exclude minorities from juries. Batson v. Kentucky, 476 U.S. at 79 (1986).

135. *Bauer*, U.S. App. LEXIS 1448 (9th Cir. 1996).

136. *Id.*

137. *See also* United States v. Dessense, U.S. App. LEXIS 4454 (9th Cir. 1993)(holding that prosecutor's instinct may act as a legitimate non-race based reason).

138. *Id.*

139. The court does not question the prosecutor's reason, even when the prosecutor changes his reason for excusing the juror. *See* United States v. Valenzuela, U.S. App. LEXIS 3929 (9th Cir. 1994).

court is taking an active role in the promulgation of discrimination. One must not forget that the intent of *Batson* and *Strauder* was to eliminate racial discrimination in the jury selection process.[140]

A second case that is also of important concern is the Ninth Circuit decision in *Burks v. Borg*.[141] The prosecutor used peremptory strikes to exclude three African American and two Latino jurors. In an opinion by Judge Kozinski, the court held that the prosecutor's subjective beliefs about a juror may play a legitimate role in the exercise of the challenge.[142] Judge Kozinski did however, stress that the justification must not be "couched in vague and subjective terms."[143]

The troubling aspect of *Burks* is that it continues to expand the prosecutor's discretion in articulating race neutral explanations. This type of explanation for the use of the peremptory challenge is known as soft-data.[144] Instead of allowing the prosecutor to proffer reasons based on subjective beliefs, the court should require explanations based on the juror's oral statement made during voir dire or information in the questionnaire.[145] Instead, the Ninth Circuit allows subjective reasons to form part of the justification for excluding jurors during voire dire.

In *U.S. v. Changco*, Judge Kozinski again authors an opinion by the circuit court that has tremendous significance to the Latino community.[146] The issue in the case asked the court to consider whether striking jurors because they were not proficient in English is tantamount to striking them because of their race or ethnicity. The prosecutor used two peremptory strikes to excuse Latino jurors. The prosecutor explained that the jurors' language abilities might affect the deliberation because of the jurors' language difficulties. Additionally, the prosecutor explained that the jurors' body language suggested timidity. Judge Kozinski reasoned for the court, that if the prosecutor doubts the ability of the potential juror to follow the events at trial, and he is able to convince the judge of his belief, then he has ample grounds to strike that juror.[147] Nonetheless, striking jurors based on their last names, would be a sweeping generalization about the language abilities of that racial group.[148] Furthermore, the court,

140. *See Batson*, 476 U.S. 79; *see also Strauder*, 100 U.S. at 303.
141. 27 F.3d 1424 (9th Cir. 1994).
142. *Id.* at 1429.
143. *Id.*
144. Joshua E. Swift, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 361 (1993).
145. *Id.*
146. 1 F.3d 837 (9th Cir. 1993).
147. *Id.* at 840.
148. *Id.*

citing *Hernandez*, held that even if the reason for striking the juror disproportionately affects minorities, the defendant must still prove intentional discrimination.[149] The court reasoned that information of disparate impact is useful only insofar as it provides circumstantial evidence of discriminatory intent.[150]

Changco addresses many of the worries that *Hernandez* leaves open for the circuits to decide, namely, what constitutes legitimate race-neutral justifications for striking a juror. Unfortunately, Judge Kozinski again deals a severe blow to the ability of Latinos to participate in the jury process through the use of the peremptory strike, so long as a prosecutor questions their language ability. If one combines the *Burks* holding with *Changco*, a prosecutor may justify the exclusion of Spanish speakers based on his subjective belief that the juror will have a problem with the English testimony. Further, once one incorporates the *Bauer* holding, the court is literally granting a license to prosecutors to lie about their reasons for using the peremptory challenges, basing them on subjective beliefs concerning the juror's perceived ability to understand English. Not only does this rule subject the Latino community to substantial abuse by prosecutors' biased and ill informed beliefs about the abilities of bilingual individuals,[151] but it also suggests that the court is likely to rule consistently with the Third Circuit in *Pemberthy*.

Additionally, the court reaffirmed the intent requirement supported in *Hernandez*.[152] The court sanctioned the exclusion of Latinos, while maintaining the "integrity" and "consistency" in requiring intent.[153] Similar to the intent requirement in *Swain*,[154] the circuit court is establishing a rule that, on its face seems valid and just. In application, however, this rule is just another "nice way" the court marginalizes the participation of Latinos in the jury selection system. Requiring intent in this area of law frustrates the purpose of *Batson* and *Strauder* because it allows courts to ignore the thousands of jurors who are excluded in the name of "race-neutrality."[155] If the goal of the Ninth Circuit was to leave the peremptory strike as strong as possible, and create a barrier from judicial review, it has certainly done so. The criticism, however, is still the same: It is being used to discriminate by excluding Latinos from the jury selection process.

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149. *Id.*
150. *Id.*
151. Ramirez, *supra* note 45.
152. *Hernandez v. New York*, 500 U.S. at 352 (1991).
153. Judge Kozinski clearly states that even if one ethnic group is disproportionately excluded, the court is justified in this exclusion unless the defendant can prove discriminatory intent. *Chanco*, 1 F.3d 837.
154. Swain v. Alabama, 380 U.S. 202 (1965).
155. Batson v. Kentucky, 476 U.S. 79 (1986).

B. *Unacceptable Race Neutral Reasons*

The Ninth Circuit has laid a foundation of cases and reasoning that may be very instrumental in attacking a *Hernandez* or *Pemberthy*-like case. However, one must keep in mind that it has been almost three years and twenty seven cases dealing with the *Hernandez* race neutrality principal, since the Ninth Circuit has rejected a prosecutor's "race neutral" justification.[156]

In *Johnson v. Vasquez*,[157] the prosecutor used two of its peremptory challenges to exclude Latina women. Justifying his strikes, the prosecutor stated that the women were uneducated and gave evasive answers to his questions. The court held, however that the use of the peremptory challenges was discriminatory because the court record undermines the prosecutor's statements.[158] In fact, one of the excluded jurors worked for an attorney and the other juror was the head of the sales department in a company.[159]

Johnson undermines the reasoning in *Bauer* in that it explicitly suggests that if a prosecutor offers unfounded reasons for exclusions, later proven to be false by the record, then the use of the peremptory strike will not be sustained.[160] One must, however, keep in mind that *Bauer* was decided in 1996 and *Johnson* was decided in 1993, three years earlier.[161] Although this is only a three year difference, it may, nonetheless, indicate the Ninth Circuit's modified reasoning. Moreover, *Johnson* and *Bauer* exemplify the problem with the articulation and confirmation of non-race based reasons. In *Johnson*, the court was able to contradict the prosecutor's stated reason because the prosecutor's reason was not supported by the record. Requiring the attorney to base his reasons for excluding jurors on the record may eliminate the problem of discriminatory uses of peremptory challenges.[162] *Johnson*, nonetheless, offers some hope that the circuit courts will take off its blinders and not allow false reasons to be accepted as legitimate and non-race based.

156. As of February 8, 1996, through the use of the LEXIS legal computing service, I concluded that the Ninth Circuit had taken approximately 3 years since it decided its last *Hernandez*-like case and rejected the prosecutor's reason. *See* Johnson v. Vasquez, 3 F.3d 1327 (9th Cir. 1993), *cert denied*, 114 S.Ct. 1838 (1994).

157. *Id.*

158. *Id.* at 1330.

159. *Id.*

160. *Bauer*, U.S. App. LEXIS at 1448 (9th Cir. 1996).

161. *See also* Rivers v. Borg, No. 92-15360, 1992 U.S. App. LEXIS 32193 at 8-9 (9th Cir. Nov. 25, 1992)(allowing the conviction to stand even though one of the prosecutor's stated reasons was not believed, so long as other non-race based reasons existed for the exclusion of the jurors).

162. Swift, *supra* note 144.

A second case that addresses the debate of the race neutrality principle in *Hernandez* is offered by *Montiel v. City of Los Angeles*.[163] The prosecutor used five of the six peremptory challenges to exclude all three Latino jurors and two of the remaining three black jurors. While the court does not address the issue directly, it does state that prosecutors may not engage in the discriminatory striking of jurors with Spanish surnames.[164] The court also suggest expanding the amount of time permitted for parties to voir dire jury panels.[165] The court reasoned that judges will be better able to "flush-out" a party's true motivations.[166]

Montiel addresses the concern Justice Marshall pointed out in *Batson* over judges' inability to determine which reasons are race-neutral. Allowing more time for parties to conduct voir dire may in fact eliminate the discriminatory use of peremptory challenges. However, one can already hear the clamoring of the critics—those individuals who are willing to sacrifice justice in the name of judicial economy. Nonetheless, if one is truly committed to the elimination of the pervasive effects of discrimination in the jury selection process, one must make necessary sacrifices. The problem with tying up the court's time may be resolved by this new process in that it may cut down on the appeals of discrimination suits based on peremptory challenges. Although this may not be the perfect solution, it is definitely a good beginning.

In *U.S. v. Bishop*,[167] the prosecutor executed two of its peremptory challenges for the purpose of eliminating two African American jurors. The prosecutor explained that because the jurors lived in a similarly poor neighborhood as the defendant, that they would likely believe that the police harassed African Americans. The court held that this reason was not race neutral because there is no nexus between the juror's residence and their possible bias in the trial.[168]

At first glance, *Bishop* signals a strong argument against the exclusion of Latinos from voir dire. However, the court cites *Hernandez* and reaffirms that there is a nexus between the jurors' characteristics, bilingualism, and their possible bias to the specific trial.[169] The court, however, focuses on the uncertainty in the ability of the juror to follow the official English language translation.[170] This reasoning falls prey to the criticism men-

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163. 2 F.3d 335 (9th Cir. 1993).
164. *Id.* at 340.
165. *Id.* at 340-41.
166. *Id.*
167. 959 F.2d. 820, 822 (9th Cir. 1992).
168. *Id.* at 825.
169. *Id.*
170. *Id.*

tioned earlier, that courts throughout the country are asking bilingual jurors to perform an impossible task—one that is not equally asked of the rest of society.[171] One may in fact be able to bring an equal protection claim based on the exclusion of bilingual ethnic jurors.[172] It is insincere for our government to state that the jury is composed of a representative cross section of society, when individuals are excluded because of an inherent inability to perform a task, not required by the rest of society.[173]

Bishop, however, should not be written off because of the court's foresight in recognizing the existence of unconscious racism, "residential patterns mirror the unspoken biases and prejudices that continue to plague our minds."[174] In fact, the court quotes one of the most prolific writers in this area, Charles Lawrence.[175] The court states that residential patterns nurture these unconscious beliefs.[176] Granted, much of the discussion by the court is dicta, it illustrates, nonetheless, the awareness and perhaps the recognition of unconscious racism in our society. Perhaps through this recognition the court will eventually see the effect of the reasoning and ruling of their decisions on the Latino community.

C. *The Ninth Circuit's Next Step*

Clearly, advocates of bilingual rights in the jury selection arena are concerned over the Court's decisions in this area of law. In New Mexico, for example, authors have been concerned over the application of a *Hernandez*-like decision in their own state.[177] Although New Mexico is not in the Ninth Circuit, it is nonetheless indicative of the concerns with *Hernandez*. Practicing attorneys are summarizing the acceptable and unacceptable race-neutral reasons.[178] Clever attorneys will be able to disguise their true motivations by focusing on the surrounding circumstances of the trial.[179] The trial judges will have no other option, other than to accept the "race-neutral" reason because it will be based on factors, though not necessarily truthful, which are certainly race neutral.

171. Ramirez, *supra* note 45, at 771-73.
172. Perea, *supra* note 91.
173. Ramirez, supra note 45.
174. Montiel v. City of Los Angeles, 2 F.3d at 827-28 (1993).
175. Lawrence, *supra* note 12.
176. *Montiel*, 2 F.3d 335.
177. McGuire writes about the concern over the applicability of Hernandez in New Mexico, a state that has a Latino population of 29%. *See* Andrew McGuire, *Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?* 23 N.M. L. Rev. 467 (1993).
178. Dykes, *supra* note 32.
179. *Id.*

Although there is no Ninth Circuit case following or even citing the holding of *Pemberthy*,[180] the *Bauer* decision is not comforting because it signals the court's acceptance of arbitrary reasons as justifications for excluding minority jurors.[181] Nonetheless, this case flies in the face of *Johnson*.[182] The inconsistency is troubling because *Bauer* is the most recent rendition by the Ninth Circuit on the issue of false justifications.[183] One may advocate, nonetheless, for the *Montiel* suggestion of allowing a longer period of time during voir dire to uncover the party's true motivation for using the peremptory strike.[184]

A second concern is the court's willingness to allow the prosecutor to base its decision to exclude the juror on subjective factors.[185] Moreover, this becomes a real problem in light of the court's decision in *Changco*, where the court allowed the prosecutor to question the juror's ability to understand English, and now may do so based merely on subjective factors.[186] To attack this argument, however, one may argue that the prosecutor's subjective beliefs are based on preconceived ideas of unconscious racism.[187] In this connection, their is no nexus between the articulated reason and the actual characteristic of the juror. However, *Bishop* is a double-edged sword that may be fatally damaging, and therefore, must be handled with care because it justifies the close nexus between bilingualism and the ability of a juror to follow the official court translation of the Spanish language testimony.[188] Nonetheless, the court's inability to understand what it means to be bilingual may be an important fact at issue, this issue once properly addressed and resolved may lead to the reversal of the trend against the exclusion of Latino bilingual jurors in the Ninth Circuit.

V. Conclusion

It is our civic duty to engage in all aspects of self government, including the judicial branch of our government. It is well settled jurisprudence that our form of justice and democracy does not allow the exclusion or labeling of a group as unacceptable without just reasons. However, Latinos will likely be systematically excluded from the jury selection process if the Court

180. *But see* Senegal v. White, 881 F. Supp. 1421, 1426 (1995)(citing only for the determination of whether a *prima facie* case was an issue of law).
181. United States v. Bauer, U.S. App. LEXIS 1448 (9th Cir. 19960).
182. Johnson v. Vasquez, 3 F.3d 1327 (9th Cir. 1993).
183. *Id.*
184. Montiel v. City of Los Angeles, 2 F.3d 335 (9th Cir. 1993).
185. Burks v. Borg, 27 F.3d 1424 (9th Cir. 1994).
186. United States v. Chanco, 1 F.3d 837 (9th. Cir. 1993).
187. United States v. Bishop, 959 F.2d 820 (1992).
188. *Id.*

continues to follow *Hernandez*. The Ninth Circuit's view may be a place civil rights advocates look toward in furthering the debate over *Hernandez* because of key cases that suggest conflicting reasoning with *Pemberthy* and *Hernandez*. Nonetheless, we must continue advocating for change in light of the continued subordination of the Latino community. I propose the following: (1) incorporating procedural safeguards, and (2) acknowledging the societal pressures in making judicial determination.

Procedural safeguards may prevent the future exclusion of Latino jurors. I offer two suggestions drawing on prior case law. First, one should incorporate Judge Bright's suggestion in *Montiel*, which proposes expanding the amount of time permitted for parties to conduct voir dire.[189] This proposal may be very significant in that the trial judge may have a broader opportunity to determine whether the party's stated reason is truthful. Although this may not solve the problem of false "race neutral" reasons, it certainly would allow the trial judge the opportunity to determine issues of credibility more carefully before the case reaches the next judicial level. Also, even if the judge concludes that the stated reasons are legitimate, the additional time spent conducting voir dire will build a record that may later prove helpful on appeal.

The second procedural safeguard is Justice Stevens' disproportionate impact analysis in his *Hernandez* dissent. This would give petitioners another tool to prevent against the discriminatory use of peremptory challenges.[190] The criticism articulated by the concurrence in *Hernandez* seems more petty than sincere. One must place the rights of individuals above any of Justice O'Connor's judicial economy concerns. Moreover, the Court already allows the plaintiff in Title VII cases to bring forth statistical data on discriminatory employment practices to prove discriminatory intent. In fact, the *Batson* standard was adopted from the Title VII rationale. In rejecting this argument, the Court establishes two very different standards of proving racial discrimination. Although it may be hard to establish a pattern in

189. 2 F.3d 335, 340-41.

190. Many scholars have written on the likely demise of the peremptory challenge itself. Even the Ninth Circuit has acknowledged the problems with peremptory strikes and the likely demise of this privilege. Although the circuit court was careful in not suggesting complete acceptance of this idea, the fact that the court referred to these concerns and the recent nature of its 1995 decision itself, may signal the court's lack of faith in the peremptory challenge. Thus, given their effect on the Latino community, one would advocate for their demise. *See* Douglass L. Colbert, *Challenging the Challenge: Thirteeenth Amendment as a Prohibition Against the Racial Use Of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990); *See also* Edward V. Byrne, *The Demise of the Peremptory Challenge: Evisceration of an Ancient Privilege*, 42 KAN. L. REV. 15 (1994).

a single case, the fact that an attorney consistently excludes Latinos from voir dire may be sufficient to prove discriminatory intent. The attorney would then be required to prove by a preponderance of the objective evidence at trial, that in this particular case, she did not discriminate against Latinos. Therefore, instead of shifting the burden on the plaintiff to find out what the prosecutor's subjective beliefs were, the prosecutor must justify her disproportionate exclusion of Latino jurors.

The second aspect of the solution draws upon a belief that judges are also subject to the societal pressures they live in. One must frame the problem of the exclusion of Latino jurors as a broader civil rights issue. The exclusion of minorities from the jury selection process is a larger problem that many minority groups face and may be explained by the unconscious racism driving much of the prosecutors' and judges' decisions.

Charles Lawrence argues that our unconscious notions and beliefs drive many of our actions.[191] Regardless of our expressed intentions, our unconscious feelings express themselves through our everyday decisions and attitudes. Thus, although some attorneys may not consciously intend to exclude Latinos and members of other minority groups from their jury pool, they may unconsciously do so. Thus, when judges are deciding whether a party has articulated a "race-neutral" justification, the judge must first consider the cultural meaning of the reason proffered. If the proffered reason has cultural meaning, the court must reject the reason and ask the proponent party to either clarify his answer or be overturned.

The two dimensions of the solution may work well together. The procedural safeguards will assure that attorneys do not articulate false reasons for excluding Latino and other minority groups. On the other hand, if attorneys manage to articulate such fallacious reasoning, the court's recognition of unconscious racism and the cultural meaning test may still prevent future abuse. These solutions do not solve all of the problems, especially since racism is so pervasively prominent in our society that its demise seems unlikely.[192] Ultimately, we all have to look at ourselves with scrutiny and ask whether our actions and beliefs are just or unjust. No one should be permitted to claim that the systematic exclusion of one group from the jury selection process because they are bilingual is race neutral. Clearly it is not!

What is clear is that race plays a significant role in all aspects of our judicial system. A recent high profile case brought the discussion of race and our jury system once again into center

191. *Bishop*, 959 F.2d at 820.

192. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992).

stage.[193] In the aftermath of the *Simpson* verdict, the nation became preoccupied in what is now commonly known as the "race card" defense.[194] As we have seen, however, race plays an important role at a much earlier stage in the trial—during voir dire. We must therefore consider the notions of justice and equality when addressing concerns over racism in our justice system. Further, establishing procedural safeguards and recognizing that our social environment creates and nurtures one's unconscious belief system, are legitimate steps in solving the Latino exclusion problem.

We now return to the verdict on Maria:

> *The tic, tock sounds of her watch compound her anxiety—"what did I do wrong?" While she waits for the judge to rule, Maria thinks about these and endless other punishing thoughts—thoughts that wound the very essence of herself.*
>
> *After what seemed to be an eternity for Maria, the judge is ready to rule, "It is a very difficult decision to make in light of the little evidence available. But, it is a very easy decision to make when one considers the possible effects not only on the integrity of our justice system, but also the effect on jurors. It is therefore my judgment that the prosecutor does not meet his burden and must introduce additional evidence. Juror number eight will not be excused."*
>
> *Maria raises her head and looks at the judge. She smiles. Maria is no longer waiting.*

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193. Jan Crawford Greenburg, *Experts: Simpson Verdict Shows Skewed Jury System*, CHI. TRIB., Oct. 8, 1995, at A1. "[T]he Simpson trial, with its controversial acquittal of the ex-football star on double-murder charges, has renewed debate on the role of race in jury selection." *Id.*

194. It was a defense strategy used to point out to a predominately black jury, charges of racism against the Los Angeles Police Department and its handling of Simpson's arrest. Tony Mauro, *Simpson Free: Prosecutors 'ran from their evidence,'* USA TODAY, Oct. 4, 1995, at 1A.