PEREMPTORY CHALLENGES: LESSONS FROM *HERNANDEZ V. TEXAS*

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> "The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."[1]
>
> —Justice Marshall

I. INTRODUCTION

What insights can a close study of *Hernandez v. Texas*[2] contribute to current debates about the use of peremptory challenges to strike non-whites from venires? In light of the Supreme Court's recent ruling in *Miller-El v. Cockrell*[3] and *Hernandez v. New York*,[4] analysis of the reasoning in *Hernandez v. Texas* as well as analysis of the evolution in the Court's understanding of the concept of "race," pre- and post-*Hernandez*, is warranted.

In *Miller-El*, the Court held that the defendant should have been issued a certificate of appealability to review the denial of his habeas appeal. The district court had denied it, deferring to the trial court's acceptance of the prosecutor's justifications for using peremptory strikes against African American prospective jurors. While it did not comment on the merit of the defendant's case, the Supreme Court did discuss evidence he presented demonstrating that the prosecutor's peremptory challenges were based on race. In some ways, the Court stepped back to 1935 when, in *Norris v. Alabama*,[5] it rejected the common practice of accepting jury commissioners' assertions that they did not intend to discriminate as evidence of non-discrimination. Instead, the Court ruled that discrimination could be shown through a pattern of absence of blacks from juries. That is, they ruled on the result of selection procedures, even if the procedures, them-

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1. Batson v. Kentucky, 476 U.S. 79, 107 (1986).
2. Hernandez v. Texas, 347 U.S. 475 (1954).
3. Miller-El v. Cockrell, 537 U.S. 322 (2003).
4. Hernandez v. New York, 500 U.S. 352 (1991).
5. Norris v. Alabama, 294 U.S. 587 (1935).

selves, were facially neutral. In subsequent decisions[6] the spirit of *Norris* was ignored. It was not until *Batson v. Kentucky*, that the Court developed more reasonable criteria for determining whether peremptory challenges were used unconstitutionally. Thus, if the defendant is part of a recognizable group and can make a prima facie case that jurors were struck for race-based reasons, then the burden of proof shifts to the prosecution to provide a race-neutral explanation. Yet, in case after case, appeals courts assumed that lower courts made the correct determination in balancing evidence of discrimination against prosecutorial explanations. In essence, *Batson* often operates to return us to the pre-*Norris* era, when a prosecutor's word that he did not intend to discriminate was trusted. The *Miller-El* case both clarifies and enforces *Batson*. However, two key questions remain.

First, the question raised in *Hernandez* — whether race and nationality can be construed similarly under the auspices of the Equal Protection Clause — remains salient. In 1991, in *Hernandez v. New York*, the Court ruled that peremptory challenges may be used to strike bilingual venirepersons so long as the action was not based on race.[7] Yet it evaded the opportunity to define the term race, while insisting that the Equal Protection Clause protected only racial discrimination.[8] Here, *Hernandez v. Texas* is instructive. The lawyers in *Hernandez* struggled with the relationship between race and ethnicity, as well as with their applicability to the Fourteenth Amendment. They offered nuanced arguments that should be revisited by the Court, today, in considering *Batson* claims.

Second, what if there is no evidence of prosecutorial malfeasance and yet a pattern of exclusion can be demonstrated? Again, *Hernandez v. Texas* can inform the debate. Although it dealt with people who were not black, prejudicial attitudes influenced the seating of Mexican Americans on juries. Such attitudes were based on things "other than race," but that served as proxies for race. How can we justify allowing peremptory challenges based on subjective judgments that may be consciously or unconsciously racially rooted?[9] How do the rules governing drawing

6. *See generally* Swain v. Alabama, 380 U.S. 202 (1965).

7. Hernandez v. New York, 500 U.S. at 370.

8. In a recent 2003 case, Rico v. Leftridge-Byrd, 340 F.3d 178, 185 (3d Cir. 2003), the defendant asserted a *Batson* claim based on presumed ethnicity (Italian). The lower courts accepted the claim, but the key question was not decided, as the state supreme court upheld the trial court's factual determination that discrimination was not a factor and the circuit court agreed.

9. Here, the Sixth Amendment guarantee of an impartial jury drawn from a fair cross-section of the community may be an alternative to the Equal Protection Clause to defend fairness in the jury system.

jury pools determine outcomes that are continually unrepresentative of the community? How could this be remedied? These issues raise the larger question of whether systems allowing peremptory challenges are so flawed as to interfere with the delivery of justice.

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

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

II. The Question of Intent

The intent of the prosecutor or jury commissioner has long been the acid test in jury discrimination cases. In 1935, in *Norris v. Alabama*, the Supreme Court reviewed the evidence and judged the lower court's findings for the first time in a jury bias

case.[10] The Court declared that prima facie discrimination could be shown through a pattern of the absence of blacks from petit juries, not just jury pools. Once this was established, the burden shifted to the state to provide a convincing explanation for the underrepresentation of blacks. Evidence of systematic exclusion was the standard for scrutiny (e.g., no names of African Americans on jury rolls). In contrast to past cases, declarations that jury commissioners did not intend to discriminate were not accepted as proving nondiscrimination. The Court ruled on the results of the process, rather than the stated intent of the prosecutors and jury commissioners.

In 1965, in the next landmark case on jury bias, *Swain v. Alabama* recognized the use of peremptory challenges to exclude African Americans as unconstitutional. However, it held that petitioners must prove a pattern of systematic exclusion, not only discrimination in their particular case.[11] *Batson v. Kentucky* remedied this by ruling that defendants only had to show that discrimination was a factor in their own trial, rather than having to prove a history of systemic discrimination by shifting the evidentiary burden to the prosecution once the defendant established a prima face case of bias.[12]

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

The prosecutor in *Hernandez v. New York* offered a "neutral" explanation for the challenged strike – that the potential juror's ability to understand testimony in Spanish may undermine his or her ability to abide by the interpreter's version of the testimony. The prosecutor noted that the jurors in question looked away from him and answered hesitantly that they would try to abide by the official interpretation. The Court accepted this reason, noting that the prosecutor divided the jurors into two

10. *Norris*, 294 U.S. 587 (1935).
11. *Swain*, 380 U.S. 202 (1965).
12. Batson v. Kentucky, 476 U.S. 79 (1986).

categories: those who convinced him they would accept the translator's version and those who would not, and that both categories could include Latinos and non-Latinos. This argument is reminiscent of earlier arguments that there are qualified and non-qualified venirepersons and that Mexican Americans on the venire just happened not to be qualified. For instance, in *Lugo v. Texas* (decided three years after *Norris*) the sheriff testified, "I know as a fact of my own knowledge that the majority of the Mexican population of this county are unable to speak intelligently in English and are unable to read and write the English language."[13] Based on this subjective judgment, the Texas Court of Criminal Appeals refused to overturn the trial court's finding of fact.[14]

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

The defense suggested that this standard could exclude *all* bilingual people from serving on juries. Even if this were true, the Court countered, this would not be enough to trigger an Equal Protection issue because "[a]n argument relating to the impact of a classification does not alone show its purpose . . . . Equal protection analysis turns on the intended consequences of government classification."[15] This is precisely the Achilles' heel of the way *Batson* has been interpreted. *Any* explanation by the prosecutor, as long as it does not specifically mention race, is deemed race-neutral.

In its decision the Court quoted *Arlington Heights v. Metropolitan Housing Development Corporation* as authoritative: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[16] But how does one gauge intention? At one point the prosecutor in *Hernandez* said that he was not even certain whether the jurors in question were Hispanic and did not notice how many Hispanics

13. Lugo v. Texas, 124 S.W.2d 344, 348 (Tex. Crim. App. 1939).

14. *Id.*

15. Hernandez v. New York, 500 U.S. 352, 361 (1991).

16. *Id.* at 360 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)). It is interesting to note that the Court depended on reasoning in a case decided *prior* to *Batson*.

were on the venire. This appears disingenuous, considering the context of his claim. He stated:

> Your honor, my reason for rejecting the — these two jurors [sic] — I'm not certain as to whether they're Hispanics. I did not notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.[17]

He invoked their ethnicity while simultaneously denying knowledge of it. It could be argued that the prosecutor offered race-neutral reasons for his strikes because of his heightened awareness of the role that race could play in the trial.

In an attempt to deny the possibility that he had predisposed ideas that Hispanics would be less likely to convict, a common perception, he further claimed that since the defendant and the witnesses were Hispanic, he would have no motive to exclude Hispanics from the jury.[18] This misapplies *Batson* and its progeny in two ways. First, in focusing on the defendant, it glosses over whether the right of the potential jurors not to be excluded from the opportunity to serve on a jury has been improperly denied. As Kenneth Melilli argues, *Batson* is often overlooked in the fact that it shifted the focus of efforts to secure rights from the defendant to prospective jurors.[19] Second, it ignores subsequent decisions that expands *Batson,* including *Powers v. Ohio*,[20] which allows third parties to lodge *Batson* claims on behalf of allegedly excluded jurors. His invocation of the race of the parties involved suggests that he does, indeed, take race into consideration. It means that race matters. In essence, because *Batson* realigns our concern with the juror, rather than the defendant, the prosecutor's explanation of motive is moot.

The Court concluded that the challenges:

> May have acted like strikes based on race, but they were not based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.[21]

Yet, the Court in *Batson* noted "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact . . . . We have observed that under some circumstances proof of dis-

17. *Id.* at 356.
18. *Id.* at 357.
19. Kenneth Melilli, Batson *in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 453 (1996).
20. Powers v. Ohio, 499 U.S. 400 (1991).
21. *Hernandez v. New York*, 500 U.S. at 375.

criminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'"[22] Despite *Batson's* stand on race-based peremptory challenges in its interpretation, courts have returned to the pre-*Batson* era in subsequent cases.

Justice Stevens differs with the Court's interpretation of *Batson*. In his dissent, he counters, "[i]f any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, 'the Equal Protection Clause would be but a vain and illusory requirement.'"[23] He argues that once a prima facie case is made, "unless the explanation provided by the prosecutor is sufficiently powerful to rebut the prima facie proof of discriminatory purpose," the fact of discrimination rests.[24] That is, he places a greater burden on the prosecution to provide a convincing explanation. He continues, "the Court has imposed on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate. Neither *Batson* nor our other equal protection holdings demand such a heightened quantum of proof."[25]

The Court did, however, admit that disproportionate impact is relevant to the identification of the prosecution's discriminatory intent. Moreover, they admitted that language ability could be a pretext for race-based challenges and that in an area with a large Latino population; this could exclude a large percentage of jurors. They even noted that there could be less-impacting alternatives, such as permitting Spanish-speaking jurors "to advise the judge in a discreet way of any concerns with the translation . . . ."[26]

The test of whether there are alternatives to striking a juror is worthy of consideration. In his dissent, Justice Stevens firmly stated, "[a]n explanation based on a concern that can easily be accommodated by means less drastic than excluding the challenged venireperson from the petit jury will also generally not qualify as a legitimate reason . . . ."[27] In this case, he suggests simultaneous translation as an easy fix. Yet despite the Court's admissions, they still conclude that "in the absence of exceptional

22. Batson v. Kentucky, 476 U.S. 79, 93 (1986) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

23. *Hernandez v. New York*, 500 U.S. at 377 (Stevens, J., dissenting) (quotes omitted).

24. *Id.* at 378.

25. *Id.*

26. *Id.* at 364.

27. *Id.* at 376.

circumstances, we would defer to state-court factual findings . . . ."[28]

III. Questions of Credibility and Deference

This tradition of deference to trial courts, combined with the ways in which the Court evaluates the prosecutor's credibility, has severely limited the success of *Batson* challenges. Yet, as Justice Kennedy, writing for the majority in *Miller-El* noted, "[d]eference does not imply abandonment or abdication of judicial review."[29]

In *Hernandez v. New York*, the Court once again accorded deference to the stated intent of the prosecutor. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[30] The Court depends on the subjective impression the prosecutor has of the potential juror. They note:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.[31]

Why is this the "best evidence?" Are lawyers not paid to convince judges and juries of the truth of their argument? A good lawyer must be persuasive. In many senses, lawyering is a type of acting — so a prosecutor's demeanor may be the least helpful piece of evidence in evaluating the truth of his claims. In his dissent, Justice Stevens argues that the best evidence of discrimination is "what actually happened," that is, the outcome of jury selection — the composition of the jury versus the composition of the venire.[32]

In *Miller-El*, the Court reviewed its decision in *Hernandez v. New York* and then conducted a lengthy discussion of step three of *Batson's* framework. Quoting *Purkett v. Elem*, they note:

> At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination". . . . Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how

28. *Id.* at 366.
29. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).
30. *Hernandez v. New York*, 500 U.S. at 360.
31. *Id.* at 365.
32. *Id.* at 377 (Stevens, J., dissenting). *See* Melilli, *supra* note 19 (similarly suggesting that this is the most convincing method used to establish a *prima facie* case of discrimination).

> improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.[33]

This stance cedes the ground of truth to the intuition of prosecutors. Unless there is direct evidence of invidious use of the strike, their explanation can be weak and still be accepted. Based on the standard that pretexts are identified only when "fantastic," it is very unlikely that any savvy prosecutor will provide such reasoning. The "fantastic" standard excludes the possibility that race and class are articulated and that class-based reasons, such as neighborhood residence or employment status can operate to disproportionately exclude racial minorities. Similarly, having a personal relationship with someone who was convicted for a felony can disproportionately exclude minorities, given their overrepresentation in the nation's prisons.

In *Miller-El* the defense claimed that many of the African American venirepersons who they eliminated through peremptory challenges were struck because of their lack of support for the death penalty. White jurors did not express such hesitancy. The Texas Court of Criminal Appeals noted that the main reason for the strikes was their "reservations concerning the imposition of the death penalty."[34] This seems, on its face, like a valid explanation. However, the defense countered that the prosecutor engaged in a suspect strategy of disparate questioning that led African American venirepersons to be more reticent about applying the law. The prosecutor accomplished this by using a "graphic script" describing in detail the process of administering the death penalty when questioning African Americans, while asking of whites a more general question about how they feel about the death penalty and whether they could serve on a jury that would have to make a decision about sentencing someone to death. Fifty-three percent of African Americans were led through the graphic script, while only six percent of white venirepersons were. The Supreme Court was impressed by this difference, quoting the appeal extensively.[35]

The combination of disparate questioning, the dubious (though legal in Texas) practice of "jury shuffling," that is, reordering the venire, and the use of peremptory challenges had resulted in one African American juror out of twenty prospective African American jurors and 108 of those interviewed. That is, African Americans made up over eighteen percent of those interviewed and comprised less than one percent of those selected for the jury. The Court finds that:

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33. *Miller-El*, 537 U.S. at 339 (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995)).

34. *Id.* at 329.

35. *Id.* at 332.

> Nine (African Americans) were excused for cause or by agreement of the parties. Of the 11 African American jurors remaining, however, all but one were excluded by peremptory strikes exercised by the prosecutors. In contrast, the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve.[36]

Were these strikes "race-neutral," if the result was so starkly racially divided?[37]

Some seemingly race-neutral explanations for strikes appeal to "common sense." But often this conventional wisdom is racially inflected.[38] It is possible that the prosecution and judges do *not* intentionally discriminate but make discriminatory judgments reflecting social "common sense." In his concurrence in *Batson*, Justice Marshall argues,

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.[39]

In support of this supposition, Juan F. Perea cites a recent example of a case in which the prosecutor struck a venireperson who had a heavy accent because he did not think he would be able to understand the proceedings.[40]

In *Hernandez v. New York*, Justice Stevens similarly points out, "[t]he Court overlooks, however, the fact that the 'discriminatory purpose' which characterizes violations of the Equal Protection Clause can sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign."[41] "[S]eat-of-the-pants in-

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36. *Id.* at 331.

37. While the Court has insisted in Holland v. Illinois, 493 U.S. 474 (1990), that a defendant is not entitled to proportional representation of his or her racial group on the jury, but only that there is a fair cross-section of the community represented on the lists from which the jury is drawn, it did hold in Castañeda v. Partida, 430 U.S. 483 (1977), that a significant statistical disparity raises the inference of a prima facie case of discrimination.

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

39. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

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

41. Hernandez v. New York, 500 U.S. 352, 377 (1991) (Stevens, J., dissenting).

stincts," in Justice Marshall's words, are often based on conventional wisdom inflected by social prejudices.[42]

Whether or not the prosecutor intends to stack the jury, the result of an unbalanced jury is to undermine confidence in the outcome of the trial and the legal system.[43] There are decades of cases where deference was shown to prosecutors' explanations, resulting in either the wholesale exclusion of minorities or only nominal inclusion.

IV. SYSTEMIC QUESTIONS

Justices Marshall and Stevens highlight the possibility that discrimination can result without invidious intent. Discriminatory notions ingrained in society can produce systemic structures of discrimination. These structures continue to produce unrepresentative juries long after the initial invidious intent has been forgotten. For example, real estate covenants are now illegal, but America's neighborhoods largely remain segregated along racial lines.[44]

In *Hernandez v. Texas*, the Court declared, "[b]ut it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years."[45] However, the absence of minorities can *seem* to be mere chance, or at least not the result of purposeful discrimination, because the way the system is structured militates against a representative petit jury. Focusing on the intent of the prosecutor helps to construe discrimination as a tort, rather than as unconscious or systemic.[46] It delegitimates a focus on the rules for juror selection. Yet rules are never neutral; they always advantage some and disadvantage others. In redistricting, for example, districts are drawn by legislatures and usually advantage the incumbents — the very people responsible for setting the rules. Even apart from invidious intent, rules unintentionally still create winners and losers and can have disproportionate impact on certain groups.

Fukurai and Krooth examine every stage leading up to the seating of a jury and detail the ways in which the system misses or dismisses potential jurors who are minorities.[47] This includes the use of voting rolls instead of lists that would encompass a

42. *Batson*, 476 U.S. 79 at 138 (quoting Justice Rehnquist).

43. HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993).

44. *See generally* THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996) (for an excellent analysis of the impact of racial covenants on continuing inequality).

45. Hernandez v. Texas, 347 U.S. 475, 482 (1954).

46. *See* Lawrence, *supra* note 38.

47. *See* FUKURAI ET AL., *supra* note 43, at 141-62.

wider range of citizens, the granting of hardship deferments, which disproportionately affects minority participation, and minorities' lower response rate to juror summonses and lack of follow-up by the state, jury qualification processes, and voir dire itself, all of which may not be purposeful but result from historical economic and educational disenfranchisement and conspire to skew the racial makeup of the jury. The practice of jury shuffling used in *Miller-El* certainly falls into this category. Given the fact that African Americans are a minority, it is easy to shuffle the panel, resulting in a dearth of African Americans at the front, thereby guaranteeing a jury comprised mainly of whites.

In *Hernandez v. New York*, the Court accepted the prosecution's reason for striking bilingual jurors as legitimate because it has been an accepted practice to allow striking people with knowledge beyond what is presented as evidence. Applying this practice to bilingual jurors, however, serves to eliminate diversity from the jury and to create a racially unbalanced jury. It also casts doubt on the ability of bilingual speakers to exercise good judgment, while at the same time assuming that monolingual jurors hearing testimony given in English will not make errors in interpreting the information. It presumes that English speakers will make more reliable jurors and that the interpretation of the non-Spanish speaking majority is the neutral standard by which to judge. Given that most people who are bilingual in English and Spanish are Latino, it casts doubt on their ability to responsibly exercise the rights of citizenship. Finally, it upholds the status quo by reinforcing the underrepresentation of Latinos on juries.

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

tral.[48] It camouflages white dominance of the system by presenting white people's assumptions, experience and the distinctions they use to structure the rules as unbiased.

Prosecutors in *Hernandez v. Texas* claimed to have race-neutral reasons for excluding Mexican Americans. Yet the Court concluded that the result — an all-white jury pool — "bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."[49] When dealing with discrimination that is invisible because it is ingrained in the system of rules, only the composition of the jury should qualify as evidence of a fair system. . .

V. QUESTIONS OF RACE

In *Hernandez v. New York*, the Court stated, "[i]n holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes."[50] Here, they admit the complexity and imprecision of race, but refuse to engage in a substantive discussion of it. This evasion is a serious abdication of responsibility. How can judges make decisions about the neutrality of explanations for strikes when the very terms they are judging are not defined?

I would argue that language ability is frequently used as a proxy for race.[51] The Court notes that language constitutes "membership in a community," that is, that Spanish-speakers could be construed as a cognizable group, fulfilling the first test of a *Batson* claim.[52] Further, they admit, "It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[53] Yet they conclude, "But that case is not before us."[54] Given other discrimination cases regarding the use of Spanish in the workplace, this is a flagrant omission.

A deeper discussion of "race" would include speaking a foreign language when that language is a primary language as a

48. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994); *see generally* FUKURAI, ET AL., *supra* note 43, at ch. 13.

49. *Hernandez v. Texas*, 347 U.S. at 482.

50. Hernandez v. New York, 500 U.S. 352, 371 (1991).

51. *See* Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000). I thank Kevin Johnson for bringing his work to my attention.

52. *Hernandez v. New York*, 500 U.S. at 370.

53. *Id.* at 371.

54. *Id.* at 372.

marker of difference and would examine when that difference creates a situation of *de facto* discrimination.[55] In *Hernandez v. Texas*, the Supreme Court presaged *Batson* by agreeing with defense attorney Carlos Cadena that exclusion on the basis of distinctions other than race can deprive a group of equal protection, and acknowledged that community prejudices change, as do the groups needing protection. Chief Justice Warren explained that, "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."[56] The justices accepted the evidence Cadena offered that people of Mexican descent were treated as a distinct class.

One way to determine whether a group is treated differently is to study the social order of the community. In *Hernandez v. Texas*, attorney Carlos Cadena did just this. Cadena found that "persons of his national origin" were "intentionally, arbitrarily and systematically" excluded from jury selection. He used the phrase "national origin" in lieu of race because only "black" and "white" were recognized as races, but he showed that "national origin" operated to exclude in the same way as race. For example, people frequently contrasted "Mexicans and whites," but not "Germans and whites" suggesting that the distinction was rooted in race, not ancestry. He also provided evidence that the state and federal governments distinguished "Mexicans" from "Negroes" and "whites," and differentiated people of Mexican descent from other whites. The federal census bureau compiled statistics on "Spanish speaking persons," the category "Mexican" was used by the Selective Service in World War II, and the Texas Department of Health distinguished them in a separate category from whites. He also showed that Mexicans experienced *de facto* segregation in schools, restaurants, public swimming pools and even in the bathrooms in the very courthouse in Jackson County in which the case was originally tried.[57]

If the *Hernandez v. New York* Court was to model itself after its predecessor in *Hernandez v. Texas*, it would consider such sociological evidence to determine whether language use is melded with notions of race. For example, they could engage in a discussion of the role of continual immigration to the United States from Latin America in fueling discrimination against Spanish-speaking people. Or they could consult experts on the

55. *See* Perea, *supra* note 40, at 17-18.

56. Hernandez v. Texas, 347 U.S. 475, 478 (1954).

57. Brief for Petitioner at 38-40, Hernandez v. Texas, 347 U.S. 475 (1954) (No. 406).

sociopolitical aspects of bilingualism.[58] They would note and puzzle over the fact that the federal census includes a separate, non-racial category for "Hispanics," the only such category, and try to determine its import. Although today there is greater recognition of the complexity of race, enduring notions of Latinos' racial difference is betrayed by the curious category "non-Hispanic whites" in many governmental and sociological studies.

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

Scholars have shown that race is a social construction and that its contours constantly change.[59] I have argued elsewhere that "Latino" is a racialized ethnic group.[60] This category includes cultural artifacts such as language and religion and encompasses people of many national origins and colors. While a Latino who was born in the United States and looks white may be less likely to experience discrimination, they can instantly become racialized when speaking Spanish. Just as race and ethnicity were once joined for non-whites,[61] today, language is often a sig-

58. *See* RONALD SCHMIDT, LANGUAGE POLICY AND IDENTITY POLITICS IN THE UNITED STATES (2000).

59. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (1994).

60. *See* Clare Sheridan, "'A Foreign, Alien Race': Racialization and the Political Rights of Mexican Americans in Progressive Era Texas," *in* A Genealogy of Citizenship: Mexican Americans, Race and National Identity (1999) (unpublished dissertation, Department of Government, University of Texas, Austin) (on file with the University of Texas, Austin).

61. *See* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67 (1999).

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

VI. CONCLUSION

In the majority's decision in *Miller-El*, the Court noted that "even though the prosecution's reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial consideration."[62] One can imagine many explanations that appear neutral but are selectively applied. In a thorough review of all cases raising *Batson* inquiries between 1986 and 1993, Kenneth Melilli analyzed the reasons given and found that the majority of them are stereotypes of people in cognizable groups. "Indeed" he notes that "evaluating people on the basis of stereotypes is an inherent aspect of the peremptory challenge system."[63] Moreover, most would be allowed as challenges for cause. Thus, he argues, using peremptory strikes for such people should be disallowed.[64] In his dissent in *Hernandez v. New York*, Justice Stevens concurs. "If the prosecutor's concern was valid and substantiated by the record, it would have supported a challenge for cause." He continues, arguing for a significant change in the system of challenges. "The fact that the prosecutor did not make any such challenge . . . should disqualify him from advancing the concern as a justification for a peremptory challenge."[65] Melilli concludes that retaining a system with peremptory challenges is antithetical to outlawing racial discrimination in jury selection.

Melilli found that in seventy-eight percent of the cases in which a prima facie case was made, the prosecutor's explanation

62. Miller-El v. Cockrell, 537 U.S. 322, 343 (2003).
63. *See* Melilli, *supra* note 19, at 447.
64. *Id.*
65. Hernandez v. New York, 500 U.S. 352, 379 (1991) (Stevens, J., dissenting).

for exercising the strike was accepted as race-neutral.[66] Only seventeen percent of blacks and thirteen percent of Hispanics making *Batson* claims were successful despite the fact that sixty-two percent of blacks and sixty-six percent of Hispanics were able to make prima facie cases that they may have been discriminated against. To echo the *Hernandez v. Texas* Court, the gap between the *prima facie* case and their ability to prove it is too large to be "mere chance."[67]

Melilli details 49 cases (of 191) in which prosecutor's explanations were rejected because they were based on stereotypes of other groups that the potential jurors belonged to.[68] Several of these, such as residence in a high crime area, could be proxies for race. In looking at the entire set of cases, he found that over fifty-two percent were based on group stereotypes and close to four percent on the subjective judgments of prosecutors. The remaining forty-three percent could be addressed by challenges for cause.[69] He objects to those based on group stereotypes because they deny individuals the right to participate on juries. The system of peremptory challenges operates, he argues, to seat favorable jurors. But the role of the state should be to create fair and impartial juries, not juries that tend to be favorable to one or the other side.[70] Melilli concludes that a system in which challenges for cause were the only option, making them more meaningful, would capture the legitimate concerns of both parties and would eliminate pretextual ones based on group stereotypes or subjective assessments by the prosecution.[71]

Justice Marshall also strongly advocated eliminating peremptory challenges. He declared in his concurring opinion in *Batson*, "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[72] Marshall noted that often, *prima facie* cases are not even made unless the challenges are "flagrant."[73] Moreover, even when a defendant is able to establish a *prima facie* case, it is difficult for trial courts to rebut facially neutral reasons for the strikes. He noted that reasons such as a juror seeming uncommunicative or having a son the same age as the defendant were accepted at face value. He prophetically warns, "If such easily generated explanations are sufficient to discharge the prosecu-

66. *See* Melilli, *supra* note 19, at 461 Table D-1.
67. *Id.* at 463, Tables E-2 and E-3.
68. *Id.* at 482, Table H-2.
69. *Id.* at 497, Table III-R.
70. *Id.* at 499.
71. *Id.* at 487-96.
72. Batson v. Kentucky, 476 U.S. 79, 102-103 (1986) (Marshall, J., concurring).
73. *Id.* at 105.

tor's obligation to justify his strikes on nonracial groups, then the protection erected by the Court today may be illusory."[74]

The most promising grounds for eliminating peremptory challenges may be the Sixth Amendment, rather than the Equal Protection Clause. The Sixth Amendment guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[75] The term "impartial" has subsequently been interpreted to refer to a "fair cross-section" of the community, though the Court noted in *Holland v. Illinois* that it does not require the actual composition of the petit jury to be representative of different groups in the community.[76] Despite this ruling, it seems that a focus on the rights of potential jurors, rather than defendants, requires a reexamination of the Sixth Amendment guarantee. One year after the decision in *Holland*, the Court held in *Powers v. Ohio* that *Batson* did, indeed, apply to the right of jurors not to be excluded from the possibility of serving on a jury.[77] It further held that the defendant could make a *Batson* claim regarding the exclusion of black members of the venire even though the defendant, himself, was white.[78] Melilli argues that *Batson* caused a largely unrecognized sea-change in focusing on the right of prospective jurors to serve, rather than on the rights of the defendant. He offers *Powers v. Ohio* as evidence that the logical conclusion flowing from *Batson* is the right of potential jurors to have a genuine opportunity to serve on a jury.[79]

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

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

74. *Id.* at 106.
75. U.S. CONST. amend. VI.
76. Holland v. Illinois, 493 U.S. 474, 496 (1990).
77. Powers v. Ohio, 499 U.S. 400, 429 (1991).
78. *Id.*
79. *See* Melilli, *supra* note 19, at 453.

defendant to the juror, the terrain of the debate must move from purposeful discriminatory intent to disproportionate effect. Reflecting our discussion of systemic bias, Justice Stevens concludes, "[t]he line between discriminatory purpose and discriminatory impact is neither as bright nor as critical as the Court appears to believe."[80]

The Court objects that allowing examination of disproportionate effect would flood the system with *Batson* claims, causing chaos and undermining the purpose of the peremptory challenge. In their concurrence, Justices O'Connor and Scalia insist,

> [a]bsent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all. The peremptory challenge is, "as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."[81]

This is precisely where the peremptory challenge fails. The Court has chosen to limit its usage only on the grounds of race and gender. It has created a system where challenges to it are frequent, but has made it nearly impossible for defendants to prove their *Batson* claims. As Melilli concludes, "[a] system which . . . seeks to accommodate both the inherent aspects of the peremptory challenge and the scrutiny of anti-discrimination laws is one which seeks a middle ground which either does not exist or is impossible to locate."[82] The two purposes simply cannot coexist.

In his decision in *Batson*, Justice Powell worries that confidence in the justice system has been undermined. Indeed, the legitimacy of a democratic system of justice rests on the confidence of its citizens in its fairness. In recent years, that confidence has eroded along racial lines. The use of peremptory challenges plays a large role in this perception. The opportunities to both serve on a jury and to be judged by a jury that has been chosen fairly may improve citizens' confidence in the system, but only if we recognize that discrimination can take many forms and is accomplished through many methods. The current crisis of legitimacy in the judicial system around racially charged cases suggests that we need to have a national conversation about bias recognizing that non-representative juries are inimical to justice.

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80. Hernandez v. New York, 500 U.S. 352, 377-78 (1991) (Stevens, J., dissenting).

81. *Id.* at 374 (quoting Lewis v. United States, 146 U.S. 370 (1892)).

82. *See* Melilli, *supra* note 19, at 483.