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## Language Disenfranchisement in Juries: A Call for Constitutional Remediation

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# Language Disenfranchisement in Juries: A Call for Constitutional Remediation

JASMINE B. GONZALES ROSE\*

*Approximately thirteen million U.S. citizens, mostly Latinos and other people of color, are denied the right to serve on juries due to English language requirements and despite the possibility (and centuries-old tradition) of juror language accommodation. This exclusion results in the underrepresentation of racial minorities on juries and has a detrimental impact on criminal defendants, the perceived legitimacy of the justice system, and citizen participation in democracy. Yet, it has been virtually ignored. This Article examines the constitutionality of juror language requirements, focusing primarily on equal protection and the fair cross section requirement of the Sixth Amendment. Finding the existing juridical framework to be wanting, this Article introduces Critical Originalism—a melding of antisubordination deconstruction principles of Critical Race Theory with the interpretive methodology of Originalism Theory—as a new method of ascertaining and capturing the discriminatory intent behind a statute or procedural rule.*

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## INTRODUCTION

The racial composition of juries has caught the nation's attention for decades. African Americans and Latinos continue to be overrepresented as criminal defendants but underrepresented as jurors.<sup>1</sup> This is cause for serious concern because majority-white juries generally spend less time deliberating, consider fewer diverse perspectives, commit more errors, and exhibit more racism than racially diverse juries, which deliberate more thoroughly, commit fewer errors, diminish the expression of racism, and consider more varied perspectives.<sup>2</sup> Legal scholars have evaluated the ways in which the law systematically restricts people of color from participating

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1. Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 145 n.16 (2012).

2. See EDIE GREENE ET AL., WRIGHTSMAN'S PSYCHOLOGY AND THE LEGAL SYSTEM 305 (6th ed. 2007); BRUCE EVAN BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 101-04 (2d ed. 2013) (summarizing racial bias in jury deliberations and verdicts when juries are not sufficiently diverse); Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation*, 97 IOWA L. REV. 1969, 1980 (2012).

on juries, and felon disenfranchisement has been at the forefront of this scholarly and public discourse.<sup>3</sup> A prior felony conviction can strip a citizen of her right to serve on a jury, and this exclusion falls disproportionately on people of color. Similarly, disenfranchisement on the basis of language proficiency excludes roughly the same number of citizens<sup>4</sup> but with two differences. First, language disenfranchisement creates even greater racial disproportionality than prior felony status. Second, the exclusion of citizens from jury service on the basis of English language ability has been virtually ignored. This presents multiple questions: Why is juror disenfranchisement on the basis of language not on the political and legal radar screens? Why are the racial implications of English language juror requirements overlooked? How can the Constitution be employed to redress juror language exclusion? This Article seeks to address these queries.

The lack of attentiveness to juror language disenfranchisement as a political and legal issue is largely due to an assumption that a person must speak English to be able to effectively participate on a jury<sup>5</sup> and the formalistic separation of language discrimination from race (as well as ethnicity and national origin) discrimination under the law. The assumption that English is necessary ignores the possibility of juror language accommodation. Allowing English language deficient jurors to serve with the assistance of interpreters has a rich centuries-long history in the Anglo-American and United States legal systems.<sup>6</sup> For example, in the New Mexico state courts, juror language accommodation programs have been successfully employed for more than a century.<sup>7</sup> In fact, in New Mexico, the exclusion of limited English proficient (“LEP”) citizens from jury service on the basis of their language ability violates the state constitution.<sup>8</sup> Juror language accommodation also finds implicit support

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3. See, e.g., Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

4. Statistics about the number of limited English proficient (“LEP”) U.S. citizens are not readily available. A reasonable estimate of the number of LEP citizens in the United States would be 12.8 million. Approximately forty million people in the United States were foreign born in 2010. ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORT: THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010 at 1–2 (2012). Of that number, two-fifths (or 17.48 million) are naturalized citizens. *Id.* at 2. Nearly thirty-nine percent of naturalized citizens are LEP. MIGRATION POLICY INST., *The United States: Language & Education*, MPI DATA HUB: MIGRATION FACTS, STATS, AND MAPS, <http://www.migrationinformation.org/datahub/state2.cfm?ID=US#1>. Thus, approximately 6.8 million naturalized citizens are LEP. Additionally, 1.9% of natural born citizens are LEP. Applied to the current population that is approximately six million natural born citizens. Therefore, in total approximately 12.8 million U.S. citizens are LEP. Similarly, thirteen million citizens are banned from jury service because they are felons. Kalt, *supra* note 3, at 67.

5. See Farida Ali, *Multilingual Prospective Jurors: Assessing California Standards Twenty Years After Hernandez v. New York*, 8 NW. J. L. & SOC. POL’Y 236, 245 n.65 (2013).

6. See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 790 (1994).

7. Edward L. Chávez, *New Mexico’s Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 303 (2008).

8. N.M. CONST. art. VII, § 3; *State v. Samora*, 307 P.3d 328, 330–31 (N.M. 2013).

in federal courts and state jurisdictions that provide sign language interpreters for deaf and hard of hearing jurors.<sup>9</sup>

There also appears to be a prevalent presumption by the courts that language discrimination is for the most part separable from race discrimination.<sup>10</sup> Courts and scholars alike generally consider juror language restrictions to be color-blind and nondiscriminatory measures, and they ignore the reality that language is closely connected to (and in many instances inseparable from) race, ethnicity, and national origin.<sup>11</sup> Thus, although the exclusion of individuals from jury service on the basis of their race, ethnicity, or national origin is impermissible,<sup>12</sup> the exclusion of LEP jurors on the basis of their English language ability is permissible despite the fact that it often has the same effect of excluding racial minorities from the jury pool. These racial implications are extensive and have been under-explored.

In the United States, approximately nine percent of the population is LEP.<sup>13</sup> There is a tremendous relationship between race and limited English proficiency. Approximately forty-four percent of Latinos and forty percent of Asian Americans are LEP.<sup>14</sup> In total, about eighty-seven percent of LEP people in the United States are people of color.<sup>15</sup> Based on current population estimates, these percentages translate into an estimated 25.67 million people of color, approximately 21 million of whom are Latino. It is not known precisely how many LEP persons are U.S. citizens and thus eligible to serve on a jury. Under a conservative estimate, 11.3 million of the 13 million LEP U.S. citizens are people of color, and the vast majority are Latino.<sup>16</sup> What is undeniable, but rarely discussed, is that the exclusion of LEP persons from the jury box is overwhelmingly the exclusion of people of color, particularly Latinos.

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9. See Colin A. Kisor, *Using Interpreters to Assist Jurors: A Plea for Consistency*, 22 CHICANO-LATINO L. REV. 37, 50 (2001); see, e.g., *United States v. Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987) (holding that the presence of a sign-language interpreter did not inhibit jury deliberations or constitute grounds for a new trial).

10. See Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1431 (2004).

11. See *id.* at 1427. This Article uses the terms “blacks” and “African Americans” interchangeably except where black is used as an adjective, such as in reference to black Puerto Ricans. At points, the Article compares the black/African American experience and legal treatment with that of Latinos. However, it is important to note that the two groups are not clearly separable, as there is a sizable population of black Latinos in the United States.

12. Cf. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

13. NAT'L CTR. ON IMMIGR. INTEGRATION POL'Y, DATA BRIEF: LIMITED ENGLISH PROFICIENT INDIVIDUALS IN THE UNITED STATES: NUMBER, SHARE, GROWTH, AND LINGUISTIC DIVERSITY I (2011).

14. PEW HISPANIC CTR., TABLE 20: LANGUAGE SPOKEN AT HOME & ENGLISH-SPEAKING ABILITY, BY AGE, RACE AND ETHNICITY: 2009 (2009), available at <http://pewhispanic.org/files/factsheets/hispanics2009/Table%2020.pdf>.

15. *Id.*

16. See Jorge M. Chavez et al., *Sufren Los Niños: Exploring the Impact of Unauthorized Immigration Status on Children's Well-Being*, 50 FAM. CT. REV. 638, 638 (2012).

Although the widespread requirement that jurors speak English affects many different racial groups, the burden of language exclusion is borne predominantly by Spanish-speaking Latinos. This is not surprising because Latinos are both the largest racial minority group<sup>17</sup> and the largest linguistic minority population in the United States.<sup>18</sup> It is also not surprising because English language restrictions have often arisen in response to perceived “threats” or “problems” concerning Latino immigration or presence.<sup>19</sup> English language requirements and policies initially intended to primarily target Latinos and Spanish language users,<sup>20</sup> but the resultant law or rule is stated in race-neutral terms. Under current constitutional analysis, the discriminatory intent, history, and context behind a language law, as well as its discriminatory effect, are generally ignored or disregarded.

This Article examines the constitutionality of juror language prerequisites, with a focus on their impact on the Latino population. Part I provides an overview of the differing federal and state juror language proficiency requirements, as well as background information on the prevalence of LEP persons in the United States. Part II discusses the problems that juror language requirements pose. Part III examines juror English language restrictions under equal protection doctrines of the Fourteenth and Fifth Amendments and the fair cross section requirement of the Sixth Amendment. This examination reveals shortcomings in the current constitutional jurisprudence, particularly equal protection law, which too often fails to recognize the racially discriminatory intent behind English language requirements. In response to this failing, this Article proposes Critical Originalism as a new method for ascertaining the discriminatory intent of a statute or procedural rule. Part IV proposes juror language accommodation as a viable solution for remedying the problems posed by the language requirements.

## I. JUROR LANGUAGE REQUIREMENTS AND LIMITED ENGLISH PROFICIENCY IN THE UNITED STATES

### A. JUROR LANGUAGE REQUIREMENTS

All federal courts and most state courts currently exclude LEP persons from jury service. However, despite the pervasiveness of juror language requirements, the severity of such restrictions varies greatly by

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17. *See id.*

18. ANA ROCA & JOHN M. LIPSKI, *SPANISH IN THE UNITED STATES: LINGUISTIC CONTACT AND DIVERSITY* 2 (1999).

19. *See* discussion *infra* Part I.A.2; Philip C. Aka & Lucinda M. Deason, *Culturally Competent Public Services and English-Only Laws*, 53 *How. L.J.* 53, 85 n.207 (2009).

20. *See* Steven W. Bender, *Introduction: Old Hate in New Bottles: Privatizing, Localizing, and Bundling Anti-Spanish and Anti-Immigrant Sentiment in the 21st Century*, 7 *NEV. L.J.* 883, 886 (2007).

jurisdiction. Some courts merely require that potential jurors understand or speak English, while others require that potential jurors are able to read and write in English. A survey of the various language prerequisites is important because the more stringent the language requirement, the greater the exclusion.

*I. The Federal English Language Juror Requirement*

The United States does not have an official language. Federal “Official English” legislation has been proposed repeatedly but has never survived a congressional vote.<sup>21</sup> Nonetheless, English is the language used in all official proceedings of the federal courts, even in the U.S. District Court for the District of Puerto Rico, where the dominant language is Spanish.<sup>22</sup>

The federal government mandated specific language requirements for jury service in the federal courts with The Jury Selection and Service Act of 1968 (“JSSA”).<sup>23</sup> The JSSA was enacted to provide a uniform jury selection process to ensure that jury pools are drawn from a “fair cross section of the community” so that “[n]o citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.”<sup>24</sup> In terms of a prospective juror’s language abilities, the JSSA provides that a person is not qualified for jury service in any federal court if he or she does not speak English or “is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form.”<sup>25</sup> This is a rather stringent standard which would exclude anyone who speaks English less than very well or who lacks written literacy in English.

Although the purpose behind the JSSA is to ensure that a jury is representative of the community, when employed in communities with high numbers of language minorities, the JSSA’s English language prerequisite actually prevents significant numbers of racial and national origin minorities from serving. In our current national demographic, where Latinos represent the largest and most rapidly growing minority group, language restrictions such as those in the JSSA can prevent the

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21. See English Language Unity Act of 2011, H.R. 997, 112th Cong. (2011) (“To declare English as the official language of the United States.”); English Language Unity Act of 2009, H.R. 997, 111th Cong. (2009) (“To declare English as the official language of the United States[.]”); National Language Act of 2009, H.R. 1229, 111th Cong. (2009) (“[T]o declare English as the official language of the Government of the United States.”); H.R.J. Res. 19, 110th Cong. (2007).

22. See, e.g., *United States v. Rivera-Rosario*, 300 F.3d 1, 5–6 (1st Cir. 2002); *United States v. Valentine*, 288 F. Supp. 957, 963–64 (D.P.R. 1968).

23. Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1968).

24. *Id.* § 1862.

25. *Id.* § 1865(b)(1)–(3).

jury pool from being derived from a fair cross section of the community.<sup>26</sup> As discussed below, the majority of states have similar English language requirements that also result in exclusionary outcomes.

## 2. *State English Language Juror Requirements*

In the state courts, English language juror requirements are derived from several different sources, including “official English” or “English-only” laws, juror language proficiency laws, and local jury rules. Indirect sources, such as “English-only” or “official English” laws, while not always binding, set an influential tone in considering who can participate in governmental functions like jury service. There are twenty-six states that currently have “official English” or “English-only” laws.<sup>27</sup> The bulk of these laws are statutes, but others came about as amendments to state constitutions.<sup>28</sup> “Official English” laws are decrees declaring English as the official language of the state and government.<sup>29</sup> “English-only” laws

26. See generally Andrea Freeman, *Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico*, 20 TEMP. POL. & CIV. RTS. L. REV. 179, 190–92 (2010).

27. ALA. CONST. art. I, § 36.01; ALASKA STAT. § 44.12.300 (2011); ARIZ. CONST. art. XXVIII, § 4; H.C. Res. 2036, 47th Leg., 2d. Reg. Sess. (Ariz. 2006); ARK. CODE ANN. § 1-4-117 (2011); CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; GA. CODE ANN. § 50-3-100 (2011); IDAHO CODE ANN. § 73-121 (2012); 5 ILL. COMP. STAT. 460/20 (2011); IND. CODE. § 1-2-10-1 (2011); IOWA CODE § 1.18 (2012); KAN. STAT. ANN. § 73-2801 (2011); KY. REV. STAT. ANN. § 2.013 (West 2011); MISS. CODE. ANN. § 3-3-31 (2011); MO. REV. STAT. § 1.028 (2011); NEB. CONST. art. I, § 27; N.H. REV. STAT. ANN. § 3-C:1 (2011); N.C. GEN. STAT. § 145-12 (2011); N.D. CENT. CODE § 54-02-13 (2011); S.C. CODE ANN. § 1-1-696 (2012); S.D. CODIFIED LAWS § 1-27-20 (2012); TENN. CODE ANN. § 4-1-404 (2012); UTAH CODE ANN. § 63G-1-201 (West 2011); VA. CODE ANN. § 1-511 (2011); WYO. STAT. ANN. § 8-6-101 (2011). Additionally Hawai'i provides that English and Hawaiian are the official languages of Hawai'i, HAW. CONST. art. XV, § 4.

28. The English language laws in Alabama, ALA. CONST. art. I, § 36.01, California, CAL. CONST. art. III, § 6, Colorado, COLO. CONST. art. II, § 30, Florida, FLA. CONST. art. II, § 9, and Nebraska, NEB. CONST. art. I, § 27, are all constitutional amendments. Arizona has both a constitutional amendment and a statute. ARIZ. CONST. art. XXVIII, § 4; H.C. Res. 2036, 47th Leg., 2d. Reg. Sess. (Ariz. 2006). In distinguishing constitutional amendments from statutory enactments, Hans Linde notes that “constitutions [and subsequent amendments] define structures, processes, and restraints of government, while rules directed at the governed are laws and cannot properly be initiated as amendments to the constitution.” Hans A. Linde, *What Is A Constitution, What Is Not, and Why Does It Matter?*, 87 OR. L. REV. 717, 727 (2008). Thus, in the context of language rights, “English-Only” amendments are a mandate on the state legislature to ensure that English remains the official language of the state. Conversely, the legislature can more easily change statutory provisions.

29. See, e.g., IOWA CODE, § 1.18(3) (“In order to encourage every citizen of this state to become more proficient in the English language, thereby facilitating participation in the economic, political, and cultural activities of this state and of the United States, the English language is hereby declared to be the official language of the state of Iowa.”); MO. REV. STAT. § 1.028 (“The general assembly recognizes that English is the common language used in Missouri and recognizes that fluency in English is necessary for full integration into our common American culture for reading readiness.”); MONT. CODE ANN. § 1-1-510 (2011) (“(1) English is the official and primary language of: (a) the state and local governments; (b) government officers and employees acting in the course and scope of their employment; and (c) government documents and records.”). Nevertheless, scholar Juan Perea argues that the “anti-Hispanic origins of the official English movement provide ample evidence that, under present circumstances, proposals for official English legislation in fact represent discrimination against

often go further than just requiring that English be deemed the “official language” of the state and additionally require that some or all governmental activities be conducted in English. For example, Article 28 of the Arizona Constitution has been amended to state that “[o]fficial actions shall be conducted in English.”<sup>30</sup> Nevertheless, despite the movement toward “English-only” laws, the state and federal constitutionality of these laws is highly suspect and, in multiple instances, has been successfully challenged.<sup>31</sup>

In addition to questions about their constitutionality, official English laws have been criticized for being nativist, racist, and xenophobic.<sup>32</sup> Often the popular movements that prompt legislative action are undeniably racist and anti-Latino.<sup>33</sup> These actions are motivated by a “fear of a Hispanic takeover” and “questions about the intelligence and values of Latin American immigrants,” and are pursued to further “missions of ‘race betterment.’”<sup>34</sup> Although English-only or official English laws might not directly prevent the participation of LEP individuals in jury service, the laws set an unmistakable tone of language intolerance and demonstrate a desire to exclude language minorities from full participation in state activities.

Additionally, forty-one states have juror statutes which require that prospective jurors possess some level of English language proficiency in order to serve on a jury panel.<sup>35</sup> These requirements vary in their

Hispanics, in principal part, framed by proxy and indirection through the closely correlated medium of language.” Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 360 (1992).

30. ARIZ. CONST. art. XXVIII, § 4.

31. In *Alaskans for a Common Language, Inc. v. Kritz*, the Alaska Supreme Court ruled that the Official English Initiative, which adopted English as the state’s official language, was unconstitutional on First Amendment grounds. 170 P.3d 183 (Alaska 2007). The Court explained “that a wholesale prohibition on speech in languages other than English by all state and local government employees creates an untenable risk of preventing employees from speaking freely on matters of public concern. To the extent that the OEI bars elected officials and public employees from helping citizens secure available services and participate fully in civic life, it touches upon matters of public concern.” *Id.* at 204 (footnote omitted).

32. Perea, *supra* note 29, at 356–57.

33. See generally Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 NEV. L.J. 895 (2007).

34. Aka & Deason, *supra* note 19, at 85 n.207 (citing Thomas Ricento’s research “based on examination of the internal documents, funding sources and written statements of leaders of the English-Only movement”).

35. ALA. CODE § 12-16-59 (2011); ALASKA STAT. § 09.20.010 (2011); ARIZ. REV. STAT. ANN. § 21-202 (2012); ARK. CODE ANN. § 16-31-102 (2011); CAL. CIV. PROC. CODE § 203 (West 2012); COLO. REV. STAT. § 13-71-105 (2012); CONN. GEN. STAT. § 51-217 (2011); DEL. CODE ANN. tit. 10, § 4509 (2011); GA. CODE ANN. § 15-12-163 (2011); HAW. REV. STAT. § 612-4 (2011); IDAHO CODE ANN. § 2-209 (2012); 705 ILL. COMP. STAT. § 305/2 (2011); IND. CODE § 33-28-5-18 (2013); IND. ST. JURY R. 5 (2011); IOWA CODE § 607A.4 (2012); KAN. STAT. ANN. § 43-158 (2011); KY. REV. STAT. ANN. § 29A.080 (West 2011); LA. CODE CRIM. PROC. ANN. art. 401 (2011); ME. REV. STAT. tit. 14, § 1211 (2011); MD. CTS. & JUD. PROC. CODE ANN. § 8-103 (West 2011); MASS. GEN. LAWS ch. 234A, § 4 (2011); MICH. COMP. LAWS

stringency and expectations of English proficiency and language skill sets. The variance in English language requirements is significant because English language abilities differ greatly among persons for whom English is not a first language. The first foreign language skill learned is generally comprehension, followed by speaking ability, reading, and lastly, writing.<sup>36</sup> Many people who speak English as a second language are unable to read or write in English, or are very limited in their ability.<sup>37</sup> This is not surprising because a large percentage of English as a second language (“ESL”) learners are fairly uneducated.<sup>38</sup> If the individual is illiterate in her native language, it is not likely that she will become literate in English.<sup>39</sup> Furthermore, illiteracy remains a problem for a considerable number of native English speakers as well, particularly for persons of color.<sup>40</sup> Thus, even native English speakers could be excluded in jurisdictions that predicate jury service on the ability to read and write, a situation that further limits the number of racial minorities eligible for jury service.

On the most restrictive end of the spectrum of state juror language prerequisites are those in place in Louisiana, Pennsylvania, South Carolina, and Vermont, which demand that jurors read, write, speak, and understand English.<sup>41</sup> These statutes arguably go beyond the federal requirement because they do not limit the required level of language proficiency to that which is necessary to complete a juror qualification form.<sup>42</sup> Similarly, although the South Dakota juror eligibility statute does not articulate any requirement to speak English, it requires that jurors be able to read, write, and understand English without qualification of the proficiency level.<sup>43</sup> Maryland roughly follows the federal requirement—

§ 600.1307A (2012); MINN. GEN. R. PRAC. 808 (2011); MISS. CODE ANN. § 13-5-1 (2011); MO. REV. STAT. § 494.425 (2011); NEB. REV. STAT. § 25-1601 (2011); NEV. REV. STAT. § 6.010 (2010); N.H. REV. STAT. ANN. § 500-A:7-A (2011); N.J. STAT. ANN. § 2B:20-1 (West 2011); N.Y. JUD. LAW § 510 (McKinney 2011); N.C. GEN. STAT. § 9-3 (2011); N.D. CENT. CODE § 27-09.1-07 (2011); OHIO CRIM. R. 24 (2011); OKLA. STAT. tit. 22, § 658 (2011); 42 PA. CONS. STAT. § 4502 (2011); R.I. GEN. LAWS § 9-9-1.1 (2011); S.C. CODE ANN. § 14-7-810 (2012); S.D. CODIFIED LAWS § 16-13-10 (2012); UTAH CODE ANN. § 78B-1-105 (West 2011); VT. STAT. ANN. tit. 4, § 962 (2012); WASH. REV. CODE § 2.36.070 (2012); W. VA. CODE § 52-1-8 (2012); WIS. STAT. § 756.02 (2012); WYO. STAT. ANN. § 1-11-101 (2011).

36. PEW HISPANIC CTR., *BETWEEN TWO WORLDS: HOW YOUNG LATINOS COME OF AGE IN AMERICA* 32 (2009).

37. NAT'L CTR. ON IMMIGRANT INTEGRATION POLICY, MIGRATION POLICY INST., *TAKING LIMITED ENGLISH PROFICIENT ADULTS INTO ACCOUNT IN THE FEDERAL ADULT EDUCATION FUNDING FORMULA* 7 (2009).

38. *Id.*

39. *Id.*

40. *National Assessment of Adult Literacy*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/naal/kf\\_dem\\_race.asp](http://nces.ed.gov/naal/kf_dem_race.asp) (last visited Feb. 2, 2014). The statistics reveal that in reading “prose” whites had the highest scores, followed by Asians/Pacific Islanders, blacks, and finally Hispanics.

41. *See* LA. CODE CRIM. PROC. ANN. art. 401 (2011); 42 PA. CONS. STAT. § 4502 (2011); S.D. CODIFIED LAWS § 16-13-10 (2012); VT. STAT. ANN. tit. 4, § 962 (2012).

42. 28 U.S.C. § 1865(B)(1)–(3) (2013).

43. S.D. CODIFIED LAWS § 16-13-10.

disqualifying individuals for jury service if they cannot speak, read, write, or comprehend English proficiently enough to satisfactorily complete a juror qualification form.<sup>44</sup>

A dozen states—Alabama, Colorado, Delaware, Hawai'i, Idaho, Indiana, Maine, Missouri, Nebraska, New Hampshire, Utah, and West Virginia—require jurors to be able to speak, understand, and read English.<sup>45</sup> New Jersey requires that jurors understand and read English.<sup>46</sup> With less stringency, Arkansas, Connecticut, Georgia, Massachusetts, Michigan, Minnesota, New York, and Washington require that jurors speak and understand or communicate in English. Alaska requires that jurors read or speak English.<sup>47</sup> More flexibly, Arizona, Illinois, Iowa, Kansas, North Carolina, Ohio, Rhode Island, and Wisconsin command that the juror understands English.<sup>48</sup> Less clear are states like California, Kentucky, Nevada, and Wyoming, which require “sufficient” or “competent” knowledge of English without indicating precisely which language skill sets would satisfy the requirement.<sup>49</sup> The juror qualification statutes for the remaining states—Montana, Florida, Tennessee, Texas, and Virginia—are silent on English proficiency.<sup>50</sup> In stark contrast, the Constitution of New Mexico guarantees the right of any citizen to serve on a jury irrespective of their native language or inability to speak, read or write English or Spanish.<sup>51</sup>

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44. “Notwithstanding subsection (a) of this section and subject to the federal Americans with Disabilities Act, an individual is not qualified for jury service if the individual: (1) Cannot comprehend spoken English or speak English; (2) Cannot comprehend written English, read English, or write English proficiently enough to complete a juror qualification form satisfactorily.” MD. CTS. & JUD. PROC. CODE ANN. § 8-103 (2011).

45. ALA. CODE § 12-16-59 (2011); COLO. REV. STAT. § 13-71-105 (2012); DEL. CODE tit. 10, § 4509 (2011); HAW. REV. STAT. § 612-4 (2011); IDAHO CODE § 209 (2012); IND. CODE § 33-28-5-18 (2013); ME. REV. STAT. tit. 14, § 1211 (2011); MO. REV. STAT. § 494.425 (2011); NEB. REV. STAT. § 25-1601 (2011); N.H. REV. STAT. ANN. § 500-A:7-A (2011); UTAH CODE ANN. § 78B-1-105 (West 2011); W. VA. CODE § 52-1-8 (2012).

46. N.J. STAT. ANN. § 2B:20-1 (West 2011).

47. ARK. CODE ANN. § 16-31-102 (2011); CONN. GEN. STAT. § 51-217 (2011); GA. CODE ANN. § 15-12-163 (2011); MASS. GEN. LAWS CH. 234A, § 4 (2011); MICH. COMP. LAWS ANN. § 600.1307A (2012); MINN. GEN. R. PRAC. 808 (2011); N.Y. JUD. LAW § 510 (McKinney 2011); WASH. REV. CODE § 2.36.070 (2012).

48. ARIZ. REV. STAT. § 21-202 (2012); 705 ILL. COMP. STAT. § 305/2 (2011); IOWA CODE ANN. § 607A.4 (2012); KAN. STAT. § 43-158 (2011); N.C. GEN. STAT. § 9-3 (2011); OHIO CRIM. R. 24 (2011); R.I. GEN. LAWS § 9-9-1.1 (2011); WIS. STAT. § 756.02 (2012).

49. CAL. CIV. PROC. CODE § 203 (West 2012); KY. REV. STAT. ANN. § 29A.080 (2011); NEV. REV. STAT. § 6.010 (2010); OKLA. STAT. tit. 22, § 658 (2011); WYO. STAT. ANN. § 1-11-101 (2011).

50. ARIZ. REV. STAT. § 21-202 (2012); MONT. CODE ANN. § 1-1-510 (2011); FLA. CONST. art. II, § 9; TENN. CODE ANN. § 4-1-404 (2012); TEX. GOV'T CODE ANN. § 62.102 (West 2011); VA. CODE ANN. § 8.01-337 (2011).

51. *See* N.M. CONST. art. VII, § 3; *see also* *New Mexico v. Samora*, 307 P.3d 328, 331 (N.M. 2013) (holding that dismissing a prospective juror for difficulty speaking English was a violation of the New Mexico Constitution).

The fact that the vast majority of states have English language prerequisites for jury service does not indicate the full breadth of the English language juror requirements in state courts. Even states that do not officially proclaim an English language requirement might be in the process of attempting to institute such a requirement, or employ such requirements in practice. For instance, Texas's juror qualification statute states that a person is competent to serve as a juror if that person "is able to read and write," but does not specify that the literacy must be in English.<sup>52</sup> In April 2011, the Texas House of Representatives voted to make a person's ability to read and write *in English* a qualification for service as a juror.<sup>53</sup> In the Texas House debate, proponents of the bill stated that specifying that the requisite literacy be in English did not change existing practice in the Texas courts that already assumed the ability to read and write would be in English and not another language.<sup>54</sup> The Texas example demonstrates how juror language requirements can be stricter in practice than in print, thus excluding more potential jurors than the statute might suggest on its face.

Juror language requirements that are stricter in practice than the statute requires are manifest in materials published on court websites or in printed pamphlet forms for prospective jurors. For instance, the Indiana state court jury rules provide that in order to serve as a juror, a potential juror must affirm that she is able to understand, read, and speak English.<sup>55</sup> However, the prospective jurors' "frequently asked questions" section of the Indianapolis and Marion County court's website assert that in addition to understanding, speaking, and reading English, a person must also be able to write in English to qualify for jury service.<sup>56</sup> Similarly, the Arkansas statute provides that a prospective juror must only speak or understand English, while the lay materials on the state court website include a requirement that a juror be able to read and write English.<sup>57</sup>

In several other jurisdictions, lay materials serve to clarify and strengthen an ambiguous juror requirement. In California and Wyoming, a person is competent to serve as a juror if she has "sufficient knowledge" of

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52. TEX. GOV'T CODE ANN. § 62.102.

53. H.B. 1633, 82d Leg. (Tex. 2011) (relating to a person's ability to read and write English as a qualification for service as a petit juror).

54. *House Transcript Apr. 19, 2011*, TEX TRIBUNE (Apr. 19, 2011), available at <http://www.texastribune.org/session/82R/transcripts/2011/4/19/house>.

55. IND. CODE § 33-28-5-18 (2013).

56. *Frequently Asked Questions*, CITY OF INDIANAPOLIS & MARION CNTY., <http://www.indy.gov/eGov/Courts/JuryPool/Pages/faqs.aspx#1> (last visited Feb. 2, 2014).

57. ARK. CODE ANN. § 16-31-102 (2011); *Who May be Called to Serve as a Juror?*, ARK. JUDICIARY, <https://courts.arkansas.gov/content/who-may-be-called-serve-juror> (last visited Feb. 2, 2014) ("You may be summoned for jury duty if you . . . have the ability to read and write in English.").

the English language—an inherently ambiguous and flexible standard.<sup>58</sup> However, court websites for prospective jurors state that a prospective juror must understand, speak, read, and write English in order to serve.<sup>59</sup> Irrespective of whether the website materials are the policy of the court, such representations undoubtedly discourage participation by prospective jurors who might be qualified under the law to serve, but who might underestimate their language abilities or be dissuaded from participating on a jury due to fears of prejudice. Therefore, at a minimum, the websites might cause prospective jurors who are self-conscious about their limited English language abilities to question their language skills, be deterred from following through with jury service, and possibly opt for self-removal from the jury pool.<sup>60</sup>

In addition to actual juror language requirements, inconsistencies in courtroom practices and inaccurate lay materials present significant risk of excluding qualified jurors from the jury pool. Although the right to serve on a jury is an essential right of citizenship, it appears that these unauthorized and even unlawful restrictions and deterrents generally go unnoticed and unchallenged. This is indicative of social and legal cultures that have become desensitized to, and unmindful of, language discrimination even where key citizenship rights are breached.

#### B. LIMITED ENGLISH PROFICIENCY IN THE UNITED STATES

In the United States, approximately twenty percent of individuals aged five or older speak a language other than English at home.<sup>61</sup> Census data shows that, in 2005 and 2009, approximately 9.4%<sup>62</sup> of the population was LEP.<sup>63</sup> Research also indicates that the percentage of LEP individuals is actually on the rise—over 29.5 million people in the United States are

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58. CAL. CIV. PROC. CODE § 203 (West 2012); WYO. STAT. ANN. § 1-11-101 (2011).

59. *Jury Service Basics*, JUDICIAL COUNCIL OF CAL., <http://www.courts.ca.gov/jurybasics.htm> (last visited Feb. 2, 2014); *Jury Duty*, CROOK CNTY. WYO., [http://www.crookcounty.wy.gov/elected\\_officials/clerk\\_of\\_district\\_court/jury\\_duty.php](http://www.crookcounty.wy.gov/elected_officials/clerk_of_district_court/jury_duty.php) (last visited Feb. 2, 2014).

60. See Hiroshi Fukurai, *Critical Evaluations of Hispanic Participation on the Grand Jury: Key-Man Selection, Jurymantering, Language, and Representative Quotas*, 5 TEX. HISP. J. L. & POL'Y 7, 8, 34 (2001).

61. HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2007 at 2 (2010).

62. In 2005, 9.46% of the total population was LEP, and 85.98% of LEP individuals were people of color. PEW HISPANIC CTR., TABLE 17: ENGLISH ABILITY BY AGE, RACE AND ETHNICITY: 2005, available at <http://www.pewhispanic.org/2006/09/19/a-statistical-portrait-20>. In 2009, 9.41% of the total population was LEP, and eighty-seven percent of LEP individuals were people of color. PEW HISPANIC CTR., *supra* note 14.

63. In collecting and analyzing language data, the Census Bureau does not define Limited English Proficiency. Rather, the individual interviewed is asked to characterize their ability to speak English as: “very well,” “well,” “not well,” or “not at all.” See SHIN & KOMINSKI, *supra* note 61, at 1. For the purposes of this paper, limited English proficiency is defined as speaking English less than “very well.” As jury service requires a high level of language comprehension, it is likely that a person who speaks English less than very well would be unable to serve without the assistance of an interpreter.

LEP—making it likely that the percentage of LEP individuals in the population will continue to increase or at a minimum remain constant.<sup>64</sup>

Data shows that there is a significant relationship between English language ability and race. In 2009, eighty-seven percent of the LEP population was comprised of people of color.<sup>65</sup> As applied to the current population, that is 25.67 million people of color.<sup>66</sup> Furthermore, approximately forty-four percent of Latinos and forty percent of Asians are LEP.<sup>67</sup> In particular, more than seventy-five percent of Latino immigrants in the United States cannot speak English “very well.”<sup>68</sup> Only seven percent of Latino immigrants speak English primarily or exclusively at home.<sup>69</sup> Further, the rate of limited English proficiency drops based on educational level.<sup>70</sup> Sixty-two percent of Latino immigrants with college degrees report being able to speak English very well.<sup>71</sup> That percentage plummets to only thirty-four percent for Latino immigrants with just a high school education and eleven percent for those who never completed high school.<sup>72</sup> Spanish speakers make up approximately 62.3% of Americans that speak a language other than English at home.<sup>73</sup>

LEP Spanish speakers are heavily concentrated in the Southwest,<sup>74</sup> Texas,<sup>75</sup> California,<sup>76</sup> and Florida.<sup>77</sup> Moreover, in many communities in the United States, LEP Latinos comprise a large percentage of the population. In border communities such as San Luis, Arizona, for example, 87.6% of residents speak Spanish at home,<sup>78</sup> and 62% of these individuals speak English less than very well.<sup>79</sup> In Nogales, Arizona, 90.8% of residents

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64. NAT'L CTR. ON IMMIGRANT INTEGRATION POLICY, *supra* note 37, at 1.

65. PEW HISPANIC CTR., *supra* note 14.

66. The U.S. Census Bureau estimated the total U.S. population was 315,624,388 in April 2013.

67. PEW HISPANIC CTR., *supra* note 14.

68. SHIRIN HAKIMZADEH & D'VERA COHN, PEW HISPANIC CTR., ENGLISH USAGE AMONG HISPANICS IN THE UNITED STATES I (2007).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. See generally U.S. CENSUS BUREAU, DETAILED TABLES, in 2006–2008 AMERICAN COMMUNITY SURVEY (2011) available at <http://www.census.gov/hhes/socdemo/language/data/other/detailed-lang-tables.xls>. In Arizona, 21.69% of the population speaks Spanish. *Id.* at tbl.5. In New Mexico, 28.31% of the population speaks Spanish. *Id.* at tbl.34.

75. *Id.* at tbl.46 (reporting that 28.98% of the population in Texas speaks Spanish).

76. *Id.* at tbl.6 (reporting 28.24% of the population in California speaks Spanish).

77. *Id.* at tbl.11 (reporting 18.81% of the population in Florida speaks Spanish).

78. U.S. CENSUS BUREAU, 2005–2009 COMMUNITY SURVEY 5-YEAR ESTIMATES, at B1600I (2009), available at <http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (insert “B1600I: Language Spoken at Home by Ability to Speak English for the Population 5-Years and Over,” then search “San Luis city, Arizona” and “Nogales city, Arizona,” and follow hyperlink associated with Dataset “2009 ACS 5-year estimates”).

79. *Id.*

speak Spanish at home<sup>80</sup> and, of that population, 53.7% speak English less than very well.<sup>81</sup> In Hialeah, Florida, 93.6% of residents speak Spanish at home,<sup>82</sup> and 65% speak English less than very well.<sup>83</sup>

Furthermore, the 2010 U.S. Census reports that not only are Latinos the largest minority group, but in the past decade, the rate of growth of the Latino population has been greater than any other racial or ethnic group;<sup>84</sup> the Latino population increased by forty-three percent, approximately four times the nation's growth rate.<sup>85</sup> Therefore, assuming that immigration rates will remain steady, it is likely that the number of LEP Spanish speakers in the United States will continue to increase, making the juror language exclusion issue increasingly more important, particularly for Latinos.

## II. THE PROBLEMS WITH JUROR LANGUAGE REQUIREMENTS

As the vast majority of LEP individuals are racial minorities, the exclusion of persons from jury service on the basis of English language ability often results in the removal of people of color from the jury pool. In areas with heavy LEP citizen populations, such as the Spanish-speaking Latino communities mentioned above, language requirements can produce juries that are not representative of the community. This has considerable detrimental effects on criminal defendants, potential jurors, and the perceived legitimacy and actual integrity of our legal system.

### A. CRIMINAL DEFENDANTS

Criminal defendants, especially racial minority defendants, are the population most directly affected by juries that are not diverse or representative of the community. The U.S. criminal justice system has a long history of disproportionately prosecuting and incarcerating people of color.<sup>86</sup> Thus, the integrity of the criminal justice system is arguably most important to criminal defendants, whose lives and liberties are in the hands of criminal juries. Due to the disproportionate prosecution of people of color, the racial composition of the jury pool is a crucial factor in ensuring that a defendant receives a fair and just trial. There are many factors that

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80. *Id.*

81. *Id.*

82. *Id.* (insert "B1600I: Language Spoken at Home by Ability to Speak English for the Population 5-Years and Over," then search "Hialeah city, Florida," and follow hyperlink for table).

83. *Id.*

84. SHARON R. ENNIS ET AL., U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010 at 2 (May 2010), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

85. *Id.*

86. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 16 (2010).

contribute to racial imbalance in juries, but English language requirements and their effects on Latino jury service have gone relatively unnoticed.

Like African Americans, Latinos are highly overrepresented in the criminal justice system,<sup>87</sup> but unlike African Americans, criminal justice statistics regarding Latinos in the criminal justice system are lacking. Latinos are often lumped together with whites in government statistics, thereby masking the racial divide in the criminal justice system and prisons.<sup>88</sup> Even so, available statistics indicate a clear overrepresentation of Latinos in the criminal justice system. For instance, “[i]n 2007, four-in-ten (40%) offenders sentenced in federal courts were Hispanic, a share larger than whites (27%) or blacks (23%).”<sup>89</sup> “In 2007, Latinos accounted for 40% of all sentenced federal offenders—more than triple their share (13%) of the total U.S. adult population.”<sup>90</sup> While only 1 in 106 white men is incarcerated, 1 in every 36 Latino men is incarcerated in the United States.<sup>91</sup> Similarly, Latina women are incarcerated at 1.6 times the rate of white women.<sup>92</sup> For men aged thirty-five years or older, Latinos are incarcerated at a greater rate than any other racial group, including African Americans.<sup>93</sup>

The overrepresentation of Latinos in the criminal justice system is even greater in communities with significant populations of LEP Latinos, making the need for representative jury pools all the more important in these regions. For instance:

In 2007, more than half (56%) of all Latino offenders were sentenced in just five of the nation’s 94 U.S. district courts. All five are located near the U.S.-Mexico border: the Southern (17%) and Western (15%) districts of Texas, the District of Arizona (11%), the Southern District of California (6%), and the District of New Mexico (6%).<sup>94</sup>

When language requirements bar Latinos from jury service, the justice system diminishes Latino defendants’ opportunity to have a jury of their peers.

87. NANCY E. WALKER ET AL., NAT’L COUNSEL OF LA RAZA, LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM 17 (2004); CHRISTOPHER HARTNEY & LINH VUONG, NAT’L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2 (2009).

88. See WALKER ET AL., *supra* note 87, at 16 tbl.2.1 (citing Barry Holman, Nat’l Ctr. on Insts. & Alts., MASKING THE DIVIDE: HOW OFFICIALLY REPORTED PRISON STATISTICS DISTORT THE RACIAL AND ETHNIC REALITIES OF PRISON GROWTH 8 (2001)) (finding over-count of white prisoners at a rate of: 26.7% in federal prisons, 54.1% in New Mexico, 30.8% in Arizona, 26% in Colorado, and 24.6% in New York).

89. MARK HUGO LOPEZ & MICHAEL T. LIGHT, PEW HISPANIC CTR., A RISING SHARE: HISPANICS AND FEDERAL CRIME i, 1 (2009).

90. *Id.* at i.

91. JENNIFER WARREN ET AL., PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 6 (2008).

92. SENTENCING PROJECT, INCARCERATED WOMEN 2 (2012) (citing PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 (2011)).

93. WALKER ET AL., *supra* note 87, at 2.

94. LOPEZ & LIGHT, *supra* note 89, at i, iv.

Racially diverse juries are important to ensure fair trials for Latino criminal defendants for several reasons. Diverse juries reduce racial bias in deliberations and interject commonsense judgment and understanding about minority communities, which helps counteract negative stereotyping about Latino criminality. Research indicates that both overt and unconscious racial bias can influence jury verdicts in ways that are damaging to criminal defendants, while the presence of racial diversity on juries reduces the expression of such bias and results in fairer trials.<sup>95</sup>

Even if non-Latino jurors are not particularly biased against Latinos, non-Latinos often lack the “common sense judgment” and understanding of the community from which the Latino defendant comes. This is particularly salient in a trial where the crime took place in a Latino neighborhood. Americans remain highly segregated by race; people from different racial groups attend separate schools<sup>96</sup> and live in separate communities.<sup>97</sup> “Because of extreme residential segregation, whites are generally unaware of the realities of daily life in black and Latino neighborhoods.”<sup>98</sup> Latino communities are some of the most insular and racially isolated neighborhoods.<sup>99</sup> Without exposure to Latino life, non-Latino jurors likely have limited ability to understand a Latino defendant’s community and culture. This lack of familiarity can lead to harmful results.

For example, imagine that a defendant comes from an urban low-income Latino neighborhood, and defense counsel asserts as an alibi that at the time of the crime, the defendant was at a liquor store purchasing food for his family’s dinner. A juror unfamiliar with defendant’s neighborhood would likely apply her own experience and that of the people she knows and perhaps conclude the following: “I don’t buy food

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95. See Vidmar, *supra* note 2, at 1974 (noting how racially mixed juries engage in longer deliberations, discuss a wider range of information, and are more accurate in their statements about the case); see also Daniel H. Swett, *Cultural Bias in the American Legal System*, 4 LAW & SOC’Y REV. 79, 97–100 (1969).

96. See Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 788 (2000). As a result of residential housing segregation, public schools are more segregated today than they ever were before. *Id.* This is particularly true for Latinos. *Id.* Eighty percent of Latino children attend schools that are majority nonwhite (where fifty to one hundred percent are nonwhite) and forty-three percent attend intensely segregated schools (where zero to ten percent of the students are white). GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 9 (2012).

97. BEVERLY DANIEL TATUM, CAN WE TALK ABOUT RACE?: AND OTHER CONVERSATIONS IN AN ERA OF SCHOOL RESEGREGATION 13 (2007) (“Most African Americans, Latinos, and Whites still live in neighborhoods with people from their same racial group.”).

98. William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 13 (2011).

99. See ORFIELD ET AL., *supra* note 96, at 9. For instance, in the greater Los Angeles area roughly thirty percent of Latinos attend a school where whites comprise one percent or less of the student body. *Id.*

at a liquor store and neither does anyone I know. Therefore, defendant must be lying. If she's lying, she must be guilty." Someone familiar with the defendant's (or a similar) neighborhood might recognize that it is located in a "food desert" where liquor stores are one of the few places in the vicinity that carry groceries.<sup>100</sup> A juror with knowledge of the defendant's specific community or similar communities could share this during deliberations and refute an assumption of guilt based solely upon lying about the food selection at a liquor store. Clearly, there might nonetheless be sufficient evidence to support a finding of guilt beyond a reasonable doubt, but at least that finding would not be based on a misguided assumption about the availability of groceries in defendant's neighborhood.

In addition to misgivings about the community that the defendant comes from, a racial majority juror might not be familiar with the defendant's culture or cultural expressions. For instance, imagine that during trial, photographs of the defendant reveal that he has tattoos of a cross, the Virgin of Guadalupe, and "Mexicano" or "Chicano" written in Old English lettering. A juror who has never known anyone with such tattoos might associate them with gang-style tattoos that one sees in movies, rather than more accurately assuming that they simply represent religious devotion, cultural pride, or local style.

To fill in the void of actual knowledge and familiarity, jurors might instead rely upon media portrayals or prevalent stereotypes about Latinos that are overwhelmingly negative.<sup>101</sup> Despite the fact that Latinos are now the largest racial minority in the United States, there are still few positive media examples of Latinos. A 2000 study by the National Council of La Raza and the National Association of Hispanic Journalists revealed that only 0.53% of "network television news stories focused on issues related to Hispanics" and that of "these stories, 80% focused on just four topics—immigration, affirmative action, crime, and drugs—

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100. "Food deserts" are areas that lack grocery stores that sell fresh food and are inundated with liquor, convenience, and fast food stores. See Christopher J. Curran & Marc-Tizoc González, *Food Justice as Interracial Justice: Urban Farmers, Community Organizations and the Role of Government in Oakland, California*, 43 U. MIAMI INTER-AM. L. REV. 207, 215 (2011). See generally Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221 (2007).

101. See WALKER ET AL., *supra* note 87, at 2 ("Although rarely covered in the media, when Hispanics are shown they typically are portrayed as having problems, being criminals, or being a problem to mainstream White society."). A study conducted by Pitzer College examined one week of television network programming in 1992 and found that seventy-five percent of Hispanic characters were depicted as being in a lower socioeconomic class versus twenty-four percent of blacks and seventeen percent of whites. *Id.* "The study's authors concluded: 'In general, African Americans are portrayed positively on prime-time TV. . . . Latinos were more likely described as powerless and stupid.'" *Id.* (alteration in original).

stories in which Latinos were likely to be portrayed in negative roles.”<sup>102</sup> The rare instances in which Latinos are portrayed in a positive light often erase their Latino identity. An example is the 2012 Academy Award winning movie *Argo*, based on the true story of celebrated Mexican American Central Intelligence Agency agent Tony Mendez who facilitated the rescue of diplomats during the Iran Hostage Crisis in 1979. Although the film glorifies Mendez, he is played by a white actor (Ben Affleck) and the film makes no mention of his Latino heritage aside from one reference to his Spanish surname.<sup>103</sup> Hollywood’s erasure of Mendez’s Latino heritage is injurious to Latinos, especially given that the majority of portrayals of Latinos in the media are derogatory.<sup>104</sup>

Moreover, due to perceived foreignness, Latinos are not only vulnerable to stereotyping about their cultural groups in the United States; they are also associated with foreign stereotypes. Such stereotyping contrasts the experience of white Americans, who are generally not associated with their ancestor culture. The largest population of Latinos in the United States is of Mexican descent,<sup>105</sup> including Chicanos whose ancestors became U.S. citizens by virtue of the Treaty of Guadalupe Hidalgo that gave the United States one-third of its current land mass.<sup>106</sup> Despite this 150-year history of Mexican Americans being U.S. citizens, Mexican Americans are often treated as foreign even in the states that were once part of Mexico.<sup>107</sup> Thus, in addition to negative stereotyping about Mexican Americans, this group is also associated with negative stereotypes about Mexican nationals.

The past few years have marked a tremendous upsurge in the coverage of violent drug- and gang-related crime in Mexico, which has led the U.S. Department of State to issue travel warnings for border towns like Tijuana, Mexico, despite the fact that Tijuana has a lower rate

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102. *Id.* at 4. See generally FEDERICO SUBERVI ET AL., NAT’L ASSOC. OF HISPANIC JOURNALISTS, NETWORK BROWNOUT REPORT 2005: THE PORTRAYAL OF LATINOS & LATINO ISSUES ON NETWORK TELEVISION NEWS, 2004 WITH A RETROSPECT TO 1995 (2005).

103. Moctesuma Esparza, *Ben Affleck’s Argo and the White-Washing of the Mexican-American*, BEYONDCHRON (Dec. 4, 2012), <http://www.beyondchron.org/news/index.php?itemid=10760>.

104. See Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y. CITY L. REV. 417, 420 (2009).

105. SETH MOTEL & EILEEN PATTEN, PEW HISPANIC CTR., CHARACTERISTICS OF THE 60 LARGEST METROPOLITAN AREAS BY HISPANIC POPULATION 5 (2012) (“Mexican-Americans are by far the nation’s largest Hispanic origin group, comprising 65% of the total Hispanic population in the United States.”).

106. See Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 493 n.18 (2004) (reviewing GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003)) (citing JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 248 (2000)).

107. See Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259, 1268 (1997).

of murder and carjacking than Philadelphia, Pennsylvania.<sup>108</sup> Mexican Americans, and often Latinos of all backgrounds, are perceived as “Mexican,” and considered more criminally inclined than ever due to this report about crime in Mexico, despite the fact that Latinos are statistically less likely to be involved in violent crime than any other racial group.<sup>109</sup>

In the absence of actual familiarity with Latinos and positive or accurate media representation of Latinos, white and other non-Latino jurors might interpret manners, dress, or other attributes, or just the phenotype and complexion of a Latino defendant or witness, to be associated with criminality and a lack of credibility. Looking Latino or Mexican is too often associated with appearing criminal or dishonest, because these are the prior dominant visual associations that a majority juror might possess. Thus, it is particularly important that Latino criminal defendants have a jury derived from a pool that contains a representative number of “peers.”

#### B. LIMITED ENGLISH PROFICIENT CITIZENS

Next to voting, jury service is the most celebrated responsibility of U.S. citizenship.<sup>110</sup> Serving on a jury is a rare opportunity to participate directly in an institution of democracy and the legal system. As the Supreme Court noted in *J.E.B. v. Alabama, ex rel. T.B.*, participation in the fair administration of justice “reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.”<sup>111</sup> Thus, jury service provides an important opportunity for minority groups—who might not have strong support from the legislature or society in general—to directly partake in and influence the justice system.<sup>112</sup>

People who are excluded from jury service are typically those individuals whom society does not consider to be full citizens: they do not have formal citizenship status, are not adults, have prior criminal convictions and have not had their civil rights fully restored, or are deemed to have poor moral character.<sup>113</sup> By including individuals who do not have sufficient English language proficiency into the group of persons precluded from jury service, LEP U.S. citizens are essentially made to share the same status as non-citizens, infants, felons, and persons of

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108. JORDAN RANE, WORLD’S 10 MOST HATED CITIES, CNN TRAVEL (June 11, 2012), <http://travel.cnn.com/explorations/life/most-hated-cities-861160>.

109. WALKER ET AL., *supra* note 87, at 4.

110. *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

111. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (citing *Powers*, 499 U.S. at 407).

112. Joanna L. Grossman, Note, *Women’s Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1122–23 (1994).

113. *See* 28 U.S.C. § 1865 (2012).

immoral character—a tremendous harm to the dignity of LEP individuals. Such exclusions and juror qualification requirements suggest to LEP citizens that they are not fit to sit in judgment of legal disputes and criminal justice issues that affect their communities.<sup>114</sup>

Permitting LEP jurors to serve with the assistance of interpreters instills the value that “sharing in the administration of justice is a phase of civic responsibility.”<sup>115</sup> Allowing LEP jurors to serve in the jury box would increase democratic participation for significant portions of the population. Moreover, increased democratic participation vis-à-vis jury service would strengthen the connection of racial minorities to their respective communities.<sup>116</sup> Data shows that participation in democratic activities positively influences individual attitudes toward the law and confidence in the legal system.<sup>117</sup> Thus, for Latino individuals who already experience alienation from the community because of language ability or societal animus toward immigrants and those perceived to be immigrants, jury participation presents an opportunity to connect Latinos to the broader communities in which they reside. Through *inclusion* in—rather than *exclusion* from—democratic activities, Latinos might also gain a greater sense of pride in the American political and legal systems, and consequently be more likely to vote and participate in public affairs, as well as experience increased confidence in the legal system.

### C. THE PERCEIVED INTEGRITY AND FAIRNESS OF THE LEGAL SYSTEM

Racially unrepresentative juries pose risks to the perceived integrity and fairness of the legal system.<sup>118</sup> As such, excluding Latinos on the basis of language contributes to an undermining of public confidence in the fairness of the criminal justice system. Because juries serve such an important function in our justice system, “[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial.”<sup>119</sup> Studies reveal that the overwhelming majority of the public feels that jury decisions reached by racially diverse juries are fairer than decisions reached by single race juries.<sup>120</sup> This is especially true for Latinos, who have the highest belief (of any racial group) in the value of

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114. *Id.* Exclusion on the basis of English ability is stigmatizing and reduces LEP citizens to second class citizenship status. See Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 48 (1992).

115. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurt, J., dissenting).

116. Fukurai, *supra* note 60, at 12.

117. *Id.*

118. *Id.* at 10–11. (“Many believe that an all-White grand jury will be biased against a Black defendant, or will favor a White defendant who is accused of a crime against a Black victim.”).

119. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

120. HIROSHI FUKURAI & RICHARD KOOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION* 128 (2003).

diverse juries.<sup>121</sup> Conversely, nearly fifty percent of Latinos express distrust toward the criminal justice system.<sup>122</sup> Therefore, verdicts rendered by representative juries (which include LEP individuals) would be perceived as more legitimate and would increase public respect for the criminal justice and court systems, which would in turn preserve “just government power and authority.”<sup>123</sup>

As discussed above, eighty-seven percent of LEP individuals living in the United States are persons of color. When English language requirements result in the removal of large segments of populations of color from the jury pool, jury pools no longer reflect a fair cross section of the community (as required by the Sixth Amendment), which effectively denies criminal defendants the opportunity to be tried by a jury of their peers.<sup>124</sup> Further, strict language requirements also preclude LEP citizens from participating in a primary self-government function, relegating them to second-class citizenship status in the court system. Finally, racially unrepresentative juries undermine the perceived legitimacy and authority of the courts.<sup>125</sup> The problems posed by English language juror requirements implicate fundamental rights and core citizenship functions that warrant rigorous constitutional examination.

### III. THE CONSTITUTIONALITY OF JUROR LANGUAGE REQUIREMENTS

Juror language requirements simultaneously infringe upon a criminal defendant’s right to a fair trial and LEP citizens’ right to participate in self-governance vis-à-vis a jury panel. These language requirements also threaten the perceived fairness and ultimately the power of the courts and legal system to administer justice effectively. The exclusion of LEP citizens from jury service on the basis of their English ability implicates several sources of law: particularly the Equal Protection Clause of the Fourteenth Amendment and its Fifth Amendment equivalent, and the fair cross section requirement of the Sixth Amendment. Analysis of English language juror requirements shows that civil rights jurisprudence is not prepared to address the unique issues faced by Latinos who experience discrimination and oppression in different ways than African Americans, the population that civil rights laws were originally designed to protect.

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121. *Id.* at 129.

122. MARK HUGO LOPEZ & GRETCHEN LIVINGSTON, PEW HISPANIC CTR., *HISPANICS AND THE CRIMINAL JUSTICE SYSTEM: LOW CONFIDENCE, HIGH EXPOSURE I* (2009).

123. FUKURAI & KOOTH, *supra* note 120, at 133.

124. Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 11 LA RAZA L.J. 17, 46 (1999).

125. Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 77 (1993).

## A. EQUAL PROTECTION

Scholars and the courts generally evaluate language discrimination claims under laws that have been established to protect racial and ethnic minorities, such as equal protection and Titles VI and VII of the Civil Rights Act of 1968.<sup>126</sup> This is not surprising due to the close and often inextricable relationship between language and race or ethnicity and the lack of explicit protection for minority language status or usage. However, language discrimination claims can be difficult to establish under equal protection law because this doctrine was developed without full contemplation of the diverse manifestations of racial and ethnic oppression in the United States. Equal protection jurisprudence was initially developed to address racial discrimination against blacks where language was not a central concern.<sup>127</sup> Although there might be implicit recognition that language is related to race and ethnicity, or even that language discrimination can be a manifestation of underlying racial or ethnic discrimination, it is difficult to succeed on language-based claims under this jurisprudential rubric. Equal protection law is one of the most important constraints on government-sponsored racial and ethnic discrimination, but this doctrine has been slow to recognize language-based racial and ethnic discrimination.

The Equal Protection Clause of the Fourteenth Amendment provides in relevant part that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>128</sup> It is also well established that there is an implied equal protection component to the Fifth Amendment that imposes the same obligation on the federal government.<sup>129</sup> Therefore, a LEP citizen who is excluded from jury service (or more likely a criminal defendant raising a third-party claim on behalf of the excluded citizen or citizens)<sup>130</sup> on the basis of their deficient English language ability could bring an equal protection claim challenging an English language juror requirement. However, due to the limited development and protection of language-based discrimination in the courts, these claims are difficult to assert and have consistently failed.

For instance, if a LEP Spanish-speaking Latina is excluded from jury service on the basis of her English language deficiency, she might challenge this inequality of treatment on a variety of grounds, each of

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126. See, e.g., Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 161 (2001).

127. See Richard Delgado et al., *Authors' Reply: Creating and Documenting a New Field of Legal Study*, 12 HARV. LATINO L. REV. 103, 105, 107 (2009).

128. U.S. CONST. amend. XIV, § 1.

129. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–18 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

130. See *Powers v. Ohio*, 499 U.S. 400, 415 (1991). (“[A] defendant in a criminal case can raise the third-party equal protection claims of jurors excluded.”).

which would pose difficulties. One approach would be to challenge a juror language requirement solely on the basis of language discrimination without any reference to the excluded citizen's race, ethnicity, or national origin. The citizen (or defendant raising a third party claim on her behalf) could argue that a requirement commanding that a juror read, write, speak, and understand English in order to serve on a jury classifies, excludes and discriminates against her on the basis of her language minority status, and thus violates her equal protection rights. However, language classifications or requirements, without more, are not subject to any heightened constitutional review.<sup>131</sup> Furthermore, although the right to serve on a jury is well established and celebrated, it has yet to be recognized as a fundamental right.<sup>132</sup> Thus, without the recognition of language minorities as a suspect class or the implication of an established fundamental right, the language requirement that jurors speak English is subject to rational basis review. Under rational basis review, a court asks whether the government has a legitimate reason for the language requirement that is rationally linked to it.<sup>133</sup> Here, the government has plausible reasons for requiring that jurors speak English: because English is the language of state and federal court proceedings, such requirements help jurors understand these proceedings and engage in deliberations without additional expense or concerns about the accuracy of language interpretation.

Now let us suppose that the same LEP Spanish-speaking citizen challenges an English language juror requirement on the basis of race, ethnicity, or national origin. Unlike language classifications, race, ethnicity, and national origin are subject to strict scrutiny.<sup>134</sup> To pass strict scrutiny, a law must be justified by a compelling governmental interest, be narrowly tailored to achieve that interest, and be the least restrictive means for achieving that interest.<sup>135</sup> Because juror language accommodation has been successfully employed as a method of allowing jurors to serve despite their English language abilities, it is likely that juror language requirements would fail strict scrutiny because a blanket exclusion of LEP individuals is not the least restrictive means to ensure that jurors sufficiently understand proceedings and engage in meaningful deliberations. However, plaintiff's obstacles to obtaining such a ruling

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131. It should be noted that strong arguments have been advanced for recognizing and protecting language as a suspect classification distinct from race, ethnicity, and national origin, but this is not the current state of the law. See Rodríguez, *supra* note 126.

132. See, e.g., *United States v. Conant*, 116 F. Supp. 2d 1015, 1020 (E.D. Wis. 2000); *Rubio v. Superior Court*, 593 P.2d 595, 602 (Cal. 1979). However, persuasive arguments have been advanced that jury service is a fundamental right of citizenship. See Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1928 (1992).

133. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

134. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

135. *Carolene Prods. Co.*, 304 U.S. at 153 n.4.

are twofold. First, she would have to establish a sufficient link between language and race, ethnicity, or national origin. Second, the intent requirement of the equal protection doctrine would need to be satisfied.

*I. The Relationship Between Language and Race, Ethnicity, National Origin, and the Law*

The relationship between language and race, ethnicity, and national origin is recognized in socio-legal scholarship and everyday life.<sup>136</sup> Nevertheless, the law's recognition of this connection has been slow to develop. Statutory law such as Titles VI and VII of the Civil Rights Act of 1964 has recognized language rights and their connection with race, ethnicity, and national origin, but interpretations of constitutional law has not. Consequently, legal treatment of language discrimination and its connection to race and national origin has been inconsistent. This Subpart first explores the relationship between language and racial identity in the context of Latinos in the United States, and then examines the intersections between language discrimination and race discrimination under equal protection law.

There are strong connections between race, ethnicity, national origin, and ancestral languages for many groups, but since Latinos are the largest minority group, focus on the experience of this population is timely and appropriate. Race, ethnicity, national origin, and the Spanish language are inextricably linked for Latinos. The Spanish language is central to Latino identity, and discrimination on the basis of language has been a primary method of discriminating against and subordinating Latinos in the United States.<sup>137</sup>

Language “defines the essence of cultural identity.”<sup>138</sup> For the majority of Latinos, Spanish is core to their racial and cultural identity. Even the Supreme Court has recognized that in localities with substantial Latino populations, “a significant percentage of the Latino population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the *one used to define the self*.”<sup>139</sup> The ties between Spanish and Latino identity extend beyond the fact that Spanish is a primary language for many Latinos. Even native English-speaking Latinos often identify culturally through the Spanish language. Mixing Spanish words with dominant English or the use of

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136. See, e.g., Perea, *supra* note 10, at 1432–34.

137. *Id.*

138. Rodríguez, *supra* note 126, at 141; see J.A. Fishman, *Language and Ethnicity*, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS 15, 25 (Howard Giles ed., 1977).

139. *Hernandez v. New York*, 500 U.S. 352, 363–64 (1991) (emphasis added).

varying forms of “Spanglish” are ways to distinguish oneself as Latino/a and create a sense of shared group identity.<sup>140</sup>

Racism against Latinos is often related to the use of the Spanish language, accent, or surname.<sup>141</sup> This is different from the African American experience, which has focused on discrimination based on color and phenotype.<sup>142</sup> Certainly, Latinos are also subject to identification and discrimination based upon physical characteristics. In fact, United States Supreme Court cases and recent laws such as Arizona’s Senate Bill 1070 make “Mexican appearance” acceptable grounds for racial profiling by police to inquire about the lawfulness of one’s presence on American soil.<sup>143</sup> This is despite the fact that these laws are enforced in geographic areas with high, if not majority, Mexican-American or Chicano populations, and on land that used to be Mexico.<sup>144</sup> Like blacks, Latinos are often identified by their “looks” and are consequently subject to derogatory treatment and racial profiling. Racist cartoons depict Latinos with certain exaggerated physical features. Derogatory names such as “spic,” “wetback,” and “beaner” have been employed in similar fashion to the “N word” against blacks.<sup>145</sup>

However, discrimination against Latinos is often manifested through the Spanish language. The law does not redress much of this discrimination because it is not based upon physical features or skin color the way that discrimination often manifests against blacks. Majority white culture in the United States has historically viewed Spanish speakers as low-class and unintelligent,<sup>146</sup> and Spanish speaking and bilingual Spanish-English speaking Latino youth have been treated as having no language.<sup>147</sup> Latino children who speak Spanish at school have been subject to ridicule, corporal punishment, “Spanish detention” and suspension.<sup>148</sup> Latino parents have faced allegations of abuse and neglect for speaking Spanish to their children and have been ordered by courts to cease speaking Spanish to their children at risk of losing custody or contact with their

140. See Jason Rothman & Amy Beth Rell, *A Linguistic Analysis of Spanglish: Relating Language to Identity*, 1 LINGUISTICS & HUM. SCI. 515, 526 (2005).

141. Andrew W. Bribriescio, Note, *Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 J. GENDER RACE & JUST. 373, 378 (2010) (citing RICHARD DELGADO ET AL., *LATINOS AND THE LAW: CASES AND MATERIALS* 3 (2008)).

142. See RICHARD DELGADO ET AL., *LATINOS AND THE LAW: CASES AND MATERIALS* 290–91, 297–98 (2008); Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education*, 47 HOW. L.J. 473, 489–90 (2004).

143. Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 67 (2010) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975)).

144. *Id.*

145. See Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1294 n.158 (2011).

146. Bribriescio, *supra* note 141, at 401.

147. Perea, *supra* note 10, at 1432.

148. *Id.* at 1443.

children.<sup>149</sup> People have been fired from their jobs for speaking Spanish at work, even at break time where no customers were present.<sup>150</sup>

Although often cast as an immigrant phenomenon, subordination of Latinos on the basis of Spanish language is not merely an immigration issue. Puerto Ricans and Mexican Americans whose families have resided for centuries in what is now the United States have endured a conquest of their land and culture through laws and policies that compel assimilation.<sup>151</sup> The central component of coerced and sometimes forced assimilation has been the learning of English and forgoing of Spanish. This sacrifice comes at a personal cost and is ultimately detrimental to the nation which could benefit domestically and compete better internationally with a more multilingual citizenry.

As *Brown v. Board of Education*<sup>152</sup> and the civil rights movement of the 1960s demonstrated, a central manifestation of racism in this country has been through the segregation of races in education. Like African Americans, Latinos were subject to educational segregation (assigning students to separate schools based upon race) during the Jim Crow era.<sup>153</sup> The effects of this segregation were the same as for blacks: a feeling of inferiority, and limited educational opportunities and career advancement.<sup>154</sup> However, unlike the segregation of blacks, the segregation of Latinos was largely couched in the pretext of language. In the Southwest, segregation of Mexican Americans—the country's largest Latino population—was justified on the basis of the students' allegedly deficient language abilities.<sup>155</sup> However, English language ability was not

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149. *Id.* at 1445 (citing STEPHEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* 88–94 (2003)).

150. See Perea *supra* note 10, at 1433.

151. See Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, 1285 (2006).

152. 347 U.S. 483 (1954).

153. See, e.g., *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (finding the racial segregation of Latino children in California schools violated the Fourteenth Amendment).

154. In *Mendez v. Westminster School District*, the district court found that “the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists.” *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 549 (S.D. Cal. 1946), *aff’d sub nom. Mendez*, 161 F.2d 774. In *Brown*, the Supreme Court held that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. . . . A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.” *Brown*, 347 U.S. at 494.

155. See *Mendez*, 64 F. Supp. at 549; *Indep. Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930); Robert R. Álvarez, Jr., *The Lemon Grove Incident: The Nation's First Successful Desegregation Court Case*, 32 J. SAN DIEGO HIST. no. 2, 1986, at 116 available at <http://sandiegohistory.org/journal/86spring/lemongrove.htm> (citing *Petition for Writ of Mandate, Álvarez v. Lemon Grove Sch. Dist.* (1931) (No. 66625)); see also Lupe S. Salinas, *Linguaphobia, Language Rights, and the Right of Privacy*, 3 STAN. J. C.R. & C.L. 53, 63–65 (2007); Guadalupe Salinas,

determined through an assessment of the pupil's English language skills. Rather, the student's physical appearance or Spanish surname was enough to determine that the student belonged in the "Mexican" school instead of the school reserved for whites.<sup>156</sup> The law has facilitated this societal discrimination by failing to recognize the connection between language and race discrimination and declining to intervene when language restrictions are a pretext for racial, ethnic, or national origin discrimination.

The relationship of language to race, ethnicity, and national origin is unsettled in the sphere of constitutional law.<sup>157</sup> The Supreme Court has not squarely addressed the question of whether language discrimination amounts to discrimination on the basis of race, ethnicity, or national origin under the Equal Protection Clause. In the few language-based equal protection cases that have reached the Court, it has often ruled on alternative statutory or constitutional grounds. For instance, in *Lau v. Nichols*, LEP children of Chinese ancestry claimed that the San Francisco school district's failure to provide ESL instruction deprived them of equal educational opportunities under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>158</sup> The Court did not reach the Equal Protection Clause arguments and relied solely on Title VI of the Civil Rights Act when it found that the failure to provide Chinese-speaking students ESL instruction had prevented their access to a meaningful education.<sup>159</sup> Thus, the Court found that the Chinese-speaking minority group had been denied a federally funded educational benefit on the basis of their national origin or race in violation of Title VI.<sup>160</sup>

Other language discrimination cases before the Supreme Court have been resolved on the grounds that parents have a fundamental due process right to educate their children in their language of choice.<sup>161</sup> In *Meyer v. Nebraska*, for example, the plaintiff was charged with violating a statute that prohibited the teaching of modern foreign languages to elementary-aged children.<sup>162</sup> The Nebraska Supreme Court found that the statute did not conflict with the Fourteenth Amendment but was a valid exercise of police power on the grounds that the purpose of the statute was "that the English language should be and become the mother

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Comment, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 Hous. L. Rev. 929, 939 (1971).

156. *Mendez v. Westminster: For all the Children/Para Todos los Niños* (KOCE 2002).

157. See Josh Hill et al., *Watch your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. Kan. L. Rev. 669, 708 (2009).

158. *Lau v. Nichols*, 414 U.S. 563 (1974).

159. *Id.* at 566.

160. *Id.* at 568.

161. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

162. *Meyer*, 262 U.S. at 397.

tongue of all children reared in [the] state.”<sup>163</sup> The plaintiff challenged his conviction for teaching biblical stories to a parochial school student in German under the due process clause of the Fourteenth Amendment.<sup>164</sup> The U.S. Supreme Court struck down the statute on the grounds that parents have the right to have their children taught heritage languages,<sup>165</sup> and noted that the protection of the Constitution extends “to those who speak other languages as well as to those born with English on the tongue.”<sup>166</sup>

Similarly, in *Farrington v. Tokushige*, the Supreme Court struck down a statute that severely regulated and effectively prohibited the teaching of a language other than English or Hawaiian, without a permit, payment of fees, and demonstration that the permit applicant “is possessed of the ideals of democracy; knowledge of American history and institutions, and knows how to read, write and speak the English language,” and the signing of a pledge that she would “direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens.”<sup>167</sup> The Court struck down the statute on the ground that it deprived “parents of fair opportunity to procure for their children instruction which they think important” because the “Japanese parent has the right to direct the education of his own child without unreasonable restrictions.”<sup>168</sup> Thus, these opinions acknowledged the different race, ethnicity, or national origin of the language minorities affected by the language restrictions but focused more on parental rights than language rights.<sup>169</sup>

In the most recent Supreme Court language discrimination case, *Hernandez v. New York*, the Court faced the issue of whether Spanish ability bears such a close relation to ethnicity that exercising a peremptory challenge on the basis of Spanish-speaking ability violates equal protection, but chose not to address the issue directly.<sup>170</sup> *Hernandez* dealt with a criminal trial of a Latino defendant in a heavily Latino and Spanish-speaking area<sup>171</sup> where Spanish language testimony would be presented.<sup>172</sup> The prosecutor used four peremptory challenges to exclude potential

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163. *Id.* at 398.

164. *Id.* at 396–97.

165. *Id.* at 401–02.

166. *Id.* at 401.

167. *Farrington v. Tokushige*, 273 U.S. 284, 293–94 (1927).

168. *Id.* at 298.

169. See generally SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES (2003).

170. *Hernandez v. New York*, 500 U.S. 352, 353 (1991) (plurality opinion).

171. Anthony Fassano, Note, *The Rashomon Effect, Jury Instructions, and Peremptory Challenges: Rethinking Hernandez v. New York*, 41 RUTGERS L.J. 783, 792 (2010).

172. *Hernandez*, 500 U.S. at 355–56.

Latino jurors.<sup>173</sup> The prosecutor claimed that he had struck two of the jurors who were Spanish-English bilingual because he was not certain that they would follow the English translation of evidence.<sup>174</sup> Ultimately, no Latino served on the jury despite the high population of Latinos and Spanish speakers in the jurisdiction.<sup>175</sup> *Hernandez* was the first *Batson* challenge by a Latino brought before the Court.<sup>176</sup>

The analyses of the *Hernandez* plurality opinion, concurrence, and dissents focused on whether the prosecutor's explanation was race-neutral. The separate opinions reflect different approaches to determining whether there is a sufficient nexus between race and language that would warrant a finding of an equal protection violation. Justice O'Connor presented a highly formalistic approach that severed language from race. In her concurring opinion joined by Justice Scalia, Justice O'Connor stated 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."<sup>177</sup>

This approach can be compared with Justice Kennedy's plurality opinion in *Hernandez*, which recognized that language discrimination can be sufficiently linked to race or ethnicity so as to implicate the shelter of equal protection.<sup>178</sup> Despite upholding the use of peremptory strikes of potential jurors who were bilingual and without resolving "the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes,"<sup>179</sup> Justice Kennedy acknowledged the close relationship between race and language. He noted that an individual's language can elicit a response from others that ranges from "distance and alienation, to ridicule and scorn. . . . the latter type all too often result[ing] from or initiat[ing] racial hostility."<sup>180</sup> Justice Kennedy further stated that "[i]t 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."<sup>181</sup> Justice Kennedy acknowledged that there might be a "locality" where a "significant percentage of the Latino population speaks fluent Spanish" and in fact prefer communicating in Spanish rather than English.<sup>182</sup> In such a locality, "a prosecutor's persistence in

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173. *Id.*

174. *Id.*

175. See Andrew McGuire, Comment, *Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?*, 23 N.M. L. REV. 467, 467 (1993); Fassano, *supra* note 171, at 792.

176. McGuire, *supra* note 175, at 470.

177. *Hernandez*, 500 U.S. at 375 (O'Connor, J., concurring).

178. *Id.* at 371 (Kennedy, J., plurality opinion).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 363-64 (plurality opinion).

the desire to exclude Spanish-speaking jurors,” despite any juror instructions to follow the English translation or to inform the judge if the translation is incorrect “could be taken into account in determining whether to accept a race-neutral explanation for the challenge.”<sup>183</sup>

In a dissent by Justice Stevens and joined formally by Justice Marshall and by reference by Justice Blackmun, Justice Stevens recognized an inherent relationship between race and language.<sup>184</sup> Stevens found that the prosecutor’s justifications proffered for striking the bilingual jurors were “insufficient to dispel the existing inference of racial animus” because the justification “would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons.”<sup>185</sup> He notes that “[a]n explanation that is ‘race neutral’ on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice.”<sup>186</sup> The dissent appears to appreciate the obvious connection between the bilingual jurors’ Spanish language abilities and Latino background. This approach is in line with interpretations of Titles VI and VII of the Civil Rights Act of 1964, which have recognized language discrimination as a form of national origin discrimination.<sup>187</sup>

## 2. Intent Requirement

To prevail on a language-based equal protection claim, a plaintiff must satisfy the intent requirement and prove a connection between the language discrimination and her race, ethnicity, or nation of origin. In other words, a plaintiff must show that in enacting the juror language requirement, the government intended to discriminate against the class of persons to which the plaintiff belongs.<sup>188</sup> This is challenging to prove under the Court’s narrow view of intent, and such claims have generally not been successful.<sup>189</sup> First, racism has become highly sophisticated. Even though on-the-ground English-only movements that prompt legislation are often blatantly racist,<sup>190</sup> legislative history is devoid of explicit expressions of racial intolerance. Even if the intent is to exclude a group of Latinos (such as a backlash against recent immigration or a bloom of nativist sentiment), there is no smoking-gun evidence of this in the legislative record.

The primary reason that courts have not found the intent requirement to be satisfied is that, on its face, a language requirement

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183. *Id.* at 364.

184. *Id.* at 379 (Stevens, J., dissenting).

185. *Id.*

186. *Id.*

187. *E.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974).

188. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

189. *See, e.g.*, *State v. Haugen*, 243 P.3d 31 (Or. 2010).

190. *Salinas, supra* note 33, at 918.

applies to all LEP persons, not just speakers of certain languages.<sup>191</sup> Although a requirement that only targeted Spanish speakers would be found to demonstrate intent to discriminate against Latinos,<sup>192</sup> discrimination against all people who do not meet certain English language speaking, reading, or writing skill levels is considered race neutral because it applies to all people with English deficiencies.<sup>193</sup>

Further, even if it can be clearly shown that a language requirement has a tremendous disparate impact on one group as opposed to society at large, that disparate impact is still not sufficient under equal protection doctrine. The Supreme Court has established that the Equal Protection Clause only renders unconstitutional express racial discrimination and not those laws that merely have a distinctly disparate effect on a racial group.<sup>194</sup> Thus a facially neutral law, like juror language requirement, is not violative of equal protection despite the fact that it might have a strikingly “disproportionate impact” on Latinos or other racial minority groups. Despite significant criticism of this approach,<sup>195</sup> it is not likely that this line of cases will be overturned soon, which emphasizes the importance of engaging in a rigorous analytical inquiry into intent that comports with the true constitutional meaning of equal protection under the law.

### 3. *Critical Originalism*

To counter the current myopic view of intentionality, this Article proposes “Critical Originalism” as a new method of ascertaining the discriminatory intent of a statute or procedural rule for Equal Protection purposes. Critical Originalism is the melding of anti-subordination deconstruction principles of Critical Race Theory with the interpretive methodology of Originalism Theory. At first glance, the coupling of tenets of Critical Race Theory and Originalism might seem discordant. Originalism is predominately touted by political conservatives, while those who embrace Critical Race Theory are usually politically progressive.<sup>196</sup> However, applying Originalist principles of interpretation

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191. See Donna F. Coltharp, Comment, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARY'S L.J. 149, 173 (1996) (citing *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986)).

192. *Id.*

193. *Id.*

194. *Washington v. Davis*, 426 U.S. 229, 235, 237–39 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

195. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

196. See Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 51 (2011) (citing a study finding that originalism “is strongly favored by individuals who are conservative in their political orientation”); CRITICAL RACE THEORY XI (KIMBERLE CRENSHAW, ET AL., 1995) (explaining that critical race theory is a “comprehensive movement in thought and life—created primarily, though not exclusively, by

under a lens of Critical Race Theory can help reveal the racially discriminatory intent behind colorblind laws. However, unlike traditional Originalists, whose starting point is a text's plain meaning, a criticalist approach asks us to be concerned about minority subordination, and thus questions facial neutrality and delves below a law's epidermis to discern its true original aim and impetus.

Under a Critical Originalist analysis, the existence of discriminatory intent behind a statutory requirement is ascertained by examining the original intent and meaning of the requirement at the point of the requirement's initial manifestation, which might well precede the initiation of the bill that gave rise to the statute. If the origination of the racially subordinating provision predates passage of the instant statute or rule and was motivated by discrimination, it should be determined whether there has been acknowledgement, denunciation, and remediation of the prior discriminatory intent, or if passage of the law at issue was a continuance of a previously discriminatory law or policy. Thus, Critical Race Theory sets the structural critique and scope of investigation, while Originalism provides the investigatory techniques.

Critical Race Theory is centrally concerned with examining the legal system as an institution that perpetuates a power structure which privileges the majority and subordinates minorities.<sup>197</sup> Under this view, a statutory provision that subordinates a racial minority group does not exist and operate in isolation. Traditional jurisprudence ignores this structural analysis and examines the discriminatory intent of a statute by looking narrowly at only the individual statute's text and possibly legislative history.<sup>198</sup> Under a Critical Originalist approach, rather than being limited merely to an inquiry into the discriminatory intent of the particular drafters or enactors of the law or policy at issue, a court could also look into the legal and political historical origins of the law or policy. A "new" law might actually be a continuation of similar prior laws or policies. A Critical Originalist approach does not view the creation of a law as an insular event that begins with the introduction of a bill and ends with its enactment, but instead looks back to the origination of the law. If the current law imposes a requirement that subordinates a racial group, a court should look back to when the requirement was initially imposed. At that point of origination, the original intent of the drafters and the original meaning of the requirement should be examined.

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progressive intellectuals of color—[which] compels us to confront critically the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy”).

197. Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007, 1008 (1992).

198. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–80 (1987).

In the context of evaluating the discriminatory intent behind juror language requirements, instead of looking only at the provision's text and legislative history for the current juror qualification statute or procedural rule that contains an English language provision, the court should also look at the preceding English language requirements that applied to that jurisdiction, as well as the political backdrop that spawned the promulgation and continuation of such requirements, to determine governmental intent to discriminate. This approach is fitting because it acknowledges the reality that governmental action is broader than the motivation of individual state actors drafting and enacting a procedural rule or statute. Government action is institutional action. Prior laws and policies and their intentions, as well as early and contemporary political motivations, are part of the institutional ethos. This is particularly true when the current law or policy at issue is a continuation of previous such laws or policies without intervening denouncement and remediation of prior discriminatory aims. From a structural perspective, a discriminatory intent behind a legal requirement does not eviscerate merely because a new group of legislators decide to perpetuate the same requirement in a different statute or rule.

Having set the scope of investigation into a statutory requirement's discriminatory intent to the time of its origination and forward, originalist techniques are useful tools to determine whether such intent exists. Originalism is a principle of interpretation which maintains that legal text should be interpreted in accordance with its original meaning or intent.<sup>199</sup> In other words, a legal text should be interpreted to further what the text meant at the time of its enactment or what the drafter or enactor of the law intended it to mean or achieve. Originalism initially and chiefly has been applied to interpretation of constitutions, but it has also been applied to statutes.<sup>200</sup>

Originalism has two central components: a methodological component (or principle of interpretation mentioned above) and a political one. The methodology or principal of interpretation attempts to determine the original intent of the drafters, meaning of the ratifiers, or public meaning at the time of adoption or enactment.<sup>201</sup> The political component is a value judgment that the original meaning, intent, or understanding of the drafters/founders should be followed and that it is not the appropriate role of the judiciary to create, amend, or repeal laws

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199. Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 574-75 (2013).

200. Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 5 (1998).

201. Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 759 (2013).

in ways that are inconsistent with this intent.<sup>202</sup> Critical Originalism embraces the methodological approach while refuting the political element. Unlike traditional Originalism, Critical Originalism rejects legal formalism that separates legal reasoning from normative policy and justice. Further, Critical Originalism does not view the legislature as the sole purveyor of substantive justice. Rather, it recognizes that in our legal system the courts have an important role to serve as a check on the legislature's actions, to ensure that the legislature does not produce discriminatory and subordinating laws, and to effectuate equal justice under the law.

The methodological component of Originalism encompasses two central theories: Original Intent and Original Meaning.<sup>203</sup> Original Intent Theory provides that in interpreting constitutional or statutory text, one should look at what the drafter or enactor meant and intended the statute to accomplish.<sup>204</sup> Original Meaning Theory, which is closely related to textualism, asserts that interpretation of a legal text should be based on what reasonable persons at the time of its adoption would have understood to be the original meaning.<sup>205</sup> Both of these theories lend insights into the original discriminatory intent of a statute.

Under a Critical Original Intent Theory analysis, when a legal requirement or provision produces a subordinating effect, it is necessary to discern what the original drafters of the requirement or provision intended to accomplish: Did they intend to discriminate? Were they aware of the discriminatory effect and did they proceed in reckless disregard of that effect? If the current law is a continuation of a prior requirement or policy, did the more recent lawmakers acknowledge the prior discriminatory intent and effect? Did they repudiate the prior discriminatory intention? Did the lawmakers take steps to remediate the discrimination? These are important questions to ask, but can be challenging to answer. Drafters' motivations for supporting or passing a piece of legislation or procedural rule might be diverse, contradictory, and transient. There might be no records specifying the legislator's reasons (purported or actual) for initiating or supporting the enactment of a law or rule. Moreover, legislators do not work alone. Thus, while it is challenging to determine the intent of an individual lawmaker, it can be even more difficult to determine the collective original intent of the

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202. See ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23–25 (1997).

203. Williams, *supra* note 199, at 574.

204. *Id.*

205. *Id.* at 575.

drafters. As such, contemporary Originalists have been critical of the Original Intent branch of Originalism.<sup>206</sup>

Current Originalists' criticism of Original Intent Theory shows us insights into reasons why it is, for practical purposes, difficult to ascertain the discriminatory intent of a law or rule. It is likely unreasonable to assume that there could be a single unified intent behind a statutory provision or rule, and even if there were, it would be difficult to determine whether there was a unified intent.<sup>207</sup> Also, as Critical Race Theory scholarship has demonstrated, racism is increasingly sophisticated, implicit, and covert.<sup>208</sup> It is not likely that a legislator would place race-based distinctions in the text of the law or overtly state a discriminatory intent in formal legislative history. Thus, it is fitting to engage in a more contextualized Original Meaning analysis. Under an Original Meaning analysis, one must look at the purpose, structure, and history of the law. A Critical Originalist would ask: What would reasonable people at the time of passage understand the law to mean? Would they understand the law to be targeting a certain group for inferior treatment?

Applying a critical originalist analysis to juror language requirements is an effective method of revealing the racially discriminatory intent prompting and contemporarily inherent in these restrictions. A striking example is the English language juror requirement in the federal courts in Puerto Rico, a topic about which I have previously written.<sup>209</sup> As a federal court, the Jury Selection and Service Act applies and requires that a juror speak, read, write and understand English.<sup>210</sup> This requirement results in the exclusion of ninety percent of age-eligible Puerto Ricans from federal jury service.<sup>211</sup> Further, the language requirement disproportionately eliminates Puerto Ricans of African descent from jury service.<sup>212</sup> Although there is an overrepresentation of black Puerto Ricans appearing as criminal defendants in the U.S. District Court for the District of Puerto Rico, very few black Puerto Ricans can be found in the jury box.<sup>213</sup> Under the current formalistic equal protection intent doctrine, a Puerto Rican plaintiff bringing an equal protection challenge against the JSSA's application in the U.S. District Court for Puerto Rico would likely fail. Under the traditional narrow view of intent, the JSSA would not likely

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206. See, e.g., William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983 (2009).

207. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

208. Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 216 (2004); Lawrence, *supra* note 195, at 331, 340–41.

209. Jasmine B. Gonzales Rose, *The Exclusion of Non-English Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497 (2011).

210. 28 U.S.C. § 1865(b)(1)–(3) (2011).

211. Gonzales Rose, *supra* note 209, at 498.

212. *Id.*

213. *Id.*

be considered to have a racially discriminatory intent because there is no evidence that the drafters intended to exclude or make it more difficult for Latinos generally, or Puerto Ricans more specifically to serve on juries. There is no indication that the drafters even considered language minorities, the connection between language and racial minorities, or residents of Puerto Rico<sup>214</sup> when developing and ratifying the English language provision of the JSSA. Thus, as statutory language and legislative history appear race neutral, the juror language provision is unassailable under equal protection doctrine.

A Critical Originalist analysis deconstructs the racial neutrality of the JSSA's English requirement as applied to Puerto Rico and reveals a different story. In determining the original intent of a statute, a Critical Originalist approach is cognizant of the systemic nature of racism and how it is institutionalized. Thus, under this approach it is essential to look beyond the JSSA juror qualification provision to the earliest origins of an English language requirement in Puerto Rico. In Puerto Rico this requirement is over a century old, having been first imposed shortly after American conquest.<sup>215</sup> The U.S. government believed that the race, color, and Spanish language background of Puerto Ricans made them unsuitable for self-governance.<sup>216</sup> Accordingly, Puerto Ricans were denied political sovereignty and voting rights, restrictions that continue today.<sup>217</sup> The vast majority of Puerto Ricans were also denied the ability to serve on federal juries. Although virtually none of Puerto Rico's inhabitants spoke English, the U.S. government mandated that the sole language of proceedings in federal court would be English.<sup>218</sup>

The English language juror requirement in Puerto Rico has had three legal manifestations, each seamlessly leading into the next. In 1906, Congress issued an Act defining the qualification of jurors for service in the U.S. District Court of Puerto Rico.<sup>219</sup> Among other things, this Act required that jurors have sufficient knowledge of the English language.<sup>220</sup> Next, Congress enacted the Jones Act of 1917, which granted Puerto Ricans statutory U.S. citizenship (a citizenship status subordinate to

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214. See 28 U.S.C. § 1863(b)(2). The JSSA only mentions Puerto Rico in one place that does not relate to the language requirement.

215. Treaty of Peace, U.S.-Spain, art. 2, Dec. 10, 1898, 30 Stat. 1754, 1775. See generally FRANK FREIDEL, *THE SPLENDID LITTLE WAR* (1958); DAVID F. TRASK, *THE WAR WITH SPAIN IN 1898* (1981).

216. Gonzales Rose, *supra* note 209, at 515.

217. See *Igartua v. United States*, 229 F.3d 80, 83-84 (1st Cir. 2000); see also Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1163 (2009).

218. Organic Act (Foraker Act) of 1900, Pub. L. No. 56-191, ch. 191, § 34, 31 Stat. 77 (1900) ("All pleadings and proceedings . . . shall be conducted in the English language.").

219. Act of June 25, 1906, Pub. L. No. 294, ch. 3542, 34 Stat. 466 (1906).

220. *Id.*

constitutionally conferred citizenship since it is potentially revocable),<sup>221</sup> and Congress reiterated the English juror language requirement.<sup>222</sup> The juror language provision of the Jones Act remained in effect until it was replaced in 1968 by the stricter English language requirement contained in the JSSA.<sup>223</sup>

Having traced the English language juror requirement back to its origination, the next step of a Critical Originalist analysis is to inquire into the actual motivation behind the promulgation of English language prerequisites, the drafters' intent in imposing these restrictions, and the original understanding and meaning of the language requirement. Here, a racially discriminatory intent to discriminate against Puerto Ricans is apparent. As I have explained elsewhere:

Lawmakers' beliefs that Puerto Ricans were racially inferior and unfit for self-governance not only determined colonial rule, but also determined the specific attributes of that government. This included the unilateral imposition of English as the language of the federal court. The English-only mandates in the federal courts simultaneously ensured Anglo- and Anglophone-American rule in the court and the exclusion of Puerto Rican participation in (although not subjugation to) the federal court. At the time of its implementation, Congress could have chosen to conduct court in Spanish or interpret the English proceedings into Spanish. If the United States had wanted Puerto Rican participation, it undoubtedly would have pursued one of these options. It did not. Thus, one of the original purposes of the English language requirement was to subordinate Puerto Ricans and wholly exclude the populations which the government deemed as most undesirable: those of African and mixed race heritage.<sup>224</sup>

Furthermore, reasonable people at the time of the enactment of the 1906 and 1917 juror language requirements would clearly understand that English-only meant no Spanish. And no Spanish meant the exclusion of the vast majority of Puerto Ricans from federal jury service. Due to the lack of English language ability among the masses, only American expatriates and some of the island's most elite families would be eligible for jury service for the foreseeable future.

The final step in a Critical Originalist analysis is to consider whether there has been any acknowledgement, renunciation, or remediation of

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221. See Gonzales Rose, *supra* note 209, at 511 (citing Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 797-98 (2010) ("[T]he statutory citizenship status of the inhabitants of Puerto Rico . . . is not equal, full, permanent, irrevocable citizenship protected by the 14th Amendment of the U.S. Constitution.")) (quoting H.R. Rep. No. 105-131, pt. 1, at 19 (1997)); see also Christina Duffy Burnett, "They Say I Am not an American . . .": *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 662 (2008)).

222. Organic Act of 1917 (Jones-Shafroth Act), Pub. L. No. 64-368, ch. 145, § 44, 39 Stat. 951 (1917) (repealed 1968).

223. 28 U.S.C. § 1865(b)(1)-(3) (2011).

224. Gonzales Rose, *supra* note 209, at 517.

the prior discriminatory intent. When applied to the U.S. District Court for the District of Puerto Rico, the JSSA is an unbroken continuation of the racially discriminatory language requirements instituted in the early twentieth century. Application of Critical Originalism to the JSSA English language prerequisite applied in Puerto Rico ferrets out the discriminatory intent behind that requirement. Inquiry into the historical purpose of the English language juror requirement reveals that it was originally racially discriminatory and the intentional racial effects of the language requirement have changed little over time. The structure of the law instituted to subordinate Puerto Ricans, especially those of African descent, remains in place and is effective in carrying out its initial discriminatory aim. The current language requirement is simply a continuation of earlier racially motivated inequity. Moreover, the federal government has not acknowledged, renounced, or remediated this discrimination. The racially discriminatory intent did not dissipate when the statutory baton laden with racial animus was passed from the 1917 Jones Act to the 1968 JSSA; rather, that discriminatory intent was passed on and the law should recognize this. A change of form and statutory numbering of a requirement should not be sufficient to eviscerate the original discriminatory intent.

The application of a Critical Originalist inquiry reveals the racially discriminatory intent behind the application of the JSSA English language requirement in Puerto Rico. This revelation supports a strict scrutiny review of a LEP Latino's equal protection claim challenging the juror prerequisite. Although the government might have a significant interest in demanding that jurors speak and understand English, the requirements are not sufficiently narrowly tailored when juror language accommodation is an available alternative. As such, it is likely that juror language requirements would fail strict scrutiny because a complete exclusion of LEP citizens is not the least restrictive means to ensure that jurors are competent to serve.

#### B. FAIR CROSS SECTION REQUIREMENT OF THE SIXTH AMENDMENT

Unlike equal protection, a fair cross section analysis does not require a showing of intent.<sup>225</sup> Rather, the analysis centers on systematic exclusion. The Impartiality Clause of the Sixth Amendment has been interpreted by the Supreme Court to require that both federal and state juries be selected from a fair cross section of the community.<sup>226</sup> Although this fundamental

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225. Chernoff, *supra* note 1, at 161–62.

226. U.S. CONST. amend. VI (providing in relevant part that a defendant has a right to an “impartial jury of the State and district wherein the crime shall have been committed”); *see, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment.”).

right was not recognized under the Sixth Amendment until 1942,<sup>227</sup> this legal concept is far from new. The related notion of a “jury of one’s peers” appeared in the Magna Carta in the early thirteenth century.<sup>228</sup> In thirteenth century England, under the tradition of trial by jury *de medietate linguae*, mixed juries were provided to foreign defendants.<sup>229</sup> Mixed juries were composed of half of the defendant’s own countrymen, and since these individuals spoke defendant’s foreign language, the juries became known as jury *de medietate linguae* or a “jury of the half tongue.”<sup>230</sup> These mixed, multilingual juries existed in England for seven centuries and were also used in the American colonies, later becoming part of the common law tradition of seven states, a practice that spanned 237 years.<sup>231</sup>

Thus, a linguistic and racial/ethnic jury of one’s peers is a long-standing tradition in the United States. However, although modern common parlance and legal rhetoric often evoke this phrase (“jury of one’s peers”), in practice, defendants in criminal trials in the United States are not entitled to juries of their “peers.” Rather, the Supreme Court emphasized that the guarantee is not that a defendant will have a jury that looks like him in demographic particulars, but rather that the jury pool from which his petit or grand jury is selected will be drawn from a fair and representative cross section of the community.<sup>232</sup>

In the beginning, unrepresentative juries were challenged under the Equal Protection Clause of the Fourteenth Amendment. These early cases focused on facially discriminatory statutes which explicitly excluded entire classes of persons, particularly African Americans, from jury service.<sup>233</sup> As explicit racial statutory exclusions became outmoded, the courts were faced with claims that facially neutral jury selection laws and procedures resulted in the statistical underrepresentation of certain

227. *Glasser v. United States*, 315 U.S. 60, 85 (1942).

228. MAGNA CARTA § 39 (1215) (“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.”).

229. Deborah A. Ramirez, *A Brief Historical Overview of the Use of the Mixed Jury*, 31 AM. CRIM. L. REV. 1213, 1214 (1994).

230. *Id.*

231. See Ramirez, *supra* note 6, at 790; Hiroshi Fukari & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL’Y & L. 645, 654–55 (1997) (“At various times between 1674 and 1911, a number of states—including Kentucky, Maryland, Massachusetts, Pennsylvania, New York, Virginia, and South Carolina—each provided for juries *de medietate linguae*.”).

232. See *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (“We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.”).

233. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that West Virginia’s statutory exclusion of African American males from jury service on the basis of color and race violated the Equal Protection Clause of the Fourteenth Amendment).

racial, gender, and economic groups. Initially, the courts continued to review these cases under the Fourteenth Amendment.

For instance, in the 1935 case *Norris v. Alabama*, the Supreme Court held that a facially race neutral Alabama statute had been administered in such a way as to exclude African Americans from jury service in violation of the Equal Protection Clause.<sup>234</sup> The Court found that the sweeping assertion by the jury commissioner that he did not know of any African American in the county that had the character, fitness, or other statutorily required attributes to serve on a jury was not sufficient to overcome the evidence that no African American had ever served on a jury in that jurisdiction despite the presence of qualified African Americans in the county.<sup>235</sup>

Five years later, in *Smith v. Texas*, the Court reviewed yet another case involving exclusion of African Americans but this case differed because the exclusion was not absolute.<sup>236</sup> Although African Americans constituted over twenty percent of the population of Harris County, Texas, and between three and six thousand such individuals were statutorily qualified to serve as jurors, only three African Americans had served as grand jurors in a seven year period.<sup>237</sup> The Court found that “[c]hance and accident alone could hardly have brought about the listing for grand jury service so few negroes from among the thousands” qualified.<sup>238</sup> Here, the state statutory scheme was not discriminatory on its face, but “by reason of the wide discretion permissible in the various steps of the plan,” it was capable of being applied in a discriminatory manner.<sup>239</sup> The Court emphasized that:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative* of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.<sup>240</sup>

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234. *Norris v. Alabama*, 294 U.S. 587, 590–91 (1935) (“The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.” (citing ALA. CODE § 8603 (1923))).

235. *Id.* at 599.

236. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

237. *Id.* at 129.

238. *Id.* at 131.

239. *Id.*

240. *Id.* at 130 (emphasis added).

Although decided under the Fourteenth Amendment, the concept of the jury needing to be a “body truly representative” is a direct precursor to modern day Sixth Amendment fair cross section jurisprudence. Furthermore, rather than focusing on racial animus or discriminatory intent, the Court looked to statistical evidence to determine that African Americans had been systemically excluded from jury service.<sup>241</sup>

Two years later, in the 1942 case *Glasser v. United States*, the Court reiterated its formulation of representative juries, but this time within the framework of the Sixth Amendment’s Impartiality Clause.<sup>242</sup> In addressing a claim of exclusion of all women who were not members of the Illinois League of Women Voters from the jury pool, the Court stated that officials charged with selecting jurors “must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a *cross-section of the community*.”<sup>243</sup> Thus, systemic jury pool exclusion cases (as opposed to individual juror exclusion) came under the purview of the Sixth Amendment and the fair cross section requirement was born. In 1975, the Supreme Court declared that the fair cross section requirement is a fundamental right.<sup>244</sup> This fundamental right can be raised by criminal defendants irrespective of whether they are a member of the group allegedly excluded.<sup>245</sup>

In the 1979 case *Duren v. Missouri*, the Court articulated the contemporary test to establish a prima facie violation of the fair cross section requirement.<sup>246</sup> This case confronted a Missouri statute that allowed women to request an automatic exemption from jury service.<sup>247</sup> Ultimately, the Court found that the statute resulted in an underrepresentation of women in violation of the Sixth Amendment’s fair cross section guarantee.<sup>248</sup> In making this determination the Court put forth the test for establishing a prima facie violation:

[T]he defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;

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241. *Id.* at 129.

242. *Glasser v. United States*, 315 U.S. 60, 86 (1942) (stating that “the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a ‘body truly representative of the community.’”).

243. *Id.* (emphasis added).

244. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

245. *Id.* at 526 (holding that a male defendant has standing to challenge the exclusion of women from the jury pool); see *Peters v. Kiff*, 407 U.S. 493 (1972) (plurality) (finding that a white male could challenge the exclusion of African Americans from jury service).

246. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

247. *Id.* at 360.

248. *Id.*

and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.<sup>249</sup>

However, even if a plaintiff can establish a prima facie case of a fair cross section violation, the government can overcome this demonstration if “those aspects of the jury-selection process,” which result “in the disproportionate exclusion of a distinctive group,” advance a significant state interest.<sup>250</sup>

Each prong of the *Duren* test, when applied to the juror language requirements (particularly with respect to the Latino community), exposes several problems as to the legitimacy of language exclusions. The first inquiry, whether the excluded group is “distinct,” raises the issue of how narrowly to define the group. The group could be articulated as LEP persons, a specific LEP racial group, or the racial group generally. For the purposes of this analysis, this Article defines the cognizable group as Latinos. Once the group is defined, the analysis turns to whether the representation of this group in the jury pool is “fair and reasonable in relation to the number of such persons in the community.”<sup>251</sup> Finally, under the third prong of *Duren*, the test asks if this underrepresentation is due to the systematic exclusion of the English language requirement itself or to other factors.<sup>252</sup>

In asserting a fair cross section claim, a Plaintiff must show that “the group alleged to be excluded is a ‘distinctive’ group in the community.”<sup>253</sup> The Supreme Court has not defined the requirements for establishing a “distinctive” group.<sup>254</sup> Nevertheless, in *Lockhart v. McCree*, the Court provided some limited guidance for groups that fall within the purview of a fair cross section claim.<sup>255</sup> The Court reflected on the groups that have traditionally been recognized under fair cross section doctrine—namely African Americans, women, and Mexican Americans<sup>256</sup>—and noted that the recognized common factor between these groups has been the immutable nature of a group’s characteristics.<sup>257</sup> The Court reasoned that the exclusion of jurors based on some immutable characteristic, such as racial, ethnic, or gender background, is not acceptable because it gives rise to an impermissible “appearance of unfairness.”<sup>258</sup> In *Lockhart*, the

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249. *Id.* at 364.

250. *Id.* at 367–68.

251. *Id.* at 364.

252. *Id.*

253. *Id.*

254. *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (“We have never attempted to precisely define the term ‘distinctive group,’ and we do not undertake to do so today.”).

255. *See id.*

256. *Id.* at 175.

257. *Id.*

258. *Id.*

Court also expressed concern about exclusions denying members of historically disadvantaged groups the right to serve on a jury.<sup>259</sup>

Nevertheless, as the Supreme Court has provided little guidance in defining a “distinctive” group, federal and state lower courts have developed their own tests. Many courts have developed some iteration of the following test:

(1) [T]he group must be defined and limited by some clearly identifiable factor (such as race or sex), (2) there must be a common thread or basic similarity in attitude, ideas or experience which runs through members of the group, and (3) there must be a community of interest among the members of the group to the extent that the group’s interest cannot be adequately represented if the group is excluded from the jury selection process.<sup>260</sup>

Latinos “are unquestionably [a] ‘distinctive’ group[] for the purposes of a fair-cross-section analysis.”<sup>261</sup> In *Lockhart v. McCree*, the Court stressed that “it [is] obvious that the concept of ‘distinctiveness’ must be linked to the purposes of the fair-cross-section requirement.”<sup>262</sup> These purposes include: “guard[ing] against the exercise of arbitrary power;”<sup>263</sup> “ensuring that the ‘commonsense judgment of the community’ will act as ‘a hedge against the overzealous or mistaken prosecutor;”<sup>264</sup> “preserving ‘public confidence in the fairness of the criminal justice system;”<sup>265</sup> and “implementing our belief that ‘sharing in the administration of justice is a phase of civic responsibility.’”<sup>266</sup> These first two fair cross section purposes are closely connected. Many communities that have a high Latino population are also high-crime areas. Latinos and Spanish speakers are overrepresented as criminal defendants, witnesses, and crime victims.<sup>267</sup> Many crimes for which Latino defendants have been charged occur in Latino neighborhoods.<sup>268</sup> When juror language restrictions are imposed in communities with a significant population of Latinos, the jury pool will likely *not* be representative of the community. This will deprive the jury of “jurors who share the same culture and language with witnesses and may have a better understanding of

259. *Id.*

260. See *Vermont v. Pelican*, 580 A.2d 942, 947 (Vt. 1990); see also *Ford v. Seabold*, 841 F.2d 677, 681–82 (6th Cir. 1988); *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985); *Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983); *Washington v. Rupe*, 743 P.2d 210, 218 (Wash. 1987).

261. See *United States v. Rioux*, 97 F.3d 648, 654 (2d Cir. 1996) (citing *United States v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995)); *United States v. Rodriguez-Lara*, 421 F.3d 932, 941 (9th Cir. 2005); see also *Castaneda v. Partida*, 430 U.S. 482, 495 (1977); *Hernandez v. Texas*, 347 U.S. 475, 478–80 (1954).

262. *Lockhart v. McCree*, 476 U.S. 162, 174 (1986).

263. *Id.* at 174 (alteration in original).

264. *Id.*

265. *Id.* at 174–75.

266. *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)).

267. See Fukurai, *supra* note 60, at 11.

268. RONALD WEICH & CARLOS ANGULO, CITIZENS’ COMM’N ON CIVIL RIGHTS, RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 205 (2000).

testimony” and evidence.<sup>269</sup> Including LEP Latinos in juries would likely decrease miscommunication, as well as actual and perceived racial and cultural bias.

When a jury is racially or culturally homogenous, it is more difficult or less likely that the jurors will consider a wide range of perspectives during the fact-finding process.<sup>270</sup> It is essential that during the fact-finding process (whether during trial or deliberations), jurors understand all of the circumstances surrounding a particular event.<sup>271</sup> After all, the justice system entrusts jurors with the important duty of finding “truth” in a particular case, and “truth” is not found by assessments based on homogenous points of view.<sup>272</sup> Therefore, in the context of a trial with a Latino defendant and an LEP Spanish-speaking juror, that juror could provide significant insights to other members of the jury. For example, the juror might be able to explain certain Spanish slang words or colloquialisms not easily translatable into English; the juror might also be able to expound upon cultural practices or norms unique to the local Latino culture.

The New Mexico jury system, which dates back to the Treaty of Guadalupe Hidalgo, provides interpreters for LEP jurors.<sup>273</sup> It is especially appropriate to have such a system in New Mexico given that 35.84% of the population of New Mexico speaks a language other than English at home.<sup>274</sup> While the system poses some logistical problems for the courts—mostly in finding enough interpreters—the inclusion of LEP jurors has been lauded as providing the fairest jury of defendant’s peers.<sup>275</sup> In a state where more than one-third of the population is non-English speaking, the inclusion of non-English speaking jurors undoubtedly expands the cultural perspective and understandings of the jury pool, making trials more fair for defendants. The expansion of racial minority roles in the jury is particularly important because minority groups are typically

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269. Fukurai, *supra* note 60, at 34.

270. *See id.* at 12.

271. *See id.* at 13.

272. In fact, Douglas Smith notes that the “evolution of modern American jury practices has had an adverse impact on the jury’s ability to discover the truth and to arrive at just outcomes.” Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 451 (1997).

273. Scott Sandlin, *Courts Rise to Language Challenge*, ALBUQUERQUE J., Nov. 15, 2004, at A1.

274. U.S. CENSUS BUREAU, DETAILED TABLES, *supra* note 74, at tbl.34. In particular, in New Mexico, 28.31% of the population speaks Spanish. *Id.*

275. ASSOCIATED PRESS, *In New Mexico County, Jurors Need Not Speak English*, WASH. POST, Dec. 16, 1999, at G09 (“Similarly, Larry Dodge, founder of the Fully Informed Jury Association, a nonprofit group in Helmsville, Mont., that educates Americans about their rights as jurors, said he is not aware of any other state with such a provision. He welcomed the ruling. ‘If you’re talking about a jury of your peers, this is it,’ Dodge said. ‘We think a random cross-section of the community is the right way to run a jury trial.’”).

overrepresented as criminal defendants.<sup>276</sup> Furthermore, the juror interpreter system has become so widespread that a court interpreter noted “we’ve had trials where we’ve had eight non-English speakers (in the pool) and out of that, four were impaneled as jurors”—an indication that New Mexico trials include and embody the true idea of a “fair cross section” of the community.<sup>277</sup>

While it is clear that Latinos present a “distinctive group” for prong one of the *Duren* analysis (and it is also possible that LEP Latinos might also constitute a “distinctive group”), the more complicated issue is whether the representation of this group in the jury pool is “fair and reasonable in relation to the number of such persons in the community.”<sup>278</sup> To answer prong two of the *Duren* test, courts must establish which individuals should count within the community. For instance, should Latinos who are ineligible for jury service on the basis of citizenship status or former felon status be included in determining how many Latinos exist in the community? Or should the community only consist of those people who are statutorily eligible for jury service? Further, once the number of Latinos in the community and the number of Latinos in the jury pool are established, what level of systematic exclusion is sufficient to give rise to a constitutional violation?<sup>279</sup> The federal circuits have split on the proper formula for determining an impermissible level of underrepresentation.<sup>280</sup>

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276. AM. SOC. ASS’N, DEP’T OF RESEARCH & DEV., RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 2-3 (2007).

277. Sandlin, *supra* note 273.

278. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

279. See Stephen E. Reil, Comment, *Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under Duren v. Missouri*, 2007 BYU L. REV. 201 (2007); Richard M. Ré, Comment, *Jury Poker: A Statistical Analysis of the Fair Cross-Section Requirement*, 8 OHIO ST. J. CRIM. L. 533 (2011); Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the “Fair Cross-section of the Community”*, 69 S. CAL. L. REV. 155, 194-95 (1995).

280. This is evident from a comparison of the federal circuits and states which have the largest populations of Latinos. The First Circuit uses the absolute disparity test and jury eligible populations where available, but they do not expressly state a preference. The available cases reject fairly low absolute disparities (under five percent). See, e.g., *United States v. Royal*, 174 F.3d 1 (1st Cir. 1999). The Second Circuit expresses a preference for jury eligible population figures, but recognizes that such figures are not generally readily available. Instead they use voting age population figures and an absolute numbers test to calculate disparities. This involves finding the absolute disparity and then calculating how many people from an underrepresented group would have to be added to the jury venire to remedy the underrepresentation. See, e.g., *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990). The Fifth Circuit uses absolute disparity. The circuit has rejected the use of total population figures as irrelevant. See *United States v. Fike*, 82 F.3d 1315 (5th Cir. 1996). The Ninth Circuit favors absolute disparity and will use total population figures where age eligible or jury eligible figures are not available. See *United States v. Rodriguez-Lara*, 421 F.3d 932 (9th Cir. 2005). The Tenth Circuit uses both absolute and comparative disparity in determining whether underrepresentation exists. See *United States v. Gault*, 141 F.3d 1399 (10th Cir. 1998). The Tenth Circuit prefers age eligible population figures when available. See *United States v. Shinault*, 147 F.3d 1266 (10th Cir. 1998). The

Finally, the third factor in a *Duren* analysis is whether the “underrepresentation is due to systematic exclusion of the group in the jury-selection process.”<sup>281</sup> The fact that exclusion of LEP jurors is a statutory and sometimes state constitutional mandate makes the third prong of the *Duren* test fairly easy to prove for the LEP juror group. Unlike many cases where underrepresentation of certain groups is the result of some “coincidence” in selection of the jury venire, in the case of juror language requirements the exclusion is the result of explicit governmental action. Here, therefore, underrepresentation of Latinos is due directly to statutory English language requirements and failure to provide juror language accommodation. The rationale for the exclusion of LEP jurors is that limited English ability, without the assistance of an interpreter, could pose a serious problem in a courtroom setting. Nevertheless, as the New Mexico example amply demonstrates, this seeming difficulty can be remedied.

In *Duren*, the Court stated that the government could prevail despite demonstration of a fair cross section violation if the aspects of the jury-selection process that resulted in the disproportionate exclusion advanced a significant state interest.<sup>282</sup> The majority of fair cross section challenges to the English language juror requirements have come out of Puerto Rico, where ninety percent of the age-eligible population is excluded from jury service under the JSSA prerequisite.<sup>283</sup> The U.S. Court of Appeals for the First Circuit (which hears appeals from the U.S. District Court for Puerto Rico) has repeatedly held that, even assuming a fair cross section prima facie case had been made, such a claim would be overcome by the government’s interest that federal court proceedings be conducted in English.<sup>284</sup> The First Circuit also upheld the government justifications for excluding LEP citizens from the jury pool, irrespective of the possibility of juror interpreters.<sup>285</sup> The government might have a legitimate interest in conducting court proceedings in the English language; however,

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Eleventh Circuit uses absolute disparity but notes that it might not be as useful where the minority population in controversy is small and uses jury eligible population figures. *See* *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984). Arizona favors an absolute disparity test. *See, e.g., State v. Gretzler*, 612 P.2d 1023 (Ariz. 1980); *Arizona v. Sanderson*, 898 P.2d 483 (Ariz. Ct. App. 1995). California uses both the absolute and comparative disparity tests and prefers juror-qualified population data. *People v. Currie*, 104 Cal. Rptr. 2d. 430 (Cal. Ct. App. 2001). Nevada uses both total population and age eligible population figures and absolute and comparative disparity figures. *See, e.g., Evans v. State*, 926 P.2d 265 (Nev. 1996); *Williams v. State*, 125 P.3d 627 (Nev. 2005). New York uses both absolute and comparative disparities and allows the use of general population figures. *See, e.g., People v. Guzman*, 454 N.Y.S.2d 852 (N.Y. App. Div. 1982). Texas uses total population figures and absolute disparity test. *See, e.g., Stanley v. State*, 678 S.W.2d 80 (Tex. Crim. App. 1984).

281. *Duren*, 439 U.S. at 364.

282. *Id.* at 367–68.

283. *Gonzales Rose*, *supra* note 209, at 498.

284. *United States v. Benmuhar*, 658 F.2d 14, 19–20 (1st Cir. 1981).

285. *United States v. Dubón-Otero*, 292 F.3d 1, 17 (1st Cir. 2002).

allowing jurors to serve with the assistance of interpreters does not frustrate this interest. Permitting juror language accommodation actually strengthens the government's interests in providing fair and impartial juries, as emphasized in the New Mexico jury service model.

Since the right to a jury represented by a fair cross section of a defendant's peers is a "fundamental right,"<sup>286</sup> jurisdictions should be particularly sensitive to protecting the right, even in the face of state interests. Unlike felon prohibitions on jury service, where a state excludes potential jurors with perceived low moral values or who show disrespect for the law, or juror age requirements, which ensure a certain comprehension level and an understanding of the gravity of jury service, the particular problem that states seek to solve through juror language exclusions is remediable. It would be more difficult for a state to evaluate a felon juror's respect for the justice system, or a twelve-year-old child's understanding of legal proceedings; however, as New Mexico has demonstrated, it is quite possible to provide interpreters to LEP jurors. Thus, in the interest of protecting a defendant's fundamental right to a fair trial and impartial jury, courts should reconsider the legitimacy of juror exclusions based on language ability and the state's interest in an English-speaking jury panel.

#### IV. JUROR LANGUAGE ACCOMMODATION

Modern courts and legislatures widely perceive English language deficiency as a valid reason to exclude potential jurors, under the assumption that a juror cannot serve effectively if she cannot understand the trial. But this language deficiency could be remedied by the use of interpreters. Although opponents of juror language accommodation might claim that allowing an interpreter to assist a LEP juror goes against our legal tradition,<sup>287</sup> juror interpretation has a rich history in the development of the common law.<sup>288</sup> The practice of mixed linguistic juries spanned seven centuries in England and has existed on what is now U.S. soil for more than two centuries.<sup>289</sup> After the United States obtained one-third of its current land mass from Mexico through the Treaty of Guadalupe Hidalgo of 1848 and the Sale of La Mesilla in 1853, monolingual Spanish speakers often served on juries with the assistance of interpreters until the early 20th century.<sup>290</sup>

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286. *Glasser v. United States*, 315 U.S. 60, 85 (1942).

287. *See, e.g., Benmuhar*, 658 F.2d at 20; *Dubón-Otero*, 292 F.3d at 17.

288. *Ramirez, supra* note 229, at 1214; *Ramirez, supra* note 6, at 790.

289. *Id.*

290. Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 *LAW & SOC'Y REV.* 1129, 1166, 1172-73 (2000); Douglas A. Kibbee, *Minority Language Rights: Historical and Comparative Perspectives*, 3 *INTERCULTURAL HUM. RTS. L. REV.* 79, 90 (2008); Colin A. Kisor, *Using Interpreters to Assist Jurors: A Plea for Consistency*,

Ever since New Mexico became a United States territory, it “has encouraged participation of non-English speakers, particularly Spanish-speaking citizens, in its jury system.”<sup>291</sup> Initially, this practice emerged out of necessity, since New Mexico was a predominately Spanish-speaking area and an adequate supply of English-speaking jurors was not readily available.<sup>292</sup> But this practice was not only practical, but also motivated by a sense of respect: the practice gave the Spanish-speaking citizens of New Mexico an important societal duty and, in return, Spanish-speaking citizens valued the opportunity to ensure their equal participation in civic society.<sup>293</sup> The common law practice of allowing non-English speakers to serve on juries was made a constitutional right in 1911.<sup>294</sup> Article VII of the Constitution of New Mexico states that the “right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages.”<sup>295</sup> New Mexico state courts have successfully allowed non-English speakers to serve on juries since the 1860s.<sup>296</sup>

The New Mexico state courts use certified court interpreters, some on permanent staff and others who work on a contract basis.<sup>297</sup> All interpreters are governed by detailed “Non-English-Speaking Juror Guidelines.”<sup>298</sup> All litigants and jurors are informed of the interpreters’ role in the trial and deliberation proceedings.<sup>299</sup> The interpreters take an oath in open court that they “will only provide translation services to the non-English-speaking juror and will not otherwise participate in the trial or jury deliberations.”<sup>300</sup> During the LEP juror’s service, the interpreter provides simultaneous and consecutive interpretation of the proceedings, as well as written translation when necessary.<sup>301</sup>

In addition to the language interpretation provided for LEP jurors in New Mexico, federal and state courts provide sign language interpretation for deaf jurors.<sup>302</sup> Previously, deaf jurors were excluded from jury service

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22 CHICANO-LATINO L. REV. 37, 41–43 (2001); *see, e.g.*, *Town of Trinidad v. Simpson*, 5 Colo. 65, 68 (1879) (holding it was “fully within the power of the court to appoint an interpreter . . . to interpret the testimony of witnesses and the arguments of counsel” for a non-English-speaking juror).

291. Edward L. Chávez, *New Mexico’s Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 303 (2008).

292. *Id.* at 305.

293. *See id.* at 303–04; *Territory of New Mexico v. Romine*, 2 N.M. 114, 123 (1881).

294. Chávez, *supra* note 291, at 303.

295. N.M. CONST. art. VII, § 3.

296. Gómez, *supra* note 290, at 1172–73.

297. Chávez, *supra* note 291, at 309.

298. *Id.* at 317 (providing a copy of the Guidelines in Appendix A).

299. *Id.* at 318.

300. *Id.* at 308.

301. *Id.* at 309.

302. Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012).

on the grounds that they lacked the English language and communication skills necessary to serve.<sup>303</sup> However the Rehabilitation Act of 1973<sup>304</sup> and the Americans with Disabilities Act of 1990<sup>305</sup> have been employed to facilitate deaf persons' full participation on juries with the assistance of sign language interpreters throughout the nation's courts.<sup>306</sup> Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against persons with hearing loss in "any program or activity receiving Federal financial assistance."<sup>307</sup> Similarly, the Americans with Disabilities Act extended the prohibition of discrimination against deaf individuals to all governmental activities and made these services, programs and activities available to all qualified individuals with disabilities.<sup>308</sup> The requirement that courts must provide interpreters for deaf jurors supports the argument that LEP jurors similarly should be allowed to serve on jury panels with the assistance of an interpreter. Scholars have argued that the analogy between deaf and LEP jurors is not about accommodation of disability, but rather that the two groups lack English language abilities and can be made competent to serve as jurors with reasonable accommodation in the form of interpretation.<sup>309</sup>

There are four primary concerns about jurors serving with the assistance of interpreters: (1) jurors not relying on the official English record, (2) risk of inaccuracy in translation, (3) presence of a thirteenth person in the jury room, and (4) cost.<sup>310</sup> Examination of these concerns is not only warranted, but also provides insights into the history, consequences, and perpetuation of systemic subordination of linguistic minorities. The first two concerns, accuracy and reliance on the English record, overlap. The trepidation that a juror will not rely on the English record that will ultimately be transmitted to the appellate court on appeal was the central issue in *Hernandez*,<sup>311</sup> in which the Supreme Court held that a prosecutor may reject Latino English-Spanish bilingual jurors in cases with Spanish language testimony on the ground that the jurors might be guided by the original Spanish rather than the official English translation.<sup>312</sup> Before getting to the doctrinal application of the holding in this case to juror language accommodation, it is appropriate to reflect on the broader implication of this opinion on the denial of Latinos'

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303. Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 157-58 (1994).

304. 29 U.S.C. § 794(a) (2012).

305. 42 U.S.C. § 12132.

306. Kibbee, *supra* note 290, at 91 n.35; Kisor, *supra* note 290, at 39.

307. 29 U.S.C. § 794(a).

308. 42 U.S.C. § 12132.

309. *See* Kisor, *supra* note 290, at 38.

310. Gonzales Rose, *supra* note 209, at 532.

311. *See* *Hernandez v. New York*, 500 U.S. 352, 371-72 (1991) (plurality opinion).

312. *See id.*

citizenship right of jury service. This was not a case in which the potential jurors indicated that they would not follow English language translation of Spanish evidence. The prosecutor acknowledged that the jurors indicated a willingness to follow the interpreter, and that he believed “in their heart they will try to follow” the interpreter, but stated that he doubted their ability to do so due to their bilingual abilities.<sup>313</sup>

The legal justification of the severance of language from race, ethnicity, and national origin is that LEP citizens can become full citizens and serve on juries if they simply learn English—that language is a mutable characteristic.<sup>314</sup> Leaving aside the issue of the considerable difficulties of learning a foreign language sufficiently to serve on a jury, *Hernandez* reveals that this is a false promise. Even once a citizen becomes highly proficient or fluent in English, she can *still* be excluded on the basis of her language ability. Although there have been instances where racial minorities have been subjected to abuse and trauma that has largely annihilated their language skills, such as Native American boarding schools,<sup>315</sup> generally a person cannot voluntarily unlearn their mother tongue. One’s native language is an immutable characteristic that is usually central to identity of self, race, ethnicity, and national origin. *Hernandez* demonstrates the need to increase legal protection for language minorities.

Although *Hernandez* dealt with bilingual rather than LEP jurors, the plurality opinion has implications for juror language accommodation. Peremptory challenges themselves have long been criticized as an obstacle to ensuring juries that fairly represent the community. As Justice Thurgood Marshall warned in his concurring opinion in *Batson v. Kentucky*, the “decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.”<sup>316</sup> The scholarship critiquing peremptory challenges is plentiful.<sup>317</sup>

For the purposes of juror language requirements, in a case where Spanish language evidence is introduced, a party (most likely a prosecutor) might rely on *Hernandez* to strike a Spanish-speaking LEP

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313. *Id.* at 356.

314. See Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby-LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1613 (1997).

315. See generally DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* (1995).

316. *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986).

317. See, e.g., Brian W. Stoltz, Note, *Rethinking the Peremptory Challenge: Letting Lawyers Enforce the Principles of Batson*, 85 TEX. L. REV. 1031 (2007); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992).

Latino juror on the ground that he will not follow the English language evidence. The risk identified in *Hernandez*—that a juror would listen to the original Spanish testimony or evidence over its English translation—is significantly heightened where a juror has limited English proficiency. If the juror does not understand English well to begin with, it is likely that the juror would listen most closely to the original Spanish speaker (or other foreign language speaker). Furthermore, assuming that the juror does not understand English at all, she might have to rely solely on the original non-English testimony.

Nevertheless, the prosecutor's purported concern in *Hernandez* is in reality not significant. Jurors do not make decisions as individuals; they make them collectively. Therefore, if there were misinterpretation or misunderstanding of a key issue, deliberation discussions could reveal and remedy that. Furthermore, as discussed previously, the presence of jurors from varied backgrounds and language abilities might actually result in a more dynamic jury deliberation, particularly where one of the parties to the trial is also LEP.<sup>318</sup>

The concern here is essentially one of accuracy. What is interesting is that Spanish language testimony and other evidence are increasingly introduced at trial.<sup>319</sup> This evidence is interpreted or translated into English. There is little concern about the accuracy of these translations. If Spanish can be translated into English and is reliable enough to form the basis of someone's criminal conviction and subsequent imprisonment, translating English into Spanish should not be an insurmountable obstacle for the courts. Furthermore, it is likely that many LEP Spanish-speaking jurors will have some degree of bilingualism and will be able to ensure that translation in both directions is more accurate. Thus, LEP jurors might actually provide a useful safeguard during multilingual trials as a result of their language ability. For example, during deliberation, LEP jurors could verify the testimony and clarify Spanish idioms or colloquialisms not easily or reliably translatable into English.

Nevertheless, the concern about accuracy is valid. Court interpretation has challenges.<sup>320</sup> However, the success in New Mexico shows that providing interpreters for jurors (even in a wide range of languages) is an attainable measure.<sup>321</sup> Certainly, courts cannot move forward without trained interpreters and developed guidelines. But, courts

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318. Fukurai, *supra* note 60, at 11.

319. See LOPEZ & LIVINGSTON, *supra* note 122, at 6 ("56% of Latinos say they or someone in their immediate family had interacted with the criminal justice system in at least one of the following ways in the five years preceding this survey"—serving as a witness, reporting a crime to the police, charged as a defendant, etc.); Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1958 (2000).

320. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 234 (William M. O'Barr & John M. Conley eds., 1990).

321. Chávez, *supra* note 291, at 303.

do not have to reinvent the wheel to establish a juror interpretation system: New Mexico stands as a useful model for other jurisdictions.

Identifying and employing qualified interpreters is not without cost. In these challenging economic times a juror interpretation system is a significant investment of already scant resources. However, as the LEP population in the United States continues to grow, the Department of Justice has urged courts to increase language access for LEP populations.<sup>322</sup> Civil litigants and criminal defendants are already entitled to interpretation services in the courts pursuant to the Sixth Amendment Confrontation Clause, due process, and Title VI. Further, the Sixth Amendment fair cross section requirement is implicated in communities that have a significant language minority.

However, the pool of qualified and certified court interpreters, even for a common language such as Spanish, is surprisingly small, adding to the cost. This is a complex problem that has been caused by the subordination of language minorities, especially Latinos. A large portion of the land that constitutes “Texas, California, Arizona, New Mexico, Nevada, and parts of Utah, Colorado, and Kansas” was previously part of Mexico.<sup>323</sup> With the land came people, the majority of whom spoke Spanish.<sup>324</sup> In addition to these Chicanos who never crossed the border (the border crossed them)<sup>325</sup> and their families are Latino immigrants who constitute the largest racial group of immigrants in the United States.<sup>326</sup> Rather than embracing the richness of Spanish language abilities and promoting bilingualism, society has systematically attempted to force assimilation and exterminate Spanish language ability. Truly bilingual education programs have been replaced with English immersion.<sup>327</sup> These programs were not the result of pedagogical imperative, but rather political actions motivated by English-only advocates, by a movement tainted with racist and xenophobic leaning.<sup>328</sup>

English immersion often stunts a student’s intellectual development because, instead of learning a variety of academic subject areas, they must focus only on English language acquisition and therefore fall behind in grade level.<sup>329</sup> Simultaneously, Latino youth are stripped of the

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322. DEP’T OF JUSTICE, LANGUAGE ACCESS PLAN (2012).

323. DELGADO, *supra* note 142, at 8.

324. Salinas, *supra* note 33, at 96.

325. JOHN M. LIPSKI, VARIETIES OF SPANISH IN THE UNITED STATES 2 (2008).

326. See RANDALL MONGER & JAMES YANKAY, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2011 at 1, 4, tbl.3 (2012).

327. Jennifer Bonilla Moreno, *¿Only English? How Bilingual Education Can Mitigate the Damage of English-Only*, 20 DUKE J. GENDER L. & POL’Y 197, 198 (2012).

328. Salinas, *supra* note 33, at 917–18.

329. PAUL R. SMOKOWSKI & MARTICA BACALLAO, BECOMING BICULTURAL: RISK, RESILIENCE, AND LATINO YOUTH 74 (2011).

opportunity to become educated in Spanish.<sup>330</sup> It is one thing to speak Spanish at home and another to learn academically in Spanish. Someone may consider herself fully bilingual but be unable to communicate effectively when faced with work or educational demands in that language. As a result of devaluing Spanish, forced language assimilation that includes a lack of bilingual education and punishment for speaking Spanish at school, we are left without sufficient numbers of bilingual professionals to satisfy domestic linguistic needs and to be internationally competitive. The claim that language discrimination cannot be remedied because of the lack of qualified interpreters and the related cost of obtaining such interpreters needs to be considered in the context that the limited supply is a result of institutionalized, state-supported efforts to decrease foreign, and especially Spanish, language ability.

The final concern is the presence of a “thirteenth” person in the deliberation room. However, there is already substantial support for such practice in our state and federal courts where sign language interpreters are allowed to interpret for deaf jurors during deliberations. Additionally, the presence of interpreters during deliberation has not been found to be a problem in New Mexico. Research is currently being conducted by Lysette Chavez and Markus Kemmelmeier of the University of Nevada-Reno Department of Social Psychology into New Mexico’s bilingual juries, specifically on the effect of non-English speaking (“NES”) jurors on jury deliberations and jury verdicts. These researchers have engaged in archival study of cases to determine whether NES jurors have an effect on verdicts in criminal cases, and have conducted community surveys and mock jury studies. Although data analysis is ongoing, this research so far reveals several findings that support juror language accommodation and indicates the fairness of these trials.

In criminal cases, archival research and mock jury studies show that there is no difference in verdicts between juries that have a LEP juror serving with language accommodation and juries that have no LEP jurors. The researchers conclude that “NES jurors and interpreters do NOT compromise deliberation outcomes.”<sup>331</sup> The Chavez and Kemmelmeier research further indicates that the inclusion of NES jurors is actually beneficial for the court system. “Participants in the sample who had prior jury experience and served on a trial with an NES juror were likely to view future jury service positively compared to participants who had prior jury service but had NOT served on a trial with an NES juror.”<sup>332</sup> Further, “Anglo participants in the sample who had prior jury experience with NES jurors were more supportive of the inclusion of NES jurors

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330. *Id.* at 905–06.

331. E-mail from Lysette Chavez, Univ. of Nevada-Reno, to Author (May 27, 2012) (on file with Author).

332. *Id.*

than Anglo participants who had not served with NES Jurors.”<sup>333</sup> However, this “was not the case for Latino participants. Latinos who had served with NES jurors did not differ in their support for the inclusion of NES jurors.”<sup>334</sup> Thus, the data show that juror language accommodation actually positively impacted the New Mexico court system, providing a greater sense of justice through more representative juries and opportunities for democratic participation to a wider population.

#### CONCLUSION

As Latinos have become the largest racial minority group in the United States, it is more important than ever to evaluate whether the law is prepared to redress the discrimination experienced by this population. Language discrimination has been and continues to be a central manifestation of racism against Latinos. English language juror requirements are just one example of the way language discrimination relegates many Latinos to second class citizenship status. These requirements are also an example of how the existing juridical paradigm overlooks the realities of how language discrimination acts as a proxy or racial marker for racial discrimination. The time has come to employ new methodology, like Critical Originalism, to expose the discriminatory intent behind language restrictions.

Excluding otherwise eligible jurors from service on the basis of their English language abilities constitutes the exclusion of racial minorities, particularly Latinos, from juries. Chief Judge Edward L. Chávez of the New Mexico Supreme Court has observed the benefits of juror language accommodation and advises: “Not only should our non-English-speaking citizens enjoy the privileges of citizenship, they should share in the responsibilities.”<sup>335</sup> “All adult citizens should participate [on juries], because above all, justice requires an unapologetic and undaunted courage to exercise one’s moral genius. All people, no matter their station in life or their ability to speak and understand the English language have that moral genius.”<sup>336</sup> Allowing jurors to serve with the assistance of interpreters would help ensure that Latino criminal defendants are tried by a jury of their peers, that LEP citizens are brought into the civil polity, and that our justice system’s commitment to equal protection under the law and the Sixth Amendment guarantee of an impartial jury are upheld.

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333. *Id.*

334. *Id.*

335. Chávez, *supra* note 291, at 316.

336. *Id.* at 304.