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Capital Punishment for Latine Populations

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Biography

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INTRODUCTION

Race and its vital and complex role in the creation of the United States has always presented a challenge in the administration of criminal sanction. This problem of race becomes exacerbated in context of the death penalty as punishment for those crimes considered most vile and inhumane. In 1983, the Court in *Zant v. Stephens* held that race must be "totally irrelevant to the sentencing process" in capital punishment proceedings.[1] This valiant goal has yet to be realized. Succeeding cases and numerous studies of the system show that defendants of color, more specifically Black defendants, are disproportionately sentenced to death compared to their white counterparts. Analysis of the racially disparate effects of the capital punishment system are limited in that they tend to neglect those groups – namely the Latiné community – that do not fit neatly into the black and white dichotomy that permeates American consciousness.

It proves impossible to completely extricate the experiences of racial minority communities in the United States from one another as so many of the stereotypes that burden these groups overlap.[2] However, it is necessary for greater attention to be given to Latiné populations that are often ignored or attributed the same treatment as Black American communities because the reactions that each of these groups elicits from the white majority are distinct in nature and magnitude and result in differing levels of jury bias.[3] Factors distinct to the Latiné experience in the United States – immigration and citizenship status, low-socioeconomic status, gang affiliation, and Spanish language use – intersect in a manner which directly impacts the group's perceived criminality. The uncertainty around and misunderstanding of these associated characteristics gives rise to an inference of future dangerousness in capital punishment proceedings that involve Latiné defendants.

Through an analysis of these enumerated identities in context of the Latiné experience, it becomes clear that American courts remain far from the idealized *Zant* dream of a capital sentencing process that is untainted by racist paradigms.[4] The presence of the future dangerousness question itself is partly responsible for maintaining a structure that allows for the admission of conscious and unconscious biases against the Latiné population and other communities of color. Only through introduction of active measures aimed at increasing awareness of racial bias in these capital proceedings can the system hope to combat prejudice and move toward genuine justice. Currently obtainable, more moderate procedural changes such as required jury instructions concerning the role of racial bias in sentencing open up the future

1. Zant v. Stephens, 462 U.S. 862, 885 (1983).

2. Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 ANN. REV. L. & SOC. SCI. 421, 422 (2020).

3. *Id.*

4. *See* Zant, 462 U.S. at 885.

possibility for a more racially equitable jury selection process that has increasing potential to limit the harm perpetuated against Latiné communities in capital sentencing determinations.

In choosing to analyze a population that has been historically marginalized and drastically underrepresented in United States society, it is necessary to include a few notes on the scope and limitations of this review. This writing actively chooses to make use of the word Latiné as opposed to Latino/a or Latinx. Latiné presents an option that is gender neutral and inclusive but does not present pronunciation difficulty for the native Spanish speaker whose diction does not easily adapt to the enunciation of the word Latinx.

This writing also actively refrains from using the identities of Latiné and Hispanic interchangeably as those who solely identify as Hispanic and not Latiné (i.e., those people with ancestry from Spain) are not meant to be included in this analysis. Generally, the Latiné identity includes those individuals who come from or have ancestors from Mexico, Dominican Republic, Puerto Rico, Cuba, some other Caribbean countries, Central America, and South America.[5] The rich and varying diversity of the Latiné population creates some level of difficulty in analyzing bias and discrimination because the aggregation of so many extraordinary countries cannot possibly do justice to the unique peoples, cultures, and experiences of each.[6] This writing is also limited in its inability to differentiate between those Latinés who identify as Indigenous, Black, White, Asian, Mestizo, or any other ethnic category.

Another difficulty in analyzing the effects of bias and discrimination on the Latiné community, particularly in context of the criminal legal system and capital punishment proceedings is the lack of data. The federal government has consistently collected data on the race of defendants, but some states have been slow to implement such measures and have only recently begun to use the all-to-broad identifiers of "Latino" and/or "Hispanic" to classify victims and defendants.[7] Since more broad and inclusive data on the Latiné population and the various ethnonational identities that fall within its scope is deficient or nonexistent in many areas, this analysis has been supplemented with data collected on the Mexican population residing in the United States. This feels appropriate given that those of Mexican nationality or descent make up a majority of the Latiné population in the United States and many Latiné individuals deriving from

5. The Editors of Encyclopaedia Britannica, *List of Countries in Latin America*, ENCYC. BRITANNICA (Nov. 9, 2021, 3:55 PM), https://www.britannica.com/topic/list-of-countries-in-Latin-America-2061416.

6. Johnson, *supra* note 2, at 423.

7. Walter I. Goncalves, *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. SOC. JUST. 333, 336 (2020).

other Latin American countries are wrongfully attributed Mexican ethnicity by an American populace largely biased toward that group. Mexican Americans also predominantly represent the Latiné population in capital executions: of the 127 Latiné men executed in the United States in the last fifty years, 103 were of Mexican descent.[8]

FUNCTION OF THE FUTURE DANGEROUSNESS QUESTION

The death penalty is currently authorized in twenty-seven states, by the federal government, and by the United States military.[9] Of those twenty-seven states, only two – Texas and Oregon – continue to use the determining factor of "future dangerousness" in the sentencing of capital defendants.[10] The Supreme Court affirmed the constitutionality of the Texas capital sentencing scheme in *Jurek v. Texas*, holding that the law requiring that at least one of five aggravating circumstances be found to find a defendant guilty of capital murder and allowing for jury consideration of mitigating circumstances was sufficient to constitute an individualized finding.[11] Here, the Court rejected Jurek's contention that the second statutory question asking the jury to determine the likelihood "that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" was not unconstitutionally vague despite the immense difficulty in determining future criminal behavior.[12] Thus, the nebulous question of future dangerous was found to be a constitutional determinant taken into account when deciding whether one was worthy of a sentence of death.[13]

In an attempt to combat the amorphous nature of the future dangerousness question, the Court of Criminal Appeals of Texas enumerated some of the various factors that a jury may consider when determining a defendant's continuing threat to society. These factors include but are not limited to: 1) the circumstances of the capital offense including the defendant's state of mind and if they worked with accomplices, 2) the calculated nature of the defendant's acts, 3) the forethought and deliberateness involved in the crime, 4) the existence of a criminal record and severity of those prior crimes, 5) the defendant's age and personal circumstances, 6) whether the defendant was acting under duress or coercion,

8. Johnson, *supra* note 2.

9. *States and Capital Punishment*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 14, 2021, 1:22 PM), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

10. *Deadly Speculation: Misleading Texas Capital Juries With False Predictions of Future Dangerousness*, ACLU (Oct. 15, 2021, 3:25 PM), https://www.aclu.org/other/deadly-speculation-misleading-texas-capital-juries-false-predictions-future-dangerousness.

11. Jurek v. Texas, 428 U.S. 262, 273 (1976).

12. *Id*. at 272-73.

13. *Id.*

7) psychiatric evidence, and 8) character evidence.[14] This mix of aggravating and mitigating evidence is meant to develop a more holistic, objective image of the individual to determine whether they are such a threat to their society so as to be deserving of death. However, "personal circumstances," "character evidence," and those factors that remain unnamed but may potentially be considered are so vague and expansive that they easily lend themselves to the imposition of implicit racial bias.[15]

CHARACTERISTICS THAT MAY CONTRIBUTE TO A FINDING OF FUTURE DANGEROUSNESS

The amorphous nature of the future dangerousness question and the broad range of factors considered in the finding of whether the individual presents a continuing threat to their society open the legal process to individual and institutionalized bias. Racial prejudice in particular presents a great problem of increased subjectivity when evaluating the unstructured question because of the ways in which it connects to many of the factors that help determine future dangerousness. To effectively combat the negative effects that racial bias against Latiné individuals has on capital sentencing when future dangerousness is involved, it is necessary to analyze how certain characteristics generally associated with that population relate to a perception of threat.

A. Immigration/Citizenship Status

One of the most controversial political and social issues of today concerns citizenry and the legality or illegality of certain persons within United States borders. Whether Latiné – particularly Mexican – presence in this country is welcome has always been dependent upon the economic value that the population supplies. The "illegal migrant" was first introduced to the American public upon the 1924 creation of the United States Border Patrol.[16] Approximately 4,600 Latinés attempting to enter through Mexico without prior authorization were apprehended within the Border Patrol's first year of existence.[17] In the decades following the conception of the "illegal," widespread deportations and stereotyping of the Mexican as associated with marijuana usage which resulted in the federal criminalization of the drug sent clear messages that this group of people is un-American and unwelcome.[18]

14. Devoe v. State, 354 S.W.3d 457, 461-62 (2011).
15. *Id.*
16. Douglas S. Massey, *The Racialization of Latinos in the United States*, *in* THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGR. 21, 26 (2014).
17. *Id.*
18. *Id.*

When the drafting of United States citizens during World War II led to an extreme shortage in agricultural labor, the United States Departments of State, Labor, and Justice developed the Bracero Program to rebrand the "illegal migrant" and import massive amounts of Mexican braceros as a labor replacement.[19] This era of pachucos and zoot suits where as many as 450,000 braceros were being imported each year was also accompanied by "Operation Wetback" – an undeniably racist mass deportation effort meant to root out those undocumented migrants that had not been invited by the Bracero Program.[20] The steady rise in undocumented immigration post-1965 has resulted in the racialization of Latinés – specifically Mexican nationals – as undocumented migrants posing a great threat to American national security, jobs, and culture.[21] Taken with the ever-increasing fear of the non-white foreigner post-9/11, the Latiné and the possibility that they may not be in this country "legally" has created in the mindsets of many Americans a sense that this population is inherently guilty, inherently violent, and inherently dangerous.[22]

In the beginning of the twenty-first century, political experts such as Samuel Huntington of Harvard University and Former White House Communications Director Patrick J. Buchanan called alarm to what they coined the "Reconquista" – "a Mexican invasion" and attack on American values.[23] They did not fear a Mexican military invasion, but rather, the occupation of their society by Mexican people, even those who had gained or were born with United States citizenship, and the very existence of these non-Americans who chose to retain so many aspects of their own culture rather than allow themselves to be white washed by the American mainstream.[24] They feared Mexican and Latiné populations because they did not and still do not assimilate in the same way of immigrant groups past through their refusal to adhere to white American "use of English, educational attainment, occupation and incomes, and intermarriage."[25]

Even though Huntington and Buchanan's highly biased argument remains unfounded by actual facts, it has been adopted by so many in this country that fear the multiculturalism that threatens to tilt the national identity away from whiteness. At the time, approximately one-half of all Americans felt that "newcomers from other countries threaten[ed] traditional American values and customs" and that the country "needed to be 'protected against

19. *Id.* at 27.

20. *Id.* at 28.

21. *Id.* at 30-31.

22. *Id.* at 34.

23. PATRICK J. BUCHANAN, STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA 125 (2006); SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 247 (2004).

24. Buchanan, *supra* note 23.

25. Huntington, *supra* note 23.

foreign influence.'"[26] Less than twenty years later, the era of Trumpism serves as a reminder that American sentiment toward the perceived foreigner – the other – is slow to evolve in the direction of human decency. When one ventures into those other factors that supposedly craft the criminal Latiné identity – low earning potential, clique mentality, and Spanish language use – it becomes ever clearer how the Latiné has come to be synonymous with danger in the American psyche.

B. Low-Socioeconomic Status

Minority communities in the United States are often associated with low-socioeconomic status due to ever-increasing wealth inequality and lack of access to resources. Latiné groups are no exception. In fact, they often typify the unaspiring minority in the minds of the American populace. The United States Senate's Dillingham Commission Report of 1911 described those of Mexican ethnicity as "notoriously indolent and unprogressive in all matters of education and culture," working the most undesirable jobs only fit for "the lowest grade of non-assimilable native-born races."[27] This report further claimed the population's "usefulness" to be "impaired by [their] lack of ambition and [their] proneness to the constant use of intoxicating liquor."[28] As with marijuana, alcohol usage became linked to the Latiné by government sanction as a means of defaming the ethnoracial identity to show increased susceptibility to depraved behavior. Quick to relegate Latiné lack of affluence to pure laziness and immorality, the government fails to observe that this population continues to perform what is considered menial labor because these jobs remain the most accessible and stable form of employment available to them. Such an unceasingly negative impression of those racial minorities who provide low-wage labor endures over one-hundred years later.

A 2009 study presented undergraduate students with trial transcripts that varied by defendant ethnicity and socioeconomic status.[29] Participants judged low-socioeconomic status Mexican American defendants to be guiltier, "more responsible, more vicious, and more blameworthy" as well as "less intelligent, more aggressive, less competent, and less ethical" than their Caucasian counterparts or those of high-socioeconomic status.[30] A follow-up study performed in 2015 replaced the undergraduates with 561 individuals selected from a pool of prospective jurors and presented participants with

26. Massey, *supra* note 16, at 34.
27. *Id.* at 25.
28. *Id.*
29. Russ K. E. Espinoza, *Juror Bias and the Death Penalty: Deleterious Effects of Ethnicity, SES, and Case Circumstances*, AM. ASSOC. BEHAV. SOC. SCI. 33-34 (2009).
30. Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 ANN. REV. L. & SOC. SCI. 421, 425-26 (2020).

capital trial transcripts where the defendants varied by ethnicity, socioeconomic status, and mitigating circumstances.[31] White jurors recommended the death penalty most often for low-socioeconomic status Mexican American defendants when mitigation was weak.[32] They also assigned these defendants higher culpability ratings and lower ratings regarding measure of positive personality traits.[33] Even when presented with strong mitigation evidence, white jurors' ratings of low-socioeconomic status Mexican Americans did not change.[34]

Despite all other factors remaining the same, low-socioeconomic status in conjunction with belonging to a Latiné ethnic group resulted in more negative sentencing outcomes.[35] Since presence of mitigation evidence did not change jurors' perception of guilt for this particular group, it may be concluded that the Anglo-American majority relates both low-socioeconomic status and minority identity with criminality. Whereas white defendants of low-socioeconomic status with strong mitigation and white defendants of high-socioeconomic status regardless of mitigation strength were seen as less culpable, Latiné defendants seemingly always remain linked to a higher level of guilt.[36] Non-Latiné Americans subconsciously project those same tropes espoused by the United States government. In a country obsessed with the obscure American Dream, those who fail to meet the unachievable standards of economic prosperity are perceived to be responsible for their own inadequacy. Those people of color who fail to assimilate to the American standard of achievement are even considered criminally liable because their lack of "success" poses a greater threat to the Anglo-American status quo.

C. Gang Activity

There exists a counterculture argument that attributes certain immigrant groups' lack of adequate assimilation to disinterest in becoming part of United States society.[37] Based on this premise of an alternative society separate from that of the general population, migrants are often considered prone to "dropping out of school, becoming gang members, and causing problems."[38] While unfounded by actual evidence and ignorant of the ways in which immigrant and minority communities rely upon close neighborhood

31. Russ K. E. Espinoza & Cynthia Willis-Esqueda, *The Influence of Mitigation Evidence, Ethnicity, and SES on Death Penalty Decisions by European American and Latino Venire Persons*, 21 CULT. DIVERS. ETHN. MINOR. PSYCHOL., 288, 288-99 (2015).

32. *Id.* at 292.

33. *Id.* at 293.

34. *Id*. at 293-94.

35. *Id.*

36. *Id.*

37. LEO CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 39 (Stanford Univ. Press, 2nd ed. 2013); Buchanan, *supra* note 23, at 23.

38. Chavez, *supra* note 37, at 40.

bonds as a means of protection and survival, this countercultural fear has reinforced the association of ethnoracial minority groups with gang activity. Though these groups are not exempt from involvement in violent gang activity, Latiné identity and geographic location should not be allowed to bolster claims of gang involvement that fuel future dangerousness findings when there is no legitimate link between the individual in question and the activity.

More progressive states like California have recently made significant changes to laws concerning gang enhancements in sentencing.[39] A.B. 333 the STEP Forward Act of 2021, signed into law by Governor Gavin Newsom on October 8, 2021, requires that crimes committed and used to present a pattern of criminal gang activity "actually benefitted a criminal street gang and that the common benefit from those offenses be more than reputational" and prohibits "use of the currently charged crime to prove the pattern of criminal gang activity."[40] Additionally, this bill allows defense counsel to request "that the defendant's guilt of the underlying offense first be proved and that a further proceeding on the sentencing enhancement occur after a finding of guilt" so as not to allow gang involvement to be used in the determination of guilt or innocence in the case at question.[41]

While the latter portion of the bill allowing for the request of a separate gang enhancement trial would not be applicable in bifurcated capital punishment proceedings as a guilt determination already precedes penalty sentencing, the higher level of proof required by the Act would do much to bolster the integrity of the system. Ensuring that those defendants labeled as gang members are genuinely involved in the activities of an organized criminal association helps limit the risk of racial bias in sentencing. The STEP Forward Act acknowledges the cruel reality that gang enhancements enforce the hyper-criminalization of those marginalized communities "historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live."[42] Gang enhancements so severely and disproportionately impact communities of color that ninety-eight percent of those sentenced with a gang enhancement in Los Angeles, California's largest jurisdiction,

39. The state of California technically authorizes the death penalty although it is not currently operational due to a gubernatorial moratorium. As of 2021, three states as well as the federal government have placed a moratorium on the death penalty and twenty-three have struck down their death penalty statutes as unconstitutional. Many of these states – most recently, Washington – have either invalidated or suspended capital punishment after finding that "it is imposed in an arbitrary and racially biased manner. *States and Capital Punishment*, *supra* note 9; DEATH PENALTY INFO. CTR., *State by State* (Dec. 15, 2021, 2:28 PM), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

40. A.B. 333, 2021 Leg., Reg. Sess. (Ca. 2021).

41. *Id.* at 1.

42. *Id.* at 2.

are people of color.[43] The California Attorney General's 2019 Annual Report on CalGang shows that the Latiné community comprises the majority of the database at sixty-five percent even though this group makes up less than forty percent of California's total population.[44]

Both the gang database and perception of gang activity are extremely inaccurate and unreliable as Latiné individuals and other people of color are frequently tied to gang social networks through their family, friends, or neighbors.[45] Those racial and ethnic minority neighborhoods most targeted for alleged gang activity are regularly mischaracterized "despite their lack of basic organizational requirements such as leadership, meetings, hierarchical decision-making, and a clear distinction between members, and nonmembers."[46] Not every gathering of Latiné individuals is indicative of gang activity and not every interpersonal association with a gang-affiliated person means that the other party is affiliated as well. This analysis is not a call to ignore or dismiss the harm caused by the sometimes-violent activity of these groups, but rather, to bring attention to the ways in which Latiné socialization is criminalized and weaponized against those who have had no choice in their race or the community in which they were raised. Mere association or even membership in a group does not necessarily mean that an individual is complicit in every action of that group and the same logic should be applied to criminal defendants and alleged gang activity, especially in capital sentencing situations.

In the matter of *Cortez v. State*, the Court of Criminal Appeals of Texas upheld defendant Mr. Raul Cortez's capital murder conviction and reaffirmed the admissibility of gang-related expert testimony.[47] Here, Mr. Cortez's counsel argued that gang-expert James Vins should not have been permitted to testify as to "bad conduct or crimes committed by others that [Cortez] has no association with without showing a nexus" of Mr. Cortez to these specific acts and not just the Latin Kings organization generally.[48] The court denied Mr. Cortez's challenge to the relevancy of Vins' testimony stating that "anything the judge deems relevant to sentencing, 'including evidence of the defendant's background or character…' is admissible."[49] The court held the State's evidence, comprised of Mr. Cortez's tattoos and Myspace page content, showing that Mr. Cortez was a member of the Latin Kings and Vins' testimony about the Latin Kings being "a street and prison gang involved in violent crimes and drug-dealing" sufficient to connect Mr. Cortez to the

43. *Id.* at 3.

44. *Id.* at 93; U.S. CENSUS BUREAU, *QuickFacts California* (2019), https://www.census.gov/quickfacts/CA.

45. A.B. 333, *supra* note 40.

46. *Id.*

47. Cortez v. State, No. AP-76,101, 2011 WL 4088105, at *19 (Tex. Crim. App. Sept. 14, 2011).

48. *Id.*

49. *Id.* at 20.

group's illegal activities.[50] Vins' presentation of Mr. Cortez as a violent member of the Latin Kings fails to actually tie Mr. Cortez to any of the criminal activity of the gang itself and fails to account for the fact that Mr. Cortez has lived in the same Chicago neighborhood for over nineteen years.[51]

The attenuated connection Vins developed between Mr. Cortez and the Latin Kings implicates Mr. Cortez in innumerable crimes that he likely was not privy to and in which he likely did not know any parties involved.[52] This was not a situation in which gang relation was necessary to a jury's understanding of the crime for Mr. Cortez had already been found guilty before the admission of Vins' testimony. This was a situation where the term "Latin Kings" itself and Mr. Cortez's proximity to that group was meant to inspire fear in a predominantly Caucasian jury that has been socialized to connect groups of people of color with inherent dangerousness. It did not matter that Mr. Cortez was raised in this neighborhood and could not have possibly avoided any affiliations with members of the Latin Kings due to their vicinity, his existence as a Latiné man linked him and he was guilty by association. The admission of highly attenuated gang relations in capital cases involving Latiné defendants will undoubtedly increase likelihood of a finding future dangerousness due to the inability of non-Latiné jurors to understand the complex community relations of people of color.[53]

D. Spanish Language

Acculturation into American society is often most directly measured by the ability of the immigrant or the person of color to incorporate English into their diction: to speak in a manner that is grammatically correct and devoid of any inflection or accent that labels them as distinctly un-American. Communication is the cornerstone of humanity, the ultimate means of survival, the basis for every personal connection. Logically, any language barrier perceived to hinder communication and understanding would keep two groups or two individuals from finding trust in one another. The issue lies in that Latiné communities are often wrongfully presumed to be lacking in English language proficiency and that Anglo-American sentiment attributes that presumption to the dangerousness of the group.

50. *Id.*

51. *Id.* at 19.

52. *Id.*

53. The jurors that ultimately decided in favor of a capital sentence for Mr. Cortez made earlier statements claiming that "genetics, circumstances of birth, upbringing, and environment should not be considered in assessing punishment" and that determination of guilt alone would be sufficient to "warrant a finding of future-dangerousness." This line of thinking comes into direct conflict with the court's attempts at making more holistic, individualized inquiry where future dangerousness is at question. Here, disinterest in accurately assessing Mr. Cortez's individual circumstances results in the jury succumbing to over-generalized depictions of the dangerous gang member and a perception of future threat to society. *Id.* at 13.

Despite misgivings of the United States government and the general population, Latiné groups, particularly the Chicano community, exhibit a high level of cultural integration in terms of English language usage.[54] Studies of the Orange County and Los Angeles Areas of California revealed that, while only two percent of first-generation Mexican immigrants preferred speaking English at home and amongst friends, the majority of second generation and ninety-four percent of those third generation or beyond reported English fluency and named English as their preferred language.[55] In the workplace, slightly less than one-half of all Latinés spoke English all or most of the time and, by the third generation, four out of five Latinés spoke English all or most of the time.[56] These statistics largely represent language preference as opposed to competence, so it is highly likely that percentages of English language understanding – whether limited, conversational, bilingual, or otherwise – are even higher than presented here amongst Latiné individuals.[57] While the numbers contradict the assumption that Latiné persons are ignorant or indolent by American standards for their failure to increase the ease of communication for native English-speakers, they do not capture a holistic image of how language use is perceived amongst the general population.

Similar patterns to those in California were found nationwide and, while mostly influenced by workplace need, English language efficiency and prevalence in Latiné individuals was also found to be dictated by relational patterns.[58] Those who more often speak Spanish in the workplace likely work amongst a group of primarily or solely Latiné peers, serve primarily or solely Latiné clients, or work the type of low-wage self-employed jobs stereotypically associated with the Latiné community. Those who fit into these classifications do not fail to acculturate themselves because of some inherent inadequacy or deviant nature of their race, but rather, because forcing themselves to operate through a non-native or less familiar language would be incompatible with the needs of their vocation and lifestyle. Based off of the wealth distribution in the United States, it may be inferred that those Latiné individuals of higher socioeconomic status work in Caucasian-dominant environments. In these spaces built upon elitism and exclusion, a high level of English language assimilation and orderly English speech are required to gain respect and continued access.[59]

English proficiency and usage is vital to ensure that Latiné individuals of a certain social and economic strata maintain the necessary proximity to

54. Chavez, *supra* note 37, at 59.

55. *Id.* at 60.

56. *Id.* at 61.

57. *Id.* at 60.

58. *Id.* at 63.

59. Jane H. Hill, *Language, Race, and White Public Space*, 100 AM. ANTHROPOLOGIST 680, 682-83 (1998).

whiteness in order to succeed. Choosing to use Spanish in white public space is only deemed appropriate or safe when it becomes a means to elevate whiteness or confer an economic benefit upon a predominantly white institution.[60] In these spaces, minimal Spanish usage may be viewed as beneficial and a symbol of intelligence in its capacity to broaden market reach, but this Spanish benefit does not extend to low-socioeconomic status Latinés or Latinés with other marginalized identities. Spanish language usage remains essential to the Latiné threat narrative because it serves as the ultimate, most clearly visible means of othering the Latiné.[61] Whether the Latiné defendant is truly incapable or only perceived as incapable of communicating in English is less important than the way in which the individual's intersecting identities present themselves.

60. *Id.*
61. Chavez, *supra* note 37, at 59.

OTHERING OF THE LATINÉ POPULATION CORRELATES TO AN INFERENCE OF FUTURE DANGEROUSNESS

Between the time that *Furman v. Georgia* was decided in 1972 and the end of 2018, 127 Latiné men were executed and 107 of those men were executed in the state of Texas.[62] Whether correlation or causation, it is important to note this significant geographic disparity and the fact that Texas is one of only two states that currently allows for legitimate consideration of the future dangerousness question.[63] A study of Harris County, Texas found that the state's 2005 adoption of life without parole as a sentencing option in capital murder cases "virtually eliminated death sentences for white offenders" but did not eliminate death for Latiné defendants or other defendants of color who must face ever widening disparities in sentencing.[64] In a state that allows for consideration of factors that show a possibility of future dangerousness, race continually produces disproportionate sentencing outcomes.

Latiné nationality, citizenship status, low-socioeconomic status, gang activity, and Spanish language use constitute identifying characteristics that remain detrimental to a defendant's case for life even in a time where racial equity is at the forefront. For Latiné defendants in states like Texas that persist in the usage of a question that opens itself to racial bias, proving lack of culpability becomes insurmountable. The case of Mr. Ramiro Hernandez Llanas presents a horribly perfect example of the ways in which historical marginalization and modern interpretations of the racial bias that has permeated American legal systems combine to enforce the improper notion that Latiné defendants are inherently guilty. Here, the determination that Mr. Hernandez Llanas did not suffer from an intellectual disability that would make him ineligible for the death penalty was based upon an "expert" assessment steeped in racial bias.[65]

The state of Texas selected non-Spanish-speaking Dr. Richard Coons who chose to rely on secondary information rather than interview Mr. Hernandez Llanas in person because of his inability to communicate effectively with the defendant.[66] Additionally, Dr. Coons admitted that he was unfamiliar with Mexican and Chicano culture and did not have even a

62. Johnson, *supra* note 2, at 423.

63. *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness*, *supra* note 10.

64. Johnson, *supra* note 2, at 425.

65. Brief for League of United Latin American Citizens et al. as Amici Curiae Supporting Petitioner, Hernandez v. Stephens, 572 U.S. 1036 (2014) (No. 13-8004), 6-7.

66. *Id.*

basic understanding of the legacy of Latiné discrimination in the state of Texas.[67] Based on Dr. Coons' finding that "Mr. Hernandez's cultural group tends to have low-socioeconomic status, low achievement, decreased social skills, increased substance abuse, and increased level of criminal behavior" and that Mr. Hernandez Llanas' "adaptive behavior is in keeping with his cultural group," the state trial court held that Mr. Hernandez Llanas did not establish "significantly subaverage adaptive functioning."[68] Dr. Coons and the Texas court reasoned that Mr. Hernandez Llanas could not possibly suffer from any type of intellectual impairment because his inability to shop by himself and his holding "only menial jobs" was in line with the expected "poor levels of functioning" and general inferiority expected of his race.[69]

This analysis – or lack thereof – of Mr. Hernandez Llanas' individual case fails to take into account the history of discrimination that Mexican Americans have faced in the state of Texas, the reputable statistical information that disproves Dr. Coons' racist assumptions, and the testimonial evidence provided by Mr. Hernandez Llanas' own family. For decades, Texas was the host of legitimized government discrimination of Mexican Americans through state promotion of segregation to keep the "more greatly retarded" Latinés away from white children, later assigning of Latiné children to the poorest school districts, and disproportionate pursuance of capital punishment for Latiné defendants.[70] Dr. Coons' testimony relies on the same prejudicial logic that early twentieth century Texas officials used to justify their mistreatment of the "mentally retarded" minority: that the Latiné does not deserve special treatment or even normal levels of humanity because they are a "subaverage" species.[71] Dr. Coons and the court ignored proof that Latinés, in fact, graduate from high school, hold steady jobs, hold high level jobs, have lower rates of alcoholism that their Caucasian counterparts, and do not have a higher propensity for crime as a race.[72] Despite this enormous amount of evidence, including Mr. Hernandez Llanas' siblings' high rates of success and functioning despite growing up as part of the same "cultural group" in the same environment as their brother, the trial court chose to advance the notion of the Latiné as innately inferior rather than find Mr. Hernandez Llanas less culpable.[73]

Where they could have provided a competent Spanish-speaking expert capable of communicating with the defendant, the state of Texas chose to rely upon outdated opinions that further perpetuate racist stereotypes of the Latiné population. Although the focus in Mr. Hernandez Llanas' capital case

67. *Id.* at 6.
68. *Id.* at 13.
69. *Id.* at 14-15.
70. *Id.* at 8-10.
71. *Id.* at 15.
72. *Id.* at 15-18.
73. *Id.* at 18.

revolved around his mental capacity, future dangerousness remains impliedly at issue because of his Mexican heritage and its insinuation of inherent dangerousness in the Anglo-American psyche. Dr. Coons' ignorant description of the Latiné population as indistinguishable from one another, incapable of meeting white American standards of achievement and financial stability, and highly susceptible to criminal behavior because of their very identity reflects those aforementioned characteristics and the assumption created through decades of discrimination.[74] It is the lack of education on the Latiné community within the United States that draws this unsubstantiated conclusion of otherness that results in higher findings of criminality than any other racial group in the United States.[75]

This is an issue of difference, misunderstanding, lack of cultural humility, and racism as opposed to one of inherent future dangerousness. Even when future dangerousness is not necessarily at issue in a capital case involving a Latiné defendant, their race and associated stereotypes are used as justification for their hyper-criminalization.[76] The potential threat of a Latiné defendant is always on trial. In order to better combat the systemic and institutionalized racism that persists in American society, all courts – especially those that undertake the sentencing of capital defendants – must institute protective measures to ensure that those defendants of color remain free from the undue influence of racial bias.

SOLUTION: LIMITED ANALYSIS THAT BETTER CONTROLS FOR FACTORS WITH RACIAL COMPONENTS

The racially neutral administration of the death penalty imagined in the minds of Supreme Court justices nearly forty years ago has yet to come to fruition in a society essentially founded upon racial difference. Where the courts have been relatively unsuccessful in curbing the influence of prejudicial bias in sentencing proceedings, it is crucial that jurisdictions take

74. *Id.* at 13-15.

75. In the United States, school textbooks serve as the primary tool of instruction and socialization for a majority of the population. Although Latinés are the fastest growing ethnoracial group in the country, their coverage in these texts and classroom curriculums is seriously lacking and often limited to a brief mention in civil rights chapters. Assessment of twenty-nine textbooks in Texas – a future dangerousness state – found Latiné contributions to political, social, and cultural development of the country to be noticeably absent from educational materials. With the bulk of Latiné representation occurring in context of discussions on immigration, educational systems reinforce the narrative of the illegal migrant and further contribute to negative attitudes toward this outsider group. Jessica Lavariega Monforti & Adam McGlynn, *Aquí Estamos? A Survey of Latino Portrayal in Introductory U.S. Government and Politics Textbooks*, 43 POL. SCI AND POL. 309, 309 (2010).

76. John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 CORNELL L. REV. 397, 398-99 (2001).

active steps toward repairing this system that allows for the imposition of harmful stereotypes when the life of a human being hangs in the balance. While the American Bar Association and Washington models of racial impartiality present valiant efforts to combat the disparate impact that the criminal legal system has on communities of color, it is necessary to take more drastic action in designing the makeup of the jury itself when those most vulnerable Latiné populations are at trial.

The American Bar Association's "Achieving an Impartial Jury Toolbox" focuses on achieving greater impartiality by directing attention to implicit rather than explicit bias.[77] The modern United States legal system has been designed to root out most if not all forms of overt racism or, at the very least, to look down upon them, but often fails to address those more nuanced and subtle ways in which the general population reflects society's worst stereotypes. The ABA suggests a new race-switching instruction urging jurors to "ask [themselves] if [their] opinion of the parties… or of the case would be different if the people participating looked different or if they belonged to a different group."[78] For example, in a capital case involving a Latiné defendant and a white victim, jurors would be asked to imagine if their analysis of guilt would change if the defendant were white and the victim Latiné.[79] If jurors find that their evaluation of the case changes after they engage in the mental race-switching process, "this suggests a subconscious reliance on stereotypes" and a need for the juror "to reevaluate the case from a neutral, unbiased perspective" should they "wish" to.[80] The ABA's recommendation provides a unique opportunity for jurors to take an active role in combatting racial prejudice against Latinés and all minority groups in the legal system.

To further their commitment to an unbiased judicial process, a Washington state committee developed a set of criminal jury instructions similar to those proposed by the ABA that specifically address the role of unconscious bias. By calling attention to the existence of unconscious bias prior to jury selection, prior to opening statements, upon presentation of witnesses, and during closing statements, Washington courts hope to instruct the jury away from their own biases and those of the society in which they exist.[81] Through language calling the jury to "discharge [their] duties without discrimination" and to base their decisions "solely on the evidence and the law before [them]" without influence of "personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias," Washington

77. AM. BAR ASS'N., ACHIEVING AN IMPARTIAL JURY (AIJ) TOOLBOX 2, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf.

78. *Id.* at 19.

79. *Id.* at 22.

80. *Id.*

81. *Criminal Jury Instructions – Unconscious Bias – Western District of Washington*, https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf.

state moves to create a more impartial process.[82] The Washington statute serves as a potential guide to help mitigate the effects of racial bias on the future dangerousness question by bringing awareness to the existence of bias and its detrimental impact on sentencing. It may prove beneficial for capital punishment states that make use of the future dangerous question to supplement with jury instructions similar to those presented by the ABA and Washington state where Latiné defendants and others that present a higher likelihood of perceived threat are at trial.

However, the race-switching and unconscious bias instructions' reliance on self-accountability presents a huge flaw in that many individuals would not be willing to admit even to themselves that their thoughts or opinions may have racist impact. The proposed instructions require a relatively high level of introspection on part of the juror. They rely upon the premise that the juror is able to realize their own subjective bias, to see the problematic nature of their own thoughts and opinions without the reinforcement of another perspective, and to want to make genuine efforts to correct them. It is all too possible that the juror may attribute their racially charged opinion to factors outside of race but that are inextricably linked to race such as those presented earlier – low-socioeconomic status, gang activity, or citizenship status. Further, these proposed instructions do little to mitigate the possibility that evidence introduced at trial is racially biased in and of itself. For example, where prosecutorial arguments rely upon race-based assumptions or expert testimony, like that in the matter of Mr. Hernandez Llanas, that attributes specific behavioral or functional patterns to the defendant's "cultural group."[83] Bolstered by supposed authority, jurors may become even more likely to allow implicit bias into their judgment. While the proposed instructions present an excellent opportunity to moderate much of the harm imposed upon the Latiné community, they alone are potentially insufficient in their capacity to remove racial bias from sentencing calculations.

In addition to the proposed revamped jury instructions, it remains vital to ensure that Latiné defendants are judged by a jury of their peers – that being jurors of Latiné descent. The same 2015 study where white jurors recommended the death penalty most often for low-socioeconomic status Mexican American defendants regardless of the level of mitigation evidence found that Latiné participants' ratings of defendants were not affected by defendant ethnicity or socioeconomic status.[84] Jurors of the same ethnicity as the defendant are statistically less likely to allow racial prejudices to factor into capital sentencing procedures. The argument that Latiné jurors were overly influenced by their sympathy or connection to defendants from their same community is easily defeated by the fact that Latiné jurors'

82. *Id.*
83. Brief for League of United Latin American Citizens et al., *supra* note 65, at 13.
84. Russ K. E. Espinoza & Cynthia Willis-Esqueda, *supra* note 31, at 288-99.

recommendations were based solely on mitigation evidence and not altered by ethnicity of the defendant.[85] Those individuals from the same ethnoracial background as the defendant may be deemed less likely to allow racial bias and related factors to influence their sentencing determinations. This proposition should be seriously considered by courts that continue to execute capital convictions despite strong evidence of racial disparity in sentencing both to quell concerns of a Latiné populace dealing with the reality of hyper-criminalization and to restore the integrity of a judicial system long accused of racism but slow to combat it.

85. *Id.*

CONCLUSION

Though today's racism is more subtle than that of the past, it is not any less real or harmful. For American courts to "turn a blind eye to conduct that appears superficially race neutral but that in fact relies on prejudicial stereotypes based on race or ethnicity" illustrates the extreme depths to which racism has become entrenched in United States "justice" systems.[86] American court systems need a major overhaul to ensure that all communities of color, but specifically Latiné communities that have long faced prejudice with so little attention provided to their plight, are given adequate protections where their lives become dependent upon the votes of twelve other human beings. Capital sentencing proceedings cannot hope to become wholly unbiased in a criminal legal system built upon racial inequity that consistently perpetuates and reaffirms societal prejudices.

While the best option for lessening racial bias in future dangerousness jurisdictions remains abolition of the vestigial question altogether, such radical change to the law is likely to remain unattainable and unwelcome by those jurisdictions that have upheld its scheme for so long. More moderate propositions such as race-switching and unconscious bias instructions, while not flawless in their execution, present great potential for bringing awareness to and limiting the role of implicit racial bias in capital sentencing. Ever greater potential exists in the even more progressive proposal to require that all capital defendants are judged by a jury composed of members of their own race – or at least members of other minority communities – who have a better understanding of and respect for the lived experiences of the defendants. Changes to capital sentencing procedures in future dangerousness states and all jurisdictions in which capital punishment is sanctioned will promote a more racially equitable assessment of Latiné defendants. Substantial reform will not only aid those marginalized communities of color but all people who look to United States courts to uphold the law in an honorable and just manner.

86. Brief for League of United Latin American Citizens et al., *supra* note 65, at 5.