

Spring 2013

## Multilingual Prospective Jurors: Assessing California Standards Twenty Years after *Hernandez v. New York*

Farida Ali

f-ali2013@nlaw.northwestern.edu

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### Recommended Citation

Farida Ali, *Multilingual Prospective Jurors: Assessing California Standards Twenty Years after Hernandez v. New York*, 8 Nw. J. L. & Soc. POL'Y. 236 (2013).

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# Multilingual<sup>1</sup> Prospective Jurors: Assessing California Standards Twenty Years after *Hernandez v. New York*

Farida Ali\*

## ABSTRACT

*This Article explores the ramifications of linguistically motivated peremptory challenges against multilingual prospective jurors in California in the twenty years since such challenges were legitimized under Hernandez v. New York. An examination of state and federal case law reveals that the pretext analysis for reviewing Hernandez-based peremptory challenges remains both an arbitrary and a flawed tool that California courts have, nevertheless, been reluctant to second-guess. This problem is particularly acute in California because it is home to the largest multilingual population in the United States, with 43% of Californians speaking a language other than English. California, therefore, provides an exemplary context for a case study of these issues and its impact on multilingual prospective jurors. However, it is important to recognize that the issues raised by language-based peremptory challenges arise in many other jurisdictions, and potentially affect a large number of Americans throughout the country.*

*The Article discusses the manner in which Hernandez-based peremptory challenges, deference to lower court decisions allowing these challenges, and discriminatory and ineffective state laws are interdependent, mutually reinforcing, and combine to render multilingual individuals proportionately underrepresented in jury service. The Article suggests that this problem signals a need to develop and institute measures to protect multilinguals' exercise of their right to jury participation. Among the recommendations offered are the embellishment and refinement of strategies available to parties objecting to linguistically based peremptory challenges. These changes would help make California's framework for responding to Hernandez more concrete, more effective, and less discriminatory. The Article also proposes changes that the California legislature, judges, courts, and litigating parties can make to reduce Hernandez's discriminatory impact and promote greater jury participation for multilinguals.*

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\* Juris Doctor, 2013, Northwestern University School of Law. I would like to thank Professor Shari Diamond for her insights and comments and Manuel Cachan for inspiring me to write on an important topic that affects our communities. I would also like to thank Joan Schipper and Pegeen Bassett for their invaluable assistance. Lastly, I would like to thank the *JLSP* editors for their contributions to the preparation of this article.

<sup>1</sup> I use this more inclusive term (as compared to "bilinguals") to account for individuals who speak one or more languages other than English.

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## I. INTRODUCTION

Linguistic diversity is a fact of life in the United States today, as it has been since colonial times.<sup>2</sup> According to a recent census, one-in-five Americans speaks at least one foreign language at home.<sup>3</sup> The constant entry of immigrants adds not only to the number of foreign-language speakers, but also to the diversity of languages spoken in the United States. Inevitably, such diversity brings a variety of challenges, including issues that affect jurisprudence. Among these issues is the number of cases in which parties use peremptory challenges to remove potential multilingual jurors.

In *Hernandez v. New York*,<sup>4</sup> the ruling commonly cited to support these peremptory strikes, the U.S. Supreme Court held that peremptory challenges were justified against

<sup>2</sup> See Philip Martin & Elizabeth Midgley, *Immigration to the United States*, POPULATION BULLETIN 1, 14–15 (June 1999). In the 16th and 17th centuries, English colonists established the groundwork for the society that would become the United States. *Id.* at 14. These colonists expanded their territory in North America when they “superimposed” their population on Native Americans and seized control of Dutch, French, and Spanish settlements. *Id.* The importation of African slaves until the early 1800s further added to the colonial population. *Id.* After the Mexican War ended in 1848, Mexicans in California, New Mexico, and Texas were integrated into the population. *Id.* Between 1820 and 1840, German and Irish migrants began arriving in North America in substantial numbers, and starting around 1880 several hundred thousand Chinese, Japanese, and other Asian migrant laborers began settling in the western states. *Id.* at 15. The variety of backgrounds, cultures, and languages that these groups possessed ultimately contributed to the diversity of the United States.

<sup>3</sup> Hyon B. Shin & Robert A. Kominski, *Language Use in the United States: 2007*, U.S. CENSUS BUREAU: AMERICAN COMMUNITY SURVEY REPORTS, 2 (Apr. 2010) (80% of the U.S. population speaks only English, while 20% speaks English and one or more other languages).

<sup>4</sup> *Hernandez v. New York*, 500 U.S. 352 (1991).

bilingual speakers of English and Spanish on the basis of their bilingualism.<sup>5</sup> The Court recognized the close connection between language and race or national origin.<sup>6</sup> However, the Court held that the strikes were adequately explained as a precautionary measure against the risk that jurors would ignore the official English translation of testimony provided by the trial court.<sup>7</sup> Employing a traditional and rigid nondiscrimination framework, the Court decided that the strikes did not intentionally target race and, therefore, did not violate the Constitution.<sup>8</sup> This decision, albeit good law, has been roundly criticized over the years for allowing racism in jury selection and for promoting the widespread exclusion of multilingual jurors.<sup>9</sup>

This Article argues that, in the twenty years since *Hernandez*, California state and federal courts have continued to play an important role in facilitating language-based exclusions that deny multilinguals their right to participate in jury service. This Article also argues that language-based exclusions deprive litigants and the courts of diverse juries that are demonstrably better decision makers who use balance and impartiality during deliberations. The Article further argues that if existing doctrine and practice remain unchanged, *Batson* will continue to allow reliance on language as a pretext for race in jury selection, thereby disenfranchising racial and linguistic minorities, and undermining public perception of integrity in the judicial process.

The problem of language-based peremptory challenges is particularly acute in California because the state is home to the largest multilingual population in the United States, with 43% of Californians speaking a language other than English.<sup>10</sup> California, therefore, provides an exemplary context for a case study of this issue and its impact on multilinguals. It is important to recognize, however, that the issues raised by language-based peremptory challenges arise in many other jurisdictions, particularly in other states with a high percentage of multilinguals in their population, such as Texas (34%), New York (29%), Arizona (29%), New Jersey (28%), Nevada (27%), and Florida (26%).<sup>11</sup> Thus, although this Article focuses on the problem as it has unfolded in California, the exclusion of multilingual jurors is not merely a state or regional issue, but one that potentially affects a large number of Americans in many parts of the country.

In exploring California's framework for facilitating language-based exclusions, this Article examines the state's standard of review, the pretext analysis,<sup>12</sup> and how it has been applied in practice with respect to peremptory challenges of multilinguals. The Article also considers California statutes regarding language and jury selection, and

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<sup>5</sup> *Id.* at 361.

<sup>6</sup> *Id.* at 370–72.

<sup>7</sup> *Id.* at 361.

<sup>8</sup> *Id.* at 358–361.

<sup>9</sup> See Marina Hsieh, *Language-Qualifying Juries to Exclude Bilingual Speakers*, 66 BROOK. L. REV. 1181, 1206 (2001) (excluding multilingual jurors amounts to an exclusion of those most able to address the growing needs of our multilingual courts); Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 133 (2001) (arguing the U.S. Supreme Court's clumsy treatment of the bilingual juror reflects a fundamental deficiency in our legal system).

<sup>10</sup> Shin et al., *supra* note 3, at 9.

<sup>11</sup> *Id.*; see also *infra* text accompanying note 73.

<sup>12</sup> A pretextual analysis for linguistic discrimination requires the trial court to determine whether the striking party's race-neutral explanation for disproportionately excluding potential jurors who speak a given language is a pretext for racial discrimination. *Hernandez*, 500 U.S. at 354.

whether they contribute to the attrition of linguistic minorities in voir dire. The Article suggests that California's framework is seriously flawed and that, given the likelihood that peremptory challenges will continue as a fixture in jury selection, added measures are needed to protect multilinguals' right to serve on juries.

Part II of this Article focuses on the history of *Hernandez v. New York*. This review looks to the rationale of *Hernandez*, its standard of review, and its progeny, *Johnson v. California*. Part III considers the California Constitution and how it paved the way for *Hernandez*. Part IV considers California's framework for removing potential jurors. Specifically, it examines California's application of the pretext analysis for reviewing *Hernandez*-based peremptory challenges. Part V considers the implications of California's pretext analysis with respect to multilinguals and discusses serious problems in this regard, including the likelihood that, when combined with existing California statutes, peremptory challenges further disenfranchise linguistic minorities. Part VI offers recommendations to judges, courts, and litigating parties for improving on the traditional pretext analysis. This section suggests that adding to, and refining, the existing methods available to an objecting party, who must develop a factual record showing linguistic discrimination, can make California's framework more concrete and effective. Among the recommendations offered is the adoption of a Second Circuit standard to establish a prima facie case of discrimination. Part VI also proposes statutory changes to the California legislature that would limit the impact of *Hernandez* on linguistic minorities. Finally, Part VI proposes a jury instruction to California courts that acknowledges and incorporates the linguistic experience of multilingual jurors.

## II. THE HISTORY OF LANGUAGE-BASED CHALLENGES

### A. *Hernandez v. New York's Rationale*

*Hernandez v. New York* involved Dionisio Hernandez, who was convicted of attempted murder in Brooklyn, New York, a jurisdiction with a large multilingual population.<sup>13</sup> At Hernandez's trial, the prosecution used peremptory challenges to disqualify bilingual jurors, citing hesitation by the jurors during voir dire when they were asked whether they could disregard direct testimony in Spanish and heed only the English translation of the court interpreter.<sup>14</sup> Hernandez's attorney protested that this was a ruse to keep Latinos off the jury who might be sympathetic to his client.<sup>15</sup> The prosecutor countered that he was not convinced the jurors would be able to follow the translation offered by the court interpreter, and that this inability could give those jurors an undue influence over the jury.<sup>16</sup> While the prosecutor admitted that after further questioning the jurors said they could follow the interpreter, the trial judge accepted the prosecutor's "race-neutral" explanation. In a six-to-three decision, the U.S. Supreme Court agreed with the trial judge.<sup>17</sup>

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<sup>13</sup> *Hernandez*, 500 U.S. at 355–56.

<sup>14</sup> *Id.* at 356.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 356–57.

<sup>17</sup> *Id.* at 353, 356.

According to the plurality opinion authored by Justice Kennedy, while racial discrimination in jury selection has long been understood to be a violation of the Equal Protection Clause,<sup>18</sup> excluding bilingual jurors is not unconstitutional.<sup>19</sup> Justice Kennedy suggested that language classifications merely divide potential jurors into people who would be able to accept official court translations at face value, and those who would not.<sup>20</sup> That such challenges inevitably exclude a disproportionate number of multilinguals is not dispositive.<sup>21</sup> So long as the explanation is not inherently discriminatory, it would not be considered race-based as a matter of law.<sup>22</sup>

### B. *Batson v. Kentucky: The Standard of Review*

In determining whether the prosecutor used peremptory challenges to disqualify multilingual jurors in violation of the Equal Protection Clause, the Court applied the three-pronged test established in *Batson v. Kentucky*,<sup>23</sup> a landmark decision forbidding prosecutors from using peremptory challenges to strike potential jurors solely because of their race.<sup>24</sup> The first step of the test requires the objecting party to establish a prima facie case of discrimination.<sup>25</sup> Next, the burden shifts to the striking party, who must put forth a race-neutral explanation for the peremptory challenge.<sup>26</sup> The Supreme Court cautioned that in determining whether the striking party has satisfied the requirements of *Batson*'s second step, a court must keep in mind that the *Batson* decision rests on the Equal Protection Clause of the Fourteenth Amendment, which means that peremptory strikes are prohibited on the basis of race.<sup>27</sup> The third step delegates to the trial court the duty of determining whether the objecting party established purposeful discrimination.<sup>28</sup>

In designing this test, the Court in *Batson* accorded great deference to the prosecutor's stated intent, holding that a "race-neutral" explanation meant an explanation based on something other than race.<sup>29</sup> Any explanation proffered, so long as it does not specifically mention race, has therefore been deemed race-neutral by lower courts based on Justice Kennedy's instruction in *Hernandez* that "unless a discriminatory intent is

<sup>18</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

<sup>19</sup> *Hernandez*, 500 U.S. 361–62.

<sup>20</sup> *Id.* at 361 (observing that each group would include Latinos and non-Latinos).

<sup>21</sup> *Id.* at 359–60 (explaining disproportionate impact is inconclusive in determining race neutrality).

<sup>22</sup> *Id.* at 360.

<sup>23</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>24</sup> The Supreme Court later expanded the *Batson* limitation. See *Powers* 499 U.S. at 416 (applies to cross-racial objections); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 631 (1991) (applies to civil proceedings); *Georgia v. McCollum*, 505 U.S. 42, 55 (1992) (applies to criminal proceedings); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 144–45 (1994) (applies to gender); *U.S. v. Martinez-Salazar*, 528 U.S. 304 (2000) (applies to ethnic origin).

<sup>25</sup> *Batson*, 476 U.S. at 94.

<sup>26</sup> *Id.*

<sup>27</sup> See *Powers*, 499 U.S. at 409 ("[R]acial exclusion of prospective jurors violates the overriding command of the Equal Protection Clause, and 'race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage'. . . [T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life.").

<sup>28</sup> *Batson*, 476 U.S. at 94–95.

<sup>29</sup> *Id.*

inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."<sup>30</sup>

Admittedly, the Court in *Hernandez* recognized that a challenge based on linguistic ability could be "inherently" race-neutral or discriminatory depending upon the context;<sup>31</sup> however, it took no steps to protect linguistic minorities, revealing its failure to grasp the ramifications of the *Hernandez* decision.<sup>32</sup> The dissent, by contrast, appeared to be more aware of these ramifications. Justice Stevens, joined by Justices Marshall and Blackmun, proposed a slightly different test. The dissenters argued that after the defense established a prima facie case in a *Batson* challenge, the striking party should have to provide an explanation that was not only race-neutral, but plausible and sufficiently persuasive.<sup>33</sup>

The *Hernandez* prosecution's concern with potential jurors' ability to accept the official version of the testimony was neither plausible nor sufficiently persuasive because: (1) if the prosecutor's concern was legitimate, he could have challenged the jurors for cause,<sup>34</sup> and; (2) the prosecutor's concern could have been remedied by a judge, who could have instructed the jurors that only the official English testimony would be considered as evidence, or otherwise provided the jury with limiting instructions.<sup>35</sup> Moreover, allowing language-based justifications for peremptory strikes is likely to lead to the disproportionate exclusion of multilingual jurors.<sup>36</sup> In essence, the *Hernandez* decision afforded striking parties wide leeway in exercising peremptory challenges, allowing the use of language as a pretext for race, no matter how implausible, so long as there was arguably a facially race-neutral reason for the exclusions. The latitude thus permitted was excessive in *Hernandez* and, as a result, in a great many cases ever since.

Nonetheless, it is unclear how different the dissent's standard would have been in practice and effect since: (1) it also relies on the notion of "race-neutral"<sup>37</sup> explanations, and; (2) it distinguishes between justifications that are pretextual (i.e., "unacceptable") and those that are implausible (i.e., likely to be wrong because they are "insufficient to dispel [an] inference of racial animus"),<sup>38</sup> but fails to provide examples of "plausible" reasons that would comport with its test. The dissenters' reliance on jury instructions as a curative measure also presumes that jurors always follow the court's instructions, and that these instructions are adequate and effectively address a juror's inability or unwillingness to accept the official English version of testimony. However, it is

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<sup>30</sup> *Hernandez*, 500 U.S. at 360.

<sup>31</sup> *Id.* at 371 ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.").

<sup>32</sup> See *infra* note 181.

<sup>33</sup> *Hernandez*, 500 U.S. at 376 (Stevens, J., dissenting).

<sup>34</sup> *Id.* at 379; see subpart IV(A) for a discussion of challenges "for cause"; see also Nancy S. Marder, *Justice Stevens, The Peremptory Challenge, and the Jury*, 74 *FORDHAM L. REV.* 1683, 1715–17 (2006) (suggesting eliminating the peremptory challenge and expanding the "for cause" challenge to end discrimination during jury selection).

<sup>35</sup> *Hernandez*, 500 U.S. at 379.

<sup>36</sup> *Id.*

<sup>37</sup> See Part V for a discussion of the problems inherent in the "race-neutral" test.

<sup>38</sup> *Hernandez*, 500 U.S. at 379 (Stevens, J., dissenting).

important to recognize that jury instructions are not always curative,<sup>39</sup> and might not have been helpful in *Hernandez*, because the jurors expressed their hesitancy following the Court's instructions.<sup>40</sup>

### C. *Johnson v. California: Clarifying the Batson Standard*

Fourteen years after the *Hernandez* decision, the Court granted certiorari in *Johnson v. California*<sup>41</sup> to resolve a conflict between the California Supreme Court and the Ninth Circuit regarding the standards applied to step one, or the prima facie prong, of the *Batson* analysis.<sup>42</sup> *Johnson* involved the trial of a black man convicted of murder and assault of a young child. During jury selection, the prosecutor used peremptory challenges against all three black jury panelists.<sup>43</sup> The defense objected to their disqualification on the basis of the *Batson* doctrine, but the trial judge overruled the objection.<sup>44</sup> The judge held that the precedent established by the state in *People v. Wheeler*<sup>45</sup> required the defense to show a “strong likelihood” of racial discrimination at step one of the *Batson* test.<sup>46</sup> The California Court of Appeal disagreed, however, and set aside the conviction,<sup>47</sup> arguing that the “strong likelihood” standard was incorrect and that the proper standard was a “reasonable inference” of discrimination used by federal courts, including the Ninth Circuit.<sup>48</sup>

On appeal, the California Supreme Court reinstated the defendant's conviction.<sup>49</sup> It held that under *Wheeler*, the California standard would require showing a “strong likelihood,” or that it was “more likely than not,” that discrimination occurred in the use of peremptory challenges.<sup>50</sup> The court defended its decision as consistent with *Batson*, which allowed states to establish their own procedures. Upon review, however, the U.S. Supreme Court disagreed and interpreted *Batson* as only giving states “flexibility in

<sup>39</sup> Jury instructions do not always have a curative effect because they may be incomprehensible or because jurors choose to disregard the law or the judge's instructions. See Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEGAL WRITING 39, 40 (2001) (“Jury instructions are notoriously incomprehensible to the public.”); James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L. J. 163, 178 (1984) (“The assumption that jurors will follow the law appears to be based primarily on wishful thinking. While jurors do not have the right to disregard the judge's instructions, they clearly have the power and are often willing to use it.”); see also *infra* subpart VI(D).

<sup>40</sup> See *Hernandez*, 500 U.S. at 362.

<sup>41</sup> *Johnson v. California*, 545 U.S. 162 (2005).

<sup>42</sup> See *id.* at 166.

<sup>43</sup> See *id.* at 164–65.

<sup>44</sup> See *id.*

<sup>45</sup> *People v. Wheeler*, 583 P.2d 748, 752 (Cal. 1978) (all-white jury convicted two black men of robbery as a result of the prosecution's peremptory strikes and cause challenges to remove all black potential jurors during voir dire), *modified*, *People v. Willis*, 43 P.3d 130 (Cal. 2002); see also *infra* Part IV, subpart IV(A) for peremptory challenges and challenges for cause.

<sup>46</sup> *Johnson*, 545 U.S. at 164–65 (2005) (quoting *People v. Johnson*, 71 P.3d 270, 272 (Cal. 2003)).

<sup>47</sup> See *id.*; *People v. Johnson*, 105 Cal. Rptr. 2d 727 (1st Dist. 2001).

<sup>48</sup> *Johnson*, 545 U.S. at 164–67. The California Court of Appeal based its decision on *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000) (holding that *Wheeler*'s “‘strong likelihood’ . . . test was impermissibly stringent in comparison to the more lenient *Batson* ‘inference’ test”).

<sup>49</sup> See *Johnson*, 545 U.S. at 166.

<sup>50</sup> *Id.*

formulating appropriate procedures to comply with *Batson*,” but that the standard was created by the Court and, therefore, not for each state to set.<sup>51</sup>

Justice Stevens, this time writing for the majority, argued that the “reasonable inference” standard, and not California’s “more likely than not” standard, was appropriate because it fit *Batson*’s original intentions.<sup>52</sup> California’s much stricter test was an “inappropriate yardstick by which to measure the sufficiency of a prima facie case”<sup>53</sup> because *Batson* had not intended “the first step to be so onerous” that a defendant would have to persuade the judge on the basis of facts that are often “impossible . . . to know with certainty.”<sup>54</sup> The Court, in essence, held that the California standard was far more severe, and thus inappropriate because it made *Batson* challenges very difficult to raise from the outset.

Under *Batson*’s first step, a party need only produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.<sup>55</sup> In other words, the evidence need only be sufficient to support an inference that the disqualification was a result of purposeful discrimination, even though the Court failed to specify the kind of evidence that would establish a reasonable inference. To the Court, the standard requiring that a party merely raise a reasonable inference was appropriate because it allowed lower courts to hear “actual answers to suspicions and inferences that discrimination may have infected the jury selection process” and, in doing so, performed the kind of oversight that *Batson* contemplated.<sup>56</sup> Presumably, the Court believed that California’s “more likely than not” standard would prevent many claims from surviving beyond step one and would force judges to make the kinds of decisions at step one that were meant for step three.

By mandating a lower prima facie threshold than California’s “strong likelihood” standard, the Court hoped to restrict California’s ability to alter the *Batson* test.<sup>57</sup> The lower threshold would allow more *Batson* challenges to satisfy the first step and proceed through to the second and third steps of the framework. The actual impact of the decision appears minimal, however, because empirical studies show that even prior to *Johnson* it was not difficult to establish step one of the *Batson* test.<sup>58</sup>

### III. THE CALIFORNIA CONSTITUTION: PAVING THE WAY FOR *HERNANDEZ*

The *Hernandez* decision was certainly timely. Five years before *Hernandez*, in the midterm election of 1986, California voters passed Proposition 63.<sup>59</sup> Proposition 63

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<sup>51</sup> See *id.* at 168.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 170.

<sup>55</sup> See *id.* at 170–71.

<sup>56</sup> *Johnson*, 545 U.S. at 172.

<sup>57</sup> *Id.* at 170–73.

<sup>58</sup> See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 460–61 (1996) (examining *Batson* state and federal court decisions from 1986 to 1993).

<sup>59</sup> California Proposition 63, or the “English Is the Official Language of California” Amendment, was a state constitutional amendment that declared English as the official language of California after passing by a margin of 73% in the 1986 midterm election. This amendment has been interpreted as a political move to disenfranchise linguistic minorities. See Connie Dyste, *Proposition 63: The California English Language*

amended the state constitution to declare that English is the official language of California. The amendment resulted in the addition of the following passage to the state's constitution:

English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect, and strengthen the English language . . . The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced.<sup>60</sup>

To date, thirty-one states, including California, have passed such "Official English" laws.<sup>61</sup> The U.S. federal government, by contrast, has never declared English or any other idiom to be the nation's official language.<sup>62</sup>

Various other California statutes require that public activities be conducted in English alone, including the Code of Civil Procedure, which requires that English be used in all judicial proceedings.<sup>63</sup> Interestingly, before *Hernandez* was decided in 1991, California's Code of Civil Procedure already excluded potential jurors from serving if they were "not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."<sup>64</sup> In essence, a potential juror

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*Amendment*, 10 APPLIED LINGUISTICS 313, 314, 327–29 (1989) (The constitutional amendment was not merely symbolic but a political move to fight the use of languages other than English in California. Indeed, the amendment provides, among other things, a constitutional basis for challenging the legality of bilingual education programs and allows any person doing business in California to sue the state to enforce the amendment. Data from the California poll survey demonstrates that the strongest supporters of the amendment were whites, the less educated, and conservatives; the strongest opponents were Latinos, Asians, the highly educated, and liberals.); see also Susannah D.A. MacKaye, *California Proposition 63: Language Attitudes Reflected in the Public Debate*, 508 ANNALS AM. ACAD. POL. & SOC. SCI. 135, 137, 144 (1990) (Although the purpose of Proposition 63 was to declare English as California's official language, published commentary reveals a widely held belief that it was to ensure that English remain the common language of California, which would make clear to immigrants and other outsiders that they cannot "get along" in the United States without the benefit of English.).

<sup>60</sup> CAL. CONST. art. III, § 6(a), (c) (West 2012).

<sup>61</sup> See *Official English Map*, PROENGLISH.ORG, <http://www.proenglish.org/official-english/state-profiles> (last visited Feb. 28, 2012).

<sup>62</sup> See *Debate: English as US Official Language*, DEBATEPEDIA, [http://debatepedia.idebate.org/en/index.php/Debate:\\_English\\_as\\_US\\_official\\_language](http://debatepedia.idebate.org/en/index.php/Debate:_English_as_US_official_language) (last visited Apr. 23, 2012).

<sup>63</sup> See CAL. CIV. PROC. CODE § 185 (West 2012). It is important to note that California is not unique in requiring that English be used in all judicial proceedings, and this rule even holds in Puerto Rico. See, e.g., 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). However, there are exceptions, with states like New Mexico providing a contrast with California in requiring English language skills for jurors. See *id.*; Edward L. Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303 (2008).

<sup>64</sup> CAL. CIV. PROC. CODE § 203 (West 2012) (added by Stats. 1988, c. 1245).

cannot be excluded in California solely on the basis of a physical or other disability, but can be excluded for lack of “sufficient” English language skills.<sup>65</sup>

A disturbing aspect of these “Official English” laws is that they negatively impact multilinguals’ participation in jury service by excluding those who speak no English at all, as well as those who do not speak sufficient English to participate in jury service. While practical considerations exist that support the disqualification of non-English speakers from serving on juries,<sup>66</sup> the problem with the California practice—and with others like it—lies in the difficulty of determining, in a non-arbitrary fashion, what constitutes English language sufficiency. For example, half of the California judges who participated in a language proficiency study said that “English sufficiency” meant being able to understand “broadly” what was said in the courtroom, whereas the other half said that it meant being able to understand “everything.”<sup>67</sup>

According to the 2010 U.S. Census, at the end of 2007, non-English-speaking Californians comprised 10% of the state’s population of individuals who speak languages other than English (43% of the state’s total population), while Californians who did not speak English well comprised 17% of that sub-group.<sup>68</sup> The census data also reported that of those Californians who speak other languages, 53% could speak English “very well” and 20% could speak English “well.”<sup>69</sup> It is tempting to conclude that 73% of multilingual Californians who speak English “well” or “very well” provide a substantial pool of potential jurors for voir dire. California’s statutory exclusions, however, significantly reduce the multilingual jury pool because the exclusions bar Californians from serving on juries if they are not: (1) at least 18 years of age; (2) U.S. citizens; (3) deemed competent by reason of mental or physical infirmities; (4) residents of the county

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<sup>65</sup> Rule 203’s legislative history does not provide any reasons for this distinction, leading some scholars to call it “arbitrary” because the distinction incorporates neither a much-needed analysis of the goals of the court system, nor an assessment of the costs and benefits of having interpreters available for, e.g., the hearing impaired but not for non-English-speaking potential jurors. See Colin A. Kisor, *Using Interpreters to Assist Jurors: A Plea for Consistency*, 22 CHICANO-LATINO L. REV. 37, 47 (2001). It has been argued that practical considerations exist in excluding individuals for lack of “sufficient” English language skills from serving on juries because: (1) “English is the language of the court proceedings and the secret jury room deliberations”; (2) Translators are not allowed in the jury deliberation rooms, and; (3) English preserves the uniformity federal courts seek. 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, 710–11 (2009). However, these arguments could also apply to jurors with hearing impairments. These arguments, moreover, fail to explain why courts must “differentiate between interpreters for the deaf and for non-English speakers, when the two interpreters perform an identical function.” Kisor, *supra* note 65, at 51. Indeed, it seems “immaterial” whether an interpreter was “provided to translate orally in English or Spanish, or into sign language, or both, so long as the juror is able to understand the proceedings, and participate in deliberations . . . and [this view is further] reinforced if one subscribes to the viewpoint that the deaf are not handicapped, but instead are a ‘linguistic minority.’” *Id.* at 47. Although it is unclear whether this view is common among advocates, the point is that the courts should recognize on a functional level that there is no genuine difference between providing a court interpreter for a deaf juror or for a non-English speaker.

<sup>66</sup> See Hill, *supra* note 65.

<sup>67</sup> See Jana Anette Radmann, *Do You Speak English?: A Study On English Language Proficiency Testing of Hispanic Defendants in U.S. Criminal Courts*, 63–64 (May 4, 2005) (master’s thesis), available at <http://etd.lsu.edu/docs/available/etd-04142005-224929/>.

<sup>68</sup> Shin et al., *supra* note 3, at 9.

<sup>69</sup> *Id.* at 8–10.

in which they are to serve, and; (5) free from any felony convictions.<sup>70</sup> The group that remains after this first round of disqualifications is further reduced because it includes low-income racial minorities who are either excused for financial hardship or who fail to respond to jury summonses because of their higher mobility relative to the overall population.<sup>71</sup> This combination of factors produces an artificially small pool of linguistic minorities that is then further reduced by the exercise of peremptory challenges, which disproportionately target racial minorities.<sup>72</sup> Although no study provides data showing the number of linguistic minorities excluded at each of these stages, studies do show that linguistic minorities continue to be underrepresented in California venires, as well as venires in many other jurisdictions.<sup>73</sup>

<sup>70</sup> See CAL. CIV. PROC. CODE § 190, § 203 (West 2012). I only discuss those statutory exceptions relevant to this Article. Readers interested in viewing a complete list of California's statutory exclusions should refer to CAL. CIV. PROC. CODE § 203 (West 2012).

<sup>71</sup> See CAL. CT. R. 2.1008(d) (potential jurors can be excused for undue hardship); Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST. 71, 84–85 (1996) (racial and ethnic minorities, and those with low-income status, are underrepresented in venires); see also ROBERT G. BOATRIGHT, *IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES* 15, 120–124 (1998) (because minorities are underrepresented on voting rolls, they are underrepresented on jury rolls); HIROSHI FUKURAI ET AL., *RACE AND THE JURY* 45 (1993) (minorities' low-income status and involvement in secondary labor markets increases their mobility and, by extension, decreases their jury eligibility); Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1055 (2003) (greater mobility, which causes low response rates to jury summonses, and financial hardship play an important role in minority participation in jury service).

<sup>72</sup> Edward S. Adams & Christian J. Lane, *Constructing A Jury That Is Both Impartial And Representative: Utilizing Cumulative Voting In Jury Selection*, 73 N.Y.U. L. REV. 703, 705–06 (1998) (arguing that although *Batson* was intended to remedy the striking of minority potential jurors, it has failed to deter the practice since minorities report to the courthouse at a lower rate, and are eliminated through peremptory strikes that employ race-neutral explanations).

<sup>73</sup> See *Racial and Ethnic Disparities in Alameda County Jury Pools*, ACLU OF NORTHERN CAL., 3 (2010) (Latinos represent 12% of the eligible jury pool but comprise only 8% of individuals appearing for jury service in Alameda, California); *Lawsuit Thrown Out Over Underrepresented Latino Jurors*, 10NEWS.COM (June 12, 2008), <http://www.10news.com/news/lawsuit-thrown-out-over-underrepresented-latino-jurors> (Latinos represent 19% of the eligible jury pool in downtown San Diego, but only 9.4% of individuals actually appear for jury service); *Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts*, JUD. COUNCIL CAL., Jan. 1997, at 193–95 (In Redding, California, Native Americans and Asians are almost never part of the jury pool. In Fresno, California, “[The jury pool] is clearly unrepresentative . . . in part because jury summonses are not enforced, and in part because the Department of Motor Vehicles list excludes those with suspended driver's licenses as well as those without licenses, so that in some rural courts, where the population consists of more than 70% minorities, a jury with even one or two minorities is unusual.”); Mary R. Rose, Shari Seidman Diamond & Marc A. Musick, *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUD. 33, 45 (2012) (Latinos and Asians are significantly less likely than whites to have served on one or more juries in California and Texas); Ann Pfau, *First Annual Report Pursuant to Section 528 of the Judiciary Law*, CHIEF ADMIN. JUDGE N. Y. 16, 16 (2011) (Latinos in New York state were underrepresented by 39% in Nassau, 22% in New York, 47% in Suffolk, 45% in Westchester, and 35% in Queens); *Summoning Jurors*, ARIZONA JUDICIAL BRANCH, <http://www.supreme.state.az.us/jury/jury/jury111.htm> (last visited Apr. 23, 2012) (The 1993 report on jurors in Maricopa, Arizona “reveals that Hispanics were 61% underrepresented.”); Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 S.M.U. L. REV. 1813, 1815 (2001) (“Hispanic Americans represent 23% of the population in Dallas County but only 9% of the venire.”); Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 JUDGES J. 17, 17 (2004) (“Latinos, the fastest growing ethnic community in the United States, are substantially underrepresented in the jury venires [of

#### IV. CALIFORNIA'S FRAMEWORK FOR REMOVING POTENTIAL JURORS

##### A. Challenges For Cause and Peremptory Challenges

As in other states, parties in California may challenge potential jurors for cause or remove them through the exercise of peremptory challenges. Challenges for cause fall into two categories: implied bias and actual bias. Bias can be implied if a potential juror: (1) has an affinity to any party or witness in the case; (2) is related to the parties or to the victim; (3) has already served on a jury in which either party was present, or; (4) has an interest in the outcome of the trial.<sup>74</sup> Actual bias exists if the potential juror's "state of mind" prevents him or her "from acting with entire impartiality and without prejudice to the substantial rights of any party."<sup>75</sup> An attorney challenging for cause must present evidence to show that the juror should be excused.<sup>76</sup> The judge will then base the decision on the evidence submitted by counsel, which often includes consideration of information from counsel's interview with the juror and counsel's arguments.

Potential jurors can also be removed by using peremptory challenges.<sup>77</sup> A peremptory challenge allows each party to disqualify prospective jurors without having to provide a reason.<sup>78</sup> In both civil and criminal cases peremptory challenges are limited, with the allowed number varying according to the gravity of the offense charged and the number of parties involved.<sup>79</sup> Challenges for cause, by contrast, are unlimited.<sup>80</sup>

Interestingly, nothing in the U.S. Constitution requires the states or the federal government to provide peremptory challenges. Nonetheless, peremptory challenges have endured since the earliest days of common law.<sup>81</sup> Attorneys have often used them when mere "hunches," "suspicions," or "arbitrary exclusions" do not rise to the level of cause.<sup>82</sup> The U.S. Supreme Court has tried to respond to the dangers associated with peremptory challenges, which include violations of the Equal Protection Clause, by allowing parties to dispute their use under *Batson*.<sup>83</sup>

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Dallas and Harris, Texas]."); see also *Final Report of the Pennsylvania Supreme Court Committee on Racial & Gender Bias in the Justice System*, COMM. ON RACIAL & GENDER BIAS JUST. SYS. 54 (2003) (Pennsylvania jury selection mechanisms "fail at each step of the process to include a representative number of minorities."); *South Dakota Equal Justice Commission, Final Report & Recommendations*, S. D. EQUAL JUST. COMM'N 8 (2006) ("Juries in South Dakota rarely represent the racial composition of a community."); *Where the Injured Fly for Justice: A Ten-Year Retrospect on the Report & Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, FLA. SUP. CT. RACIAL & ETHNIC BIAS STUDY COMM'N 13 (2000) (current jury selection mechanisms in Florida do not result in juries that "are racial and ethnic composites of the community."); *Final Report*, MINN. SUP. CT. TASK FORCE ON RACIAL BIAS IN THE JUD. SYS. S-14 (1993) ("[J]ury pools rarely are representative of the racial composition of [Minnesota] communities.").

<sup>74</sup> CAL. CIV. PROC. CODE § 229 (West 2012). I discuss only the general principles of implied bias; therefore, readers interested in viewing specific provisions of the statute should refer directly to CAL. CIV. PROC. CODE § 229.

<sup>75</sup> See CAL. CIV. PROC. CODE § 225 (West 2012).

<sup>76</sup> See CAL. CIV. PROC. CODE § 230 (West 2012) ("Challenges for cause shall be tried by the court.").

<sup>77</sup> CAL. CIV. PROC. CODE § 225(b)(2) (West 2012).

<sup>78</sup> CAL. CIV. PROC. CODE § 226(b) (West 2012).

<sup>79</sup> CAL. CIV. PROC. CODE § 231(a), (c) (West 2012).

<sup>80</sup> *Palacios v. Felker*, No. CV 07-4470-RGK(JTL), 2008 WL 793373, at \*12 (C.D. Cal. Feb. 13, 2008).

<sup>81</sup> See *Swain v. Alabama*, 380 U.S. 202, 212–13 (1965), *overruled by*, *Batson*, 476 U.S. 79.

<sup>82</sup> See *Driver v. Trimble*, No. C 10-2564 SI (pr), slip op. at 11 (N.D. Cal. Nov. 21, 2011).

<sup>83</sup> See *Hernandez*, 500 U.S. at 352.

### *B. Current Standard for Reviewing Peremptory Challenges*

As in federal court, a party in California state court that raises a *Batson* challenge to oppose a striking party's use of a peremptory challenge must make a timely objection,<sup>84</sup> demonstrate on the record that the challenged persons are members of a distinct racial group,<sup>85</sup> and show that there is a reasonable inference that they have been challenged because of their race.<sup>86</sup> The objecting party must allege that the strike is racially motivated and request the court to ask the striking party to justify its action. If the court finds that a reasonable inference of racial motivation exists, the burden shifts to the striking party to show that the strikes were not racially motivated.<sup>87</sup> If the striking party's explanation is not facially race-neutral, then the court dismisses the jury pool to start voir dire again or applies alternative judicial remedies.<sup>88</sup> However, if the explanation is facially neutral, believable, and not a pretext for race, then the court will accept the explanation and the strike sustained.<sup>89</sup>

As a first step, both federal and California state courts must determine whether a person or group fits into a "cognizable class" to have standing and assert a *Batson* challenge.<sup>90</sup> First, the analysis involves whether the objecting party's group is large enough that the general community recognizes it as an identifiable population. Second, the analysis considers whether the group is internally cohesive, based on attitudes or experiences that may not be adequately represented by other segments of society.<sup>91</sup> However, national origin, native language, and surname are not dispositive in establishing a person's ethnicity.<sup>92</sup> The trial court retains discretion to make this determination when an objection is made to a peremptory challenge.<sup>93</sup>

Once the court determines that a person fits into a cognizable class, context-dependent features of the case are considered to determine whether the likelihood of racial motivation exists. The types of evidence that may be relevant include whether: (1) most or all of the members of the identified group were excused; (2) a disproportionate number of peremptory challenges were exercised against the group; (3) the jurors in question share only one characteristic—i.e., their membership in the group—and are in other respects heterogeneous, and; (4) the failure to engage these jurors, as either a result

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<sup>84</sup> See *People v. Morrison*, 101 P.3d 568, 577 (Cal. 2004).

<sup>85</sup> See *People v. Ramos*, 938 P.2d 950, 964 (Cal. 1997).

<sup>86</sup> See *Morrison*, 101 P.3d at 577; *Ramos*, 938 P.2d at 964.

<sup>87</sup> See *People v. Reynoso*, 74 P.3d 852, 869 (Cal. 2003).

<sup>88</sup> See *People v. Willis*, 27 Cal. 4th 811, 819 (2002) (holding a court can declare a mistrial and discharge the jury venire, or apply alternative remedies if it chooses to do so, including assessment of sanctions against counsel whose peremptory challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve).

<sup>89</sup> See *People v. Jurado*, 131 P.3d 406, 421 (Cal. 2006).

<sup>90</sup> See *Ramos*, 938 P.2d 950 (Latinos); *In re Freeman*, 133 P.3d 1013, 1022 (2006) (religious groups); *People v. Cleveland*, 86 P.3d 302 (Cal. 2004) (African-American women); *People v. Gray*, 104 Cal. Rptr. 2d 848 (2d Dist. 2001) (African-American men).

<sup>91</sup> See *Yee v. Duncan*, 463 F.3d 893, 898 (9th Cir. 2006); *People v. Morris*, 131 Cal. Rptr. 2d 872 (2d Dist. 2003).

<sup>92</sup> See *Ramos*, 938 P.2d 950 (Latinos); *Gray*, 104 Cal. Rptr. 848 (2d Dist. 2001) (African-American men); *Cleveland*, 86 P.3d 302 (African-American women); *People v. Davis*, 208 P.3d 78 (Cal. 2009) (religious groups).

<sup>93</sup> See *Cleveland*, 86 P.3d at 324 (trial court has wide discretion in conducting voir dire and retains great latitude in deciding what questions or factors to consider in voir dire).

of desultory<sup>94</sup> voir dire or a calculated decision on the part of the striking party not to ask them any questions.<sup>95</sup>

In drawing an inference of discrimination from the fact that a striking party has excused “most or all members of a cognizable group,” the court, in finding a prima facie case, relies on an apparent pattern in the party’s challenges.<sup>96</sup> However, such patterns are “difficult to discern when the number of challenges is extremely small.”<sup>97</sup> Thus, detecting a pattern of discrimination is difficult in practice because, as noted above, linguistic minorities are already underrepresented in California jury pools.

In any case, once the objecting party has established a prima facie case, the burden then shifts to the striking party to provide a race-neutral explanation for the exercise of peremptory challenges.<sup>98</sup> Under *Batson*, a legitimate reason in this second step must be race neutral.<sup>99</sup> The second step does not require an explanation that is persuasive or plausible; the issue is simply the “facial validity of the prosecutor’s explanation.”<sup>100</sup> However, there will “seldom be much evidence bearing on the issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.”<sup>101</sup> Thus, the determination comes down to a court evaluating the striking party’s state of mind, via demeanor, which “lies peculiarly within a trial judge’s province.”<sup>102</sup>

Under *Batson*, a striking party cannot assume in exercising peremptory challenges that because a prospective juror belongs to a cognizable minority group that the prospective juror holds views that are undesirable for the position.<sup>103</sup> However, the striking party may excuse prospective minority jurors based on personal, individual biases even if these views or attitudes may be more widely held inside than outside the cognizable group.<sup>104</sup> It is perfectly valid, for example, for a party to strike an African-American juror because he or she has a bias against police officers, even though this view may be more widely held within the African-American community than outside it.<sup>105</sup> A striking party’s justification for excluding linguistic minorities who respond “equivocally” is also race neutral when based on a distrust of these jurors’ ability to restrict themselves to the interpreter’s official English translation.<sup>106</sup> Furthermore, a given juror’s demeanor or “body language,” which may include “alienating bare looks and gestures,” is a proper basis for disqualifying a potential juror.<sup>107</sup>

<sup>94</sup> A party can demonstrate that his or her opponent engaged in desultory voir dire, which means that the opponent subjected potential jurors to inappropriate, unfocused, or random questioning before striking them from the jury pool. *See* *People v. Fuller*, 186 Cal. Rptr. 283, 293–294 (3d Dist. 1982), which illustrates this type of objection.

<sup>95</sup> *See* *Fernandez v. Roe*, 286 F.3d 1073, 1079 (9th Cir. 2002); *People v. Crittenden*, 885 P.2d 887, 905, 119 (Cal. 1994).

<sup>96</sup> *People v. Bell*, 151 P.3d 292, 30 n.3 (Cal. 2007).

<sup>97</sup> *People v. Bonilla*, 160 P.3d 84, 104 n.12 (Cal. 2007).

<sup>98</sup> *See id.* at 103.

<sup>99</sup> *See* *McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir. 2000).

<sup>100</sup> *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

<sup>101</sup> *Hernandez*, 500 U.S. at 365.

<sup>102</sup> *People v. Lenix*, 187 P.3d 946, 955 (Cal. 2008).

<sup>103</sup> *People v. Lewis*, 140 P.3d 775, 812 (Cal. 2006).

<sup>104</sup> *Id.* at 812–813.

<sup>105</sup> *See id.* at 809–810.

<sup>106</sup> *See* *People v. Lomax*, 234 P.3d 377 (Cal. 2010).

<sup>107</sup> *People v. Phillips*, 54 Cal. Rptr. 3d 678, 684 (3d Dist. 2007).

If a race-neutral explanation is provided, the trial court must decide, in step three, whether the opponent of the peremptory challenge has proven purposeful racial discrimination.<sup>108</sup> In this third step, the plausibility or persuasiveness of the striking party's justification becomes relevant and "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."<sup>109</sup>

The trial court has a duty to determine the credibility of the striking party's purported reasons for exercising the challenge,<sup>110</sup> but the "burden of persuasion" to prove purposeful discrimination rests with, and never shifts from, the objecting party.<sup>111</sup> Even when the inquiry is unfavorable, the objecting party must renew his or her objection before the jury is sworn to preserve the issue for appeal.<sup>112</sup> In making its credibility determination with respect to the proffered reasons, the court must determine whether the striking party has given a "clear and reasonably specific explanation" of the reasons for exercising a peremptory challenge.<sup>113</sup> The court must consider the "totality of the relevant facts," including the striking party's strategies and explanations, whether racial or non-racial, for striking potential minority jurors.<sup>114</sup> The court focuses on whether there is evidence to support the party's reasons, no matter how reasonable these reasons may be.<sup>115</sup> In essence, credibility is measured by how reasonable, or how improbable, the attorney's explanations are, and by whether the proffered reason has some basis in accepted trial strategy.<sup>116</sup> Moreover, evaluation of the striking party's state of mind based on credibility "lie peculiarly within a trial judge's province."<sup>117</sup> To this the California Supreme Court has added the provision that, even though an appellate court can make a comparative juror analysis for the first time on appeal to determine whether the stated reasons for exercising a peremptory challenge were pretextual, the appellate court must give great deference to the trial court's ultimate finding of no discriminatory intent.<sup>118</sup>

## V. THE LESSONS OF *HERNANDEZ* IN JURY SELECTION

### A. *A Study of California Case Law*

The recent *Hernandez* cases decided by California state and federal courts demonstrate that the pretext analysis remains arbitrary and perilous in practice, as judges try to peer into the hearts of striking parties to divine their true motivations for exercising peremptory challenges. These authorities reveal the reluctance of the appellate courts to disturb or question lower court determinations, and their willingness to accept

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<sup>108</sup> See *Hernandez*, 500 U.S. at 352.

<sup>109</sup> *Purkett*, 514 U.S. at 768.

<sup>110</sup> *McClain*, 217 F.3d at 1220.

<sup>111</sup> *Johnson*, 545 U.S. at 171.

<sup>112</sup> See *People v. Hamilton*, 200 P.3d 898, 925 (Cal. 2009) (party must communicate to the trial court any dissatisfaction with the jury selected to preserve the issue for appeal).

<sup>113</sup> *Lenix*, 187 P.3d at 954.

<sup>114</sup> *Id.* at 956, 958.

<sup>115</sup> *Id.*

<sup>116</sup> *Miller-El v. Cockrell*, 537 U.S. 322, 359 (2003).

<sup>117</sup> *Lenix*, 187 P.3d at 955.

<sup>118</sup> *Id.*

implausible race-neutral explanations despite substantial evidence to the contrary.<sup>119</sup> Only in truly egregious circumstances have courts been willing to grant *Batson* relief.

In *People v. Cardenas*,<sup>120</sup> a Latino defendant argued to the California Court of Appeal that the trial court had erred in overruling his *Batson* objection. The prosecution had used peremptory challenges to strike two Latino venire persons, Jurors A and B.<sup>121</sup> The prosecution's proffered justification for the strikes was that she distrusted both jurors' ability to disregard direct testimony in Spanish and follow only the English translation of the court interpreter.<sup>122</sup> Although the trial judge "admonished" or warned both potential jurors and asked them to follow only the English translation—which both jurors agreed to do—the trial judge ultimately accepted the prosecutor's "race-neutral" explanation for disqualifying both Latino venire persons.<sup>123</sup>

The Court of Appeal admitted that evidence existed in the record that could "arguably support" a finding that the prosecutor was "insincere in her proffered reasons for excusing Jurors A and B."<sup>124</sup> First, the prosecutor's "purported doubt" that the jurors would follow the interpreter's translation, even after the trial court's firm admonition that they must do so, "contradicts one of the basic tenets of our system of trial by jury which is frequently cited by attorneys for the People—the presumption that jurors 'generally understand and faithfully follow instructions.'"<sup>125</sup> Second, in *Hernandez*, the prosecutor based his peremptory challenges on "the specific responses *and* the demeanor" of the two multilingual jurors.<sup>126</sup> In *Cardenas*, however, the prosecutor did not cite any specific aspect of the jurors' demeanor that led her to doubt the credibility of their promise to follow the trial court's instruction.<sup>127</sup> Lastly, the fact that the prosecutor did not bother to question another Latino venire person, Juror F, about his ability to accept the translations provided in court was acknowledged as "some albeit . . . slight, evidence of the prosecutor's intent to discriminate against Hispanics."<sup>128</sup>

The Court of Appeal, however, pointed out that a finding of "substantial evidence" does not necessarily imply that there is "no contrary evidence" that would shield the prosecution.<sup>129</sup> Nonetheless, it failed to discuss any of this "contrary evidence." Because

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<sup>119</sup> The Ninth Circuit defines substantial evidence as "more than a mere scintilla . . . but less than a preponderance," which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Young v. Sullivan*, 911 F.2d 180, 183 (9th Cir. 1990). The California Supreme Court defines substantial evidence as "evidence which is reasonable, credible, and of solid value." *People v. Ceja*, 847 P.2d 55, 58 (Cal. 1993).

<sup>120</sup> *People v. Cardenas*, 66 Cal. Rptr. 3d 821 (2nd Dist. 2007).

<sup>121</sup> *Id.* at 824.

<sup>122</sup> *Id.* at 826.

<sup>123</sup> *Id.* at 824.

<sup>124</sup> *Id.* at 827.

<sup>125</sup> *Id.* at 828.

<sup>126</sup> *Id.*

<sup>127</sup> *Cardenas*, 66 Cal. Rptr. 3d at 828. Although the court did not explain why this was evidence of the prosecutor's insincerity, it probably viewed the prosecution's failure to cite any specific aspects of the juror's demeanor as evidence that the prosecution did not have any real basis for striking the juror during voir dire.

<sup>128</sup> *See id.* Likewise, the court did not explain why this was evidence of the prosecutor's insincerity. However, the court probably viewed the prosecution's failure to ask the juror about his ability to accept English translations—and then excusing the juror on that basis—as evidence of the prosecution's discriminatory intent. *See* subpart VI(B) for more on a party's failure to pursue further questioning.

<sup>129</sup> *Id.*

the trial court had concluded that the prosecution had put forth a “valid, race-neutral reason” for excluding Jurors A and B, and that this was the prosecutor’s “true reason,” the Court of Appeal held that the peremptory challenges were not a mere pretext to cover up intentional discrimination against Latinos.<sup>130</sup> On the strength of these observations, the Court of Appeals affirmed the trial court’s rejection of the *Batson* challenge.

*Cardenas* exemplifies many of the difficulties with the pretext analysis. The striking party’s threshold of proof for offering race-neutral explanations is so low that plausible, run-of-the-mill justifications can be readily found or manufactured for striking almost any juror in almost any case. How is a trial court supposed to judge those justifications proffered by the prosecution? How is a judge supposed to read a prosecutor’s mind? How is an appellate court supposed to analyze the trial court’s credibility findings? How much deference should it accord to lower courts? How much is too much deference? As *Cardenas* demonstrates, the problems of analysis and implementation may be intractable even where the reasons proffered for exclusion are plainly unsound, undermined by “substantial evidence” of discriminatory intent, and acknowledged by the appellate court as such.

Indeed, the implication supported by cases like *Cardenas* is that to survive a *Batson* challenge, the striking party need only say something that does not contain the word “race” and describes a lack of confidence in a given juror’s ability to ignore non-English testimony. In this environment, trial and appellate courts are hard-pressed to deem any peremptory challenge based on language classifications as a pretext for race-based exclusion, despite the pattern of strikes and other outward indicia<sup>131</sup> of discrimination.

In another case, *Corona v. Almager*,<sup>132</sup> the Ninth Circuit addressed a deeply troubling *Batson* challenge. At Corona’s state court trial for attempted murder, the prosecutor exercised peremptory challenges to strike the only two black venire persons. When the defendant raised *Batson* objections, the prosecutor stated that the primary reason he struck one of the jurors, Juror 28, was that the “juror had a strong accent [from which] the prosecutor inferred a lack of English proficiency.”<sup>133</sup> Ironically, the trial judge was the “first to advance [the view] that juror 28’s accent was a reason to exercise a peremptory strike,”<sup>134</sup> suggesting that the court was itself biased against the juror. Meanwhile, the prosecutor conducted no further inquiry into Juror 28’s language ability and “failed to ask follow-up questions.”<sup>135</sup>

The Ninth Circuit upheld the denial of Corona’s *Batson* motion, citing the “considerable difficulty” the court and prosecutor had with the juror’s accent.<sup>136</sup> Yet, the District Court record “supports the *opposite* inference—that the [juror] *was* proficient in English.”<sup>137</sup> The juror read and answered questions perfectly in English.<sup>138</sup> He spoke in

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<sup>130</sup> *Id.*

<sup>131</sup> See discussion *supra* subpart IV(B) and *infra* subpart VI(B), for examples of outward indicia and patterns of strikes that may establish a prima facie case of discrimination.

<sup>132</sup> *Corona v. Almager*, 449 F. App’x 672 (9th Cir. 2011).

<sup>133</sup> *Id.* at 674.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Corona v. Almager*, No. CIV. 07-2117 BTM (NLS), 2008 WL 6926574, at \*13 (S.D. Cal. Nov. 3, 2008).

<sup>138</sup> *Id.*

open court using grammatically correct English, thereby strongly suggesting that “he spoke English proficiently, albeit with an accent.”<sup>139</sup> There were no questions from the court reporter to signal an issue with the juror’s English,<sup>140</sup> and “[n]either the prosecutor nor anyone else asked any questions [regarding the juror’s] . . . ability to speak and understand English.”<sup>141</sup> Simply put, there are “no objective, factual grounds in the record which support the . . . conclusion that the prosecutor’s strike appropriately rested on [the juror’s] inability to speak or understand English sufficiently.”<sup>142</sup> Nonetheless, the Ninth Circuit failed to acknowledge any of these points in its decision and simply concluded that nothing in the record “show[ed] that the trial court . . . ‘acted contrary to clearly established [Supreme Court] law in recognizing and applying *Batson*’s [framework].”<sup>143</sup>

With its decision in *Corona*, the Ninth Circuit afforded great deference to the state court despite substantial evidence showing the unreasonableness of the proffered reason for the peremptory strike. If the Ninth Circuit’s decision is accepted at face value, prosecutors will be permitted to strike any minority juror who speaks English with an accent—irrespective of whether the accent causes actual difficulty in understanding the juror’s speech. A fair reading of *Corona* is that the Ninth Circuit took largely on faith that the state court had gotten it right and, in the absence of egregious proof of discrimination, essentially swept aside troubling aspects of the issue presented by the District Court.<sup>144</sup>

Such fact patterns are common in California case law. In *People v. Jurado*,<sup>145</sup> the prosecutor challenged the juror’s language ability because the juror indicated that she was born in the Philippines, suggesting that English was not her first language and that she would have difficulty understanding spoken English. In *People v. Vargas*,<sup>146</sup> the Court of Appeals affirmed a lower court’s denial of a *Batson* objection by a Latino defendant, where the prosecutor used a peremptory strike based on the juror’s ability to speak Spanish, even though the juror believed his English was good enough to fully engage in deliberations. In *Vasquez v. Runnels*,<sup>147</sup> juror Liang possessed a level of proficiency in English sufficient to allow her to participate on the jury. However, the District Court<sup>148</sup> held that trial courts have great leeway in deciding these issues and, as such, it could not

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Corona*, 449 F. App’x 672 (citing *Early v. Packer*, 537 U.S. 3 (2002)).

<sup>144</sup> Another example of a case exhibiting egregious proof of discrimination is *U.S. v. Burton*, 191 F.3d 461 (9th Cir. 1999). In this unpublished opinion, the Ninth Circuit affirmed the lower court’s decision finding a prima facie showing of discrimination in the peremptory challenge directed against a Latino venire person. According to the court, there was “no indication in the record [to suggest] that [the juror] was having difficulty understanding or answering [in English] the questions posed to her, either orally or in writing.” *Id.* at \*1. Further, the striking party revealed a clear bias against Latinos in its earlier challenge by claiming that “people who are Spanish-speakers or Hispanic . . . no matter how clear they are, they generally don’t understand legal concepts of the law.” *Id.*

<sup>145</sup> 131 P.3d 400 (Cal. 2006).

<sup>146</sup> No. B207146, 2010 WL 119930 (Cal. Ct. App. Jan. 14, 2010), *cert. denied* (2010).

<sup>147</sup> No. C 05–4669 MMC PR, 2011 WL 1496040 (N.D. Cal. Apr. 20, 2011).

<sup>148</sup> Petitioner challenged in District Court the validity of a judgment obtained against him in California state court.

say whether the state court was unreasonable in allowing juror Liang's exclusion or whether it violated petitioner's Sixth Amendment rights.<sup>149</sup>

These California decisions reveal the potential arbitrariness of decisions concerning challenges based on language proficiency. They illustrate that the practice allows courts to accept implausible "race-neutral" explanations for challenges that, in reality, highly correlate with race. These decisions also show that the *Batson* standard is a perilous instrument that can be turned into "a mere exercise in thinking up any rational basis" for disqualifying linguistic minorities.<sup>150</sup>

Meanwhile, courts rarely grant *Batson* relief and do so only in truly egregious circumstances. In 2008, the California Court of Appeal, Third District, found such circumstances in *People v. Gonzales*.<sup>151</sup> During voir dire, the prosecutor exercised four peremptory challenges on prospective jurors, all of whom had Latino surnames. The defense contested two of these challenges—for jurors J.C. and F.R.—compelling the prosecutor to give reasons for their disqualification.<sup>152</sup> According to the prosecutor, the fact that they were "Spanish speaking" posed the risk that the jurors would ignore the official court translation.<sup>153</sup> He added that juror J.C.'s youth, as expressed through the absence of marital and parental relationships, suggested that he had insufficient maturity to serve as a juror.<sup>154</sup>

The Court of Appeal looked to the fact that the prosecutor failed to individually question any of the Latino jurors to determine their ability to accept only the interpreter's translation of Spanish testimony.<sup>155</sup> Indeed, there was nothing on the record to show that J.C. or F.R. would have problems accepting the interpreter's English translation.<sup>156</sup> The court observed that: (1) Spanish proficiency was not a race-neutral reason for excluding jurors J.C. and F.R.,<sup>157</sup> (2) the prosecution was, in effect, eliminating the "clearly Hispanic Spanish-speaking prospective jurors" who more closely identified with their ethnicity or national origin, and; (3) the prosecution offered no other reason that might have provided a race-neutral justification for challenging J.C. and F.R.<sup>158</sup> There was also nothing on the record to support the prosecutor's claim that J.C.'s youth prevented him from serving effectively as a juror.<sup>159</sup> On these grounds, the appellate court denied the challenges against J.C. and F.R., concluding that the strikes amounted to nothing more than "stereotypical assumptions about Latinos or bilinguals."<sup>160</sup>

<sup>149</sup> Although both parties ultimately passed the juror for cause and not peremptorily, this case aptly illustrates appellate courts' reluctance to disturb lower court decisions, and courts' willingness to accept implausible race-neutral, language-proficiency explanations despite substantial evidence to the contrary.

<sup>150</sup> *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

<sup>151</sup> 81 Cal. Rptr. 3d 205 (3d. Dist. 2008).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 208.

<sup>154</sup> *Id.* at 213.

<sup>155</sup> *Id.* at 212.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 211 (agreeing with defendant that Spanish proficiency was not a race-neutral reason for excluding jurors J.C. and F.R.; because the exclusion of both jurors raised the same issues, the court only analyzed J.C.'s case).

<sup>158</sup> *Id.* at 211–12.

<sup>159</sup> *Id.* at 213.

<sup>160</sup> *Id.* at 211 (quoting *Hernandez*, 500 U.S. at 361).

An interesting question that arises from the cases discussed above is whether the *Gonzales* court would have allowed the peremptory challenges if the prosecutor had questioned both jurors individually and they had answered that they would accept only the English translation. In *Cardenas*, the challenges were deemed acceptable largely on the assumption that the presence of such a question could be taken as an indicator of the prosecutor's "true" motivations, irrespective of the answer that the prosecutor received.<sup>161</sup> This issue never arose in *Gonzales*. However, the unanswered question of whether the *Gonzales* court would have followed *Cardenas* and allowed the peremptory challenges, had the prosecutor asked the jurors about the translation question, renders *Gonzales* a somewhat hollow victory for those who want *Batson* relief applied to viably protect linguistic minority jurors' rights.

*B. Case Law Findings: Batson's Failure, Untempered Judicial Discretion, and Implausible Race-Neutral Explanations*

Despite occasional successes like *Gonzales*, the arbitrariness of the *Batson* analysis with respect to multilingual prospective jurors continues to plague objecting parties who bear the unusual burden of proving the striking party's discriminatory state of mind. Indeed, proving states of mind is at best an elusive goal, yet in this context such a goal might be said to border on the impossible because discrimination—whether on the part of striking parties or of judges presiding over voir dire—may be either "conscious or unconscious."<sup>162</sup> Currently, moreover, striking parties need only provide "race-neutral" explanations, or explanations that are based on something other than race, to justify striking multilinguals.<sup>163</sup> Indeed, the threshold has been so low in practice that striking parties can meet their burden of proof by offering almost any explanation.

Trial judges must rely on credibility determinations where these explanations are concerned.<sup>164</sup> Since they only have direct access to facts and statements, not mental states, trial judges must divine the truth or "genuineness"<sup>165</sup> of the reasons proffered, which renders them "ill equipped to second-guess"<sup>166</sup> what appears to be facially neutral reasons to uncover discrimination. Indeed, the Supreme Court has admitted that there

<sup>161</sup> See *Cardenas*, 66 Cal. Rptr. 3d at 824, 826, 828.

<sup>162</sup> *Batson*, 476 U.S. at 106. The distinction between "conscious" and "unconscious" bias is helpful to the extent it reveals that unconscious bias warrants attention because it poses a unique challenge for antidiscrimination doctrine and advocacy. The distinction is also helpful because people may be willing to acknowledge the possibility of unconscious bias within themselves, while vigorously denying conscious bias. The unconscious bias claim therefore facilitates a consensus that the race problem persists. See e.g., Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); see also Jean Moule, UNDERSTANDING UNCONSCIOUS BIAS AND UNINTENTIONAL RACISM, available at

<http://people.uncw.edu/browna/documents/UnderstandingUnconsciousBiasUnintentionalRacism.pdf>.

Indeed, the U.S. Supreme Court acknowledged that "bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." *Gratz v. Bollinger*, 539 U.S. 244, 300–01 (2003) (Ginsburg, J., dissenting).

<sup>163</sup> *Hernandez*, 500 U.S. at 353.

<sup>164</sup> *Miller-El*, 537 U.S. at 324 (credibility can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy").

<sup>165</sup> See *Lenix*, 187 P.3d at 965.

<sup>166</sup> *Batson*, 476 U.S. at 106.

“will seldom be much evidence bearing on the issue [of discrimination] and that the best evidence often will be the demeanor of the attorney who exercises the challenge.”<sup>167</sup> Studies, however, have shown that determining neutrality or credibility based on demeanor is susceptible to great inaccuracies,<sup>168</sup> and a party can easily present false but neutral reasons while putting forward an honest and proper demeanor.

The fact that the race-neutral test relies on *subjective* criteria—the judge’s beliefs regarding the intent or mental state of the striking party—makes it all the more difficult to reach an *objective* result in which illegitimate forms of peremptory challenges are properly and consistently identified and rejected. Moreover, in states like California, where trial courts have substantial discretion in evaluating *Batson* issues because of the great deference accorded to them by reviewing courts,<sup>169</sup> both trial and appellate courts become reluctant to make the stark findings of attorney misconduct necessary to declare a *Batson* violation.<sup>170</sup>

The Supreme Court, meanwhile, has only compounded the problem. In *Johnson*,<sup>171</sup> where the court established the “reasonable inference standard,” the Court failed to explain what it meant by an acceptable inference of discrimination, leaving California with scarcely any guidance as to the type of evidence that would comport with its holding. Instead, California state courts escape constitutional scrutiny simply by using the same verbiage found in *Johnson*. They pepper their decisions generously with the term “race neutral,” but apply such language according to their own interpretation, allowing their opinions ultimately to comport with the *Batson* standard without actually changing their analysis post-*Johnson*.

The confusion wrought by *Batson* and its progeny has generated substantial literature on peremptory challenges. Some scholars conclude that eliminating peremptory challenges is the ideal response because it would not only prevent discrimination against minorities in jury selection, but would also alleviate the confusion cultivated by the complex *Batson* case law.<sup>172</sup> These scholars suggest that any value gained by allowing

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<sup>167</sup> *Hernandez*, 500 U.S. at 365.

<sup>168</sup> See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075, 1082–88 (1991) (empirical evidence shows that demeanor can diminish rather than enhance the accuracy of credibility judgments).

<sup>169</sup> *Lenix*, 187 P.3d at 955.

<sup>170</sup> See *People v. Jackson*, 13 Cal. 4th 1164, 1250–51 (1996) (“The tendency of trial courts to deal perfunctorily with [*Batson/Wheeler*] motions may be understandable, given the press of the court’s business, but it also further underscores the importance of appellate review [because] ‘[e]ven the most conscientious trial judge can be misled by such extraneous pressures as a reluctance to dismiss the venire after some or all of the jurors have been seated, or a felt urgency to begin taking testimony in a trial expected to be lengthy, or a natural disinclination to disbelieve assertions of good faith made by an attorney in open court.’”) (citing *People v. Johnson*, 767 P.2d 1047, 1105 (1989)).

<sup>171</sup> *Johnson*, 545 U.S. 162.

<sup>172</sup> See Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502 (1996) (based on his empirical study of court cases, Melilli concludes that peremptory challenges no longer serve a useful purpose); see also Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Marvin B. Steinberg, *The Case for Eliminating Peremptory Challenges*, 27 CRIM. L. BULL. 216 (1991); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986).

peremptory challenges to give effect to attorneys' hunches, suspicions, or arbitrary predilections is promptly overridden because such a system can be—and, in fact, is—easily manipulated to exclude minorities and other disfavored groups from jury service.<sup>173</sup>

Advocates of peremptory challenges, on the other hand, could point to studies showing a strong correlation between a minority juror's race and his or her decision not to convict, although other studies show an equally strong but opposite correlation.<sup>174</sup> Advocates posit that peremptory challenges provide “tangible” security by allowing attorneys to excuse jurors whom they believe—but cannot offer evidence to prove—are biased.<sup>175</sup> They argue that peremptory challenges ultimately lead to fairer juries and reassure litigants that they have a say as to who judges them.<sup>176</sup> These advocates also suggest other benefits to peremptory challenges, that is, that they prevent the unpleasantness of articulating concerns about juror bias and that they enable attorneys to swiftly remove jurors whom they have alienated through probing questions during voir dire.<sup>177</sup>

Other scholars have compiled evidence to suggest that the effects of juror race are context-dependent, with juror attitudes and experiences serving as more powerful predictors of juror verdicts.<sup>178</sup> Indeed, related research supports the view that giving force to stereotypes or hunches not only fails to produce less biased juries, it also results in juries that are more biased than randomly selected ones.<sup>179</sup> In other words, striking

<sup>173</sup> See *supra* text accompanying note 168.

<sup>174</sup> Compare Mark D. Bradbury & Marian R. Williams, *Diversity and Citizen Participation: The Effect of Race on Juror Decision Making*, 44 ADMIN. & SOC'Y 1, 13 (2012) (arguing that Latino jurors are more likely to convict) with Stephen P. Garvey, et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 372, 382 (2004) (arguing that Latino jurors are less likely to convict than white jurors, but the difference between the two groups fails to reach statistical significance); see also Richard Seltzer, *Scientific Jury Selection: Does it Work?*, 36 J. APPLIED SOC. PSYCHOL. 2417, 2419 (2006) (noting that in one pornography case, there was a strong relationship between race and juror attitudes toward conviction, but in a similar case in a different jurisdiction, there was an equally strong relationship between these two variables in the opposite direction).

<sup>175</sup> See Valerie P. Hans & Neil Vidmar, *Jury Selection*, in THE PSYCHOLOGY OF THE COURTROOM 39, 63 (1982).

<sup>176</sup> See *id.* (“Babcock argues that the peremptory challenge serves the valuable function of allowing defendants some additional choice in the jury that will decide their fate, a choice unfettered by the requirements of legal tests or rationales for exclusion.”).

<sup>177</sup> Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 554–55 (1975).

<sup>178</sup> See Valerie P. Hans & Alayna Jehle, *The Jury in Practice: Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1180 (2003); see also Tanya S. Taylor & Harmon M. Hosch, *An Examination of Jury Verdicts for Evidence of a Similarity-Leniency Effect, An Out-Group Punitiveness Effect, or a Black Sheep Effect*, 28 LAW & HUM. BEHAV. 587, 597 (2004); Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 LAW & HUM. BEHAV. 545, 546-48 (1995).

<sup>179</sup> Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of Its Content and Effect*, 18 LAW & HUM. BEHAV. 487, 498 (1994) (arguing that striking jurors based on stereotypes or hunches fails to produce a less biased jury, but results in juries that are worse than or, at best, similar to a random selection); see also Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 737 (2006) (demographic characteristics like race generally account for very little of the variation in verdict response); EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING THE DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 87 (2003) (as in the criminal context, jurors' characteristics have little to no effect in the civil context); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on*

potential jurors based on stereotypes produces a homogenous jury that denies a defendant a right to an impartial jury. All in all, by far the strongest indicator of juror verdicts is likely to be the evidence presented at trial.<sup>180</sup> Nonetheless, the weight of tradition behind them and the reassurance that they provide to litigants probably mean that peremptory challenges will remain a fixture in jury selection. This likelihood poses an important challenge for California and for other state courts.<sup>181</sup> After all, if existing doctrine and practice remain unchanged, *Batson* will continue to allow reliance on language as a pretext for race in jury selection, thereby disenfranchising racial and linguistic minorities, and undermining public perception of integrity in the judicial process.

### C. Ineffective California Laws that Heighten Hernandez's Effect

California's constitution, like the U.S. Constitution, prohibits the use of peremptory challenges to exclude prospective jurors based on race and declares the right of defendants to a trial by jury drawn from a representative cross section of the community.<sup>182</sup> In practice, however, California state laws have not provided linguistic minorities with any greater or more meaningful protection than have federal laws in attempting to prevent discriminatory jury selection practices. While California's venire selection mechanisms<sup>183</sup> and Penal Code<sup>184</sup> were amended to protect "representational due process values,"<sup>185</sup> exclusion of multilinguals from jury service because of imagined language issues raises Sixth Amendment concerns, which these laws were meant to stay. In other words, while venire mechanisms and the Penal Code were amended to protect Sixth Amendment guarantees that allow an accused to "enjoy . . . a speedy and public trial, by an *impartial jury*,"<sup>186</sup> California has failed in this objective by allowing

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*Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 673 (2001) (few if any juror characteristics are good predictors of jury verdict preferences and those characteristics that are related to juror verdict preferences have weak and inconsistent effects); REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 149 (1983) (the relationship between demographic characteristics, such as race, and verdict preferences is weak).

<sup>180</sup> See Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1, 13–14 (1987).

<sup>181</sup> U.S. Supreme Court opinions suggest that though there are problems with peremptory challenges, they are ultimately fair because the strikes of one party will always be offset or canceled out by the strikes of the second party. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 159 (1994) (In his dissent, Justice Scalia declares that "[t]his case is a perfect example of how the system as a whole is evenhanded" in its treatment of peremptories and other legal tools.).

<sup>182</sup> See CAL. CONST. art. I, § 16 ("Trial by jury is an inviolate right and shall be secured to all . . ."); CAL. PENAL CODE Section 904.6(e) (West 2012); *People v. Wheeler*, 583 P.2d 748, 755 (Cal. 1978) (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)) ("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."), *overruled on other grounds by Johnson*, 545 U.S. 162.

<sup>183</sup> See CAL. CONST. art. I, § 16 ("Trial by jury is an inviolate right and shall be secured to all . . .").

<sup>184</sup> CAL. PENAL CODE § 904.6(e) (West 2012).

<sup>185</sup> *Hobby v. U.S.*, 468 U.S. 339, 346 (1984).

<sup>186</sup> U.S. CONST. amend. VI (emphasis added). The California Supreme Court has also recognized the value of the representative cross section requirement via impartial juries. See *People v. Wheeler*, 583 P.2d 748, 762 (Cal. 1978), ("[T]he primary purpose of the representative cross section requirement . . . is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences." When racial minorities are underrepresented on jury venires, "such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the

*Hernandez*-based challenges to overwhelm its constitution, leading to the de facto restriction of jury service to monolinguals, who represent little more than half of California's total population.<sup>187</sup>

Indeed, disqualifying multilingual jurors based on language classifications violates state laws by producing juries that do not adequately reflect a broad or "representative cross section of the population."<sup>188</sup> These exclusions further violate a defendant's right to a fair hearing because juries should be made up of one's peers, and this point is particularly salient in light of the fact that most defendants are not monolinguals. Ultimately, such exclusions not only result in the infringement of personal or constitutional<sup>189</sup> rights, but they also deny multilinguals the opportunity to participate in a vital aspect of civic life.

While California's venire laws have failed to protect multilinguals' right to jury service, California's "English Only" laws have reduced multilinguals' participation in jury service by imposing an arbitrary standard that allows only those who speak English "sufficiently" well to participate in jury service.<sup>190</sup> Overall, these laws have worked in concert to heighten the impact of *Hernandez* on multilinguals. Since *Hernandez* allows even those multilinguals who are fluent in English to be excluded on the basis of their multilingualism, the already-small pool of multilingual potential jurors is further diminished.<sup>191</sup> All of these laws, consequently, reinforce each other and combine to facilitate the systematic exclusion of multilinguals from jury service.

In light of the negative impact of *Hernandez* and the rest of California's discriminatory framework on linguistic minorities, and the remote prospect of abolishing peremptory challenges, it is clear that there is a pressing need for special measures to protect multilinguals' right to jury service and to encourage greater diversity in jury venires.<sup>192</sup>

#### *D. The Importance of Diverse Juries*

Jury diversity is especially salient in light of the fact that most U.S. jurisdictions today are both racially and linguistically heterogeneous. A diverse jury enhances the quality of deliberations by bringing together a range of perspectives to test the evidence and arguments in the case. A jury verdict, moreover, should reflect the community's

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majority."); *see also* *People v. Bell*, 778 P.2d 129, 167 (Cal. 1989) (Broussard, J., dissenting) ("[T]he only practical way to achieve an overall impartiality is to encourage the representation of . . . a variety of [racial] groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.").

<sup>187</sup> See Shin et al., *supra* note 3, at 8–10 (monolinguals represent 57% of California's total population).

<sup>188</sup> CAL. PENAL CODE § 904.6(e) (West 2012); *see also supra* text accompanying note 181.

<sup>189</sup> This paper will not revisit these constitutional issues, which have already been discussed by other authors. *See* H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. ILL. U. L. REV. 295 (1996) (describing *Hernandez* as an indication that the Court has prioritized the peremptory challenge over the Equal Protection Clause); Andrew P. Averbach, *Language Classifications and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481 (1994) (suggesting a way for the Equal Protection Clause to protect linguistic minorities); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993) (describing *Hernandez* as diluting the line of *Batson* protections).

<sup>190</sup> *See* Part III of this paper for a discussion of California's "English Only" laws.

<sup>191</sup> *See supra* text accompanying note 72.

<sup>192</sup> *See* Part VI for suggested measures.

conscience if it is to be legitimate in the eyes of the community, and both the perceived and real accuracy of this reflection are enhanced to the extent that the decision makers are drawn from a fair cross section of that community.<sup>193</sup>

Striking linguistic minorities from a jury because they are more likely to understand the witnesses' original testimony arguably excludes the very people who will be able to understand the testimony most accurately and undermines the system's ultimate goal of justice. After all, linguistic minorities' ability to help correct translation errors and distortions can positively contribute to the truth-seeking function of a jury trial. Such exclusions, moreover, can harm linguistic minorities' perceptions of the justice system, threatening their belief in its fairness and influencing others in the community to lose confidence in a system that tolerates discriminatory exclusions.<sup>194</sup>

Allowing the exclusion of any potential juror on the grounds that he or she will bring the biases of a particular racial group into the jury room is to misunderstand the democratic task of the jury, which is precisely to represent the diversity of views held in a heterogeneous society. If the jury is balanced to accomplish this representative task, then as a whole it will be impartial, even if no one juror is perfectly so. Linguistic minorities' participation in juries is especially important because their viewpoints can help stimulate discourse that might otherwise not be explored, even if the ideas considered are not ultimately accepted by the group. Although the Supreme Court has held that the Sixth Amendment's fair cross section requirement does not extend to potential jurors' viewpoints,<sup>195</sup> empirical studies have shown that racially diverse juries are *better* decision makers than all-white juries: they exchange a wider range of information; demonstrate more complex thinking; are less biased, more thorough, and more competent; devote more time to discussing and resolving polarizing or uncomfortable topics; discuss more trial evidence; and, make fewer factually inaccurate statements in discussing the evidence than do all-white juries.<sup>196</sup> In adding new perspectives, linguistic minorities thus contribute to a framework in which jury decisions are qualitatively better, even when these decisions are not actually different from what they otherwise might have been. Thus, minority participation is a valuable component in the interpretive process, and the participation of linguistic minority jurors encourages balance and impartiality during deliberations.

Diverse juries also promote a positive social good that may go beyond the courtroom given that participants share their experiences and the products of their education during deliberations, which enables individuals of diverse backgrounds to learn to work together as equals.<sup>197</sup> Within the judicial process, diverse juries positively influence the performance of attorneys, including their voir dire strategies, trial preparations, and presentations.<sup>198</sup> Above all, diverse juries embody the ideals enshrined

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<sup>193</sup> See *supra* text accompanying note 181 for a discussion of the cross section requirement.

<sup>194</sup> See *Powers*, 499 U.S. at 406–09, 411 (recognizing that the jury and even the entire community may lose confidence in a justice system that tolerates discriminatory exclusions).

<sup>195</sup> See *Lockhart v. McCree*, 476 U.S. 162, 178 (1986).

<sup>196</sup> Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 598, 600, 606–08 (2006).

<sup>197</sup> HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION 16 (2003).

<sup>198</sup> *Id.*

in both the U.S. and the California constitutions and must, therefore, be protected and ensured.

## VI. IMPROVING THE CALIFORNIA FRAMEWORK

### *A. Recommendations to Judges, Courts, and Litigating Parties*

Improving the application of California's pretext analysis is necessary and requires that courts and litigants bear the following considerations in mind. From a trial judge's standpoint, perhaps the most obvious remedy is meaningful judicial oversight of the jury selection process. A trial judge could ensure that several information-gathering tools are used in voir dire, including individualized and collective questioning of prospective jurors, written questionnaires to supplement oral voir dire, meaningful co-participation of judge and lawyer in questioning prospective jurors, and adequate time for parties and the court to implement such practices. In cases where voir dire is less dominated by the trial judge, the judge should still include an opportunity to ask at least a few individualized questions of potential jurors, all the while subjecting the attorneys to meaningful judicial oversight. Such practices can ultimately help the trial court assess whether the proffered "race-neutral" explanations for striking a given juror were a pretext for language-based racism.<sup>199</sup>

When a trial judge decides a peremptory-related matter, he or she should be vigilant when applying each of the three steps of the *Batson* test, and should ensure that each step is properly and carefully considered and supported by the record. Because reviewing courts look to trial records when adjudicating *Batson* appeals, defects or a lack of evidence in the record could be a basis for remand. A trial judge should, therefore, include on the record both the reasons for the decision and any circumstances that were crucial to the determination. Moreover, a trial judge should neither rely on generalities nor resolve peremptory objections summarily, but should develop a record that clearly outlines the findings with respect to each *Batson* step so that an appellate court will be in a position to evaluate intelligently the soundness of the trial judge's decision.

For their part, appellate courts should not confer undue deference to trial courts in their review procedures. Because a meaningful multi-judge review is part of California's design for deciding appeals involving its citizens and laws, the first step is to recognize that the rule of deference has important limits if California is to improve its application of the pretext analysis. Appellate courts should not invoke the rule of deference to avoid close analysis of difficult questions. Instead, they must carefully and thoroughly review the lower court's decision along with its record and offer clear reasons and guidelines in stating their own opinions. After all, it is only from appellate opinions that trial judges learn the boundaries of their discretionary power.

Indeed, the California opinions discussed in this article illustrate the fact that appellate courts have fallen far short of satisfactorily defining or clarifying the notion of abuse of discretion. This would not be the case if appellate courts crafted guidelines that

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<sup>199</sup> Of course, with more information, an attorney is better prepared to offer a reason that sounds non-pretextual. Indeed, certain voir dire techniques, such as sequestration of individual potential jurors, can provide more complete disclosures from jurors that could be used to justify striking the juror. *See, e.g.,* Shari Seidman Diamond, et al., *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J. L. & PUB. POL'Y 77 (1998).

could adequately prevent the discriminatory use of peremptory challenges. For example, appellate courts should start by recognizing that trial courts rely heavily on assessments of a striking party's motivations when deciding *Batson* challenges. In response, appellate courts should require judges to specify the basis of their "motivational judgments," and they could enforce this requirement by refusing to defer to the findings of lower courts that neglect to do so.<sup>200</sup> In fact, appellate courts would likely become more sensitive to the need for abuse-of-discretion guidelines if they sat regularly as trial judges,<sup>201</sup> for it would remind them that records often fail to convey important factors upon which cases should be decided. Ultimately, the rule of discretion need not contribute to discrimination against linguistic minorities if those who confer and review its application understand and remain sensitive to the dangers that it carries.

In turn, striking parties should be required to articulate plausible, race-neutral, and specific reasons for each peremptory strike. If this were the case, and if review were more thorough and less deferential than at present, striking parties would be forced to accept the fact that they would be better served by assessing the attitudes and experiences of multilingual jurors than by making assumptions—or pursuing "hunches"—based simply on language or race. Objecting parties, for their part, must raise a timely *Batson* challenge by objecting during voir dire or before the swearing of the venire panel.<sup>202</sup> The objecting party must also clearly specify the grounds for the objection. Failure to do so—either because the objection was general or because it specified a different ground than that raised on appeal—will neither weaken the peremptory strike nor preserve the issue for appellate review. Most importantly, the objecting party must pay close attention to the first step, or the prima facie prong, of the *Batson* analysis and support the objection by presenting evidence that is supported by the factual record.<sup>203</sup>

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<sup>200</sup> Although this measure would be an exception to the usual deference granted to trial courts on credibility-related judgments, it would address many of the issues discussed in subparts V(A) and (B) of this paper. However, in a recent decision, *Ayala v. Wong*, the Ninth Circuit held that an appellate court "cannot defer to the trial court where procedural error . . . has rendered the trial court's determination unreliable." 693 F.3d 945, 972 (2012) (Defendant's counsel was mistakenly excluded from *Batson* proceedings, thereby depriving him of the opportunity to persuade the trial judge that the prosecutor was motivated by racial bias. The trial court also lost the vast majority of juror questionnaires, preventing the appellate court from engaging in proper comparative juror analysis.).

<sup>201</sup> While appellate judges may be reluctant to consider this suggestion because it would require more of their time, places like Mississippi have successfully implemented this measure. Mississippi allows appellate judges to pursue trial judge duties in an effort to save the state money, and appellate judges have appreciated this move since it would help them become "better" at their jobs by keeping them "in touch with reality."

*Court of Appeals Judges Sit As Special Trial Judges*, STATE OF MISSISSIPPI JUDICIARY, <http://courts.ms.gov/news/2005/01.06.05specialappt.pdf>.

<sup>202</sup> See, e.g., *U.S. v. Changco*, 1 F.3d 837, 841 (9th Cir. 1993) (admitting the defense presents "significant arguments" to establish a prima facie case of language discrimination, but denying these objections because they were neither raised in a timely manner, nor supported by a factual record); *Guillen v. Scribner*, No. CV 05-4519 VBF (JC), 2010 WL 2509416, at \*27 (C.D. Cal. Mar. 23, 2010) (dismissing defense's objections to the peremptory challenge because of "*Batson*'s inherent timeliness requirement").

<sup>203</sup> See, e.g., *Changco*, 1 F.3d at 841 (stating that objections to peremptory challenges should be supported by the factual record).

### *B. Recommendations for Developing the Factual Record*

This section presents recommendations for strategies that objecting parties should employ to show objective evidence that a prima facie case for discrimination exists. These strategies are recommended because their use increases the likelihood that the objecting party can overcome the striking party's race-neutral explanation and show intent to discriminate under step three of the *Batson* analysis. However, as some of the recommendations included in this section relate to strategies that have not yet been formally recognized by California state or federal courts, this section should also be taken as an appeal to these courts to do so as soon and as definitively as possible to establish a more just and concrete framework within which parties can develop a factual record and support discrimination claims.

First, California federal courts should follow state courts and the Eleventh Circuit<sup>204</sup> in allowing objecting parties to present, where relevant, evidence of a historical pattern in which the striking party excused members of a particular group from the prospective jury pool in other, unrelated cases.<sup>205</sup> This does not mean that counsel can or should be required to show that a striking party always excluded every member of a cognizable group over any particular period of time,<sup>206</sup> but that evidence of any such pattern can contribute to a showing of intent on the part of the striking party to disenfranchise members of the cognizable group. At the same time, it must be noted that the California Supreme Court held that even if counsel successfully establishes the striking party's pattern of excusal of all members of a particular group, which raises an inference of impropriety, it is not dispositive. In such instances, trial courts are expected to evaluate the strikes in light of the totality of circumstances surrounding these strikes.<sup>207</sup> Objecting parties should therefore be prepared to marshal other evidence that supports their discrimination claims.

Second, the California Supreme Court should follow the Ninth Circuit's lead and allow state courts to consider comparative juror analysis as evidence for establishing step one, or the prima facie prong, of the *Batson* test. Comparative juror analysis considers whether the answers of challenged jurors were similar to, or different from, those of jurors who went unchallenged.<sup>208</sup> The results of such an analysis can support an inference that differential treatment of individuals, if not based on different (individual) answers, may derive from their membership in racial or minority groups. Indeed, the Ninth Circuit has conducted comparative juror analyses sua sponte in a variety of cases and, by emphasizing the value of comparative evidence in preventing a court from unreasonably accepting racial motives as nonracial, it has implied that lower courts should do the same.<sup>209</sup> As it stands, the California Supreme Court has limited the use of this analysis by allowing state courts to consider such evidence only during the third step of the *Batson*

<sup>204</sup> See the Eleventh Circuit apply the historical pattern test in *Willis v. Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983).

<sup>205</sup> See the California Supreme Court apply the historical pattern test in *People v. Crittenden*, 885 P.2d 887, 903 (Cal. 1994).

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> *Johnson*, 71 P.3d at 280–81, *overruled by Johnson*, 545 U.S. 162.

<sup>209</sup> See *Ali v. Hickman*, 571 F.3d 902, 910 (9th Cir. 2009) *amended by*, 584 F.3d 1174 (9th Cir. 2009); *Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006); *Boyd v. Newland*, 467 F.3d 1139, 1151 (9th Cir. 2006).

inquiry.<sup>210</sup> The Ninth Circuit, however, has argued that “[t]here is nothing that suggests that it is more difficult or less desirable to engage in such analysis at step one rather than step three of *Batson*.”<sup>211</sup>

Third, counsel in state or federal proceedings should raise the issue of statistical disparities, with respect to the proportion of available minorities stricken from the venire, the disproportionate rate of strikes against minorities, or both.<sup>212</sup> Moreover, since California courts have not specified the numerical data necessary to raise or support an inference of discrimination, they should adopt the Second Circuit’s approach in this regard. In its analysis, the Second Circuit differentiates the issues of challenge rate and exclusion rate.<sup>213</sup> The challenge rate focuses on the proportion of peremptory challenges exercised against minority group members and the proportion of group members removed, whereas the exclusion rate focuses on patterns where group members were completely or almost completely excluded from the jury.

In practice, the challenge rate compares the “total peremptory strikes against members of a cognizable racial group . . . to the percentage of that racial group in the venire.”<sup>214</sup> The exclusion rate records the disproportionate number of peremptory challenges used to strike members of a cognizable racial group.<sup>215</sup> The Second Circuit believes that the “distinction between the two types of challenges is an important one” because cases involving challenge rates are successful upon a finding of “substantial statistical disparity,” while cases involving exclusion rates “have typically included patterns in which members of the racial group are completely or almost completely excluded from participating on the jury.”<sup>216</sup>

To establish a prima facie case, the Second Circuit has required a complete record for both the challenge rate and exclusion rate.<sup>217</sup> First, to establish a prima facie case based on the challenge rate, “the record should include, at a minimum, the number of peremptory challenges used against the racial group at issue, the number of peremptory challenges used in total, and the percentage of the venire that belongs to that racial group.”<sup>218</sup> In *United States v. Alvarado*,<sup>219</sup> the prosecution’s challenge rate against minorities was 50% (three of six) in the selection of twelve jurors, and 57% (four of

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<sup>210</sup> *Lenix*, 187 P.3d at 950.

<sup>211</sup> *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006).

<sup>212</sup> *See* *People v. Neuman*, 97 Cal. Rptr. 3d 715, 719, 725 (Cal. Ct. App. 2009); *Paulino v. Harrison*, 542 F.3d 692, 703 (9th Cir. 2008); *Fernandez v. Roe*, 286 F.3d 1073, 1078–79 (9th Cir. 2002) (Prosecutor disproportionately struck four of seven (57%) Latinos, supporting an inference of discrimination. Prosecutor also struck the only two black venire members, which, standing alone, is not always enough to establish a prima facie case. However, prosecutor’s prior use of peremptory challenges against Latino venire members, taken together with subsequent strikes against the only two black venire members, additionally supported inference of discrimination.); *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995) (finding prima facie case of discrimination to be established when the government uses 56% of its peremptory challenges against black venire persons, although black venire persons comprise only 30% of the venire population), *overruled by* *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc).

<sup>213</sup> *See* *Jones v. West*, 555 F.3d 90, 97–98 (2d Cir. 2009).

<sup>214</sup> *See id.* at 98.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *See* *Sorto v. Herbert*, 497 F.3d 163, 171–72 (2d Cir. 2007).

<sup>218</sup> *See id.*; *Jones*, 555 F.3d at 98.

<sup>219</sup> 923 F.2d 253 (2d Cir. 1991).

seven) in the selection of twelve jurors plus alternates.<sup>220</sup> Because the court did not know the percentage of minorities in the venire, it used as a proxy the percentage of minorities in the population of the Eastern District of New York from which the venire was drawn (29%).<sup>221</sup> The court reached the conclusion that “a challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under *Batson*.”<sup>222</sup> In *United States v. Franklyn*,<sup>223</sup> the government used half of its peremptory challenges against black potential jurors, who made up only one-eighth of the venire, establishing a prima facie case of discrimination.

To establish a prima facie case based on the exclusion rate, “the record need only include how many members of that group were in the venire, and how many of those were struck.”<sup>224</sup> In *Jones v. West*,<sup>225</sup> the prosecutor used peremptory challenges to strike four of five black venire members not already struck for cause, establishing a pattern of prima facie case of discrimination. In *Green v. Travis*,<sup>226</sup> though the court lacked precise data about the composition of the venire, the prosecutor used all of his peremptory strikes to remove black and Latino venire members and struck all black venire members not already struck for cause, establishing a pattern of prima facie case of discrimination. In *Harris v. Kuhlmann*,<sup>227</sup> peremptory strikes that excluded all five black potential jurors established a pattern of prima facie case of discrimination, while in *Tankleff v. Senkowski*,<sup>228</sup> peremptory strikes that excluded the only three black potential jurors constituted a sufficiently dramatic pattern to establish a prima facie case of discrimination.

Counsel in state and federal proceedings should also keep in mind that jury selection procedures may give rise to an inference of prejudice even if opposing counsel does not actively strike potential jurors. Counsel should consider whether the trial court might have allowed a jury shuffle that prevented a random selection of jurors. The jury shuffle is a tool commonly used in Texas criminal trials to change the seating order for the jury pool.<sup>229</sup> Specifically, venire members’ names are reshuffled or rearranged, which affects the order in which these members are seated and therefore reached for questioning. The jury shuffle has been considered problematic<sup>230</sup> because once the order is established, the panel members seated at the back are likely to escape voir dire altogether, for those not questioned by the end of the week are dismissed.<sup>231</sup> In essence, the jury shuffle has been used as a tool to deliberately move racial minorities to the back of the venire panel where they are less likely to be considered and selected. Indeed, California’s own version of jury shuffling is already admissible as evidence of bias and

<sup>220</sup> *Id.* at 255.

<sup>221</sup> *Id.* at 255–56.

<sup>222</sup> *Id.* at 255.

<sup>223</sup> No. S1 96 CR. 1062 (DLC), 1997 WL 334969 (S.D.N.Y. June 16, 1997) *aff’d*, 157 F.3d 90 (2d Cir. 1998).

<sup>224</sup> *See Jones*, 555 F.3d at 99; *Harris v. Kuhlmann*, 346 F.3d 330, 345–46 (2d Cir. 2003).

<sup>225</sup> 555 F.3d 90.

<sup>226</sup> 414 F.3d 288 (2d Cir. 2005).

<sup>227</sup> 346 F.3d 330 (2d Cir. 2003).

<sup>228</sup> 135 F.3d 235 (2d Cir. 1998).

<sup>229</sup> *See Blanton v. Quarterman*, 543 F.3d 230, 242 (5th Cir. 2008).

<sup>230</sup> *William v. Dorsaneo III et al.*, TEXAS CIVIL PROCEDURE: TRIAL AND APPELLATE PRACTICE § 2.01(E)(1) (2010) (discussing criticisms of the jury shuffle in racial contexts).

<sup>231</sup> *Id.* at 242.

procedural abuse.<sup>232</sup> To the extent that a jury shuffle occurs in the venire selection process and that counsel believes such a shuffle has defeated the random selection of potential jurors, counsel should raise this procedural challenge. Courts should then consider whether the departure from a random selection excluded linguistic minorities from participating in voir dire.

Finally, state and federal courts should consider allowing evidence of a striking party's failure to pursue further questioning as a legitimate element in raising a prima facie case of discrimination.<sup>233</sup> Indeed, asking few or no follow-up questions regarding a juror's English proficiency and then excusing that juror on the basis of a perceived "insufficiency" is, as common sense dictates, counterintuitive and may well raise an inference that something else—namely, discrimination—is at work. However, courts may be reluctant to pursue this line of reasoning because the striking party can always claim that the decision to ask few or no follow-up questions was warranted based on the juror's questionnaire or existing voir dire answers, and that further questioning would have been unnecessary or a waste of time. Therefore, it may be appropriate in practice to combine a failure to pursue further questioning with one or more of the other types of evidence discussed above, e.g.,: (1) a statistical disparity analysis, such as one in which the striking party is shown to have removed the only remaining linguistic minority from the panel; or (2) a comparative juror analysis that demonstrates that the responses of those jurors who were excused were not substantially different from those of other jurors who were allowed to serve. Such combined use can overcome the aforementioned objection and, thus, allow this common and significant type of evidence to play a role in establishing an overall case for discrimination.

### *C. Recommendations for the California Legislature*

First, state legislators should reconsider California's "Official English" laws. Sadly, these laws have exacerbated the negative impact of *Hernandez* and resulted in the

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<sup>232</sup> See CAL. CIV. PROC. § 222(b) (West 2012) (court shall seat prospective jurors in random order); *Woods v. Scribner*, No. 1:02CV05894-JKS, 2007 WL 852184, at \*11 (E.D. Cal. Mar. 21, 2007) (court acknowledges that "shuffling of juries to place white [jurors] ahead of black jurors" is evidence of pretext); see also *People v. Mayfield*, 928 P.2d 485, 519 (1997) (Jury ordering or shuffling procedures that unnecessarily narrow a jury pool are disfavored. Courts should, therefore, strictly adhere to statutory provisions designed to provide defendants with juries constituting as nearly as reasonably possible a random cross section of the community.); *People v. Visciotti*, 825 P.2d 388, 404–09 (1992) (Defendants have a constitutional right to a jury drawn from a representative cross section of the community. To show that this right was violated, a defendant must demonstrate that the trial court's failure to seat prospective jurors randomly affected his or her ability to select a jury drawn from a representative cross section. In other words, a defendant must show that the jury selection procedure prevented a random selection of jurors and, thus, held the potential for abuse or appearance of partiality.); *People v. Wright*, 802 P.2d 221, 238–41 (1990) (Jury ordering or shuffling procedures used to select prospective jurors for voir dire do not deny a defendant his right to a randomly selected jury if: (1) selection was not undertaken by a single person, (2) there was no evidence that these prospective jurors were aware that the order in which they entered the courtroom or were seated would determine whether they would be included in voir dire, and (3) defense counsel was able to fully question them and exercise his peremptory challenges in an informed manner).

<sup>233</sup> Indeed, the Supreme Court has already recognized that "disparate questioning" of venire persons can raise a reasonable inference of discrimination. See *Miller-El*, 545 U.S. at 234. *People v. Gonzales*, discussed in subpart V(A) of this paper, also offers a good rationale for why a failure to pursue further questioning should be considered in raising a prima facie case of discrimination.

disenfranchisement of linguistic minorities from jury service. Indeed, it is ironic that, although it is clearly and demonstrably the case that linguistic minorities are underrepresented in jury service, obstacles are thrown in their path that effectively prevent them from exercising their civic duty. Thus, California legislators should (1) consider abolishing discriminatory Official English laws; and (2) allow state courts to expand their existing infrastructure so that they can better accommodate linguistic differences in the full spectrum of courtroom activity, including jury composition. For example, under the California Rules of Court, Rule 985, which governs interpreter services in the courts,<sup>234</sup> the corps of courtroom interpreters could be expanded to accommodate those jurors who, in the court's view, do not possess "sufficient" English skills. This accommodation could also be extended to non-English-speaking citizens.

Second, state legislators could consider allowing convicted felons to participate in jury service.<sup>235</sup> Convicted felons in California must be pardoned by the Governor to have their civil rights restored so they can participate in jury service.<sup>236</sup> However, not all felons are eligible for pardon and<sup>237</sup> even for those who are, state law mandates procedures that make it extremely difficult for felons to shed their status.<sup>238</sup> This is especially troubling

<sup>234</sup> See e.g., CAL. JUD. ADMIN. R. 10.51 (West 2012).

<sup>235</sup> See CAL. CIV. PROC. CODE § 203(a)(5) (West 2012) (disqualifying from jury service those who have been convicted of a felony). One common argument against including convicted felons as jurors is that they are "inherently biased," and allowing them on a criminal jury would deny a criminal defendant the right to an impartial jury. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 71 (2003). However, some scholars counter that defining felons as "inherently biased is inconsistent with [court] decisions affirming verdicts rendered by juries with felons," and that exclusions are often applied over-inclusively in states that allow clemency felons to serve. *Id.* at 85. Based on a 2003 study, thirty-one states exclude felons from serving on juries for life, unless their rights are restored pursuant to discretionary clemency rules. *Id.* at 157. However, two states—Maine and Colorado—do not exclude convicted felons from serving on juries. *Id.* at 158.

<sup>236</sup> See *California Courts: The Judicial Branch*, FREQUENTLY ASKED QUESTIONS, <http://www.courts.ca.gov/3953.htm#felon> (last visited Feb. 20, 2012); U.S. Dept. of Justice, *Civil Disabilities of Convicted Felons: A State-By-State Survey*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, 29–30 (Oct. 1996) <https://www.ncjrs.gov/pdffiles1/pr/195110.pdf>.

<sup>237</sup> See *California Department of Corrections and Rehabilitation*, HOW TO APPLY FOR A PARDON: STATE OF CALIFORNIA, OFFICE OF GOVERNOR, [http://www.cdcr.ca.gov/BOPH/docs/apply\\_for\\_pardon.pdf](http://www.cdcr.ca.gov/BOPH/docs/apply_for_pardon.pdf) (last visited Feb. 20, 2012).

<sup>238</sup> See e.g., COUNTY OF SAN DIEGO, EXPUNGEMENT, *available at* [http://www.sdcounty.ca.gov/public\\_defender/expungement.html](http://www.sdcounty.ca.gov/public_defender/expungement.html). Under California law, expunging a felony conviction requires the individual to attend a formal court hearing regarding his or her expungement, with the presiding judge having complete discretion over the matter. *Id.* Therefore, the hearing may require calling witnesses, filing legal declarations, and preparing additional information for the court about the individual's particular circumstances. This requires money, time, and a good attorney. Indigent individuals can seek assistance from the Public Defender's Office and apply for a filing fee waiver, but these resources are subject to eligibility. *Id.* Under California law, moreover, expungement is just the first step toward obtaining a pardon for a felony conviction. *Id.* California Penal Code 1203.4 also makes clear that the felony case is not sealed, but simply "dismissed," which means that the conviction remains on the record. Thus, there are numerous limitations to expungements. See also Samara Marion, *Justice by Geography - A Study of San Diego County's Three Strikes Sentencing Practices from July–December 1996*, 11 STAN. L. & POL'Y REV. 29 (1999) (California's three strikes law allows non-violent offenses to be elevated to a felony and to be tried as a second or even third felony strike, dramatically increasing the number of felons in the state).

since over 165,000 Californians are in jails and prisons,<sup>239</sup> with racial minorities constituting 73% of the male prison population and 52% of the female prison population.<sup>240</sup> In fact, Latinos alone comprise 38% of male prisoners, 28% of female prisoners, and 64% of all foreign-born prisoners.<sup>241</sup> These numbers suggest that racial *and* linguistic minorities are disproportionately represented in jails and prisons, and that felon jury exclusion may be a strong contributor to the low incidence of racial and linguistic minorities serving on California juries. However, if convicted felons who have completed their sentences are made eligible for jury service, legislators and courts would also need to establish procedures to mitigate against convicted felons being challenged and dismissed disproportionately; otherwise, the positive impact on jury diversity could be severely undercut.

Finally, state legislators should allow non-county residents to participate in jury service.<sup>242</sup> Given the exceptional mobility of California's low-income minorities,<sup>243</sup> allowing individuals to serve regardless of their county residence status would significantly increase the pool of linguistic minorities eligible for jury service. Indeed, a study based on 1999 to 2000 showed that approximately 16% of Californians were disqualified from jury service,<sup>244</sup> and that the second "most common reason for

<sup>239</sup> Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisons in 2010*, BUREAU OF JUSTICE STATISTICS, 14 (2011) <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

<sup>240</sup> Amanda Bailey & Joseph M. Hayes, *Who's in Prison? The Changing Demographics of Incarceration*, 8 PUB. POL'Y INST. OF CAL. 1, at 4 (2006), <http://www.ppic.org/main/publication.asp?i=701> (last visited Feb. 20, 2012).

<sup>241</sup> *Id.* at 6.

<sup>242</sup> See CAL. CIV. PROC. CODE § 203 (West 2012) (persons are disqualified from jury service if they are not residents of the county or jurisdiction wherein they are summoned to serve). The proposal to allow non-county residents to participate in jury service is in keeping with the Sixth Amendment's vicinage clause that provides an accused with an impartial jury in his or her vicinage. See *Stevenson v. Lewis*, 384 F.3d 1069, 1072 (9th Cir. 2004) ("[T]he Supreme Court has not decided whether the Sixth Amendment's vicinage clause applies to the states. Nor has the Court defined the scope of a state defendant's federal vicinage rights, such as what constitutes the 'district' in the state context or whether the vicinage requirement allows a crime committed in two different countries to be tried by a jury drawn from either one."). No state has yet applied the measure suggested by the author here, probably due to the associated costs of having to track county and non-county residents for jury summonses. However, this measure would provide greater incentive for a state to improve the representativeness of registration lists and source lists from which the names of prospective jurors are drawn. Indeed, a 2002 study examining California juries reports that over 16% of jury summonses and affidavits were undeliverable due to inaccurate state address records. Daniel Klerman, *A Look at California Juries: Participation, Shortcomings and Recommendations*, AM. TORT REFORM ASS'N, at 6 (Sep. 2002), available at <http://lawweb.usc.edu/users/dklerman/PDFs/A%20Look%20at%20California%20Juries%20Participation%20Shortcomings%20and%20Recommendations.pdf>. This highlights the need for California to take serious and immediate steps to improve their lists to successfully track potential jurors.

<sup>243</sup> HIROSHI FUKURAI ET AL., RACE AND THE JURY IN THE PLENUM SERIES IN CRIME AND JUSTICE 45 (James A. Fox et al. eds. 1993) (minorities' low-income status and involvement in secondary labor markets increases their mobility and, by extension, decreases their jury eligibility); Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1055 (2003) (greater mobility, which causes low response rates to jury summonses, and financial hardship play an important role in minority participation in jury service).

<sup>244</sup> Daniel Klerman, *A Look at California Juries: Participation, Shortcomings and Recommendations*, AM. TORT REFORM ASS'N, at 6 (Sep. 2002), available at <http://lawweb.usc.edu/users/dklerman/PDFs/A%20Look%20at%20California%20Juries%20Participation%20Shortcomings%20and%20Recommendations.pdf>.

disqualification . . . [was] non-residence in . . . [the California] county that summoned them.”<sup>245</sup> Thus, lifting the county residence requirement for jury service would help to offset the negative impact of socioeconomic constraints on minorities’ exercise of civil rights by enabling more extensive participation on the part of members of linguistic and other minority groups, who are currently underrepresented in the jury selection process.

*D. Recommended Jury Instructions Regarding “Official” English Translations*

The Ninth Circuit currently offers a manual on criminal jury instructions for use by district courts.<sup>246</sup> This manual contains, among others, a model jury instruction with respect to official English translations.<sup>247</sup> The instruction is as follows:

§ 1.12. Jury to be Guided by Official English Translation/Interpretation.

[A language] [Languages] other than English will be used for some evidence during this trial. [When a witness testifies in another language, the witness will do so through an official court interpreter.] [When recorded evidence is presented in another language, there will be an official court translation of the recording.]

The evidence you are to consider and on which you must base your decision is only the English-language [interpretation] [translation] provided through the official court [interpreters] [translators]. Although some of you may know the non-English language used, you must disregard any meaning of the non-English words that differs from the official [interpretation] [translation].

[You must not make any assumptions about a witness or a party based solely upon the use of an interpreter to assist that witness or party.]<sup>248</sup>

Although the final sentence above rightly instructs jurors to avoid making inappropriate assumptions about a witness or party based on the fact that the court requires the witness to depend on a court interpreter (i.e., based on his or her status as a multilingual or non-English speaker) to prevent juror bias, the premise of requiring jurors to restrict themselves to a specific translation of a language that they understand is fundamentally

<sup>245</sup> *Id.* at 10.

<sup>246</sup> *See Manual of Model Criminal Jury Instructions: Criminal*, 9TH CIR. CRIM. JURY INSTR. 3.1 (2010), available at [http://www3.ce9.uscourts.gov/web/sdocuments.nsf/d4f8f49f20ea8ab3882564bb000fc20d/\\$FILE/1\\_2012\\_Final\\_Criminal.pdf](http://www3.ce9.uscourts.gov/web/sdocuments.nsf/d4f8f49f20ea8ab3882564bb000fc20d/$FILE/1_2012_Final_Criminal.pdf) (last visited Apr. 25, 2012). The Ninth Circuit also offers an instruction for English translations in civil cases. However, because this instruction is a diluted version of the criminal instruction, I focus my discussion only on the latter. *See manual for civil instructions at Ninth Circuit Manual of Model Jury Instructions: Civil*, 9TH CIR. CIV. JURY INSTR. 3.1 (2007), available at [http://www3.ce9.uscourts.gov/web/sdocuments.nsf/1ae2dda702db203388256aae0064d796/\\$FILE/1\\_2012%20final%20civil.pdf](http://www3.ce9.uscourts.gov/web/sdocuments.nsf/1ae2dda702db203388256aae0064d796/$FILE/1_2012%20final%20civil.pdf) (last visited Apr. 25, 2012).

<sup>247</sup> *See Manual of Model Criminal Jury Instructions: Criminal*, 9TH CIR. CRIM. JURY INSTR. 3.1 at 14 (2010) (§ 1.12: Jury to be Guided by Official English Translation/Interpretation).

<sup>248</sup> *See id.* at 14.

flawed. Indeed, this insistence obviates the use of a linguistic resource present in court—namely, the jurors—to act as a check on the official translation’s veracity or accuracy. At present, no mechanism exists to take advantage of this dynamic. In other words, forcing multilingual jurors to accept only the court interpreter’s translation prevents them from directing the court’s attention to questionable or outright erroneous translations, which then become part of the trial record and part of the basis for the jury’s determination.

As noted above, the notion that jurors faithfully and infallibly follow court instructions is a methodological premise and a procedural goal, not a perfect reflection of reality. The idea that multilingual jurors can simply “disregard” any meanings of non-English words that differ from the court interpreter’s translation is an excellent example of this disparity. The present system of depriving multilingual jurors of the opportunity to openly consider and perhaps correct what they perceive to be misleading or erroneous translations is likely to result in these jurors feeling frustrated or confused by the discrepancy between what they know or believe to be true and what they are told by the court.<sup>249</sup> By contrast, instructing juries to raise any issues related to questionable or erroneous translations at the end of a witness’s testimony has a number of benefits. First, the practice would foster greater accountability among court interpreters, incentivizing them to provide more accurate translations (and may actually be instructional to court-appointed interpreters—making them better). Second, this change would enable multilingual jurors to make an added contribution to truth and accuracy in the judicial process. Finally, it would obviate the concerns about multilingual jurors exerting an undue influence over their peers when deliberating matters involving translated testimony, since translation issues would have already been dealt with during the course of trial.

Indeed, this issue illustrates the fact that multilinguals are not only presently underrepresented in jury service, their limited participation is undervalued and underutilized. Beyond allowing multilinguals to contribute their linguistic expertise to determining what was or was not stated by witnesses, permitting the firsthand consideration of non-English testimony would enable multilingual jurors to better fulfill a core juror function: evaluating a witness’s credibility. By considering such testimony directly, in other words, jurors with the appropriate language skills and cultural background can evaluate more meaningfully the witness’s use of language, demeanor, gestures, and other non-verbal expressions that are part of the communication system in any linguistic sub-culture, that typically defy translation, and that can be crucial to making accurate credibility determinations.<sup>250</sup> Nuance and demeanor, for example, can greatly affect the meaning that a witness wishes to convey, as well as a juror’s understanding of the witness’s intent.<sup>251</sup> Court interpreters may try to account for such

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<sup>249</sup> One argument against allowing jurors to disagree with the court reporter’s interpretation is to promote uniformity and efficiency of the judicial process because all jurors will be instructed to accept only the court interpreter’s testimony without question. However, this argument is unsatisfying and highly problematic for the reasons discussed in this section.

<sup>250</sup> See Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1129–31, 1135 (2000) (jurors are instructed and expected to evaluate all aspects of a witness’s testimony, including the credentials via demeanor and other non-verbal expressions).

<sup>251</sup> *Id.* at 1169–70.

factors in the translations that they provide; however, even highly trained interpreters are likely to be unable to fully capture these subjective aspects of a witness's testimony.<sup>252</sup>

In this regard, providing a legitimate role for multilingual jurors' firsthand observations regarding the nuances of a witness's use of language or gestures would have a considerable impact on closing the gap between the handling of non-English testimony and the evidentiary rule against hearsay.<sup>253</sup> The hearsay rule excludes out-of-court statements because a "witness under oath, subject to cross-examination, and *whose demeanor can be observed by the trier of fact*, is a reliable informant."<sup>254</sup> Strictly speaking, this rule could be invoked to question the use of interpreted testimony, which stands at a distance from any "demeanor . . . observed by the trier of fact." Input from multilingual jurors on the role of demeanor and related nuances, from this standpoint, should therefore not be systematically ignored, but should be openly valued and solicited.

In fact, California's jury instruction on English translations offers, in the final line of the passage quoted below, a corrective to the Ninth Circuit model:

§ 121. Duty to Abide by Translation Provided in Court.

Some testimony may be given in [insert name or description of language other than English]. An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff).<sup>255</sup>

However, based on the above discussion, the following modified version of jury instruction should be considered as preferable (proposed changes shown in italics):

Some testimony may be given in [insert name or description of language other than English]. An interpreter will provide a translation for you at the time that the testimony is given. *You may be able to understand the language spoken by the witness. As jurors we expect you to draw on your common sense and experience in evaluating witness testimony.* If you believe the court interpreter translated testimony incorrectly, let me know

<sup>252</sup> One could argue that the ideal situation would be to have only those jurors who understand fluently both English and any other language used at trial. However, this would violate the Sixth Amendment's "representative cross-section requirement," and deprive a defendant of his or her right to a fair hearing by an impartial and diverse jury that is made up of his or her peers.

<sup>253</sup> See FED. R. EVID. 802 ("Hearsay is inadmissible"); CAL. EVID. CODE § 1200 (West 2012) ("Except as provided by law, hearsay evidence is inadmissible").

<sup>254</sup> *Dutton v. Evans*, 400 U.S. 74, 88 (1970) (emphasis added).

<sup>255</sup> See *Criminal Jury Instructions: CalCrim 2012*, JUDICIAL COUNCIL OF CALIFORNIA (2012), at 22, available at [http://www.courts.ca.gov/partners/documents/calcrim\\_juryins.pdf](http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf) (last visited Apr. 25, 2012). California's criminal instruction on English translations was first introduced in January 2006, *id.*, and is an exact replica of California's civil instruction, § 108, that was introduced in September 2003. See *Civil Jury Instructions: CACI*, JUDICIAL COUNCIL OF CALIFORNIA (2011), at 24, available at [http://www.courts.ca.gov/partners/documents/caci\\_2012\\_edtion.pdf](http://www.courts.ca.gov/partners/documents/caci_2012_edtion.pdf) (last visited Apr. 25, 2012).

immediately by writing a note and giving it to the (clerk/bailiff) *and refrain from retranslating any of the testimony for or in the hearing of other jurors until such matters are resolved.*

In its present form, California's instruction rightly provides jurors with a judicially sanctioned channel through which to raise translation concerns.<sup>256</sup> The instruction, however, suffers from the same problem as the Ninth Circuit model in that it insists that jurors rely only on the court interpreter's translation. The implication is that the acceptance of an official interpretation would lead to greater objectivity in judgment. However, no data exist to support this conclusion. Moreover, this implication may be expected to discourage multilingual jurors from bringing language issues to the court's attention, despite the invitation to do so, particularly in light of the fact that the present instruction specifically bars them from sharing relevant observations and perceptions with their fellow jurors at any time.<sup>257</sup> The proposed revision, therefore, restates jurors' potential understanding of non-English testimony in neutral or positive terms and leaves open the possibility that such jurors may discuss this understanding with, or in the hearing of, their peers at the appropriate time.

## VII. CONCLUSION

Examination of California case law in the twenty years since *Hernandez* demonstrates that the pretext analysis for linguistically motivated peremptory challenges remains both an arbitrary and a flawed tool that courts have, nevertheless, been reluctant to second guess. The goal of voir dire is to elicit meaningful information about prospective jurors' ability to weigh the facts of a case and the arguments of litigating parties, with fairness and impartiality, and *Hernandez* has failed to further this goal. The resulting situation, in which language-based exclusions are widely allowed, denies linguistic minorities their right as members of the community to serve on juries and, thus, to participate in an important aspect of civic life. Language-based exclusions also deprive litigants and the courts of diverse juries that are demonstrably better decision makers, and that practice balance and impartiality during deliberations.

These exclusions ultimately affect not only individuals and minority groups, but society as whole. Indeed, the systematic pattern of exclusion caused by the legal mechanisms, practices, and associated factors discussed in this paper yields juries that do not adequately reflect a representative cross section of California's population. Moreover, an examination of this issue in other states and localities likely presents the same weighty concern.

In the end, the abolition of the peremptory challenge may be the ideal response to this quandary. Given the remoteness of this possibility at the present time, however, it is clear that there is a pressing need for careful review of *Hernandez*, and for the crafting of practical and workable remedies that can limit its negative impact on juries not only in California, but other jurisdictions as well. The suggestions proffered in this Article are

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<sup>256</sup> The instruction for multilinguals not to retranslate testimony for other jurors is based on *People v. Cabrera*, 230 Cal.App.3d 300, 305 (2d Dist. 1991) (the actions of bilingual jurors in retranslating the official testimony is "misconduct").

<sup>257</sup> *Id.*

not intended to be exhaustive. They can, however, provide a starting point in offering options and alternatives for use by attorneys and courts, as well as in suggesting directions that might be taken by state legislatures. The latter, after all, have the power to shape state laws so that they better support the equitable representation of all members of their diverse citizenry. Legislative action designed to more effectively represent speakers of languages other than English in the state's population and on juries would further this goal by improving the representative nature of jury composition, as well as affording protection to linguistic minorities' civil rights.