COMMENTS

CHANGE IS NEEDED: HOW LATINOS ARE AFFECTED BY THE PROCESS OF JURY SELECTION

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INTRODUCTION

Latinos have long been a part of the United States. Yet, only until recently have Latinos held an increasingly meaningful voice in the American public discourse. It is estimated that by the year 2050, nearly one in three U.S. residents will be Latino.[1] Accordingly, as their numbers increase, issues that affect Latinos will begin to gain more traction in the public discourse; issues such as disparate treatment of Latinos within the legal system.

Latinos generally face unique legal dilemmas as compared to whites. One such dilemma arises when peremptory strikes are used in jury selection on the basis of language and cultural differences. Because language is a quasi-immutable trait, discrimination on the basis of language is functionally equivalent to discrimination on the basis of national origin.[2]

Recently there have been a string of violent attacks on undocumented immigrants at the hands of local and ostensibly an-

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1. *An Older and More Diverse Nation by Midcentury*, U.S. CENSUS BUREAU NEWS, Aug. 14, 2008, *available at* http://www.census.gov/Press-Release/www/releases/archives/population/012496.html.

2. *See* Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

gry white Americans.[3] In one instance in Shenandoah, Pennsylvania, a Mexican man was beaten to death by four young white males who yelled racial slurs as they carried out their heinous act.[4] The all-white jury found the men guilty, not of murder, but of simple assault.[5] According to the jury foreman, jurors were too busy indulging their prejudice and perhaps looking for a way to spare the teenagers long prison sentences.[6] As one of the jurors later reported, the jury did not think much of the evidence, or process it thoroughly out of racial animus.[7]

As the Shenandoah case demonstrates, a lack of empathy on the part of jurors can many times explain the egregious results that are reached in such cases. Given the acknowledged prejudicial sentiment of the jurors in the Shenandoah case, the jurors found it easier to relate to the white "all-America boys" sitting at the defendant's table than to the Mexican immigrant lying in the morgue.[8]

The controversy surrounding this case epitomizes the common challenges that Latino defendants face when telling their narratives to a jury. This comment discusses some of the legal issues that affect Latinos with respect to peremptory strikes on the basis of language. Ultimately, this comment proposes a discursive race conscious remedy that considers the concrete experiences of the least advantaged and oppressed. Part I of this comment discusses the early forms of exclusion of Latinos on jury panels. Part II discusses the concerns that arise from use of preemptory strikes. Finally, this comment concludes with suggestions of genuine alternatives to the procedural rules and prosecutorial tactics that have disparately impacted Latinos.

I. EARLY FORMS OF EXCLUSION OF LATINOS ON JURY PANELS

Early forms of jury exclusion of Latinos and other minority groups can be traced to Jim Crow segregation. In states where Latinos were excluded from juries, Latinos were, paradoxically, legally characterized as white, but socially treated as non-white. Courts typically justified their exclusion from juries based not so much on the race of Latinos, but on their subordinate relationship to whites in society, a practice the U.S. Supreme Court

3. Ruben Navarrette, *When 'Justice' Isn't*, REAL CLEAR POLITICS, May 13, 2009, *available at* http://www.realclearpolitics.com/articles/2009/05/13/when_justice_isnt_96459.html.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

found in *Hernandez v. Texas* to be constitutionally impermissible.[9] To understand the doctrinal significance of the Court's focus on group mistreatment, it is necessary to understand past exclusionary justifications.

An early iteration of Latino jury exclusion can be found in *Sanchez v. State*, a case in which a Mexican man was on trial for murder.[10] Upon being convicted of murder, the Mexican defendant appealed, alleging that his Mexican ancestry deprived him of a fair trial by jury.[11] He argued that the jury commissioners, in the selection of grand jurors, intentionally declined to select any jurors of Mexican or Spanish descent.[12] On appeal, the Court of Criminal Appeals of Texas found that the trial court had selected men whom they considered "best qualified" for grand jury service.[13] Notwithstanding the fact that forty to fifty percent of the county was of Latino decent, the court found relevant the alleged facts that many of those Latinos were not citizens, could not read, write or speak English, and had not paid poll taxes.[14] Applying a deferential standard, the court found no appreciable discrimination.[15]

The reasoning in *Sanchez*, which mirrored numerous other state court decisions, was repudiated by the U.S. Supreme Court in *Hernandez v. Texas*.[16] In *Hernandez*, the petitioner was indicted and convicted for murder.[17] Like the defendant in *Sanchez*, the defendant in *Hernandez* alleged that persons of Mexican ancestry were systematically excluded from service as jury commissioners, grand jurors, and petit jurors, despite the fact that there were such persons who qualified to serve as jurors residing in the county where the trial took place.[18] He asserted that the exclusion of this class deprived him, as a member of the class, equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.[19] The Court granted certiorari to decide whether Mexican Americans constitute a separate and disparate class, and ended up striking down Texas' narrow reading of the Equal Protection Clause, a reading that Texas asserted only included African Americans as a suspect class.[20] The Court

9. *See* Hernandez v. Texas, 347 U.S. 475 (1954).
10. *See* Sanchez v. State, 181 S.W.2d 87 (Tex. Crim. 1944).
11. *Id.* at 88-89.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 89.
16. *See Hernandez*, 347 U.S. at 475.
17. *Id.* at 476.
18. *Id.* at 476-77.
19. *Id.* at 477.
20. *Id.* at 477-78.

held that to exclude an insular and discrete group on account of their subordinate class contravenes the Equal Protection Clause of the Fourteenth Amendment.[21] From the Court's view, the petitioner in *Hernandez* successfully established that people of Mexican ancestry constituted a separate class from whites in Jackson County by showing that, notwithstanding their *de jure* white status, Mexican Americans occupied a *de facto* non-white status.[22]

The Court found that the petitioners showed that residents of the community distinguished between 'white' and 'Mexican.'[23] There was also evidence that Mexicans did not participate in business and community groups; that the children of parents of Mexican descent were required to attend a segregated public schools; and that public establishments displayed signs announcing "No Mexicans Served."[24] While the Court did not explicitly hold that Mexican Americans were non-white, the fact that Mexican Americans endured mistreatment under Jim Crow segregation supported a finding that Mexican Americans indeed constituted a separate and disparate class that deserved protection under the Equal Protection Clause of the Fourteenth Amendment.

The Court rationally rejected the notion that discrimination existed along a "two-class theory" based upon a black and white paradigm. What is noteworthy is the Court's finding that community prejudices are not static, and that when it is shown that a distinct class is treated disparately based on an unreasonable classification, the guarantees of the Fourteenth Amendment are violated.[25] *Sanchez* and *Hernandez* are thus demonstrative of the racial caste system that Mexican Americans occupied in regions of the country where Jim Crow segregation was deeply entrenched. Notably, *Hernandez* was decided two weeks before *Brown v. Board of Education*, the epochal Supreme Court case that affirmatively ended segregation of public schools.[26] However, despite the Court's efforts to craft a reading of the Equal Protection Clause predicated on an anti-subordination principle, Latino exclusion from jury service and other forms of procedural obstacles continue to reify Latinos second-class status, even after *Hernandez*.

21. *Id.* at 479.
22. *Id.* at 479-80.
23. *Id.* at 479.
24. *Id.*
25. *Id.* at 478.
26. *See* Brown v. Board of Education, 347 U.S. 483 (1954).

II. CONCERNS WITH PEREMPTORY STRIKES

An area where procedural requirements continue to reify Latinos second-class status is the jury selection process – a process where prosecutors can use peremptory strikes to exclude Latinos from serving on juries.

In the 1987 case of *United States v. Lopez*, the defendant petitioned for a bilingual Spanish speaking jury.[27] The defendant insisted that the Spanish speaking jury would be the only jury capable of understanding and evaluating the exculpable evidence in the case.[28] Indeed, the bulk of the government's evidence consisted of various tape recordings, telephone conversations, and documents that were all transcribed in Spanish.[29] Although the government intended to provide the jury with English transcripts of the tape recorded conversations, defendant argued that such transcripts may only be used to assist the jury as it listens to the recordings, but cannot be used as a substitute for the recordings themselves.[30] This indeed was the law where English conversations were involved.[31] Defendant claimed that this same rule should also apply to tapes in a foreign language, and that because the "best evidence" of the conversations here were the tapes themselves, only a Spanish-speaking jury could properly evaluate the evidence.[32]

The court disagreed, reasoning that no other cases had found the need for a bilingual jury.[33] The court further reasoned that 18 U.S.C § 1865 of the Jury Selection and Service Act of 1968 required the selection of a jury that speaks "the language in which the case is presented."[34] According to the court, the only language required by the statute was English since § 1865 did not impose or even contemplate any foreign language requirement.[35] Yet, the court's reasoning was premised on a contestable notion of zero sum game. It noted that since § 1862 prohibits the exclusion of jurors based on national origin, and because a majority of the Spanish-speaking people in the Chicago area are Latino, se-

27. United States v. Lopez, No. 86 CR 513, 1987 WL 18573, at *1 (N.D.Ill. Oct. 15, 1987).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See* United States v. Allen, 798 F.2d 985, 1002-03 (7th Cir. 1986).

32. *Lopez*, 1987 WL 18573 at *1.

33. *Id.*; *See also* United States v. Llianas, 603 F.2d 506, 509 (5th Cir. 1997); United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir. 1976), *cert. denied*, 429 U.S. 923 (1976); United States v. Cruz, 765 F.2d 1020 (11th Cir. 1986).

34. *Id.*

35. *Id.*

lecting only Spanish-speakers to the jury panel would have the effect of excluding individuals who were non-Latino.[36]

The reasoning in *Lopez* rested squarely on the cost of racial subordination on Mexican Americans. Indeed, the court took judicial notice of the myriad segregationist practices in finding that Mexican Americans in fact were a distinct class. Yet, in practice, courts have displayed ineptness in evaluating the costs stemming from harms that directly and significantly impact Latinos.

First, the cost of selecting a bilingual jury is mitigated when one is readily available. Second, a woeful dearth of judges acquainted with issues keenly affecting Latinos only compounds the problems associated with informational costs. Certainly, the court's emphasis that 18 U.S.C § 1862 does not contemplate a foreign language requirement[37] is frighteningly nearsighted. As Ilan Stavans states, "language cannot be legislated . . . it is the most democratic form of expression of the human spirit."[38] When language and a narrow reading of procedural statutory requirement serve as the basis and rational for jury exclusion, the spirit of democracy is twice undermined.

In *Batson v. Kentucky*,[39] the U.S. Supreme Court held that peremptory challenges based on race or national origin violated both state and federal Constitutions.[40] In holding such, the Court established a three-step process for evaluating an objection to peremptory challenges: (1) a defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race; (2) the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question; and (3) finally, the trial court must determine whether the defendant has carried his own burden of proving purposeful discrimination.[41] In *Pemberthy v. Beyer*,[42] the Third Circuit used this three-step process to find that the prosecutor in the case had adequately articulated a race-neutral argument.[43]

In *Pemberthy*, the Third Circuit held that the prosecutor in the case could use a peremptory challenge of jurors based on their ability to speak and understand Spanish.[44] The court rea-

36. *Id.*
37. *Id.*
38. Ilan Stavans, *The Gravitas of Spanglish*, THE CHRONICLE OF HIGHER EDUCATION, Oct. 13, 2000, *available at* http://chronicle.com/article/The-Gravitas-of-Spanglish/14232.
39. Batson v. Kentucky, 476 U.S. 79 (1986).
40. *See id.*
41. *Id.*
42. Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994).
43. *Id.* at 868.
44. *Id.*

soned that a juror may be biased toward certain testimony and taint it using facts not in evidence.[45] Hence, if a native Spanish speaker interpreted the Spanish in the case differently than the court interpreter, he or she may provide impermissible opinion evidence to the other members of the jury, thus risking jury confusion and non-uniformity of the Spanish translation provided.[46] The court also found that the Equal Protection Clause does not prohibit a trial attorney from peremptorily challenging jurors because of their ability to understand a foreign language – the translation of which will likely be disputed at trial.[47] This is because the alleged discrimination would not be on the basis of race or national origin, but rather based on experiences and training which may have a separate bias.[48] This court ruling, however, resulted in the legalized exclusion of Latinos from the jury panel.

In the context of peremptory strikes, the application of race-neutral prongs undermines the principles and objectives of antidiscrimination law. The U.S. Constitution prohibits exclusion of jurors on the basis of race and national origin.[49] Yet, prosecutors, as the cases above demonstrate, achieve disparate results in the application of preemptory strikes by showing that those jurors who speak a foreign language will have an advantage over those jurors who do not. At issue is not the use of language as the basis of juror exclusion *per se*, but rather that language is often used as a proxy for race and national origin discrimination. Certainly, in other areas of the law, courts have recognized that discrimination against a trait that serves as a stand in for race is prohibited.[50] However, what constitutes a race neutral reason for excluding Spanish-speaking jurors in one context clearly amounts to patent race discrimination in another.

This doctrinal incoherence is also found in state and U.S. Supreme Court decisions when courts aim to provide some guidance in applying constitutionally sound rules and principles. For example, in *State v. Gilmore*, the New Jersey Supreme Court held that when a criminal defendant makes a prima facie showing that the prosecution exercised peremptory challenges on a constitutionally impermissible ground, the prosecution must articulate clear and reasonably specific explanations of its legitimate reasons for exercising such peremptory challenges.[51] Conversely,

45. *Id.* at 859-62.
46. *Id.* at 865.
47. *Id.* at 858.
48. *Id.* at 862.
49. *See* U.S. CONST. amend. VI; 28 U.S.C. § 1861.
50. *See* Matsuda, *supra* note 2.
51. *See* State v. Gilmore, 103 N.J. 508, 537-38 (1986).

the *Pemberthy* court provided little guidance on the question by concluding that that the peremptory strikes had nothing to do with race, but rather the comprehension of the Spanish language. In *Hernandez v. New York*,[52] the U.S. Supreme Court reached a similar result as the court in *Pemberthy*, but by different means. In *Hernandez*, the Court found that the prosecutor did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of testimony in Spanish.[53] This reason either leaves open the question or presumes that language is a proxy for race.

Lastly, as articulated earlier, the *Hernandez* and *Pemberthy* courts appeared to be concerned with devising procedural rules that would promote efficiency. However, when a court creates rules that, in the hypothetical, lead to efficient ends, a court can potentially create inefficient rules because it relies on imperfect information. First, the test can lead to a disproportionate exclusion of Latinos from juries, thus violating sound and time tested constitutional and equitable principles. Secondly, a prosecutor, like the one in *Pemberthy*, can rely on less costly means of filtering for bias without disproportionately excluding Latinos. Finally, Spanish-speakers, and Latinos derivatively, under certain circumstances could reach more accurate and just ends then non-Spanish-speakers. Ironically, whether a prosecutor sufficiently articulates a race-neutral application of a legal principle is a question that can only be examined through a race-conscious lens.[54]

CONCLUSION

The issues and debates raised in this comment are serious. More importantly, Latinos have a great stake in this debate. As this comment demonstrates, courts have dismissed requests for competent Spanish translators on the grounds that they are costly. Also, the appellate standards of review, like the "clearly erroneous" and "abuse of discretion" standards, have given trial courts much discretion over matters that are particularly important to Spanish-speaking defendants. All of this is often justified on the basis of efficiency, a justification which invariably sacrifices other principles of law and justice. Instead of finding which procedural rules work best to promote justice, a court instead obscures the issue when it decides to exclude Spanish-speakers from jury because of illusory race neutral means.

52. Hernandez v. New York, 500 U.S. 352 (1991).
53. *Id.* at 360.
54. *See* Matsuda, *supra* note 2.

This is certainly an area where courts and legislators could conceivably offer Latinos genuine alternatives to the procedural rules and prosecutorial tactics that have disparately impacted Latinos for decades. There is no question that Latino immigrants want to learn English. A 2006 survey by the Pew Hispanic Center showed that 92% of Latinos and 96% of foreign-born Latinos say it is important to learn English.[55] Yet, even as they aspire to learn English, many Latinos do not want Spanish to disappear from their family life.[56] One researcher, Carlos Santos said it best: "[The Spanish language] is a connection to their culture, their parents, their ancestors and their history. It is part of who they are, who they were and who they will be."[57]

The emergence of Latino communities also tells us a similar story. Latinos have slowly made their mark on communities throughout the country. Census projections indicate that Latinos will be the biggest minority population in the United States by the year 2050. Yet, the problem is that there is disconnect between what these trends portend and the operations of our justice system, as has been exemplified in the *Gilmore*, *Pemberthy*, and *Hernandez* cases mentioned above. Instead of being open to serious policy considerations that affect the deliverance of justice, courts delve into legal frameworks that effectively preserve the *status quo*. Stripped of the veneer of race neutrality, the judges in the aforementioned cases evince strained efforts to give primacy to law and to subordinate facts and the materiality that inhibit the lives of Latinos.

55. Leslie Sanchez, *What's in a 'Ghetto'*, REAL CLEAR POLITICS, Apr. 11, 2007, *available at* http://www.realclearpolitics.com/articles/2007/04/whats_in_a_ghetto.html
56. *Id.*
57. *Id.*