"NOW THAT I SPEAK ENGLISH, NO ME DEJAN HABLAR ['I'M NOT ALLOWED TO SPEAK']": THE IMPLICATIONS OF *HERNANDEZ V. NEW YORK*

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> [Any statute] which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law, as jurors, because of their color, though qualified in all other respects, is, practically, a brand upon them affixed by the law, and is a discrimination against that race forbidden by the [Fourteenth] Amendment. It is a denial of the equal protection of the laws to the race thus excluded, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds.[1]

I. INTRODUCTION

Strauder v. West Virginia struck down a West Virginia statute that excluded non-Whites from jury duty because it violated the Fourteenth Amendment and federal legislation designed to implement that Amendment.[2] *Strauder* did not guarantee a right to a jury containing all members of one's race, however, it did guarantee that states could not use race, color, national origin or other impermissible grounds to exclude people from juries. In other words, it guaranteed the right to a jury "selected without discrimination."[3]

On May 21, 1991, more than one hundred years after *Strauder*, the United States Supreme Court upheld the exclusion of bilingual Latino jurors from a petit jury through the use of

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1. Strauder v. West Virginia, 100 U.S. 664 (1879).
2. *Id.* at 664.
3. *Id.* at 666.

peremptory challenges as nondiscriminatory.[4] During jury selection in *Hernández v. New York*, the prosecutor excluded two bilingual prospective jurors because he felt they would be unable to abide by the official translation of the testimony of Spanish-speaking witnesses and because "he doubted their ability to defer to official translation of anticipated Spanish-language testimony."[5] The two other Latino jurors on the panel were excluded because they had family members who had been or would be prosecuted by the same office. The result was that there were no Latinos on the jury.

In this Article, I re-examine *Hernández* and argue that the Supreme Court was wrong in holding that the exclusion of bilingual venire persons from juries is not racial discrimination. I offer several reasons why the *Hernández* decision is wrong. First, *Hernández* is wrong because the decision is based on an erroneous interpretation of the *Batson v. Kentucky*[6] standard. Second, the decision wrongly assumes that, for bilingual persons, language is separable from ethnicity or national origin. Third, *Hernández* incorrectly treats bilingualism as behavior that can be altered or changed at will. Although language is learned and acquired, I propose that once persons become bilingual, language is largely an immutable characteristic over which they have little, if any, control; much like race or skin color is an immutable characteristic for other groups. Thus, language should receive strict scrutiny. Fourth, the decision is wrong because it is based on the prevailing liberal model of equality, which defines equality as sameness. Finally, *Hernández* is wrong in concluding that the presence of bilingual jurors will detract from the truth-seeking function of juries. I suggest that rather than having a detrimental effect, the presence of bilingual jurors may be necessary to maintain the truth-seeking function of juries.

Part II presents a summary of the facts, judicial history, opposing arguments, and the Supreme Court's ruling in *Hernández*. I argue that the exclusion of Latino jurors, because they are bilingual, is facial discrimination, not disparate impact as *Hernández* held. Thus, *Hernández* should be reconsidered.

Part III discusses why Latino bilingualism should be treated as an immutable characteristic. After critically examining the dominant model of bilingualism, which provides the theoretical underpinnings for *Hernández*, I offer an alternative model that is more consistent with linguistic research and the experience of bi-

4. Hernández v. New York, 500 U.S. 352 (1991).

5. *Id.* at 352.

6. 476 U.S. 79 (1986).

lingual speakers. This alternative model treats bilingualism as an immutable characteristic.

Finally, in Part IV, I attempt to place *Hernández* within a broader theoretical framework. I propose that discrimination and the denial of equal protection occur in our legal system because prevailing conceptions of equality are based on a traditional liberal model that defines equality as sameness and promotes a narrow and limiting view of equal protection, as well as racial and national origin discrimination.

II. JUDICIAL HISTORY OF *HERNANDEZ V. NEW YORK*

A. *Factual Background*

In 1986, Dionisio Hernández was charged with attempted murder, assault, and criminal possession of a weapon arising out of an incident in which he allegedly attempted to kill his fiancée, Charlene Calloway, and her mother, Ada Saline. Two patrons at a restaurant were also injured in the incident. Saline was expected to testify in Spanish as a key prosecution witness. The trial was held in the New York Supreme Court. Jury selection was held during November 3-7, 1986, but no transcript of the voir dire examination was created.[7] After sixty-three prospective jurors were questioned and nine empaneled, defense counsel objected that the prosecution had used four peremptory challenges to exclude all potential Latino jurors. The prosecution gave the following explanation for excluding two of the Latino jurors:

> We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it [the interpreter's translation], but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses. . . . I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter. . . . I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.[8]

The prosecutor said that the other two potential Latino jurors were excluded "because they had close relatives who had been [or would be] prosecuted by the District Attorney's office

7. Voir dire refers to the questioning or interrogation of prospective jurors by either the judge or attorneys.

8. *Hernández*, 500 U.S. at 356-357.

and there was a question as to their impartiality."[9] The trial judge denied the defendant's motion for a mistrial, but made no specific finding that the proffered explanations offered by the prosecution were neutral.[10]

Following the trial, the judge dismissed the assault charges. However, the jury returned a guilty verdict on the counts of attempted murder and criminal possession of a weapon. On appeal, the New York Supreme Court Appellate Division affirmed the conviction and the trial court's rejection of petitioner's *Batson* claim. The court ruled that although the defendant had made a prima facie showing of discrimination, the prosecution had stated nondiscriminatory reasons for the challenges. A divided New York Court of Appeals also affirmed the judgment. Although the majority found that there was a prima facie case of discrimination under *Batson v. Kentucky*, the prosecution had articulated a nondiscriminatory reason for the challenge. The court held,"[h]esitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges."[11] In a plurality opinion written by Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Souter, the U.S. Supreme Court affirmed and concluded that the prosecution did not use peremptory challenges in a way that violated the Equal Protection Clause of the Fourteenth Amendment.[12]

B. *The* Batson *Claim*

In *Batson*, the U.S. Supreme Court affirmed the principle announced in *Strauder* which stated that a defendant is denied equal protection when he is tried before a jury from which members of his race have been purposely excluded.[13] Batson, an African American man,[14] was indicted in Kentucky on charges of second degree burglary and receipt of stolen property.[15] On the

9. People v. Hernández, 528 N.Y.S.2d 625, 626 (1988).
10. *Id.*
11. *Id.* at 624.
12. Justice O'Connor, joined by Justice Scalia, wrote an opinion concurring in the judgment. Justice Blackmun wrote a dissenting opinion; Justice Marshall joined Justice Stevens in a dissenting opinion.
13. *Batson*, 476 U.S. at 85.
14. As much as possible, I have retained the racial terms used by the Court. In *Strauder* the Court used "colored." In Swain v. Alabama, 380 U.S. 202 (1964), the Court referred to African American as "Negroes." The labels are important because they reflect the prevailing societal attitudes and racial animus toward a particular group. In areas where Mexicans are devalued, for example, they have been called "Mesicans." Saucedo v. Brothers Well Service, Inc., 464 F. Supp. 919, 921 (1979).
15. 476 U.S. at 82.

first day of the trial, which was held in Jefferson Circuit Court, the judge conducted voir dire examinations and allowed the parties to exercise peremptory challenges. Under the Kentucky Rules of Criminal Procedure,[16] the prosecution used four of the six allowed peremptory challenges to exclude all of the African Americans on the venire. This resulted in an all White jury.

The defense moved to discharge the jury on the grounds that the prosecutor's removal of the African American prospective jurors violated the defendant's Sixth and Fourteenth Amendment rights to a jury drawn from a cross-section of the community and to Equal Protection of the laws under the Fourteenth Amendment.[17] Without directly ruling on the defense's request for a hearing on the motion, the trial judge remarked that each party was entitled to use peremptory challenges to strike "anybody."[18] The judge denied the motion on the ground that the cross-section requirement applies only to the selection of the venire, and not to the selection of the petit jury itself.[19] The defendant was subsequently convicted on both counts. The Kentucky Supreme Court, relying on *Swain v. Alabama*,[20] reversed and held that "a defendant alleging the absence of a fair cross-section must show the systematic exclusion of jurors from the venire."[21]

Batson is significant not only because it affirms *Strauder* but also because it reduces the burden required to establish a prima facie case of racial discrimination. Prior to *Batson*, the U.S. Supreme Court held in *Swain* that a defendant who alleged invidious discrimination in the selection of jurors had to establish a pattern of exclusion of jurors by the prosecution.[22] The pattern of discrimination had to extend to the venire.

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16. Under the Kentucky Rules, the trial court is authorized to conduct the voir dire examination or to permit counsel to conduct the examination. KY. R. CRIM. P. 9.38. Once jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number of jurors to be seated plus the number of allowable peremptory challenges. KY. R. CRIM. P. 9.36. Since the offense charged was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges and the defense counsel to nine. KY. R. CRIM. P. 9.40. *Batson*, 476 U.S. at 83 n.2.

17. *Id.* at 84 n.4.

18. *Id.*

19. The "venire" refers to the panel of prospective jurors from which the "petit jury" is selected. A "petit jury" is distinguished from a "grand jury" in that grand juries have broad discretion in issuing indictments. Grand jury proceedings differ because they are conducted in secret, the defendant does not have a right to be present, the defendant may not confront witnesses or introduce evidence, and a jury indictment may be based on illegally obtained evidence. However, the jury pool in a grand jury may not be chosen in a racially discriminatory manner.

20. 380 U.S. 202 (1965).

21. *Batson*, 476 U.S. at 84.

22. 380 U.S. 202 (1965).

In 1964, Robert Swain, an African American man, was sentenced to death after having been indicted and convicted of rape in Talladega County, Alabama.[23] Swain's motion "to quash the indictment, to strike the trial jury venire, and to declare void the petit jury selected was denied."[24] In support of the claim of invidious discrimination in the selection of juries, Swain offered evidence which showed that while twenty-six percent of the persons eligible for jury selection in Talladega County were African American males, jury panels since 1953 had averaged ten to fifteen percent "Negro."[25] Although petit jury venires in criminal cases included on the average six or seven African Americans, no African American had served on a petit jury in Talladega County since 1950.[26] African Americans had served on about eighty percent of the grand juries, with the number ranging from one to three. Two African Americans served on the grand jury that indicted Swain. With respect to the petit jury, out of the eight African Americans on the venire, two were exempt and the remaining six were struck by the prosecutor.[27]

In rejecting Swain's petition and affirming the conviction, the U.S. Supreme Court remarked that "[i]t is wholly obvious that Alabama has not totally excluded a racial group from grand or petit jury panel."[28] The Court held that even if a state's striking of African American prospective jurors raises a prima facie case of discrimination, the petitioner has the burden of proving purposeful discrimination, and Swain failed to meet this burden.[29]

Swain set an onerous burden on the petitioner. A showing that an identifiable group had been underrepresented on juries, or that African American jurors were struck from the jury panel in a particular case, was not sufficient to establish purposeful racial discrimination.[30] The Court acknowledged the underrepresentation of African Americans on juries in Talladega County, but concluded that "an imperfect system is not equivalent to purposeful discrimination based on race."[31] Citing the "rule of exclusion" articulated in *Norris v. Alabama*,[32] the Court noted that:

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23. *Id.* at 203.
24. *Id.*
25. *Id.* at 205.
26. *Id.*
27. *Id.*
28. *Id.* at 206.
29. *Id.* at 226-227.
30. *Id.* at 208-209, 221.
31. *Id.* at 209.
32. Norris v. Alabama, 294 U.S. 587 (1935).

> Where discrimination is said to occur in the selection of veniremen by [a] state jury commissioner, proof. . .that some Negroes were qualified to serve as jurors, and that none *had been called* for jury service over an extended period of time. . .constitute[s] prima facie proof of the systematic exclusion of Negroes from jury service.[33]

In order to prove intentional discrimination, the *Swain* Court held that the petitioner must show that the prosecutor purposely and systematically excluded African American jurors over a period of time.[34] Although the *Swain* Court relied on earlier decisions like *Hernández v. Texas*,[35] *Patton v. Mississippi*,[36] and *Norris v. Alabama*,[37] its holding was in fact a radical departure from these earlier cases.

Although subsequent decisions after *Strauder* upheld the principle that the exclusion of African Americans from jury service over a prolonged period of time was prima facie proof of exclusion, it was not until 1954, in *Hernández v. Texas*, that the Fourteenth Amendment Equal Protection Clause was extended to persons of Mexican descent. The Court concluded in *Hernández* that in Jackson County, persons of Mexican descent constituted a separate class—distinct from "Whites."[38] Mexicans were recognized as a distinct group in the area. In addition, Mexicans had very limited participation in business and community groups. For example, at least one restaurant had a "No Mexicans Served" sign, and until recently, Mexican children were required to attend segregated elementary schools for the first four grades. There also were separate facilities for "Colored Men" and Mexicans.[39] The Court in *Hernández v. Texas* further noted not only that Mexicans were an identifiable class, but that when members of an identifiable class are singled out for differential treatment the guarantees of the Constitution have been violated:

> The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro. . . . The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.[40]

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33. Swain v. Alabama, 380 U.S. 202, 226 (1965) (quoting Norris v. Alabama, 294 U.S. 587 (1935))(emphasis added).
34. *Id.* at 227.
35. 347 U.S. 475 (1954).
36. 332 U.S. 463 (1947).
37. 294 U.S. 587 (1935).
38. 347 U.S. at 479-480.
39. *Id.* at 480-481.
40. *Id.* at 478-479.

Thus, having established the existence of a class, the petitioner then has the burden of proving discrimination. In *Hernández v. Texas*, the defendant relied on the "rule of exclusion"—the pattern of proof established in *Norris*. The fact that there were qualified African Americans, but that none had been called for jury service over a prolonged period of time, was prima facie proof of the exclusion of African Americans.[41] Similarly, although Mexicans made up fourteen percent of the population of Jackson County, there is no record of any person of Mexican descent serving on a jury in the county for the last twenty-five years.[42]

The petitioner in *Hernández v. Texas*, Pete Hernández, was indicted, tried, convicted, and sentenced to life imprisonment for the murder of Joe Espinosa.[43] Prior to the trial, he moved to quash the indictment, alleging that persons of Mexican descent were systematically excluded from service as jury commissioners and from grand and petit juries.[44] The motions were renewed at the trial and denied once again.[45] In affirming the judgment, the Texas Court of Criminal Appeals considered, but did not rule on, the federal constitutional question raised by the petitioner.[46]

The State, in *Hernández v. Texas* sought to rebut the prima facie case of denial of equal protection by offering the testimony of five jury commissioners who stated that their only objective was to select the best qualified jurors, and that they did not discriminate against persons of Mexican descent.[47] The Supreme Court rejected this argument and reversed, noting that it was not sufficient to overcome the strong prima facie case.[48] Petitioner did not claim to have a right to be tried by a jury that had proportional representation, nor a right to have a person of Mexican descent sitting on his particular jury. Hernández only claimed to have a right to be indicted and tried by a jury "from which all members of his class are not systematically excluded."[49]

Batson and *Hernández v. Texas* differ from the earlier cases in that they focus not on long term patterns of exclusion of an identifiable group from grand and petit juries, but on their exclusion through the use of peremptory challenges in a particular proceeding without cause. Although no reason need be given for excluding jurors by peremptory challenge, peremptory chal-

41. *Norris*, 294 U.S. at 587.
42. *Hernández v. Texas*, 347 U.S. at 480-481.
43. *Id.* at 476.
44. *Id.*
45. *Id.* at 477.
46. *Id.*
47. *Id.* at 481.
48. *Id.*
49. *Id.* at 482.

lenges may not be used to systematically exclude members of a particular race or national origin group. The prosecution, therefore, is required to give a legitimate non-discriminatory reason for excluding jurors based on their race.

Batson outlines a three-step process for evaluating a claim that peremptory challenges were used in violation of the Equal Protection Clause of the Fourteenth Amendment.[50] The *Batson* analysis permits prompt rulings on objections to peremptory challenges without significantly disrupting the jury selection process. First, the defendant has the initial burden to make a prima facie showing that the prosecution has exercised peremptory challenges based on race.[51] The burden then shifts to the prosecution to offer a "race-neutral" explanation for striking the jurors.[52] Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[53]

Batson rejected the *Swain* standard requiring a showing that the prosecutor had excluded members of an identifiable class over a number of cases because it "placed on defendants a crippling burden of proof"[54] that immunized peremptory challenges from constitutional scrutiny.

C. *Arguments in* Hernández v. New York

In *Hernández v. New York*, Petitioner Dionisio Hernández sought to reverse his conviction, arguing that the prosecutor's exclusion of Latino jurors was discriminatory on its face and that there was a non-discriminatory alternative to the exclusion of Latino jurors.[55] The prosecution responded that the prospective jurors were not excluded because of their race or language ability, but because of the jurors' hesitancy to abide by the official translation of Spanish language testimony.[56] The prosecution argued that the exclusion of jurors who might not abide by the official translation is a legitimate, racially neutral reason for the exercise of a peremptory challenge. The prosecution further argued that Hernández' definition of racial neutrality unjustifiably distorts the intent of the Equal Protection Clause, which is to prohibit intentional racial discrimination. The defense, nevertheless,

50. 476 U.S. at 96-98.
51. *Id.* at 97.
52. *Id.*
53. *Id.* at 98.
54. *Id.* at 92.
55. Hernández v. New York, 552 N.E.2d 621 (N.Y. 1990), *cert. granted*, (No. 89-7645).
56. Respondent's Brief in Opposition at 13, Hernández v. New York, 500 U.S. 352 (1991)(No.89-7645).

maintained that the ruling in this case would determine whether *Batson* would have any meaning or effect for Latinos.

Because language-based reasons for excluding jurors are inevitably linked to national origin, Hernández claimed that the prosecutor's explanation was a per se violation of the Equal Protection Clause.[57] In Brooklyn, where the trial took place, ninety-six percent of all Latinos are bilingual and could have been excluded because of their language ability.[58] Although the prosecutor did not say that language was the reason for exclusion, his explanation revealed that language ability was, indeed, the basis for exclusion. In fact, the jurors said that they would try not to rely on what they heard in Spanish. However, the prosecutor reasoned from their initial "hesitant" answers and their "failure to establish eye contact," that the jurors "could" not comply:[59]

> The jurors' "I-will-try" answers to questions about the interpreter are the natural and honest responses. In essence, the jurors had been asked whether they could parse out and disregard what they had heard in Spanish from the witness and rely only on what they heard in English from the interpreter . . . . The jurors honestly answered, as would any bilingual juror, that they would try not to rely on what they heard in Spanish.[60]

Hernández argued that if the decision was upheld, prosecutors could use the types of explanations offered by the prosecution to exclude any bilingual Latino juror. This would essentially mean that *Batson* and the Equal Protection Clause would not apply to Latino criminal defendants.[61] Hernández noted that there was a nondiscriminatory alternative to satisfy the prosecutor's concerns. Bilingual jurors could be instructed by the court that if they believe there were errors in the translation, they could pass a note to the bailiff. The court could then determine whether the mistake is material, and if so, seek to clarify it.[62]

In addition to arguing that the prosecutor's reasons for excluding jurors was based on their language ability, Hernández maintained that there was a *Batson* violation, regardless of the prosecutor's good or bad faith intent. A violation of the Equal Protection Clause turns not on the absence of good faith, but rather, on using race as a factor for exclusion.[63] Thus, the deci-

57. Brief for Petitioner at 12, Hernández v. New York, 500 U.S. 352 (1991)(No. 89-7645).
58. *Id.*
59. *Id.*
60. *Id.* at 7-8.
61. *Id.* at 8.
62. *Id.* at 9.
63. Richmond v. Croson, 488 U.S. 469 (1989); Palmore v. Sidoti, 466 U.S. 429 (1984); *Hernández v. Texas,* 347 U.S. at 481-482.

sion to exclude jurors based on race, gender, ethnicity, or national origin, violates the Equal Protection Clause of the Fourteenth Amendment.[64] Hernández argued that a finding of a per se violation was necessary to protect the efficacy of *Batson.* Finally, he argued that a finding in his favor would not interfere with the legitimate use of peremptory challenges.[65]

D. *The Supreme Court's Ruling in* Hernández

In affirming Dionisio Hernández' conviction, the U.S. Supreme Court elected to only address the narrow issue of whether the prosecution had offered a valid, race-neutral reason for striking the jurors in question.[66] After presenting an overview of the issues, facts, and judicial history of the case, Justice Kennedy turned to the *Batson* claim in Part II of the opinion.[67]

The Court reviewed the three-step process outlined in *Batson* for evaluating claims that peremptory challenges were being used in a manner that violated the Equal Protection Clause. Because the prosecution defended its use of peremptory challenges without prompting from the court, and offered a race neutral explanation for the challenges, the issue of whether the defendant made a prima facie case was moot.[68] The Court next turned to the second step in the three-step *Batson* process, noting that in evaluating whether a proffered explanation is "race-neutral," a court must be mindful of the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause."[69]

Hernández concluded that a neutral explanation is one that is based on something other than race.[70] Thus, unless discriminatory intent is inherent in the explanation for the peremptory, the reason will be assumed to be race-neutral.[71] The Court need not address the argument that the explanation violated the Equal Protection Clause since Spanish language ability is so closely related to ethnicity. The Court further reasoned that the prosecution did not rely on language ability alone, but on the specific responses and demeanor of the individual in question:[72]

64. *See* Petitioner's Brief, *supra* note 57, at 19.
65. *Id.* at 24.
66. *Hernández*, 500 U.S. at 358-359.
67. *Id.*
68. *Id.*
69. Arlington Heights v. Metropolitan, 429 U.S. 252, 264-265 (1977).
70. *Hernández*, 500 U.S. at 360.
71. *Id.*
72. *Id.*

> The prosecutor here offered a race-neutral basis for these peremptory strikes. As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals. The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during voir dire would persuade him that they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos.[73]

Although this basis of excluding jurors might well have a disproportionate impact on Latino jurors, disproportionate impact does not mean that it is a per se violation of the Equal Protection Clause. The Court added that even if it were true, as the petitioner contends, that a high percentage of bilingual jurors would hesitate when answering questions of this sort, this would not in itself mean that the criterion would not pass the race-neutrality test.[74] Disproportionate impact is a factor that should be given appropriate weight in determining whether the prosecutor acted with discriminatory intent, but it is not conclusive evidence of such an intent, "[u]nless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race-neutrality."[75]

After the prosecution offers a race-neutral explanation for the peremptory challenge, the Court must determine whether the defendant has carried the burden of proving purposeful discrimination. If the prosecutor's basis of exclusion leads to a disproportionate exclusion of one group, the trial judge may consider this and other factors in determining whether the stated reason is a pretext for racial discrimination.[76]

In this case, the trial judge chose to believe the prosecutor's race-neutral explanation for striking the jurors, and to reject petitioner's claim that the reasons were pretextual.[77] Because this was a finding of fact, the Court reasoned the decision should be accorded great deference on appeal.[78] Federal Rule of Civil Procedure 52(a) permits factual findings to be set aside only if they are deemed to be clearly erroneous.[79] Because this case came on direct review of the state court judgment, no statute or rule gov-

73. *Id.* at 361.
74. *Id.* at 362.
75. *Id.*
76. *Id.* at 364.
77. *Id.*
78. *Id.*
79. FED. R. CIV. P. 52(a).

erns the Court's review of the facts.[80] Barring exceptional circumstances, the Court will defer to state court findings, even if such findings are related to a constitutional question.[81] The Court declined to overturn the lower court's finding on the question of discriminatory intent unless the ruling was found to be clearly erroneous. The Court stated, "we discern no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of Latino jurors."[82]

E. *Why* Hernández *Should be Reconsidered*

1. *The Peremptory Challenges Were Based on the Spanish Language Ability of the Latino Jurors*

Under *Batson*, once a prosecutor uses peremptory challenges to exclude Latinos from the jury, a prima facie case of discrimination is established. In *Batson*, the Court noted that a prima facie case of purposeful discrimination can be made solely on evidence concerning the prosecutor's use of peremptory challenges at trial: "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose."[83]

In *Hernández*, both parties agreed that sufficient evidence existed to make a prima facie case. The Court of Appeals of New York observed that the use of peremptory challenges to exclude the only Latino jurors was sufficient to trigger the *Batson* threshold.[84] The burden then shifted to the prosecutor to provide "clear and reasonably specific" non-discriminatory reasons for exercising the peremptory challenges.[85] Because there is an integral relationship between using Spanish and being Latino,[86] the petitioner argued that a decision based on Spanish language ability is tantamount to one based on national origin.[87] According to the petitioner, the use of peremptories to exclude Latino

80. *Hernández*, 500 U.S. at 366.
81. *Id.*
82. *Id.* at 369.
83. 476 U.S. at 97.
84. *Hernández*, 552 N.E. 2d at 623.
85. *Batson*, 476 U.S. at 98 & n.20.
86. This is not to suggest that Spanish language ability and Spanish speaking ability are perfectly correlated. There are Latinos who do not speak Spanish and non-Latinos who speak Spanish. What is significant in this case is that the prosecutor apparently did not inquire into the Spanish language ability of non-Latinos. This suggests that language was a pretext for exclusion.
87. *Hernández*, 500 U.S. at 360.

jurors was, therefore, a facially discriminatory reason and a per se violation of the Fourteenth Amendment.[88]

The prosecutor maintains that the exclusion of these jurors was not based on their Spanish-speaking ability but on the prosecutor's speculation that these jurors would not be able to disregard the Spanish language testimony. In Part III, I present support for the defense position that the jurors' hesitancy and "I will try" answers were clearly based on their Spanish language fluency.[89]

In its opinion, the Court of Appeals of New York acknowledged that, "[t]hese jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony."[90] The Court of Appeals concluded that this was "a legitimate neutral ground for exercising a peremptory challenge."[91] It held that these jurors were not excluded because they were Latino or because they spoke Spanish, but rather, because they were unable or unwilling "to decide a case on the official evidence before them, not on their own personal expertise or language proficiency."[92] However, if the hesitancy is inferred from their being functionally bilingual, as I suggest in Part III, it is discrimination based on language ability and national origin.

Although the majority argues that the case is really about the ability of jurors to decide the case on the official evidence rather than language, it is significant that both jurors told the judge that they would agree to abide by the official translation. Moreover, as the dissent in the Court of Appeals notes, if unwillingness to abide by the translation had been the reason for their exclusion, they would undoubtedly have been excluded for cause and not under a peremptory challenge.[93] While the prosecution emphasized the importance of excluding Spanish-speaking jurors because of the presence of an interpreter, the dissent in the New York Court of Appeals noted that there is no evidence that any other members of the panel were questioned about their ability to speak Spanish.[94]

88. *Id.*
89. *See* Brief for Petitioner, supra note 57, at 13.
90. *Hernández*, 552 N.E.2d at 623.
91. *Id.*
92. *Id.* at 624.
93. *Id.* at 627.
94. *Id.* at 628.

2. Hernández *is Based on An Incorrect Interpretation of the Equal Protection Clause*

The holding in *Hernández* is based not only on a very narrow reading of *Batson,* but on an incorrect interpretation of the Fourteenth Amendment. The Court in *Hernández* concluded that in evaluating whether the prosecutor articulated race-neutral explanations for the peremptory challenges, "a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law."[95] Drawing on the holding of *Arlington Heights v. Metro. Hous. Dev. Corp.*,[96] *Washington v. Davis*,[97] and *Personnel Adm'r of Massachusetts v. Feeney*,[98] the Court held that state action is not unconstitutional simply because it has a racially disproportionate impact.[99] Proof of discriminatory intent or purpose is required to demonstrate a violation of the Equal Protection Clause.[100]

If one looks more carefully, it is clear that the supporting cases are not on point. Unlike *Hernández*, these cases deal with the disparate impact of ostensibly facially-neutral state action on protected groups. In *Davis*, the Court upheld the validity of a qualifying test that measures verbal skills for police officers in the District of Columbia, even though the test apparently bore no relationship to job performance and a disproportionate number of African American applicants failed the test.[101] In overruling the Court of Appeals, the Supreme Court concluded that the lower court had erroneously applied the Title VII standard which allows courts to focus solely on racially differential impact.[102] But the primary purpose of the Fourteenth Amendment is to prohibit official conduct which discriminates on the basis of race or another impermissible ground.[103] In *Davis*, the Court noted it has never embraced "the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[104]

Similarly, in *Arlington Heights*, the Court found that there was no proof that a rezoning denial was racially motivated, even though it had a disproportionate impact on racial minorities, par-

95. 500 U.S. at 359.
96. 429 U.S. 252, 264-265 (1977).
97. 426 U.S. 229 (1976).
98. 442 U.S. 256 (1979).
99. *Hernández*, 500 U.S. at 359-360.
100. *Id.*
101. 426 U.S. at 235.
102. *Id.* at 238.
103. *Id.* at 239.
104. *Id.* (emphasis added).

ticularly since the area in question was heavily segregated.[105] *Arlington Heights*, holding that the respondents had failed to meet their burden of proving discriminatory purpose,[106] maintained that the rezoning denial was motivated not by a desire to discriminate, but by a desire to protect property values and to maintain the village's rezoning plan.[107]

The *Feeney* Court held that a Massachusetts statute that gives preference to veterans in hiring did not discriminate against women in violation of the Equal Protection Clause of the Fourteenth Amendment, even though most beneficiaries of the preference were men.[108] According to the Court, the law retains a preference for veterans of either sex over nonveterans, but it does not reflect a purpose or intent to discriminate on the basis of sex.[109]

Even if discriminatory impact is not a sufficient basis for establishing a Fourteenth Amendment Equal Protection violation, *Hernández* was wrongly decided for at least two reasons. First, the Court in *Davis*, *Arlington Heights*, and *Feeney* did not establish that discriminatory impact was not relevant for establishing a constitutional violation. Instead, the Court established that it was not "unconstitutional *solely* because it has a racially disproportionate impact."[110] Although it is necessary to show discriminatory purpose, the Court in *Davis* noted that the purpose need not be express, overt, or that "a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination."[111] A facially-neutral statute must not be applied so as to invidiously discriminate on the basis of race.[112] The Court in *Davis* also concluded that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[113] The decision in *Arlington Heights* added that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on ra-

105. 429 U.S. at 268-71.
106. *Id.* at 258.
107. *Id.* at 270.
108. 442 U.S. at 280-281.
109. *Id.* at 281.
110. *Davis*, 426 U.S. at 239 (emphasis added).
111. *Id.* at 240-241.
112. In an early equal protection decision, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court held that when an ordinance which appears neutral on its face is administered exclusively against a particular class of persons, it constitutes a practical denial of the Equal Protection Clause. Yick Wo was convicted of violating a local San Francisco ordinance prohibiting the operation of a laundry not located in a brick or stone building. Chinese laundries were located in wooden buildings. More than two hundred petitions by Chinese nationals had been denied, whereas all but one of the petitions filed by non-Chinese were granted.
113. 426 U.S. at 242.

cially discriminatory purposes." Disparate impact is important in determining whether invidious discriminatory purpose was a motivating factor.[114]

In addition, *Hernández* was wrongly decided because it was not a disparate impact case. The disparate impact cases involve statutes or state actions that are neutral on their face, such as a written test, a rezoning denial, or a veteran's preference policy, which had a racial or gender disproportionate impact. In this case, the prosecutor's policy was not at issue. Furthermore, the Latino jurors in this case were excluded because of their Spanish-speaking ability and because of the prosecutor's fear that they could not abide by the official translation. Consequently, all of the prospective Latino jurors were excluded from the panel.

3. Hernández *is Based on a Narrow and Erroneous Reading of* Batson

The *Hernández* decision erroneously applied the *Batson* standard. Once a prima facie case is established, or there is no dispute as to the existence of a prima facie case, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the prospective jurors. *Hernández* concluded that a neutral explanation meant an "explanation based on something other than the race of the juror."[115] This interpretation of *Batson* is so vague that as long as the prosecutor gives a reason other than race, almost any explanation meets the burden. However, the Court has consistently held that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[116]

Although the prosecutor's explanation need not rise to the level of use to justify a challenge for cause, neither can it be based on assumptions made by the prosecutor that arise solely from the jurors' race. Nor can the prosecutor rebut simply by affirming his "good faith" intention in making the selections.[117] Thus, the prosecutor "must articulate a neutral explanation related to the particular case to be tried."[118]

A prosecutor also may not rebut the defendant's prima facie case of discrimination "by stating merely that he challenged jurors of the defendant's race on the assumption— or his intuitive judgment— that they would be partial to the defendant because of their shared race."[119] In this case, the peremptories were not

114. *Arlington Heights*, 429 U.S. at 265 (1977).
115. 500 U.S. at 353.
116. *Feeney*, 442 U.S. at 272.
117. *Batson*, 476 U.S. at 98.
118. *Id.*
119. *Id.* at 97.

based on the assumption that the jurors would be biased in favor of the defendant but on the prosecutor's "intuitive judgment" that bilingual jurors would not be able to abide by the official translation. To the extent that bilingual Spanish-speaking ability is linked to being Latino, jurors are thus being excluded on the basis of assumptions which arise solely from their race. The justification that jurors were excluded not because they were Latino but because they spoke Spanish would be insufficient to rebut the presumption of racial/national origin discrimination. An analogy might be the exclusion of Whites from a jury trial where African Americans would be testifying because the prosecutor feared they might not understand African American English. In *Hernández*, the jurors were ostensibly not excluded because they spoke Spanish, but because the prosecutor "feared" that they would have difficulty abiding by the official translation, even though they indicated that they would abide by it. Nevertheless, if the reluctance of the Spanish-speaking jurors inheres in their bilingual ability, as I suggest in Part III, they are in effect being excluded because of their race and language ability.

III. Bilingualism as an Immutable Characteristic

A. *The Dominant Model of Bilingualism*

In equal protection analysis, race has been the paradigm.[120] Race is the dominant paradigm because equal protection analysis and antidiscrimination principles have been derived largely from the experience of slavery and the post-Civil War amendments designed to eliminate unequal treatment of African Americans. In seeking to trace the evolution of the "antidiscrimination principle," Paul Brest has observed that "the Supreme Court has construed the amorphous language of the Fourteenth Amendment to hold that racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.'"[121] Race is also the paradigm because racial categories are presumed to be permanent and immutable. No one can change their place of birth, the place of birth of their forebears, or their race. I propose that the exclusion of bilingual Latino jurors is racial discrimination not only because language and race are inextricably linked but because bilingualism is itself an immutable characteristic over which the individual has little, if any, control. Although a comprehensive analysis and review of research on bilingualism and language usage is well beyond the scope of this article, I will use it to illustrate how the "I will try" responses of the prospective

120. *Feeney*, 442 U.S. at 272.

121. Paul Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976).

jurors in *Hernández* are consistent with existing research on bilingualism and code switching. In addition, I will demonstrate that the linguistic response of bilinguals is not *always* within their rational control; at that moment, it is automatic or semi-automatic behavior. Finally, I will argue that the dominant model of language usage which is employed by prosecutors and courts is based on an erroneous conception of bilingualism which is inconsistent both with research findings on bilingualism and the experience of bilingual persons.

The essential elements of the dominant model of bilingualism can be readily identified. First, in the dominant model, being bilingual is simply an extension of being monolingual. Bilingual jurors are expected to disregard certain testimony, in the same way that judges ask monolingual jurors to disregard or not consider certain evidence in their deliberation.[122] In *Hernández*, the prosecutor excluded the jurors because he doubted their ability to accept the official English translation, rather than the Spanish testimony of the witness. In the dominant model, the bilingual person, like the monolingual person, should be able to disregard the Spanish language testimony. Second, in the dominant model, bilingualism is likened to a faucet with "hot" and "cold" handles that can be readily turned "on" or "off." Third, in the dominant model, language is something that can be acquired, altered, or changed at will. Finally, in the dominant view, language usage is considered rational behavior and well within the control of the actor.

There is a line of employment discrimination cases, for example, which can be used to illustrate the dominant model of bilingualism. Courts have consistently upheld English-only rules on the job as neither having a disparate impact under Title VII nor as violating the Equal Protection Clause. The rationale for upholding English-only rules is that bilingual persons can readily comply with the rule, and the decision to comply or not, is one of individual preference. In upholding an English-only rule in *Garcia v. Spun Steak*, the Ninth Circuit ruled that "we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy. Because they are able to speak English, bilingual employees can engage in conversation on the job."[123]

122. Jurors are routinely instructed to avoid news accounts of a trial, or to refrain from discussing the case with anyone prior to beginning their deliberations and then to discuss the case only with fellow jurors. They are also instructed that if they have heard of the case before trial, to disregard any prior impression that they might have about the case and to base their judgment only on the evidence presented at trial. *See* Mendez, *infra* note 193, at 194.

123. Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1987).

In an earlier English-only employment case, the Ninth Circuit Court concluded that it is "self-evident that the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice."[124] The same justification is found in *Jurado v. Eleven-Fifty-Corp.*, which denied a bilingual disk jockey's claim that a rule which prohibited him from using Spanish words or phrases on the air was discriminatory because he "had the ability to conform to the English-only order, but chose not to do so."[125]

The justification for not seeing language as an impermissible basis of discrimination in the dominant model is that language competence is not an immutable characteristic like race or national origin. Proponents of this view point out that Title VII does not prohibit all kinds of discrimination—only discrimination based on impermissible grounds such as race, color, religion, sex, or national origin. In *Garcia v. Gloor*,[126] the Fifth Circuit concluded that:

> [S]ave for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter [citation omitted] or that impose a burden on an employee on one of the prohibited bases. No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics.[127]

Employment or hiring practices that discriminate on the basis of grooming codes, length of hair, or the sign of the zodiac a person was born under, are not prohibited under Title VII because they relate to an employer's business operation, rather than to equality of employment opportunity. In *Garcia*, the Fifth Circuit concluded that restrictions on bilinguals were more like those based on the length of one's hair or zodiac sign than those based on race, skin color, or national origin.[128] The Court held that: "[A]n employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person who is *fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule.*"[129]

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124. Garcia v. Gloor, 618 F.2d 1406, 1411 (5th Cir. 1980).
125. 813 F.2d 1406, 1411 (9th Cir. 1987).
126. 618 F.2d 264 (5th Cir. 1980).
127. *Id.* at 269.
128. *Id.* at 264.
129. *Id.* at 272.

B. *An Alternative Model of Bilingualism and the Issue of Choice*

Francois Grosjean terms the prevailing model of bilingualism among researchers, educators and lay persons, the monolingual or "fractional" view.[130] According to Grosjean, the problem with the dominant model is that it sees bilingualism as two monolinguals in one person. Each bilingual person has, or should have, two language competencies corresponding to the competency of a monolingual person in each language. The language sciences have, therefore, developed from the study of monolinguals who have served as the model of the "normal speaker-hearer."[131] The fractional view of bilingualism has reflected a strong monolingual bias and has produced the following results:

1. Bilinguals have been described and evaluated in terms of the fluency and balance they have in the two languages.
2. Language skills have been appraised in terms of monolingual standards.
3. The "effects" of bilingualism have been closely scrutinized without a corresponding concern with the "effects" of monolingualism.
4. Because the two language systems should remain autonomous, the contact of the individual's two languages is seen as accidental and anomalous.
5. Research on bilingualism has been largely conducted in terms of the bilingual's competency in each of two autonomous and separate languages.
6. Bilinguals have been influenced by the monolingual bias and seldom evaluate their language competencies as adequate.[132]

In lieu of the fractional view of bilingualism, Grosjean proposes a holistic model that sees bilingualism not as the sum of two incomplete monolinguals but as an unique and specific linguistic configuration.[133]

Research on bilingualism does not support the traditional model of bilingualism found in the *Hernández* decision. Padilla and Sung have developed a theoretical framework for looking at bilingual memory which is based on principles from cognitive psychology.[134] In the model, information moves through three

130. Francois Grosjean, *The Bilingual as a Competent But Specific Speaker-Hearer*, 6 J. MULTILINGUAL & MULTICULTURAL DEV. 467, 468 (1985).
131. *Id.*
132. *Id.* at 486-471.
133. *Id.*
134. Amado M. Padilla & Hyerkyung Sung, *A Theoretical and Pedagogical Framework for Bilingual Education Based on Principles from Cognitive Psychology*,

distinct memory systems: sensory memory (SM), short-term memory (STM), and long-term memory (LTM). An environmental stimulus is first experienced through sensory memory which, based on its saliency, may be transferred to STM or LTM. Once information enters LTM, it is learned and available for use in the future.[135]

A hotly debated but unresolved issue is whether "LTM store" is separate or shared among bilinguals. In Kolers' influential work on the matter, the issue was framed as the independence versus the interdependence of the individual's two language systems.[136] Based on Kolers' initial discussion of the bilingual's memory system, competing hypotheses emerged. One view hypothesized that there is interdependent or common storage. In the interdependent model, bilingual memory consists of a single system in which information is stored as "a complex set of attributes or tags that enables the bilingual to store nonsemantic information such as modality, frequency, spatial and temporal aspects, and type of language (e.g., English, Korean)."[137] The independence model, however, posits separate and independent language-specific stores. These stores are connected by a "translation mechanism."[138]

Kolers and his associates have subjected the common store (interdependence) and separate store (independence) models to an empirical test by using a word association test in which the person is required to say the first word that comes to mind in response to a stimulus word. Under the extreme alternatives in the common storage model, the differences in reading the same poem in two languages would be due entirely to the difficulty of translation.[139]

However, "if separate storage were the case, the difference would be due to other kinds of experience."[140] For example, in the test, a large percentage of English speakers respond to "table" with "chair," or to "black" with "white." The subjects' native languages were German, Spanish, or Thai, and they also spoke English. Each subject responded to the word association test in English and in their other language. In addition, they responded in one language to a stimulus presented in the other language:

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in CRITICAL PERSPECTIVES ON BILINGUAL EDUCATION 11 (Raymond V. Padilla & Alfredo H. Benavides eds., 1992).

135. *Id.*

136. *See* Paul A. Kolers, *Bilingualism and Information Processing*, 218 SCI. AM. 78 (Mar. 1968).

137. *See* Padilla & Sung, *supra* note 134, at 20.

138. *Id.*

139. *See* Kolers, *supra* note 136.

140. *Id.* at 81.

> If the hypothesis of a common store of information were correct, one would expect a large percentage of responses to be similar in all the tests, since the concepts with which the subject was dealing would be essentially the same regardless of the language he was speaking. On the other hand, if information were stored according to language, one would expect the percentage of such direct translation to be low.[141]

The researchers found that about a fifth of the responses were the same in a bilingual person's two languages. This figure is obviously too low to confirm the common storage model and too high to support the idea that the meanings of words are stored in completely separate and independent tanks.[142]

Kolers and his associates concluded that bilinguals do not have a single store of meanings in the mind that are tapped with the two languages.[143] Rather, access to information that is stored in one's mind is in some instances restricted by the language or context in which it was encoded. The results demonstrated that words referring to more concrete objects such as "table" and "house" were more likely to evoke similar responses in the bilingual person's two languages than more abstract words. The more abstract words (freedom, justice, wisdom), in turn, elicited a larger number of similar responses in both languages than the category of words referring to feelings (love, guilt, sadness).[144] Thus, some information is stored so that it is readily accessible in either language, but the accessibility of other information is linked to the language by which it was stored in the mind.[145]

Despite these differences, both the common and the separate store models recognize the presence of a mechanism that allows bilinguals to switch from one system to the other. The models differ only to the extent where they locate each system:

> In the common-store model, this switch is situated before semantic memory. The switching mechanism is set to whichever language is being processed and the information is sent to a common memory store. In the separate-store model information in each language is stored separately unless it is required

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141. *Id.* at 82.

142. *Id.*

143. *See* Paul A. Kolers & Esther Gonzalez, *Memory for Words, Synonyms, and Translations*, 6 J. OF EXP. PSYC. 53 (1980); Paul A. Kolers, *Interlingual Word Association*, J. VERBAL & LEARNING BEHAVIOR (1963).

144. *See* Kolers, *supra* note 136.

145. *Id.* My own experience is consistent with Koler's findings. I was born in Mexico and came to the United States at age nine. My first and most fundamental exposure to religion occurred in Mexico before I spoke English. Even though I have good command of English and my vocabulary in English is more extensive than in Spanish, I find it impossible to pray in English. Whenever I go to church (and it is not very often these days), or pray in another setting, I revert to Spanish. I also find it very difficult to write poetry or express my deeper emotions in English.

in the opposite language and is then translated via the translation mechanism.[146]

An additional model, "dual-coding," seeks to resolve the controversy between the common storage and the separate storage models. In the dual-coding model, memory and cognition are served by two separate symbolic systems: one system processes verbal representations (logogens); the other, nonverbal representations (imagens).[147] The two systems are independent but interconnected. Pavio and Lambert propose that in addition to having two verbal representations, one for each of the languages, there is a third representative imagery system. The three systems are "partially interconnected but capable of functioning independently."[148]

This brief overview of research findings concerning the way that bilingual persons acquire and process information suggests a model of bilingualism that is much more sophisticated and complex than the model articulated by the Court in *Hernández*. Whether one subscribes to the common storage, the separate storage, or the dual storage model, it is clear that bilingual persons process symbolic stimuli that they experience and that this processing is automatic or semi-automatic. None of the models support the dominant theory of bilingualism, that bilinguals can arbitrarily "block out" Spanish stimuli and only process the official English translation, advanced by the prosecution and endorsed by the Court. There is, in fact, other evidence which directly contradicts this assumption.

Kolers and his associates found that if a list is presented with words appearing sequentially in two languages, subjects were able to code and store verbal information in some form other than the language in which the item appeared. The findings indicate that recall of a word increased regardless of which language it was presented in. Recall increased linearly according to the frequency of a meaning's occurrence so that presenting, for example, the word "fold" twice and its French counterpart "pli" twice, produced the same effect on recall as repeating either one four times. This occurred even though the words do not look or sound alike. This suggests that rather than storing words individually as visual or phonetic objects, bilingual persons sometimes store them in terms of their meaning.[149]

146. *See* Padilla & Sung, *supra* note 134, at 20.

147. *Id.* at 21-22.

148. Allan Pavio & Wallace Lambert, *Dual-Coding and Bilingual Memory*, 20 J. VERBAL LEARNING & VERBAL BEHAVIOR, 532, 538 (1981).

149. *See* Kolers, *supra* note 136, at 83. It should be noted that the experiment was done using a more concrete category of words such as chair, trousers, and house.

Although the dual-coding model may help resolve the debate over the "interdependence" versus the "independence" of the bilingual's two languages by offering a promising alternative to the common-store and separate-store models, the model does not address all of the issues raised in *Hernández*. A major limitation is that the model focuses on access to representation rather than the organization of bilingual memory. It, therefore, fails to explain the mechanisms through which bilinguals process information in one or both languages.[150] In fact, "[i]t is limited only to the representation in LTM and does not explain the full processing of information from stimulus representation to eventual LTM storage and retrieval."[151]

It should be noted that the type of information transfer that the bilingual jurors in *Hernández* were processing does not entail LTM storage of information. Rather, the processing of the stimulus is apt to be at the sensory memory (SM) level before it is stored even in short term memory. Thus, when the bilingual jurors initially heard the Spanish testimony or English questions, it is evident that this sensory stimulus (the substance of the question or response and the language it was in), would certainly not have been stored in LTM. Moreover, if the information was not especially salient, it probably had not yet transferred from sensory memory to STM.

Though research on bilingualism is important and long overdue, much of this psychological research is not directly relevant to the analysis of bilingualism. One of the problems with the research is that it has focused on the characteristics or attributes of bilingual individuals without considering how social or situational contexts affect bilingual communication and expression. Furthermore, a related problem is that research on bilingualism has been concerned primarily with language acquisition and learning, rather than with linguistic expression and interaction among bilingual speakers. It focuses more on how one acquires a second language than on how one maintains bilingual communication once the language is acquired. Many bilinguals like Hector Garcia are born and raised in the United States and have acquired both languages simultaneously, rather than alternately.[152] Finally, existing models, whether of the common-store, separate-store, or dual-coding variety, treat the learning and usage of two languages as separate processes. They fail to consider

150. *See* Padilla & Sung, *supra* note 134, at 22.

151. *Id.* at 22-23.

152. Garcia was a native born Texan but always spoke Spanish at home. *See Garcia*, 618 F.2d at 264.

the extent to which bilinguals are able to effectively integrate two separate grammar and language systems.

Sociolinguists have defined "code-switching" in a variety of different ways, including the following: "the juxtaposition of passages of speech belonging to two different grammatical systems or subsystems, within the same exchanges,"[153] "the alternation of grammatical rules, drawn from two different languages, which occurs within sentence boundaries,"[154] or "the alternation of two languages within a single discourse sentence or constituent."[155] Much of the early literature in the area of language contact studies adopted a negative view of code-switching—regarding it either as a form of linguistic borrowing or interference.[156] Weinreich, for example, saw interference as "those instances of deviation from the norms of either language which occur in the speech of bilinguals as a result of their familiarity with more than one language."[157] Such linguistic interference was viewed either as a transitional stage from the regular use of one language to the use of another, or as some sort of "linguistic diffusion." One result of the tendency to classify code-switching as interference is that there has been confusion regarding the prevalence of code-switching in bilingual speech and the function of code switching in bilingual communication.[158]

More recent studies have begun to interpret code-switching not as deficient or transitional behavior, but as a linguistic adaptation by bilingual speakers. According to Hans R. Dua:

> Code-switching as a process of language use implies that the individual speaker has the competence of two codes at his disposal and that he can use them alternately, consciously or unconsciously, in accordance with linguistic and extra-linguistic constraints to achieve certain communicative goals and convey sociosemantic connotations. This further implies that the two codes are kept distinct whether the competence in them is balanced or non-balanced and that the speaker can identify the elements of the respective codes.[159]

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153. John J. Gumperz, *The Sociolinguistic Significance of Conversational Code Switching*, Working Papers of the Language Behavior Research Laboratory Berkeley, University of California 46 (1976).

154. R. Gingras, *Problems in the Description of Spanish-English Intrasentenial Code-Switching, in* Southwest Areal Linguistics 167 (G.D. Bills ed., 1974).

155. Shana Poplack, *Sometimes I'll Start a Sentence in Spanish Y TERMINO EN ESPAÑOL: Toward a Topology of Code-Switching*, 18 LINGUISTICS 581, 583 (1980).

156. Adalberto Aguirre Jr., *The Sociolinguistic Basis For Code Switching in Bilingual Discourse and in Bilingual Instruction, in* CRITICAL PERSPECTIVES ON BILINGUAL EDUCATION RESEARCH 70, 73 (Raymond V. Padilla & Alfredo H. Benavides, eds., 1992).

157. U. WEINREICH, LANGUAGES IN CONTACT 1 (1968).

158. *See* Grosjean, *supra* note 130, at 471.

159. Hans R. Dua, *Perspectives on Code-Switching Research*, INT'L J. DRAVIDIAN LINGUISTICS 136, 137 (Jan. 1984).

Code-switching entails the co-existence of two separate grammars with two general language systems. Code-switching is also an intra-sentential process.[160] Bilingual speakers appear to have established a subset of grammatical rules or knowledge that permits them to code-switch effectively. A study of bilingual Mexican-Americans, conducted by Gumperz and Hernández-Chávez, found that adverbial constructions such as "Vamos next week," could not be switched when used as interrogatives, such as "When Vamos?" In addition, they found that "a code switch may occur at a noun phrase only after a determiner 'Se lo di a mi grandfather,' but not as 'Se lo di a my grandfather'. . . . [Also,] an adverb may be switched before an adjective, 'Es very friendly,' but not, 'Es very amistoso.'"[161]

Thus, Aguirre's research illustrates not only that bilingual speakers can rank-order the level of acceptability of code-switched sentences, but also that some types of code-switching are more acceptable than others, and that a bilingual speaker's ability to evaluate the acceptability of code-switched sentences is directly related to the person's proficiency in the two languages. Other research also shows that bilingual speakers use a combination of the grammatical knowledge from their two languages in processing bilingual speech.[162]

In a study of Puerto Rican bilinguals in Harlem, Poplack found that both "fluent" and "non-fluent" bilinguals were able to code-switch effectively and still maintain proper grammar in both languages: "While fluent bilinguals tended to switch at various syntactic boundaries within the sentence, non-fluent bilinguals favoured switching between sentences, allowing them to participate in the code-switching mode, without fear of violating a grammatical rule of either of the languages involved."[163] These findings show that code-switching, rather than representing a debased or inferior linguistic adaptation, is a verbal skill requiring a high level of linguistic ability in both languages. Linguists and educators traditionally considered this switching, which in actuality requires much skill, as deviant and suspect.[164]

In addition to intra-sentential switching, bilinguals often switch from one language to the other. An early study of bilingual Norwegians found that they readily switched back and forth between the two languages, and that one respondent switched

160. *See* Aguirre, *supra* note 156, at 76-77.
161. *Id.* at 78.
162. Evelyn P. Altenberg & Helen Smith Caims, *The Effect of Phonotactic Constraints on Lexical Processing in Bilingual and Monolingual Subjects*, 23 J. VERBAL LEARNING & VERBAL BEH. 174 (Apr. 1983).
163. *See* Poplack, *supra* note 155, at 581, 615.
164. *Id.*

from Norwegian to English four times in the course of fifteen minutes.[165] Haugen has noted that "[s]peakers will often be quite unaware that they are switching back and forth; they are accustomed to having bilingual speakers before them, and know that whichever language they use, they will be understood."[166] According to Weinreich, bilingual speakers use language situationally and to symbolize political and social values such that, "[t]he ideal bilingual switches from one language to the other according to the appropriate changes in the speech situation. . . ."[167]

IV. The Liberal Model of Equality and Equal Protection

A. *Feminist Critiques of the Liberal Model of Sexual Equality*

Although this paper has focused on the implications of *Hernández*, I have interpreted the decision within a larger theoretical context. The basic thesis I advance is that decisions like *Hernández* result from the imposition of a liberal model of equality which treats equality as sameness. In the prevailing liberal model, equality will be attained by treating protected groups the same as members of the dominant group. For example, equality for women will be attained by treating them the same as men. Likewise, equality for homosexuals will be attained by treating them like heterosexuals. Thus, the same proponets of a liberal model of equality erroneously believe that equality for bilinguals will be attained by treating them like monolinguals.

Using feminist scholarship as a point of departure, I propose that the liberal model will work only to the extent that there are no essential differences between men and women, and between monolinguals and bilinguals. However, if there are essential differences, treating them equal works to perpetuate, rather than eradicate, inequality. Feminist scholars have been critical of the liberal model, arguing that acceptance of the model works to perpetuate inequality.[168]

Catherine MacKinnon articulates perhaps the most influential and powerful feminist challenge to the dominant model.

165. Einar Haugen, The Norwegian Language in America 65 (1969).
166. *Id.*
167. *See* Weinreich, *supra* note 157, at 73.
168. My intent is not to discuss feminist theories in depth but to use them to provide a theoretical context for analyzing *Hernández*. *See* Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986); Catherine MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* Feminism Unmodified 32 (1987); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Treatment, Positive Action and the Meaning of Women's Equality Theory*, 13 Golden Gate U. L. Rev. 513 (1983).

MacKinnon is critical of both the liberal "equal rights" theory and Carol Gilligan's "different voice" approach,[169] arguing that the first does not go far enough and the second goes too far. Equal rights permits women to compete in a game with man-made rules where they are destined to fail. After all, "[w]hy should you have to be the same as a man to get what a man gets simply because he is one?"[170] MacKinnon is especially critical of Gilligan's depiction of gender differences in morality and world view. While differences may exist, such differences are what one would expect in a situation of subordination and are not necessarily attributable to essential gender differences.

You cannot begin to determine woman's "true essence," until such time as women are liberated. To glorify gender differences and term them essential, as Gilligan does, not only serves to internalize stereotypes but to disable women and preclude effective change on their behalf. Further, MacKinnon argues that "[f]or women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness."[171] MacKinnon believes that the difference approach errs in viewing sexism as a question of difference rather than the forced imposition of gender hierarchies by men on women because conceptions of sex equality emanate from a male perspective. Ironically, in the view that equates differentiation with discrimination, changing an unequal status quo through affirmative action or other means is discrimination but allowing it to exist is not.[172]

In addition to perpetuating the status quo, the liberal model has been criticized because its vision of equality is based on the homogeneity assumption. Krieger and Cooney have critically examined the "Miller-Wohl" controversy over whether legal arguments can be offered to justify special treatment of women in a pregnancy context without simultaneously endorsing legal principles that would permit less favorable treatment of women in other contexts. In some instances, which include pregnancy-related disabilities, treating men and women equally produces inequality.[173]

169. CAROL GILLIGAN, IN A DIFFERENT VOICE 25 (1982). Gilligan proposes that there are essential differences in the world view and moral reasoning capacities of men and women, with men being more analytical, concrete, and preferring detached, objective, and relational reasoning. Women on the other hand, are less analytical, more subjective, and more connected to others and contextual in their reasoning and moral judgment.

170. *See* MacKinnon, *supra* note 168, at 37.

171. *Id.* at 39.

172. *Id.* at 42.

173. *See* Krieger & Cooney, *supra* note 168, at 515, 517.

Unlike Gilligan's different voice approach, the liberal model of sexual equality assumes that there are no "real" or essential differences between the sexes that are not illusory, or the result of faulty sex-role stereotyping.[174] There is, therefore, no condition or experience that women have that does not have a cross-sex analogue. People are disabled for a number of reasons, including pregnancy, but disabilities should be treated the same. Moreover, the liberal view assumes that because men and women are essentially the same, "once all vestiges of disparate treatment are removed, men and women . . . will achieve equal status through individual freedom of choice and equal competition in the social and economic marketplace."[175]

The Supreme Court articulates one of the most bizarre extensions of the liberal view of sexual equality in its equal protection analysis in *Geduldig v. Aiello*.[176] The Supreme Court held that the exclusion of pregnancy-related disabilities from a state administered disability insurance plan was not sex discrimination nor a violation of the equal protection clause.[177] In the often cited footnote 20, the Court concluded that:

> [t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities .... The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[178]

Drawing on Elizabeth Wolgast's "bivalent model"[179] of sexual equality and on Scales' "incorporationist" view, Krieger and Cooney point to the need to develop a feminist jurisprudence that accords special rights to women without perpetuating stereotypic assumptions about differences between the sexes.[180]

Wolgast's bivalent model distinguishes between two types of rights: "equal" rights which are afforded all members of society, and "special" rights which are recognized among subgroups. Every individual is assumed, for example, to have an equal right of access to public buildings, but all persons are not equally able to exercise this right. A disabled person in a wheelchair will not be able to exercise the right, unless the society recognizes a "special" right of handicapped persons to have access to the build-

174. *Id.* at 538.
175. *Id.*
176. 417 U.S. 484 (1974).
177. *Id.*
178. *Id.* at 496, n.20.
179. Wolgast's "bivalent" view is similar to Giligan's "different voice" approach.
180. *See* Krieger & Cooney, *supra* note 168, at 563.

ing.[181] Applying the bivalent model of equality to the abortion context, if society recognizes an equal right of all members of society to bodily integrity, because women have the capacity to become pregnant, they will be denied that right, unless women are accorded the special right to abortion.[182]

The danger in the bivalent model and similar liberal approaches, according to Krieger and Cooney, is that special "positive" treatment based on essential differences also opens up the possibility of special "negative" treatment based on presumed differences. The danger in perspectives like Gilligan's "different voice" approach and Wolgast's "bivalent model" is that they may well perpetuate sex role stereotyping based not on essential differences but on normative considerations.[183] Krieger and Cooney conclude that this problem can be circumvented by adopting Scales' "incorporationist" approach, which applies a "limiting principle" to Wolgast's bivalent model.[184] Under the limiting principle, the special rights of women would be limited to sex-specific conditions such as pregnancy and breastfeeding. This safeguard insures that normative differences between the sexes will not be used to allocate special rights or burdens.[185]

B. *The Liberal Model, Bilingualism, and Equal Protection*

Like traditional conceptions of sex equality, English-only rules and the use of peremptories to exclude bilingual venirepersons are practices based on a liberal view that seeks to attain equality by treating bilingual speakers the same as monolingual English-speakers. The problem, of course, is that bilingual persons are not the same; they are different. Bilinguals are not simply the sum of two monolinguals.

An essential flaw in the traditional model of bilingual behavior is that it assumes that bilingual employees deliberately "choose" to disregard English-only employment rules or that bilingual jurors "refuse" to accept the official translation as the final arbiter and to disregard Spanish language testimony. This model emanates from a monolingual model of language use and is based on additive conception of bilingualism which treats bilingual persons as two separate monolingual English and monolingual Spanish speakers.

If we think of language as a faucet, the monolingual English-speaker is the "cold" handle of the faucet and the monolingual

181. *Id.* at 557-558.
182. *Id.* at 561.
183. *Id.* at 563.
184. Ann C. Scales, *Toward a Feminist Jurisprudence*, 56 IND. L.J. 375, 435 (1981).
185. *See* Krieger & Cooney, *supra* note 168, at 563.

Spanish speaker is the "hot" handle or vice versa. Under this conception of bilingualism, a bilingual person can completely "turn off," or "turn on," one or the other handle at will. An added assumption of the theory of bilingualism employed by the prosecutor in *Hernández* is that bilinguals can turn off both handles and become momentarily alingual. The prosecutor rejected the prospective Latino jurors because he was not convinced from their response during voir dire that they could listen to the Spanish language testimony and then completely disregard it and accept only the English testimony. Since this is a simultaneous translation, the expectation requires that jurors have an extraordinary ability to turn the English and Spanish handles "on" and "off" at will. This is not possible, especially for bilinguals who are used to interacting with other bilinguals and to code-switching both between sentences and within them.

V. CONCLUSION

In this Article, I have argued that *Hernández v. New York* denies Latinos the right to a jury selected without discrimination and to equal protection under the Fourteenth Amendment. By holding that the exclusion of prospective Latino jurors was facially neutral because the prosecutor felt that they might have difficulty abiding by the official translation, the Supreme Court effectively denied the protection of *Strauder* to bilingual Latinos.

The argument that the jurors were not excluded because they were Latino is unpersuasive, given that most Latinos speak Spanish. Moreover, ninety-seven percent of all bilingual Spanish speakers in the United States are Latino, and most Latinos claim some knowledge of Spanish.[186] In addition, regardless of language competency, the fear that Latinos will not abide by the official translation can be used as a pretext for excluding them from juries.

Significantly, the prosecutor in *Hernández* did not question non-Latinos about their knowledge of Spanish or whether they would have difficulty abiding by the official translation. The prosecutor also assumed the language competency of the two excluded jurors without first assessing it. Thus, *Hernández* sets a dangerous precedent because the decisions will likely lead to the wholesale exclusion of Latinos from juries.

The Third Circuit Court of Appeals has recently extended *Hernández* in holding that the "Equal Protection Clause does not

186. Brief for the Mexican American Legal Defense and Educational Fund and the Commonwealth of Puerto Rican Community Affairs in the United States, as Amici Curiae in Support of Petitioner. *Hernandez v. New York*, October term, 1990, at 3.

prohibit a trial attorney from peremptorily challenging jurors because of their ability to understand a foreign language, the translation of which will be disputed at trial."[187] In *Pemberthy*, the prosecutor used five peremptory challenges to exclude Latinos who spoke Spanish because the translation of wiretap tapes would be contested at trial. The defendants moved to suppress all of the wiretap evidence, "arguing, among other things, that the interceptions had not been properly minimized due to the monitors' deficient knowledge of Spanish."[188]

However, in *Hernández*, the prosecutor claimed that the jurors were not excluded because they were Latino or because they spoke Spanish, but because of their hesitancy in answering whether they would abide by the official interpretation. In this brief review of research on bilingualism, I have argued that the excluded jurors in *Hernández* answered in the way that any honest person would have answered. I have further argued that available research on bilingualism and the experience of bilingual speakers supports the conclusion that bilingualism is largely an immutable trait over which the individual has little, if any, conscious control. In addition to research which suggests that language processing occurs automatically among bilinguals, postmortem studies of polyglot brains provide evidence that knowledge of more than one language has anatomical consequences.[189]

Bilingual Latinos are different not only from monolinugals but from protected classes for whom language is not a primary basis of difference, identity, or discrimination. Like race or national origin, bilingual children learn the language or languages that are spoken in the home and have little choice or control over the acquisition of language. I argue that if equality is to be attained, law and equal protection analysis must take into account this difference. Otherwise, the *Hernández* equal treatment analysis is bound to perpetuate inequality.

The imposition of the liberal model by courts has the effect of homogenizing differences not only between the dominant group and protected classes, but also among protected groups. It is difficult to ignore the similarities of the equal protection analysis between *Hernández v. New York* and *Geduldig v. Aiello*. In *Geduldig*, the Court held that the California insurance program was not sex discrimination because the program classified recipients as pregnant women and "nonpregnant persons."[190] In *Her-*

187. *Pemberthy v. Beyer*, 19 F.3d 857, 858 (1994).
188. *Hernández*, 552 N.E.2d at 623.
189. MARTIN L. ALBERT & LORAINE K. OBLER, THE BILINGUAL BRAIN 95 (1978).
190. 417 U.S. 496 (1974).

nández, there was no racial discrimination because the prosecutor's articulated race neutral basis for the challenges grouped potential jurors into two classes: "those whose conduct during voir dire would persuade him they might have difficulty in accepting the translator's rendition and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos."[191]

The *Hernández* decision brings to light a number of paradoxes. One harsh paradox, reluctantly acknowledged by the Court, is that "one may become proficient enough in English to participate in a trial [citations omitted] only to encounter disqualification because he knows a second language as well."[192] Historically, Latinos have been excluded from juries because they did not know English. After *Hernández,* they can be excluded because they do.

An additional paradox in *Hernández* is that the decision was justified because it advanced the "truth-seeking" function of courts.[193] The paradox is that this decision justifies excluding the only persons who actually hear the testimony in the language used by the witness. Monolingual English-speakers only have access to the official translation. However, the presence of bilingual jurors is essential to advance the truth-seeking function of juries. In a situation where there is a good, accurate translation, there is no problem with having bilingual jurors because the English translation would be an accurate reflection of the testimony. However, in situations where the translation is disputed, the bilingual juror can help to correct errors and distortions. Miguel Méndez notes that "[d]isqualifying from jury service individuals who can call attention to such inaccuracies defeats the truth-seeking function of a jury trial."[194]

In what has emerged as a classic statement on civil rights and equal protection, Paul Brest proposed that despite the vagueness and ambiguity of the language of the Equal Protection Clause and regardless of the specific intent of the framers, a principle disfavoring racial classifications is warranted under the Fourteenth Amendment.[195] Brest proposed adoption of an "antidiscrimination principle" which he defined as a "general principle disfavoring classifications and other decisions and practices that

191. 500 U.S. at 361.
192. *Id.* at 371.
193. For a critique of the *Hernández* decision, *see* Miguel A. Méndez, *Hernández: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193 (1992-93); Juan F. Perea, *Hernández v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992).
194. Mendez, *supra* note 193.
195. Paul Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976).

depend on race (or ethnic origin) of the parties affected."[196] Support for the antidiscrimination principle is warranted not only because it rests on fundamental values that are widely accepted in our society but also because it can provide the moral force necessary to justify extension of the Equal Protection Clause to "novel circumstances and new beneficiaries."[197]

196. *Id.*
197. *Id.*