



ST. MARY'S  
UNIVERSITY

The Scholar: St. Mary's Law Review on Race  
and Social Justice

---

Volume 18 | Number 2

Article 6

---

1-1-2017

## No un Jurado de Mis Pares: Juror Exclusion of Limited English Proficient Speakers.

Michael McCann

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Courts Commons](#), [Immigration Law Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Michael McCann, *No un Jurado de Mis Pares: Juror Exclusion of Limited English Proficient Speakers.*, 18 THE SCHOLAR (2017).

Available at: <https://commons.stmarytx.edu/thescholar/vol18/iss2/6>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

## NO UN JURADO DE MIS PARES: JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS

MICHAEL MCCANN\*

I. Introduction.....	346
II. The Historical Development of the Role of the Juror .....	348
A. The Self-Informed Juror and Its Development .....	348
B. The Role of the Juror in the U.S. Court System.....	350
III. The English Language Requirement: An Overview of its Implementation .....	352
A. Proficiency Standards in State Courts .....	353
IV. Justice System Access for LEP Individuals is Essential ....	355
V. Implications of a Juror Language Requirement on the Jury Pool.....	357
VI. Constitutional Upheaval of the LEP Community .....	359
A. The Supreme Court's Formalistic Approach and Standards of Review .....	359
B. Executive Support .....	363
VII. Recognition of the LEP Community as a new Cognizable Class of Persons.....	364
A. The First Circuit's Definition of Cognizable Group... ..	365
VIII. Addressing LEP Speakers in a Justice System: The New Mexico Model .....	367
A. The Right to Serve on a Jury .....	367
B. What Constitutes Reasonable Effort? .....	369
C. Eligibility Requirements of the Judicial Interpreter... ..	370
D. Criticisms of the Judicial Interpreter .....	373
IX. The Cost of New Mexico's Interpreter System .....	375
A. Financial Responsibilities of the State .....	375
B. Additional Program Funding is Necessary .....	375
C. Potential Solutions to the Problem .....	377

---

\* Candidate for Juris Doctor at St. Mary's University School of Law, Class of 2016; B.A., Political Science and B.A., Psychology, University of Texas-Pan American (2011). I want to acknowledge and thank Judge Micaela Alvarez and Trevor Hall for the experience they provided through my internship with the U.S. District Court for the Southern District of Texas. It was this experience that provided the foundation for my thoughts in this comment. Additionally, I wish to thank Roel Alanis, Selina Garcia, JonCarlo Serna, Lisa Martinez and Dylan Price for their continued support.

## X. Conclusion ..... 378

## I. INTRODUCTION

Throughout our nation's history, the U.S. court system has been an essential part of the framework that shapes the laws and views of society. As important a role a judge plays in any case, the role of the juror is equally important. Every day throughout the United States, panels of jurors comprised of citizens representing virtually every facet of society, are appointed the duty to decide an infinite number of criminal and civil disputes.<sup>1</sup> Without juries, our nation's court system would not have the legitimacy it does today. The goal behind a jury trial is to ensure the court renders a judgment that subscribes to the laws and regulations established by the various branches of government and that correctly and *accurately* represents societal views.<sup>2</sup> Such a goal can only be accomplished by assembling a group of individuals whose judgment reflects society as a whole.<sup>3</sup> This includes mixing the educated with the ignorant, the shy with the outspoken, the wealthy with the impoverished, and one race with another.<sup>4</sup> If this is the type of diversity our jury system strives for, why are citizens who are not fluent in English—individuals termed as those with limited English proficiency (LEP)<sup>5</sup>—routinely disqualified or excluded from fulfilling an essential civic responsibility?

In our court system, jurors are considered “fact finders” and, as such, are responsible for ascertaining the truth in a controversy containing issues of fact.<sup>6</sup> In a typical trial setting, jurors must be able to comprehend and consider the relevant evidence presented,<sup>7</sup> evaluate the credibility of

---

1. See generally A.B.A. DIV. FOR PUB. EDUC., THE HISTORY OF TRIAL BY JURY 1, [http://www.americanbar.org/content/dam/aba/migrated/jury/moreinfo/dialoguepart1.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jury/moreinfo/dialoguepart1.auth_checkdam.pdf) (describing the individual right of obtaining a trial by jury, and the important role it plays in American society).

2. *Id.*

3. *Id.* at 4 (explaining how the right to a jury trial now includes the right to have a jury selected from a representative cross section of the community).

4. See generally *id.* (noting jury composition is intended to form a cross section of the community).

5. An LEP individual is someone who speaks a language other than English as her primary language and has a limited ability to read, write, speak, or understand English. *Frequently Asked Questions*, LEP.GOV, <http://www.lep.gov/faqs/faqs.html#OneQ7> (last visited Sept. 13, 2015).

6. Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different* 62 U. CIN. L. REV. 1377, 1390 (1994).

7. *Cf. id.* (explaining juror understanding of legal concepts has been a contested issue within trials).

## 2016] JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS 347

witnesses,<sup>8</sup> and decide the probability of certain events that have occurred—all through their own understandings of law and from material facts presented to them by judges, witnesses and lawyers.<sup>9</sup> Unlike witnesses, defendants, or plaintiffs—each of whom have their own account of the relevant facts—a juror must formulate their decision based on the information presented to them during a trial.<sup>10</sup> To reach a confident unanimous verdict, each individual juror must understand the substance of the courtroom discourse and analyze the credibility and weight of the evidence offered.<sup>11</sup>

As illustrated, the role of the juror is extremely important. Statutes that create overly burdensome language proficiency standards create problems with the jury selection process. These standards limit, and often times completely deny LEP individuals the opportunity to fulfill their fundamental civic duty.<sup>12</sup> Moreover, the absence of necessary juror interpretation programs throughout the U.S. continues to provide the courts with “reasonable” justification for LEP exclusion. Instead of completely disqualifying an individual for a linguistic limitation, federal and state governments should advocate for LEP inclusion in all judicial proceedings. “Both LEP persons and English speakers alike benefit, as courts often decide issues which affect the interests of both.”<sup>13</sup> In addition, upholding the integrity of the entire justice system equally serves as motivation for why language access services must be provided in a comprehensive manner, not merely isolated to one part of the legal proceedings. An effective interpreter program can mitigate this severe ine-

---

8. See generally Renee McDonald Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505, 509 (2014) (describing the role jurors play in determining the witness's credibility is a fairly modern notion).

9. See generally *Role of the Jury*, CITIZENS INFO., <http://www.citizensinformation.ie/en/justice/courtroom/jury.html> (last updated Feb. 5, 2014) (listing the rules applicable to jurors during both civil and criminal trials).

10. See generally John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1189 (2002) (explaining juror duties consist of weighing evidence, drawing factual inferences, and applying relevant law instructed by the judge).

11. Cf. *id.* (asserting jurors need to “decipher complex and lengthy instructions” in making a decision).

12. See Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 815, 829–30 (2014) (arguing federal and state English literacy requirements deprive LEP individuals from being afforded full citizenship rights like jury service).

13. ABA, STANDARDS FOR LANGUAGE ACCESS IN COURTS 21 (2012), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_standards\\_for\\_language\\_access\\_proposal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf).

quality, but there are many obstacles that leave the LEP community with much to desire.<sup>14</sup>

This comment examines the inception of jury instructions and how LEP jurors, especially those in minority communities, can accomplish the purpose the instructions were designed to realize. By exploring the history of jury instructions and the initial development and evolution of jury composition, the importance of complete inclusion of non-English speakers should be recognized as a fundamental right. Eliminating the distinction between language ability from other constitutionally protected groups may lead to the recognition of a new cognizable class of protected people. Further, this comment will examine the issues associated with language interpretations and how courtroom proceedings can be modified to accommodate the LEP community, and it will provide guidance in examining the issues associated with providing interpreters for LEP jurors by reviewing New Mexico's juror interpretation program.

## II. THE HISTORICAL DEVELOPMENT OF THE ROLE OF THE JUROR

### A. *The Self-Informed Juror and Its Development*

The exact origins of jury procedures have not been determined with great precision.<sup>15</sup> However, the first documented use of the term "juror," or self-informing juries, can be traced back to the 12th Century reign of King Henry II.<sup>16</sup> During that time, self-informing "juries were viewed as inquisitive bodies and jurors were allowed to question witnesses both outside and inside the courtroom."<sup>17</sup> However, unlike the modern court

---

14. Rose, *supra* note 12, at 813. These obstacles include the Supreme Court's formalistic distinction of language and race discrimination. *Id.* In addition, societal assumptions regarding how the ability to understand and speak English is necessary to effectively participate on a jury has perpetuated a lack of inquiry into the purpose of the language requirement and possibility of implementing language accommodations. *Id.*

15. See Wylie A. Aitken, Comment, *The Jury Instructions Process—Apathy or Aggressive Reform?*, 49 MARQ. L. REV. 137, 138 (1965) (stating the historical formation of juries and jury instructions has not been narrowed to a specific date).

16. See Steven Muhlberger, *Law and Administration under Henry II*, ORB, [http://163.238.55.65/textbooks/muhlberger/law\\_and\\_admin.html](http://163.238.55.65/textbooks/muhlberger/law_and_admin.html) (last visited Oct. 2, 2015) (explaining the pivotal role King Henry II had on the establishment of the common law system). King Henry II has been cited as the father of the common law of England. *Id.* "[Common law] means the indigenous system of principles, procedures, and precedents that evolved in England and which is the basis for the legal systems of Britain, the USA, most of Canada, and other English-speaking countries." *Id.*

17. ELLEN CHILTON & PATRICIA HENLEY, PUB. LAW RESEARCH INST., IMPROVING THE JURY SYSTEM 2 (2004), <http://gov.uchastings.edu/public-law/docs/plri/juryinst.pdf>.

system there was no formal trial or presentation of evidence.<sup>18</sup> Jurors were often chosen because they were either witnesses, or because of their standing and ability to ascertain facts from the community.<sup>19</sup> Without the limitations imposed today, jurors had full discretion to obtain every conceivable fact in order to render a party innocent or guilty.<sup>20</sup> Often times these facts were obtained by the individual juror's own investigatory means.<sup>21</sup> If a juror needed additional information, they simply conferred with any person within the community who had knowledge of the facts.<sup>22</sup> Throughout these early days, the court was not concerned with regulating this type of fact-finding process.<sup>23</sup> In fact, often times the jurors knew significantly more about the facts of the case than the judge.<sup>24</sup> By the end of the 15th century, however, fewer informed jurors and issues involving witness credibility led to the eventual decline of the self-informed jury system.<sup>25</sup> These issues created loopholes that quickly developed into an insurmountable weakness for the juror self-investigatory system.<sup>26</sup>

---

18. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170 (1996) (noting jurors were required to investigate the facts and consult people who were informed in the subject).

19. *Id.* "The hope was that a jury of the locality would contain witness-like persons who would know the facts, or if not, that these jurors would be well positioned to investigate the facts on their own." *Id.*

20. See *id.* (inferring early jurors were more independent in their decisions since instructional trials were not common practice). "The medieval jury came to court not to listen but to speak, not to hear evidence but to deliver a verdict formulated in advance." *Id.*

21. See *id.* (illustrating the role of a juror which required them to be able to attain facts from members of the community or conduct their own investigations).

22. *Id.*

23. See Daniel Klerman, *Was the jury ever self-informing?*, in 1 JUDICIAL TRIBUNALS IN ENGLAND AND EUROPE, 1200–1700 THE TRIAL IN HISTORY 58, 60 (Maureen Mulholland et al. eds., Manchester University Press 2003) (asserting in-court testimony was not important).

24. *Id.*

25. See *id.* at 74 (describing how the concept of "self-informed jurors" began to fade during the mid-15th century). Self-informed jurors ". . . were partly replaced by officials, such as coroners, hundred bailiffs, and constables" who had specific knowledge about cases. *Id.* In addition, due to the increased pressure to present more in-trial evidence (because of the lack of availability of self-informed jurors), witnesses and prosecutors began to play a larger role, thus minimizing the importance of the self-informed juror. *Id.* Witness credibility problems arose due to the lengthy period between the initial indictment of a crime (the formal charge against a defendant) and the commencement of the actual trial. *Id.* Specifically, trials were held every four years, which made it impossible for jurors to remember pertinent facts of a case. *Id.*

26. See generally *id.* (describing some of the many problems that arose from the long waiting periods in criminal cases).

As the self-informing jury became less effective, the role of the juror changed.<sup>27</sup> Jurors began participating by listening to evidence presented at trial.<sup>28</sup> Additionally, jurors were no longer selected for their knowledge about the facts, but rather, they were chosen because they were ignorant of them, forming expectations that they would be an unbiased party.<sup>29</sup> Nevertheless, similar to the self-informing system, jurors were not constrained solely to what was presented at trial and could still base their verdict on their personal knowledge.<sup>30</sup> Limitations involving outside evidence would not come to fruition for almost two hundred years after this initial reform.<sup>31</sup> Consequently, it was during this period that jury instructions, limitations, and restraints were sought.<sup>32</sup>

### B. *The Role of the Juror in the U.S. Court System*

In the United States, the transition from an active jury, to a more passive one, necessitated an instructional process.<sup>33</sup> Initially, judges exercised control over jury instructions by influencing and regulating the content and procedures of the trial,<sup>34</sup> while the jurors were to decide both questions of fact and questions of law.<sup>35</sup> These instructions were fraught with abuse of judicial authority and consequently, a growing concern over the level of competency of ordinary jurors led to the adoption of restrictions.<sup>36</sup> An 1895 decision by the Supreme Court officially prohibited ju-

27. A.B.A. DIV. FOR PUB. EDUC., *supra* note 1, at 2.

28. *Id.*

29. Langbein, *supra* note 18, at 1171.

30. A.B.A. DIV. FOR PUB. EDUC., *supra* note 1, at 2; *see also* Klerman, *supra* note 23, at 60 (explaining medieval juries were never fully self-informing since jurors also based their ultimate decision on evidence presented at trial by attorneys and witnesses).

31. *See* A.B.A. DIV. FOR PUB. EDUC., *supra* note 1, at 2 (noting the right of jurors to base their opinions at trial on personal knowledge was a recognized right until the 17th century).

32. *See* Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 718, 730–31 (1983) (explaining how trial mechanisms helped foster jury neutrality beginning in 17th century trials).

33. Langbein, *supra* note 18, at 1171.

34. Aitken, *supra* note 15, at 138.

35. Ellen Chilton & Patricia Henley, *Jury Instructions: Helping Jurors Understand Evidence and the Law*, 2004 IMPROVING THE JURY SYSTEM 9, <http://gov.uchastings.edu/public-law/docs/plri/juryinst.pdf>.

36. *See* Aitken, *supra* note 15, at 138 (discussing the problems that led to the development of jury instructions included abuse of discretion of judges and bullying of juries); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 607 (1993) (“The judiciary came to believe that the jury was incapable of comprehending the new industrial reality. Judges also assumed that jurors were irremediably biased against corporate defendants. Based on these assumptions, judges sought to curtail the jury’s authority.”).

2016] *JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS* 351

ries from deciding issues of law.<sup>37</sup> The Court held judges solely responsible for deciding issues of law, and limited juries to deciding issues of fact.<sup>38</sup> The Supreme Court's decision added more confusion than clarity for the courts.<sup>39</sup>

Judges had difficulty implementing this new change as they were concerned with issuing jury instructions while maintaining accurate legal language (legalese).<sup>40</sup> They feared an appellate court would overturn their decision if precise legal language was not used in the jury instructions.<sup>41</sup> By 1938, the American Bar Association adopted minimum standards for trial practice.<sup>42</sup> Still, this instruction process became a mere formality.<sup>43</sup> Judge Robert L. Winslow<sup>44</sup> eloquently explained the practice:

After the argument to the jury, we judges don our robes and go forth in the battle of *justice v. evil* with our 'Book.' Our part in the trial is beginning, our script is set, the scriptural [sic] lesson for the day is 'negligence.' The language must not vary except that we might insert the names of the parties. We must not, however, deviate from 'approved legal language.' Any desire to make the ritual understandable must be suppressed for we must correctly state the law even if it is not understood. To make the script understandable would be to risk reversal for an understandable statement would not be in 'approved legal language.'<sup>45</sup>

---

37. See *Sparf v. United States*, 156 U.S. 51, 98–106 (1895) (holding a juror's duty is to take the law as expressed by the presiding judge at trial and apply the law to the facts of the case).

38. Aitken, *supra* note 15, at 138; see CHILTON & HENLEY, *supra* note 17 (claiming states mandated judges to instruct the jury on the law they were required to apply).

39. See Aitken, *supra* note 15, at 139 (describing how judges' inability to explain the law without legalese in juror instructions created more confusion than it alleviated).

40. *Id.* at 139.

41. *Id.*

42. Kenneth Dayton et al., *Report of the Committee on Trial Practice*, 63 ANN. REP. A.B.A. 551, 553 (1938). "[A]fter the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and he may advise the jury as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury." *Id.*

43. Aitken, *supra* note 15, at 138.

44. LL.B., Stanford University Law School, 1949; Judge, Superior Court, Mendocino County.

45. Robert L. Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456, 456 (1962).



The presumption remains that jurors will follow these instructions and understand a judge's response to their question,<sup>46</sup> when in reality, this is not the case.

The implementation of jury instructions has evolved and serves as a type of decisional framework to guide and narrow the scope of a juror's application of the law to the facts.<sup>47</sup> The underlying framework is based on the instructions' intention to inform jurors of principles of law, burdens of proof, and standards for weighing evidence.<sup>48</sup>

### III. THE ENGLISH LANGUAGE REQUIREMENT: AN OVERVIEW OF ITS IMPLEMENTATION.

Neither the U.S. government nor any explicit language in the Constitution declares English as the official language of the nation<sup>49</sup>—although currently, twenty-six states have adopted English as the official language.<sup>50</sup> Yet, to qualify as a juror, one *must* be able to read, write, speak,

46. *Weeks v. Angelone*, 528 U.S. 225, 226 (2000). “To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge’s answer.” *Id.*

47. *See Cronan, supra* note 10, at 1193 (stating the Supreme Court established that a trial’s judges role in instructing jurors is to direct the application of law accurately).

48. *See generally id.* at 1193–1994 (discussing different purposes for instructions juries receive at various stages of a trial).

49. *Rose, supra* note 12, at 816; *see* U.S. CONST. (exemplifying the lack of an official language requirement). *But see* English Language Unity Act of 2013, H.R. 997, 113th Cong. 3 (2013) (proposing to declare English as the official language of the United States). Although bills declaring English as the official language have been proposed, they have never been passed. *Rose, supra* note 12, at 816–20. *See generally* Walter Hickey, *One Map That Shows Why English Will Never Be The Official Language Of The US*, BUSINESS INSIDER (Sept. 11, 2013, 4:47 PM), <http://www.businessinsider.com/one-map-that-proves-english-will-never-be-the-official-language-of-the-us-2013-9> (showing regions where non-English speakers are among the highest numbers of the population). The language diversity of the United States is making it increasingly difficult to proclaim and maintain an official language for the country. *Id.* The idea of English becoming the official language will undoubtedly never come to fruition. *Id.*

50. *Rose, supra* note 12, 816–20; *see, e.g.*, FLA. CONST. art. II, § 9 (declaring English as the official language of Florida); HAW. CONST. art. XV, § 4 (designating both English and Hawaiian as the official languages of Hawaii); TENN. CODE ANN. § 4-1-404 (2010) (establishing English as the official language of Tennessee); VA. CODE ANN. § 1-511 (2005) (adopting English as the official language of Virginia). States have also implemented statutes requiring jurors to be able to speak, read, and write in English. *E.g.*, ALA. CODE § 12-16-59 (1975); ALASKA STAT. § 09.20.010 (2014); ARIZ. REV. STAT. ANN. § 21-202 (2014); ARK. CODE ANN. § 16-31-102 (2015); CAL. CIV. PROC. § 203 (1995); COLO. REV. STAT. § 13-71-105 (2015); GA. CODE ANN. § 15-12-163 (2015); IDAHO CODE § 2-209 (2014); IND. CODE § 33-28-5-18 (2015); IOWA CODE § 607A.4 (2015); KAN. STAT. ANN. § 43-158 (2014), *proposed amendment by* 2015 Kan. Sess. Laws 333; KY. REV. STAT. ANN. § 29A.080 (2015); MO. REV. STAT. § 494.425 (2014); NEB. REV. STAT. § 25-1601 (2003); N.H. REV. STAT. ANN. § 500-A:7-a (2014); N.C. GEN. STAT. § 9-3 (2014); N.D. CENT. CODE § 27-09.1-07

## 2016] JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS 353

and understand English, in order to serve on a jury panel in federal courts and in many state courts.<sup>51</sup> Specifically, federal courts disqualify potential jurors on the basis of language for two reasons. First, if the individual is completely incompetent in the English language, the individual will be disqualified from jury participation.<sup>52</sup> Second, if the individual is not completely incompetent, but is “unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form” they will be disqualified.<sup>53</sup> In practicality, the federal judicial system has implemented a high, if not impossible, language efficiency standard for individuals with LEP to overcome.<sup>54</sup> As strict as the federal standard may seem, it is still less demanding than standards implemented by some states.<sup>55</sup>

#### A. Proficiency Standards in State Courts

Assistant professor of law at the University of Pittsburgh, Jasmine B. Gonzales Rose, studied every individual states’ efficiency requirement that must be satisfied for a citizen to qualify to serve as a juror.<sup>56</sup> This state-by-state analysis found many stipulations directly conflict with constitutional guarantees.<sup>57</sup> Specifically, forty-one states have English language prerequisites that require “prospective jurors possess some level of English language proficiency in order to serve on a jury panel.”<sup>58</sup> The

---

(2015); S.C. CODE ANN. § 14-7-810 (1962) (amended 1986); S.D. CODIFIED LAWS § 16-3-10 (2015); UTAH CODE ANN. § 78B-1-105 (2008); WYO. STAT. ANN. § 1-11-101 (2015).

51. Rose, *supra* note 12, at 816–17. English is the language required in all official proceedings of federal courts. *Id.*

52. 28 U.S.C. § 1865 (West 2015).

53. *Id.*

54. See Rose, *supra* note 12, at 816 (asserting the JSSA standard is a high bar to overcome causing the exclusion of those who cannot speak or write less than very well in English).

55. See *id.* at 819 (comparing the federal language requirement with those of Louisiana, Pennsylvania, South Carolina, and Vermont).

56. *Id.*

57. See generally *id.* at 834 (showing the discrepancies between Constitutionally guaranteed rights and rights implemented by state laws).

58. *Id.* at 818; e.g., ALA. CODE § 12-16-59(b)(3) (1975); ALASKA STAT. § 09.20.010(a)(6) (2014); ARIZ. REV. STAT. ANN. § 21-202(B)(3) (2014); ARK. CODE ANN. § 16-31-102(a)(3) (2015); CAL. CIV. PROC. § 203(a)(6) (1995); COLO. REV. STAT. § 13-71-105(2)(b) (2015); CONN. GEN. STAT. § 51-217(a)(3) (2015); DEL. CODE ANN. tit. 10, § 4509(b)(4) (2015); GA. CODE ANN. § 15-12-163(b)(6) (2015); HAW. REV. STAT. § 612-4(a)(4) (2014); IDAHO CODE § 2-209(1)(a) (2014); 705 ILL. COMP. STAT. § 305/2(3) (1997); IND. CODE § 33-28-5-18(b)(2) (2015); IND. ST. JURY r. 5(d) (2001) (amended 2006); KAN. STAT. ANN. § 43-158(a) (2014), *proposed amendment* by 2015 Kan. Sess. Laws 333; KY. REV. STAT. ANN. § 29A.080(2)(d) (2015); LA. CODE CRIM. PROC. ANN. art. 401(a)(3) (2010); ME. REV. STAT. tit. 14, § 1211 (2015); MD. CODE ANN., CTS. & JUD. PROC. § 8-103(b)(2) (2006); MASS. GEN. LAWS ch. 234A, § 4(3) (2015); MICH. COMP. LAWS

study explains that states with the most restrictive language requirement standards go beyond what is required by the federal standard.<sup>59</sup> States including Louisiana, Pennsylvania, South Carolina, and Vermont, explicitly mandate jurors *must* have the ability to read, write, speak, and understand English in order to serve on a jury.<sup>60</sup> In contrast, the language set forth in the federal standard does not define “the degree of proficiency” one must have, but rather defers to the discretion of the sitting trial judge.<sup>61</sup>

States that have not officially declared an English language requirement for juror service may “be in the process of attempting to institute such a requirement, or employ such requirements in practice.”<sup>62</sup> For example, Texas’s juror qualification statute states that a person is competent to serve as a juror if that person “is able to read and write,” but does not identify that the literacy must be in English.<sup>63</sup> Consequently, the Texas

§ 600.1307a(1)(b) (2009); MINN. GEN. R. PRAC. 808(b)(4) (2015); MO. REV. STAT. § 494.425(5) (2014); NEB. REV. STAT. § 25-1601 (2003); NEV. REV. STAT. § 6.010 (2015); N.H. REV. STAT. ANN. § 500-A:6(III)(b)(2) (2014); N.J. STAT. ANN. § 2B:20-1(b) (2015); N.Y. JUD. LAW § 510 (2015); N.C. GEN. STAT. § 9-3 (2014); N.D. CENT. CODE § 27-09.1-07(1)(b) (2015); OHIO CRIM. R.(C)(13) (1973) (amended 2009); OKLA. STAT. tit. 22, § 22-658 (effective Sept. 1, 2015); 42 PA. CONS. STAT. § 4502(a)(1) (1980) (amended 2001); 9 R.I. GEN. LAWS § 9-9-1.1(a)(4) (2014); S.C. CODE ANN. § 14-7-810(2) (1962) (amended 1986); S.D. CODIFIED LAWS § 16-3-10 (2015); UTAH CODE ANN. § 78B-1-105(1)(d) (2008); VT. STAT. ANN. tit. 4, § 962(a)(3) (2015); WASH. REV. CODE § 2.36.070 (1988); W. VA. CODE § 52-1-8(b)(2) (2015); WIS. STAT. § 756.02 (2015); WYO. STAT. ANN. § 1-11-101(a)(iii) (2015).

59. See *Rose*, *supra* note 12, at 819 (arguing some state statutes regulating juror requirements surpass federal standards).

60. See *id.* (recognizing these states as having the most restrictive juror language requirements); see also LA. CODE CRIM. PROC. ANN. art. 401(A)(3) (2010) (equating sufficient knowledge of the English language with a juror’s ability to read, write, and speak English); 42 PA. CONS. STAT. § 4502(a)(1) (“[E]very citizen . . . shall be qualified to serve . . . unless such citizen is unable to read, write, speak and understand the English language.”); S.C. CODE ANN. § 14-7-810 (asserting a juror must be able to read, write, and speak English to serve); VT. STAT. ANN. tit. 4, § 962(A)(3) (demanding jurors read, write, speak, and understand English). These statutes in particular go above and beyond the federal standard of English proficiency. *Rose*, *supra* note 12, at 819.

61. *C.f. id.* at 822 (discussing state wide discrepancies in courtroom practices and how ambiguous standards pose significant risks of excluding potential qualified jurors).

62. *Id.* at 821.

63. TEX. GOV’T CODE ANN. § 62.102 (West 2005). *But see id.* § 62.109 (giving a judge discretion to excuse someone from participating in a jury if it will prove to be difficult for them to understand). English proficiency is not listed as a requirement, although in practice it has been implied as a silent requirement in Texas courts. See *House Transcript, April 19, 2011*, TEX. TRIB. (Apr. 19, 2011), <http://www.texastribune.org/session/82R/transcripts/2011/4/19/house> (arguing the practice of determining literacy for a juror’s eligibility is already presumed to mean literacy in English and this presumption has impacted the application of the Texas juror qualifications).

## 2016] JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS 355

House of Representatives proposed a bill in April 2011 to make a person's qualification for jury service to be based on one's ability to read and write English.<sup>64</sup> During the Texas House debate, advocates for the bill stipulated that an English literacy requirement would not change the current practice of Texas courts already assuming the ability to read and write is in English and not another language.<sup>65</sup> Although the bill did not pass in the Texas Senate,<sup>66</sup> this serves as an example of how proposed legislation can effectively and indelibly limit the opportunities of future civic duties of LEP individuals.

## IV. JUSTICE SYSTEM ACCESS FOR LEP INDIVIDUALS IS ESSENTIAL

Identifying a need for services to those with limited English proficiency, and enabling LEP individuals to have meaningful access to the justice system including its obligations is a continuing struggle.<sup>67</sup> Meaningful access to the justice systems means ensuring that these individuals are afforded the same privileges and opportunities as every other U.S. citizen.<sup>68</sup> The issue becomes even more important in light of the country's current influx of immigrants<sup>69</sup> in border states (specifically, states bordering Mexico) such as California, Arizona, New Mexico, and Texas.<sup>70</sup> Nearly two-thirds of the immigrant population entering Texas (and other

---

64. Tex. H.B. 1633, 82nd Leg., R.S. (2011).

65. See *House Transcript*, *supra* note 63 (explaining the current standard used by judges is "whether a juror can read or write in English" to determine if the person is qualified).

66. *Id.*

67. *C.f.* Rose, *supra* note 12, at 831 (asserting that English literacy requirements restrict core citizenship functions for LEP citizens and those requirements should be examined with strict constitutional scrutiny).

68. *Id.*

69. See generally CTR. FOR AM. PROGRESS IMMIGRATION TEAM, THE FACTS ON IMMIGRATION TODAY (2014), <https://cdn.americanprogress.org/wp-content/uploads/2013/04/ImmigrationFacts-brief-10.23.pdf> (listing facts on immigration in the United States) (last visited Oct. 14, 2015); Kyle Rothenberg, *Mississippi officers now required to learn Spanish to better reach the community*, FOX NEWS LATINO (Feb. 25, 2015), <http://latino.foxnews.com/latino/news/2015/02/25/mississippi-officers-now-required-to-learn-spanish-to-better-reach-community> (describing a new program that teaches police officers conversational Spanish since the Spanish/English language barrier has become a prevalent problem); Cristina Silva, *Immigration Reform 2015: More Hispanics In US Schools, But They're Struggling To Keep Up*, INT'L BUS. TIMES (Feb. 25, 2015, 11:35 AM), <http://www.ibtimes.com/immigration-reform-2015-more-hispanics-us-schools-theyre-struggling-keep-1827574> (stating Hispanics have become the fastest growing ethnic group in U.S. public schools).

70. See Rose, *supra* note 12, at 862 (arguing juror interpretation programs can be implemented to adapt to the growth of the LEP population in the United States); see also *Spanish Speaking State Statistics*, STAT. BRAIN RES. INST. (Sept. 7, 2012), <http://www.statisticbrain.com/spanish-speaking-state-statistics> (illustrating the percentage of populations within each state that only speak Spanish). A little over 12% of the Texas population is

parts of the United States) comes from Mexico.<sup>71</sup> In 1990, citizens with LEP's accounted for approximately 6% of the total U.S. population.<sup>72</sup> The U.S. Census Bureau's 2011 American Community Survey found 25.3 million, or 9%,<sup>73</sup> of individuals with LEP, both foreign and U.S.-born, were living in the United States.<sup>74</sup> This translates to an 81% increase in the LEP population in a twenty-year period.<sup>75</sup> Geographically, a large majority of the LEP population resides in the southern and eastern states,<sup>76</sup> with Spanish as the primary language.<sup>77</sup> The large number of individuals speaking Spanish and other foreign languages<sup>78</sup> illustrates the need for judicial interpreters. This is a critical issue, specifically because our justice system promotes that every American citizen has a fair opportunity to participate. Fairness can only be achieved if the system enables individuals with LEP the opportunity to fulfill their civic obligation of juror service.<sup>79</sup>

---

only Spanish speaking, with a majority of this population clustering in communities along the Texas/Mexico border. *Id.*

71. ANN BEESON ET AL., CTR. FOR PUB. POLICY PRIORITIES, IMMIGRANTS DRIVE THE TEXAS ECONOMY: ECONOMIC BENEFITS OF IMMIGRANTS TO TEXAS 2 (2014), [http://forabettertexas.org/images/EO\\_2014\\_09\\_PP\\_Immigration.pdf](http://forabettertexas.org/images/EO_2014_09_PP_Immigration.pdf). "Texas is home to more than 4.2 million immigrants. Texas immigrants come from numerous countries, with two-thirds coming from Mexico, Canada, Central America, and the Caribbean. Of this group, 2.5 million are from Mexico. The remaining one-third is from Asia, Europe, Africa, South America, and the Middle East. Of this group, the largest numbers come from India, Vietnam, and Germany (approximately 400,000 combined)." *Id.*

72. Monica Whatley & Jeanne Batalova, *Limited English Proficient Population of the United States*, MIGRATION POL'Y INST. (July 25, 2013), <http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states#14>.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

With a total of 4.8 million native-born LEP individuals nationwide, the states with the largest native-born LEP populations were California (950,000 native-born LEP residents), Texas (930,000), and New York (450,000). *Id.* Additional states, whose native-born LEP populations were relatively small, yet made up a sizable share of their total LEP populations included Montana (57 percent of the state's total LEP population), West Virginia (49 percent), Maine (45 percent), New Mexico (38 percent), Alaska (37 percent), and North Dakota (36 percent).

*Id.*

77. See Camille Ryan, U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2011, at 1-2 (2013), <http://www.census.gov/prod/2013pubs/acs-22.pdf> (listing Spanish and thirty-nine other languages spoken at home by NES from the 2011 American Community Survey).

78. See *id.*

79. See, e.g., Rose, *supra* note 12, at 825 ("The overrepresentation of Latinos in the criminal justice system is even greater in communities with significant populations of LEP

## V. IMPLICATIONS OF A JUROR LANGUAGE REQUIREMENT ON THE JURY POOL

The Supreme Court's interpretation of the Sixth Amendment's requirement for a defendant to be tried by an "impartial jury"—which was eventually codified in the U.S. Code<sup>80</sup>—means that every jury pool must be a "random cross-section of the community."<sup>81</sup> U.S. District Courts are required to devise and operate a plan to randomly select jurors "from a fair cross-section of the community in the district," without excluding any person from service on account of race, color, national origin, religion, sex, or economic status.<sup>82</sup> This ensures that every defendant is tried by a random selection of persons representing the community in the district or division where the court convenes, and not a "pool made of up of only special segments of the populace."<sup>83</sup> Nonetheless, the Sixth Amendment's implicit guarantee to be tried by a jury of *peers* remains by the wayside for LEP defendants in federal courts and in a majority of the state courts.<sup>84</sup> Although the process of jury composition cannot actively

---

Latinos, making the need for representative jury pools all the more important in these regions.").

80. 28 U.S.C.A. §§ 1861–63 (West 2015). In 1968, Congress enacted the Jury Selection and Service Act that codified the requirements, which declared that litigants are entitled to a jury selected at random from a fair cross section of the community. *Id.*

81. *See Powers v. Ohio*, 499 U.S. 400, 422 (1991) (citing *Holland v. Illinois*, 493 U.S. 474, 477 (1990)) (recognizing the Court's cases have held that the Sixth Amendment allows a defendant to object to a venire not representing a fair cross section of the community); *Duren v. Missouri*, 439 U.S. 357, 358–59 (1979) (citing *Taylor v. Louisiana*, 419 U.S., 522, 526–31, 538 (1975)) (stating exclusion of women resulting in jury pools not representative of the community denies a defendant's rights under the Sixth and Fourteenth Amendments); *Taylor*, 419 U.S. at 527 (stating the Court has previously maintained the concept of jury trial considers a jury drawn from a fair-cross-section of the community). The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI.

82. 28 U.S.C.A. §§ 1861–63.

83. *See Powers*, 499 U.S. at 422 (arguing Sixth Amendment case law allows defendants to object to a venire that is not a fair cross section of the community); *Duren*, 439 U.S. at 370 (stressing states must be cautious when exempting broad categories of people from jury service to avoid a violation of defendant's Sixth Amendment right); *Taylor*, 419 U.S. at 530, 538 (holding jury pools must not exclude distinctive groups in the community).

84. *See* 28 U.S.C.A. § 1865 (prohibiting individuals from participating in juries if they are unable to read, write and understand English); *Rose*, *supra* note 12, at 818 ("[F]orty-one states have juror statutes which require that prospective jurors possess some level of English language proficiency in order to serve on a jury panel."). Potential jurors can be disqualified or exempted based on inadequate English language proficiency in the overwhelming majority of states. *E.g.*, ALA. CODE § 12-16-59 (1975); ALASKA STAT. § 09.20.010 (2014); ARIZ. REV. STAT. ANN. § 21-202 (2014); ARK. CODE ANN. § 16-31-102 (2015); CAL. CIV. PROC. § 203 (1995); COLO. REV. STAT. § 13-71-105 (2015); CONN. GEN. STAT. § 51-217 (2015); DEL. CODE ANN. tit. 10, § 4509 (2015); GA. CODE ANN. § 15-12-163

include non-English speakers, they should not be automatically disqualified on the basis of insufficient proficiency in the English language.<sup>85</sup>

In 2011, a U.S. Census Bureau study revealed English is a secondary language in nearly 22% of U.S. homes (encompassing individuals ages five and over).<sup>86</sup> Additionally, almost a quarter of that population is not qualified to participate in jury service.<sup>87</sup> This rather small percentage may seem unproblematic, but when viewed in the context of a jury trial in a minority community, the gravity of this limitation on jury selection becomes apparent. This problem can be illustrated by Hidalgo County, Texas, where the percentage of individuals who do not speak English, or do not speak it well enough, skyrockets to an astonishing 25%.<sup>88</sup> It is nearly impossible for LEP defendants to be judged by a jury consisting of

---

(2015); HAW. REV. STAT. § 612-4 (2014); IDAHO CODE § 2-209 (2014); 705 ILL. COMP. STAT. § 305/2 (1997); IND. CODE § 33-28-5-18 (2015); IND. ST. JURY r. 5 (2001) (amended 2006); IOWA CODE § 607A.4 (2015); KAN. STAT. ANN. § 43-158 (2014), *proposed amendment* by 2015 Kan. Sess. Laws 333; KY. REV. STAT. ANN. § 29A.080 (2015); LA. CODE CRIM. PROC. ANN. art. 401 (2010); ME. REV. STAT. tit. 14, § 1211 (2015); MD. CODE ANN., CTS. & JUD. PROC. § 8-103 (2006); MASS. GEN. LAWS ch. 234A, § 4 (2015); MICH. COMP. LAWS § 600.1307a (2009); MO. REV. STAT. § 494.425 (2014); NEB. REV. STAT. § 25-1601 (2003); NEV. REV. STAT. § 6.010 (2015); N.H. REV. STAT. ANN. § 500-A:7-a (2014); N.J. STAT. ANN. § 2B:20-1 (2015); N.Y. JUD. LAW § 510 (2015); N.C. GEN. STAT. § 9-3 (2014); N.D. CENT. CODE § 27-09.1-07 (2015); OHIO CRIM. R. 24 (1973) (amended 2009); OKLA. STAT. tit. 22, § 22-658 (effective Sept. 1, 2015); 42 PA. CONS. STAT. § 4502 (1980) (amended 2001); 9 R.I. GEN. LAWS § 9-9-1.1 (2014); S.C. CODE ANN. § 14-7-810 (1962) (amended 1986); S.D. CODIFIED LAWS § 16-3-10 (2015); UTAH CODE ANN. § 78B-1-105 (2008); VT. STAT. ANN. tit. 4, § 962 (2015); WASH. REV. CODE § 2.36.070 (1988); W. VA. CODE § 52-1-8 (2015); WIS. STAT. § 756.02 (2015); WYO. STAT. ANN. § 1-11-101 (2015).

85. See generally Rose, *supra* note 12, at 818 (stating LEP persons are excluded from jury participation in all federal courts and most state courts). Jurors “must be drawn from a source fairly representative of the community.” *Taylor*, 419 U.S. at 538 (citing *Fay v. New York*, 332 U.S. 261, 284 (1947)). The Court stated there was “no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition,” but a defendant was constitutionally entitled to a jury which had been selected from a cross section of eligible persons in the community at large without systematic and intentional exclusion or discrimination as to racial, religious, political, economic, geographical or social status. *Id.*

86. RYAN, *supra* note 77, at 11.

87. *Id.* There are approximately 60.6 million people in the United States that speak another language other than English at home. *Id.* Out of those 60.6 million, 13.6 million people (many of whom do not speak any English) would be disqualified to serve on a jury. *Id.*

88. *Hidalgo County, Texas*, CITY-DATA.COM, [http://www.city-data.com/county/Hidalgo\\_County-TX.html](http://www.city-data.com/county/Hidalgo_County-TX.html) (last visited Sept. 12, 2015). This percentage is comprised by adding percentages of people do not speak English well (12%) with those who do not speak English at all (13%). *Id.*

2016] *JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS* 359

a fair-cross-section of the community when such jurors are purposely excluded or excused from this civic duty.<sup>89</sup>

“In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must first show that the group alleged to be excluded is a ‘distinctive’ group in the community . . . .”<sup>90</sup> Second, the defendant must show that the representation of this group in a panel of prospective jurors from which a jury is selected is not fair or reasonable, relative to the number of such persons in the community.<sup>91</sup> Finally, the defendant must prove the “underrepresentation is due to systematic exclusion of the group in the jury-selection process.”<sup>92</sup> The problem is trying to establish LEP individuals as a group that is a recognizable, distinct class such as race, ethnicity or national origin.<sup>93</sup> For the same reasons these categories have been recognized as *cognizable classes*, so to should limited English proficient individuals.

## VI. CONSTITUTIONAL UPHEAVAL OF THE LEP COMMUNITY

### A. *The Supreme Court’s Formalistic Approach and Standards of Review*

Currently, there is no Supreme Court precedent establishing LEP status as a fundamental right.<sup>94</sup> As such, the Court has been reluctant to classify the LEP community as a protected class worthy of the protections afforded under the Equal Protection Clause.<sup>95</sup> The Court has taken a formalistic approach by distinguishing language from protected classes

---

89. See TEX. GOV’T CODE ANN. § 62.102 (West 2005) (requiring a person be able to read and write to serve as a petit juror); *id.* § 62.109 (allowing a judge to disqualify a person from jury service if that person has an inability to understand the proceedings). English proficiency is not listed as a requirement, although in practice it has been implied as a silent requirement in Texas courts. See *House Transcript, supra* note 63 (arguing the practice of determining literacy for a juror’s eligibility already is presumed to mean literacy in English and this presumption has impacted the application of the Texas juror qualifications).

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

91. *Id.*

92. *Id.*

93. See *Rose, supra* note 12, at 852 (emphasizing that, while the Supreme Court has not defined the requirements for establishing a distinct group for the purposes of a cross section analysis, it has traditionally only recognized race, national origin, and gender as such).

94. See *id.* at 837 (stating the Supreme Court has not ruled on the issue of whether language discrimination amounts to racial, ethnic, or national origin discrimination under the Equal Protection Clause).

95. See *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (refusing to consider whether language ability bears a close enough relation to ethnicity to be afforded protection by the Equal Protection Clause).



such as race, ethnicity, and national origin.<sup>96</sup> The result is the LEP community is left without the constitutional recourse. The Court argues that the LEP community is not identifiable by any particular race, ethnicity, or national origin, thus they should not be afforded First Amendment protection so long as there is a race neutral explanation.<sup>97</sup> Equally, on a state level, this same line of reasoning is used by state legislatures to deny LEP American's ability to participate in their civic responsibility of juror service if the state can provide a rational basis for the requirements—whether implied or codified.<sup>98</sup> State legislatures have extensive discretion and are generally entitled to a presumption of validity against an attack under the Equal Protection Clause.<sup>99</sup> LEP individuals relying on language alone as a constitutional challenge to a state's juror exclusion practice are only entitled to a rational basis review.<sup>100</sup> Under this review, laws that have the inevitable effect of treating some people differently from others are constitutionally accepted, unless no rational relationship between the action and a permissible state objective can be established.<sup>101</sup> For a state's action to be validated under the highly deferential rational basis standard, a court must merely conclude that the state's legislation is reasonably related to a legitimate state interest.<sup>102</sup> Since it is the most deferential standard of constitutional review, rational basis has continually worked as a “rubber stamp” for state legislation.<sup>103</sup>

In *Hernandez v. New York*,<sup>104</sup> in a plurality opinion, the Court addressed the issue of juror exclusion during *voir dire* on the potential basis

96. See *Rose*, *supra* note 12, at 814 (arguing although it is impermissible to exclude a citizen from jury service on the basis of race, ethnicity or national origin, LEP individuals are allowed to be excluded from jury service despite the fact that doing so effectively excludes racial minorities); see also *Hernandez*, 500 U.S. at 360 (refusing to consider whether language ability bears a close enough relation to ethnicity to be afforded protection by Equal Protection Clause).

97. See *Hernandez*, 500 U.S. at 360–61 (concluding a prosecutor who excluded potential jurors via preemptory strikes did so on a race-neutral basis because the decision was based on the jurors' responses and demeanor during *voir dire* in addition to their language abilities and not on an intention to exclude Latino or bilingual jurors).

98. See *Rose*, *supra* note 12, at 833 (“[W]ithout the recognition of language minorities as a suspect class or the implication of an established fundamental right, the language requirement that jurors speak English is subject to rational basis review.”).

99. *Parham v. Hughes*, 441 U.S. 347, 351 (1979).

100. *Id.*

101. *Id.*

102. *Rose*, *supra* note 12, at 833.

103. See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 491 (2004) (pointing out that state classifications subjected to rational basis review receive “rubber stamp” treatment from courts).

104. 500 U.S. 352 (1991).

of language discrimination.<sup>105</sup> The Court, however, did not fully decide the issue.<sup>106</sup> In *Hernandez*, the prosecutor struck two bilingual jurors from the panel.<sup>107</sup> The prosecutor's main point of contention was whether the bilingual jurors had the ability to listen and follow the court interpreter, and questioned whether the jurors would accept the translator as the final arbiter of the witnesses' responses.<sup>108</sup> The Court found the prosecutor did not merely rely on their language ability, but instead explained that the responses and behavior of the two individuals during *voir dire* triggered him to "doubt their ability to defer to the official translation of Spanish-language testimony."<sup>109</sup> The Court looked to the holding in *Batson v. Kentucky*<sup>110</sup> that defined peremptory challenges violating the Equal Protection Clause:

First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. [ ]. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. [ ]. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. [ ].<sup>111</sup>

The explanation given by the prosecutor in *Hernandez* was deemed sufficient to negate the underlying assumption that the prosecutor wanted to prevent bilingual Latinos from serving on the jury.<sup>112</sup> If the prosecutor had not articulated this reasoning during *voir dire*, but rather relied on a group stereotype rather than specific characteristics of the individual jurors, he would have violated the Court's holding in *Batson*.<sup>113</sup> Rather than confronting the issue of whether or not language discrimination,

---

105. *Id.* at 360.

106. *See id.* (avoiding the argument that a juror's language ability bore such a close relation to ethnicity that it implicated the Equal Protection Clause because the Petitioner-Prosecutor did not rely solely on language in excluding the jurors).

107. *Id.* at 356–57.

108. *Id.*

109. *Id.* at 360.

110. 476 U.S. 79 (1986).

111. *Hernandez*, 500 U.S. at 358–59 (citations omitted). A *Batson* violation can be established even when the defendant is not a member of the cognizable group because of the harm caused by group-based discrimination to the judicial process as a whole and cognizable group(s) involved. *Powers v. Ohio*, 499 U.S. 400, 413–15 (1991).

112. *Hernandez*, 500 U.S. at 362.

113. *See id.* at 361 ("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."). Nonetheless, a strong nexus to the race, ethnicity or natural origin must be shown to rouse a *Batson* violation. *Id.* at 358–59.

standing alone, is entitled to a strict scrutiny standard, the Court found the three-step process in *Batson* restricted its consideration into the matter.<sup>114</sup> Consequently, after the first prong of the *Batson* standard was not met, the initial question of whether the defendant had made a prima facie showing became a moot point in the Court's final decision.<sup>115</sup>

Once the prosecutor validated his explanation as race-neutral, the plurality did not need to directly address the issue begged: whether language has an intimate relation to race, ethnicity, or natural origin that it could be enveloped by a higher standard of review in terms of equal protection.<sup>116</sup> However, the plurality, recognized that in some cases—although not in *Hernandez* itself—“proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.”<sup>117</sup> In his dissenting opinion, Justice Stevens agreed that “[a]n explanation that is ‘race neutral’ on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice.”<sup>118</sup> The facts of *Hernandez* may not have been the best forum for deciding such an issue, as a bilingual individual is not linguistically handicapped as an individual with LEP.<sup>119</sup> Nevertheless, the fact the Court approved the reasoning that the jurors may not be able to understand or listen implies the outcome would be similar if applied to a case involving LEP jurors.

In legal application, the Equal Protection Clause is not intended to discern “equality” among persons or classes, rather, the standard is to provide “equal application” of the law.<sup>120</sup> A violation of the Equal Protection Clause requires a “discriminatory purpose.”<sup>121</sup> A facially neutral law will not be held unconstitutional merely because the result leads to racially disproportionate impact.<sup>122</sup> While disproportionate impact is

---

114. *Id.* at 359.

115. *Id.*

116. *See id.* at 364 (holding “*Batson*’s treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard accords with our treatment of that issue in other equal protection cases”). The Court reasoned that where a “trial judge’s findings . . . turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” *Id.*

117. *Id.* at 371.

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

119. *See id.* at 371 (“Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful.”).

120. *See generally* U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person . . . within its jurisdiction the equal protection of the laws.”).

121. *Hernandez*, 500 U.S. at 359–60.

122. *Id.* at 361.

relevant, it is not dispositive of a discriminatory purpose.<sup>123</sup> Establishing proof of invidious intent is required to have a prima facie violation.<sup>124</sup>

To succeed on a language-based equal protection claim, the plaintiff must prove: first, there is an identifiable nexus between the language discrimination and race, ethnicity, or national origin, and second, the juror language requirement is intended to discriminate against the class of persons to which the plaintiff belongs.<sup>125</sup> Consequently, juror exclusion based on race, ethnicity, or national origin is wholly impermissible, but without attaching a language discrimination claim to one of the three categories above, the exclusion of LEP jurors fits in the contours of what is constitutionally permissible.<sup>126</sup>

### B. Executive Support

The LEP community received acknowledgement on August 11, 2000, when President Clinton signed Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency” (LEP Executive Order).<sup>127</sup> The order incorporates Title VI of the Civil Rights Act and allows LEP speakers the right to have meaningful access to federally funded activities and programs (extending to federally funded state programs).<sup>128</sup> The order is detailed in the U.S. Department of Justice (DOJ) issuance of the policy guidance document, “*Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination*

123. *See id.* at 361, 363 (explaining that the disproportionate impact on Latinos resulting from a prosecutor’s jury selection criteria is relevant but does not answer the race-neutrality inquiry nor turn it into a constitutional violation).

124. *See id.* at 353 (explaining “proof of racially discriminatory intent or purpose” is required for an Equal Protection Clause violation).

125. *C.f. id.* at 362 (finding no violation in the principal of race-neutrality because the prosecutor’s exclusion of jurors was not for the purpose of preventing bilingual Latinos from serving).

126. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986); *c.f. Hernandez*, 500 U.S. at 373 (explaining the nexus required between the use of a preemptory strike in jury selection and discrimination on account of race).

127. *Improving Access to Services for Persons With Limited English Proficiency*, 65 Fed. Reg. 50,121, 50,121 (Aug. 16, 2000).

128. *See id.* (requiring all federal agencies to engage in a self-assessment of services to improve access to LEP persons). This was effectively an extension to Title VI of the Civil Rights Act of 1964. *See id.* at 50,123 (elaborating on how these regulations add to the already existing regulations of Title VI formulated by “virtually every executive agency that grants federal financial assistance . . .”). The Executive Order requires Federal agencies to examine the services they provide, identify any need for services to those with LEP, and develop and implement a system (without unduly burdening the agencies) to provide those services so LEP persons can have meaningful access to them. *Id.* at 50,121.

*Against Persons With Limited English Proficiency*” (LEP Guidance).<sup>129</sup> The policy states “[t]he LEP Guidance sets forth the compliance standards that recipients of Federal financial assistance must follow to ensure that their programs and activities normally provided in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI’s prohibition against national origin discrimination.”<sup>130</sup> The order also requires federal agencies to work to ensure that recipients of federal financial assistance, such as various state institutions, provide meaningful access to their LEP applicants and beneficiaries.<sup>131</sup>

The DOJ’s Civil Rights Division “sent out a letter to chief justices in all 50 states, warning them that if their courts receive federal funds, as most courts do, the courts must provide free interpreters in all court-related matters.”<sup>132</sup> Unfortunately, the mandate was largely ignored because, whether in practice or codified, many states have English language requirements in place for juror service qualification.<sup>133</sup> The LEP community has not been recognized as an independent protected class, as such, rational basis scrutiny governs, regardless of the LEP Executive Order.<sup>134</sup> This undue and unbridled deferential treatment enables state legislatures to continue to oppress LEP Americans and their inclusion on juries nationwide.

#### VII. RECOGNITION OF THE LEP COMMUNITY AS A NEW COGNIZABLE CLASS OF PERSONS

A cognizable group has generally been referred to as those groups containing verifiable distinctive features,<sup>135</sup> a definite composition with limits as to what is included, and whose membership does not change “from day to day or whose members can[not] be arbitrarily selected.”<sup>136</sup> “There

---

129. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

130. *Frequently Asked Questions*, *supra* note 5.

131. *Id.*

132. Jude Joffe-Block, *As need for court interpreters grows, who pays?*, S. CAL. PUB. RADIO (May 14, 2012), <http://www.scpr.org/programs/madeleine-brand/2012/05/14/26461/as-need-for-court-interpreters-grows-who-pays>.

133. *See* Rose, *supra* note 12, at 817 (outlining the official and unofficial sources of English language juror requirements that result in exclusionary outcomes in state courts).

134. *Id.* at 833.

135. *See* NAT’L CTR. FOR STATE COURTS, JURY MANAGERS’ TOOLBOX: A PRIMER ON FAIR CROSS SECTION JURISPRUDENCE 2 (2010), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/What%20We%20Do/A%20Primer%20on%20Fair%20Cross%20Section.ashx>. (defining a cognizable group).

136. *People v. Motton*, 704 P. 2d 176, 181 (Cal. 1985).

must be a commonality that defines the group, such as the sharing of similar attitudes, ideas or experiences.”<sup>137</sup> The National Center for State Courts has stated that cognizable groups are those containing

immutable characteristics, especially gender, race, and ethnicity (Hispanic/Latino) and are recognized as valid groups under both Sixth Amendment and Equal Protection Clause criteria. In addition to gender, race, and ethnicity, some courts have found groups characterized by religious affiliation or national origin to be distinctive groups under the Sixth Amendment. In most instances, however, distinctive groups characterized by religious affiliation have such a strongly cohesive community that the religious affiliation is similar to ethnicity in terms of its cultural significance.<sup>138</sup>

Classifying language proficiency as a cognizable group is much more difficult when physical features do not define the group.<sup>139</sup> Some courts have attempted to rectify this problem by distinguishing what is, and what is not, a cognizable group.

#### A. *The First Circuit’s Definition of Cognizable Group*

In *Anaya v. Hansen*, the First Circuit described a three-factor test that must be satisfied by every cognizable group.<sup>140</sup> To satisfy the first element of the test, the proponent must show the group is “defined and limited by some clearly identifiable factor.”<sup>141</sup> Next, the petitioner must show a “common thread or basic similarity in attitude, ideas, or experience run[s] through the group.” Finally, the proponent must show “that there [is] a community of interest among the members of the group, such that the group’s interests cannot be adequately represented if the group is excluded from the jury selection process.”<sup>142</sup> Under this definition, LEP individuals appear to meet the credentials of a cognizable group. The First Circuit analysis established in *Hansen* outlines how LEP individuals are indeed a cognizable group.

*Hansen* requires a cognizable group to be defined and limited by an identifiable factor.<sup>143</sup> A limited English proficient community encompasses “individuals who do not speak English as their primary language

---

137. *Id.*

138. NAT’L CTR. FOR STATE COURTS, *supra* note 135, at 2.

139. *See Rose, supra* note 12, at 835 (emphasizing the law fails to redress Spanish language discrimination largely because it is not based on physical features the way discrimination manifests against blacks).

140. *Anaya v. Hansen*, 781 F.2d 1, 5 (1st Cir. 1986).

141. *Id.*

142. *Id.*

143. *Id.*

and who have a limited ability to read, speak, write, or understand English.”<sup>144</sup> To further this contention, anthropological linguist Dr. Orville Boyd Jenkins, identifies language as a prominent aspect of cultural identity, and that language in particular “is a primary and dominant identifying factor” distinguishing individuals “by their ethnolinguistic<sup>145</sup> uniqueness, [while] sharing a common self-identity.”<sup>146</sup> The fact that LEP individuals are restricted by their inability to speak English closes the possibility of the admission of new members. LEP membership is innate. A person cannot simply unlearn English. Membership to this group is preserved and isolated to those possessing this natural inability. This fact alone closes admission into the LEP community and avoids any transient characteristics that eviscerate a definition of a cognizable group.

The second element requires individuals in cognizable groups to be interconnected through a “common thread or basic similarity in attitude, ideas, or experience.”<sup>147</sup> The LEP community is unified by a lack of English proficiency, effectively preventing these individuals from participating in a fundamental civic duty.<sup>148</sup> These individuals are deprived of basic civil liberties, merely because they are not proficient enough in speaking, reading, or fully understanding the English language.<sup>149</sup> Just as the broad categories of race, ethnicity, and national origin all contain subgroups, so too does the LEP community.<sup>150</sup> Diversity within a group should not negate its common and unified front of experiencing the civic obligations that many Americans take for granted.

Finally, one must prove there exists a community of interest among members of the group and, if the group is prevented from the jury selection process, that the group’s interests cannot be adequately represented.<sup>151</sup> As previously mentioned, whether in statute or in practice, minority communities are the groups most affected by English profi-

---

144. *Frequently Asked Questions*, *supra* note 5.

145. Ethnolinguistics is “the study of language as an aspect or part of culture, esp[ecially] the study of the influence of language on culture and of culture on language.” *Ethnolinguistics*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d. ed. 2001).

146. Orville Boyd Jenkins, *What is a “People Group”?*, ORVILLEJENKINS.COM, <http://orvillejenkins.com/ethnicity/peoplegroup.html> (last updated Feb. 13, 2013).

147. *Anaya*, 781 F.2d at 5.

148. *See* *Rose*, *supra* note 12, at 816–19, 822 (asserting federal and state laws requiring English proficiency to serve on juries prevents a significant number of LEPs from an essential right of citizenship).

149. *Id.* at 830 n.114.

150. *See* *Whatley & Batalova*, *supra* note 72 (finding the United States’ LEP population is composed of various subgroups, such as age, ethnicity, race, gender, and socioeconomic status).

151. *Anaya*, 781 F.2d at 5.

ciency requirements.<sup>152</sup> This problem is especially prevalent in communities situated along the southern border of the United States where the LEP population is largely concentrated.<sup>153</sup> In these areas, selecting a jury from a fair cross-section of the community, as required by the Sixth Amendment, is not feasible.<sup>154</sup> It is impossible for every individual with LEP to be adequately represented.<sup>155</sup> Until corrected, jury pools and jury panels will not *accurately* reflect the decisions of society as a whole.<sup>156</sup>

When compared to other cognizable groups, the formalistic distinction echoed by the Supreme Court seems rather arbitrary. A realist approach to the issue is necessary to meet the demands of our nation's ever-changing social, demographic, and cultural transformations.<sup>157</sup> An individual's proficiency in the English language should not prevent them from exercising important rights, and although the LEP community is not currently considered a cognizable group, they deserve similar protections. At least one state, New Mexico, shares this similar belief.<sup>158</sup>

#### VIII. ADDRESSING LEP SPEAKERS IN A JUSTICE SYSTEM: THE NEW MEXICO MODEL

##### A. *The Right to Serve on a Jury*

New Mexico is the only state in the country to fully accommodate non-English speakers, mandating interpreters for LEP jurors.<sup>159</sup> The New Mexico Constitution was adopted on January 21, 1911.<sup>160</sup> Article VII,

152. Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, CHICANO-LATINO L. REV. 154, 190 (2005).

153. See *id.* at 184–85 (providing examples of minority underrepresentation in grand juries due to language requirements for jury service in areas near the U.S./Mexico border).

154. See Rose, *supra* note 12, at 816–17 (arguing English jury service requirements preclude many people in LEP-heavy areas from serving on juries, thus creating juries that are not representative of the community).

155. See *id.* 824 (contending English requirements for jury service in LEP-heavy areas create non-representative juries); see also Farida Ali, *Multilingual Prospective Jurors: Assessing California Standards Twenty Years after Hernandez v. New York*, 8 NW J.L. & SOC. POL'Y 237, 259 (2013) (arguing language classification requirements used to prohibit multilingual jurors produce juries that do not adequately reflect the population).

156. Rose, *supra* note 12, at 816–17.

157. See *id.* (stating English language jury service requirements that preclude Latinos from being on juries ignore the fact that Latinos are the largest and fastest growing minority group in the United States).

158. See N.M. CONST. art. VII, § 3 (protecting a citizen's right to serve on a jury regardless of an inability to speak, read, or write the English language).

159. Kelly James, *NM District Court Accused of Segregating Juries*, MYHIGHPLAINS.COM (Oct. 6, 2014, 10:03 PM), <http://www.myhighplains.com/story/d/story/nm-district-court-accused-of-segregating-juries/69177/wN3WBe3s1kKg8sC911TWHA>.

160. N.M. CONST. art. VII, § 3.



Section 3 provides that “[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages . . . .”<sup>161</sup> Article II, Sections 14 and 18 of the New Mexico Constitution, as well as the Fourteenth Amendment of the U.S. Constitution, protect the right of the accused to an impartial jury composed of a representative cross-section of the community.<sup>162</sup> Together, these declarations serve as the logical basis that enables all LEP individuals to serve on juries. The New Mexico Supreme Court explains that the right to serve on a jury panel is a protected right to be enjoyed by every citizen, even non-English speaking individuals.<sup>163</sup> As a result, New Mexico’s large population of Hispanic citizens,<sup>164</sup> many of whom are not proficient in English, are afforded the right to serve on a jury.<sup>165</sup> New Mexico courts are required to provide a translator for individuals with LEP, and typically extend these accommodations to those who speak languages other than Spanish, such as speakers of Native American languages.<sup>166</sup> Providing language access services does not solely benefit the LEP individual. Rather, competent language access services can also promote the administration of justice by ensuring the integrity of the fact-finding process, accuracy of court records, and efficiency in legal proceedings.<sup>167</sup>

This right, however, is not absolute and must be weighed in favor of the defendant’s other constitutional rights, such as the right to a speedy trial as guaranteed by the Sixth Amendment of the U.S. Constitution.<sup>168</sup> The

161. *Id.* As opposed to the U.S. Constitution which leaves language concerns and protections open-ended and at the mercy of the majority in terms of legislation. See U.S. CONST. (omitting any mention of language concerns or protections).

162. *State v. Aragon*, 784 P.2d 16, 17–18 (N.M. 1989); see *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 128 (1994) (reaffirming commitment to an impartial jury).

163. N.M. SUPREME COURT, NON-ENGLISH SPEAKING JUROR GUIDELINES 3 (2000), <https://www.nmcourts.gov/newface/court-interp/guidelinesandpolicies/New%20Mexico%20Guidelines%20for%20NES%20Jurors%2008.pdf?uid=05.17.2013>.

164. See *QuickFacts Beta*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045214/00,35> (last visited Oct. 3, 2015) (stating 46.3% of New Mexico’s population is Hispanic or Latino).

165. See *State v. Samora*, 307 P.3d 328, 332 (N.M. 2013) (holding excusal of a Spanish-speaking prospective juror who had difficulty understanding the English language violated the juror’s state constitutional right to perform jury service).

166. *Id.* “[I]nconvenience alone will not suffice” to overcome the state constitutional right for a non-English-speaking citizen to perform jury service; “a trial court cannot excuse a juror on the basis of an inability to speak, read, or write the English or Spanish languages’ absent a showing that accommodating that juror will create a substantial burden.” *Id.*

167. See generally Edward L. Chavez, *New Mexico’s Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 304 (2008) (arguing juries need to truly reflect the diversity of their community since they have great power and responsibilities).

168. *Id.* at 306.

New Mexico legislature also developed the Non-English Speaking Juror Guidelines to assist the judiciary with incorporating LEP citizens into the juror selection process.<sup>169</sup> These guidelines serve as an educational guiding tool and are not mandatory directives that must be followed in all cases.<sup>170</sup> Because individual jurisdictions have unique needs and limitations, a trial judge may also consider the feasibility of such assistance using their discretion to make every reasonable effort to accommodate prospective jurors' language difficulties.<sup>171</sup> These decisions are made on a case-by-case basis, as some courts do not have the resources available to provide an interpreter, regardless, the presiding judge must make every reasonable effort to accommodate a prospective juror's language deficiencies.<sup>172</sup>

### B. *What Constitutes Reasonable Effort?*

In determining what constitutes "reasonable efforts," a reviewing court will examine the trial courts actions in light of several factors:

The steps actually taken to protect the juror's rights, the rarity of the juror's native language and the difficulty that rarity has created in finding an interpreter, the stage of the jury selection process at which it was discovered that an interpreter will be required, and the burden a continuance would have imposed on the court, the remainder of the jury panel, and the parties. It must be emphasized, however, that inconvenience alone will not suffice; a trial court shall not excuse a juror on the basis of an 'inability to speak, read or write the English or Spanish languages' absent a showing that accommodating that juror will create a substantial burden or otherwise fall within the exception provided within Article VII, Section 3 itself.<sup>173</sup>

The deference given to the judge does not allow for a strict and standardized analysis, but it allows a court to defend its reasons for a possible excusal of a juror based on language limitation on a case-by-case basis.<sup>174</sup> For example, merely stating that an interpreter is unavailable will not be a sufficient reason to excuse a non-English-speaking juror.<sup>175</sup> The judge's discretion must be based in fact in order to provide an appellate court "insight into what the judge may or may not have done to remedy the

---

169. N.M. SUPREME COURT, *supra* note 163, at 3.

170. *Id.*

171. *Id.*

172. *Id.*

173. *State v. Rico*, 52 P.3d 942, 945 (N.M. 2002).

174. *See id.* (discussing the factors reviewing courts can consider when determining whether dismissal of an LEP individual was constitutional under New Mexico law).

175. *State v. Samora*, 307 P.3d 328, 332 (N.M. 2013).

situation.”<sup>176</sup> Additionally, if deemed appropriate, the trial judge can postpone trial until a court interpreter is available, or, if postponement would be unreasonable, the judge may excuse a prospective non-English speaking juror, provided that the excused prospective juror is recalled for jury selection for the next scheduled trial.<sup>177</sup>

### C. *Eligibility Requirements of the Judicial Interpreter*

To maintain the integrity of the court system,<sup>178</sup> the New Mexico judiciary clearly defines the scope and role of the interpreter.<sup>179</sup> This is evidenced by guidelines promulgated by extensive regulations and detailed certification procedures.<sup>180</sup> For example, in addition to traditional interpreter certification requirements, the strict standards of the New Mexico courts require interpreters to acquire additional certifications approved by the state.<sup>181</sup> As such, merely possessing a language certificate in a particular language is not sufficient to qualify as a judicial interpreter.<sup>182</sup>

Courts look at several factors to determine an interpreter's courtroom eligibility, including the interpreter's educational background and certifi-

176. *Id.*

177. N.M. SUPREME COURT, *supra* note 163, at 4. By recalling jurors who were excused solely because of a language limitation New Mexico courts assure citizens of their right to serve on a jury. *See Samora*, 307 P.3d at 331 (holding dismissal of a non-English speaking juror violated the juror's rights under the New Mexico Constitution).

178. *See Rose*, *supra* note 12, at 824, 830 (asserting that imposing language requirements and having racially unrepresentative juries has a detrimental effect on the integrity of the legal system while allowing NES jurors to serve with the assistance of interpreters promotes confidence in the legal system).

179. *See generally* N.M. SUPREME COURT, *supra* note 163, at 6 (establishing standards and emphasizing the demanding and sensitive nature of the services provided by the court's interpreters).

180. *See generally Rose*, *supra* note 12, at 854–55 (stating the inclusion of LEP jurors in the New Mexico jury system has been lauded as providing the fairest jury of defendants' peers and embodies fairness).

181. *See generally* N.M. STAT. ANN. § 38-10-3(B) (1985) (dictating a court must appoint an interpreter for LEP individuals); *Court Interpreter Certification*, N.M. CTR. FOR LANGUAGE ACCESS, <http://nmcenterforlanguageaccess.org/cms/en/training/court-interpreter-certification> (last visited Oct. 5, 2015) (outlining the requirements an individual must complete to attain interpreter certification); *Certificate Programs*, N.M. CTR. FOR LANGUAGE ACCESS, <http://nmcenterforlanguageaccess.org/cms/en/training/certificate-programs> (last visited Oct. 5, 2015) (describing the certification program).

182. *See* Letter from Pam Sanchez, Statewide Program Manager, Language Access Services, to Interested Parties on Becoming a Certified Court Interpreter in New Mexico (Jan. 2014), [http://www.nmcourts.gov/newface/court-interp/files/Becoming\\_a\\_Certified\\_Court\\_Interpreter\\_in\\_New\\_Mexico\\_December\\_2014.pdf?uid=12.27.2013](http://www.nmcourts.gov/newface/court-interp/files/Becoming_a_Certified_Court_Interpreter_in_New_Mexico_December_2014.pdf?uid=12.27.2013) (outlining the additional requirements to becoming a Certified Court Interpreter in New Mexico).

cations acquired in their language of expertise.<sup>183</sup> New Mexico mandates a policy requiring every judicial interpreter to be certified by a government-approved program.<sup>184</sup> Every applicant must enroll in a certification program offered by the New Mexico Center for Language Access (NMCLA), a program administered by the Administrative Office of the Courts (AOC).<sup>185</sup> The NMCLA offers three distinct certifications: Court Certified Interpreter (CCI), Justice System Interpreter (JSI), and Language Access Specialist; incidentally, the Court certification and the Justice System certification fall under the Justice System Interpreter Program (JSI Program).<sup>186</sup> A court certified interpreter is specifically allowed to operate within courts and interpret for jurors during the trial process.<sup>187</sup> Following the completion of the JSI Program, interpreters must show their proficiency in the English language by successfully completing various exams comprised of multiple-choice, written, and oral questions.<sup>188</sup> The exams demand a fairly high level of skill in English to pass the minimum recommended requirements.<sup>189</sup> Only interpreters certified through these programs are eligible to operate as interpreters

---

183. See NAT'L CTR. FOR STATE COURTS, COURT INTERPRETING QUALIFICATIONS 1 (2006), <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/State%20Interpreter%20Certification%202/Qualifications.ashx> (discussing qualifications that individuals should have before attempting to become certified court interpreters in federal or state courts). The National Center for State Courts classifies professional court interpreters as "individuals who possess educated, native-like mastery of both English and a second language; display wide general knowledge, characteristic of what a minimum of two years of general education at a college or university would provide; and perform the three major types of court interpreting: sight translation, consecutive interpreting, and simultaneous interpreting." *Id.* These are baseline prerequisites before attempting to become a certified court interpreter in federal or state courts. *Id.*

184. See generally *Court Interpreter Certification*, *supra* note 181 (describing the different steps an individual must complete to obtain a court interpreter certification).

185. Letter from Pam Sanchez, *supra* note 182.

186. See generally *Court Interpreter Certification*, *supra* note 181 (describing the different steps an individual must complete to obtain a court interpreter certification); *Certificate Programs*, *supra* note 181 (outlining the available certificate programs). The distinction between a court certified interpreter and a justice system interpreter is the scores required to pass examinations. *Id.* To be certified as a court interpreter a score of 80% or above on the written exam is required to register for the oral Simultaneous Exam. *Id.* A score of 70% or above on the simultaneous exam is required to register for the Oral Consecutive and Sight Translation Exams, each requiring a score of 70% or above for certification. *Id.* Whereas, Justice system interpreters must pass with a score of 80% or above on the written exam and attain between 55% and 69% in all three oral examinations to be added to the New Mexico registry of Justice System Interpreters. *Id.*

187. See N.M. SUPREME COURT, *supra* note 163, at 5 (stating all courts should use court interpreters during jury selection, trial, and deliberation proceedings).

188. Letter from Pam Sanchez, *supra* note 182.

189. *Id.*

within New Mexico's justice system.<sup>190</sup> This provision ensures that every interpreter has been properly trained and educated to meet the standards set by the state, while effectively affording individuals with LEP the opportunity to participate in trials.<sup>191</sup>

In situations where an interpreter is necessary, courts must first attempt to obtain a certified interpreter as required by New Mexico law.<sup>192</sup> Non-certified court interpreters cannot be used for a juror in criminal trials, evidentiary hearings, or guilty or no-contest plea proceedings if incarceration is possible under statute or ordinance.<sup>193</sup> In addition, this restriction also applies to civil trials and evidentiary proceedings.<sup>194</sup>

However, there is an exception. A court cannot hire a non-certified interpreter unless "the appointing authority has made diligent efforts to obtain a certified interpreter and has found none to be reasonably available in the judicial district."<sup>195</sup> Courts must refer to the list of certified interpreters provided by the AOC.<sup>196</sup> If the court cannot locate a court-certified interpreter, the court must contact AOC for assistance in locating a certified interpreter.<sup>197</sup> If a certified court interpreter cannot be located, efforts will be made by the courts to identify a JSI from the AOC Registry of Justice System Interpreters.<sup>198</sup> If both of these avenues have been exhausted and the court has maintained a diligent, good faith effort,

190. *See generally id.* (describing the mandatory formal steps that individuals interested in becoming certified court interpreters must take).

191. *Mission and Values*, N.M. CTR. FOR LANGUAGE ACCESS, <http://nmcenterforlanguageaccess.org/cms/en/about/mission-and-values> (last visited Oct. 5, 2015).

192. N.M. STAT. ANN. § 38-9-3 (2007); *id.* § 38-10-3(A).

193. N.M. ADMIN. OFFICE OF THE COURTS, COURT INTERPRETER STANDARDS OF PRACTICE AND PAYMENT POLICIES 7 (2012), [http://www.nmcourts.gov/newface/court-interp/guidelinesandpolicies/Practice\\_and\\_Payment\\_Policies\\_2012.pdf?uid=05.17.2013](http://www.nmcourts.gov/newface/court-interp/guidelinesandpolicies/Practice_and_Payment_Policies_2012.pdf?uid=05.17.2013).

194. *Id.*

195. N.M. STAT. ANN. § 38-10-3(B). *See generally id.* § 38-9-3 (maintaining the court must provide the appropriate interpreter for any person who needs an interpreter, and choose a certified interpreter from the list provided).

196. N.M. ADMIN. OFFICE OF THE COURTS, *supra* note 193, at 6.

197. *Id.*

198. *See id.* (emphasizing the court must be diligent in finding a certified or Justice System Interpreter before the court can consider other alternatives if neither can be found). "Certified Court Interpreters and JSI interpreters work throughout the justice system and provide language access services in, as well as outside, the courtroom." *Certification Programs in New Mexico*, N.M. CTR. FOR LANGUAGE ACCESS, <http://nmcenterforlanguageaccess.org/cms/en/training/language-access-specialist-certification> (last visited Oct. 16, 2015). JSIs are certified interpreters that ensure that non-English speakers who become involved with the New Mexico justice system, civil or criminal, have culturally and linguistically appropriate services available to them. *See generally* Paula Couselo-Findikoglu, *Making a Difference*, N.M. CTR. FOR LANGUAGE ACCESS, <http://nmcenterforlanguageaccess.org/cms/images/pdf/NMCLA-NEWSLETTER-MAR11.pdf> (last visited Oct. 16, 2015) (stating more than 36% of New Mexico residents speak a language other than English at

a court may then appoint a language access specialist or less qualified non-certified court interpreter.<sup>199</sup> Nevertheless, the court must still consult with the AOC prior to retaining a non-certified interpreter.<sup>200</sup>

Before appointing a court interpreter to provide interpretation services to a case participant, the court must qualify the interpreter according to Rule 11-604 of the Rules of Evidence.<sup>201</sup> Consistent with the obligation of *reasonable effort*, the court must qualify the interpreter to ensure their proficiency of communicating effectively with the officers of the court and the person for whom they are interpreting.<sup>202</sup> However, before qualifying a JSI or other less qualified non-certified court interpreter, the court, on record, will investigate the interpreters competency and skills and the specific needs of the case participant requiring interpretation services.<sup>203</sup> Additionally, the court will look into any potential conflicts of interest the interpreter may have<sup>204</sup> to alleviate any concerns with judicial integrity.<sup>205</sup>

#### D. Criticisms of the Judicial Interpreter

The main concern regarding judicial interpreters is that they may inappropriately participate in confidential jury deliberations.<sup>206</sup> This apprehension over the presence of an interpreter, or what is seen as a “thirteenth juror,” is based on the conjecture that an interpreter’s presence could destroy the integrity and secrecy of jury deliberations, and negatively impact the defendant’s right to a fair and impartial trial by jury.<sup>207</sup> Although a legitimate concern, it is no different than the already

---

home and the need for linguistic assistance is essential to provide people a chance to be understood in the justice system).

199. COURT INTERPRETER RULES § 1-103(C)(4) (2012), [http://www.thirddistrictcourt.com/core/scripts/wysiwyg/kcfinder/upload/files/Court\\_Interpreters\\_rules\\_01012013.pdf](http://www.thirddistrictcourt.com/core/scripts/wysiwyg/kcfinder/upload/files/Court_Interpreters_rules_01012013.pdf).

The Language Access Specialist certification program is designed to train and certify bilingual judiciary employees who are called on to provide language access services as part of their regular work outside the courtroom. *See generally Certification Programs in New Mexico, supra* note 198 (emphasizing Language Access Certification provides services for NES outside the courtroom and for non-jailable offenses inside the courtroom).

200. COURT INTERPRETER RULES, *supra* note 199, § 1-103(C)(4).

201. *Id.* § 1-103(E)(1).

202. N.M. ADMIN. OFFICE OF THE COURTS, *supra* note 193, at 7.

203. COURT INTERPRETER RULES, *supra* note 199, § 1-103(E)(1)(a).

204. *Id.*

205. *See generally id.* § 1-103(C)(4) (stressing the court is obligated to put on the record that the non-certified interpreter has fulfilled the requirements of the rules, including that the interpreter has adequate knowledge and skills to translate and that the interpreter possesses a community license from the New Mexico Regulations and Licensing Department).

206. Rose, *supra* note 12, at 858, 863.

207. State v. Pacheco, 155 P.3d 745, 749-50 (N.M. 2007).

inherent risks associated with each of the selected jurors.<sup>208</sup> All jurors must take an oath<sup>209</sup> and whether or not this oath provides a decision cleansed from outside influences may not be known for certain. Similarly, preceding the excusal of the jury for deliberations, all interpreters are required to take an oath prior to providing any interpretation services for jurors.<sup>210</sup> The New Mexico Supreme Court clarified the process of jury deliberations and the interpreter's role in *State v. Pacheco*.<sup>211</sup> The court specified the trial court must administer an oath, on the record, and in the presence of the jury, instructing the interpreter not to participate in the jury's deliberations.<sup>212</sup> The judge instructs the interpreter not to interfere with deliberations in any way by expressing any ideas, opinions, or observations that the interpreter may have during deliberations and is strictly limited to interpreting the jury deliberations to the LEP juror.<sup>213</sup> The record must reflect the identity of the interpreter, identify their credentials, and make a determination of whether or not he or she understands the instructions given to them.<sup>214</sup> Furthermore, the trial court must also give an instruction to the jury about the interpreter's role during deliberations.<sup>215</sup>

Following the deliberation process, "but before the verdict is announced, the trial court is required to ask the interpreter on the record whether he or she abided by the oath not to participate in deliberations,"<sup>216</sup> and their answer officially becomes part of the record.<sup>217</sup> In concluding, the trial judge must instruct the interpreter not to divulge any portion of the jury deliberations pending the close of the case.<sup>218</sup> If there is any doubt as to the conduct of the interpreter during deliberations, a request to question the jurors can be made to discover any improper conduct that may have occurred.<sup>219</sup> New Mexico established appropriate

---

208. See generally Rose, *supra* note 12, at 861 (specifying jurors do not make jury verdicts as individuals, but as a collective, and that any misunderstandings or influences within the jury room can be dealt with amongst the jurors).

209. TEX. CRIM. PROC. CODE ANN. art. 35.22 (West 2013 & Supp. 2014)

210. N.M. STAT. ANN. § 38-10-8 (1985); N.M. SUPREME COURT, *supra* note 163, at 7.

211. 155 P.3d at 751.

212. N.M. SUPREME COURT, *supra* note 163, at 7; see *Pacheco*, 155 P.3d at 751 (reasoning interpreters are officers of the court and the sworn oath requires the interpreter to follow the court's orders and instructions).

213. N.M. SUPREME COURT, *supra* note 163, at 7–8. These instructions are stated on the record, as is the interpreter's understanding of the instructions. *Id.*

214. *Pacheco*, 155 P.3d at 754.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. See N.M. SUPREME COURT, *supra* note 163, at 8.

2016] *JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS* 375

methods to preserve any error on record that can be attributable to the interpreter.<sup>220</sup>

## IX. THE COST OF NEW MEXICO'S INTERPRETER SYSTEM

### A. *Financial Responsibilities of the State*

Every state-endorsed program shares at least one commonality—support through government aide. To operate effectively, these programs must be adequately funded to meet and serve the needs of its citizens.<sup>221</sup> In general, state governments operate through various state departments, each tasked with a specific duty to ensure the state is running in an efficient manner.<sup>222</sup> A state's finance department, although specific functions vary in scope and detail from state-to-state, is primarily responsible for balancing the state budget and for providing fiscal oversight to state agencies.<sup>223</sup> Because state resources are limited, finance departments are typically conservative when providing monetary aide to state-run programs.<sup>224</sup> Often times this results in underfunded programs, unable to provide sustainable services to meets the demands of the state's citizenry. This is one of the primary problems facing New Mexico's judicial interpreter program. New Mexico is a state with a diverse populace that requires effective interpreter assistance, however, the program is struggling because its current budget does not reflect society's current demand.<sup>225</sup>

### B. *Additional Program Funding is Necessary*

As population increases so does the demand for judicial resources. In New Mexico, the growing populace has created a greater need and demand for more judicial interpreters. This growth presents a two-fold problem for the program's funding issue. First, as judicial activity (hearings and trials) increases, more government money is spent on interpreter

220. See *Pacheco*, 155 P.3d at 754 (requiring trial courts to conduct oaths, among other types of procedure, on record).

221. See generally, *New Mexico Department of Finance and Administration*, <http://www.nmdfa.state.nm.us/> (last updated Nov. 5, 2015) (explaining the various goals and responsibilities pertaining to the state finance department and how the department serves the interests of the citizens through responsible oversight to government agencies).

222. *Id.*

223. See *id.* (“The Mission of the Department of Finance and Administration is to . . . provide budget direction and fiscal oversight to state agencies and local governments . . . and [to] ensure every tax dollar is spent wisely.”).

224. *Id.*

225. Fernanda Santos, *As the Demand for Court Interpreters Climbs, State Budget Conflicts Grow as Well*, N.Y. TIMES (June 14, 2014), [http://www.nytimes.com/2014/06/15/us/as-the-demand-for-court-interpreters-climbs-state-budget-conflicts-grow-as-well.html?\\_r=0](http://www.nytimes.com/2014/06/15/us/as-the-demand-for-court-interpreters-climbs-state-budget-conflicts-grow-as-well.html?_r=0).



fees. Second, since more judicial resources are being used, the availability of current resources becomes much more limited, resulting in a greater demand for interpreters. The effect is that the government must hire and pay more interpreters. Typical fees for judicial interpreters include an hourly wage of \$47, and additional expenses such as reimbursement per diem payments for travel time and hotel accommodation.<sup>226</sup> In response to this persistent problem, the AOC (the judicial interpreter funding agency) annually requests a budget increase from the state's financial governing authority, the New Mexico State Board of Finance.<sup>227</sup> Although the board has largely granted these requests—as the budget has nearly doubled over the past eleven years<sup>228</sup>—the program is still severely underfunded to meet the current demands of New Mexico's growing population.<sup>229</sup> Jocelyn Samuels, Assistant Attorney General of the DOJ's Civil Rights Division, weighed in on the issue by asserting that “states ha[ve] a civil rights obligation”<sup>230</sup> to fund the increasing costs of court interpreters and “pleading poverty” is not an excuse to shield state courts from compliance.<sup>231</sup> Barbara J. Vigil, Chief Justice of the New Mexico Supreme Court, said:

Under its current budget, the judiciary is unable to provide adequate juror pay and interpreters for those court participants with limited English proficiency. Every juror in New Mexico should receive at least the minimum wage for jury service, and every New Mexican has a constitutional right to participate in our justice system regardless of his or her ability to speak, read or write English or Spanish.<sup>232</sup>

When balancing the interests between conserving state resources and allocating additional funds necessary to achieve effective interpreter assistance, Assistant Attorney Samuels said, “[w]e recognize that there are

---

226. *Id.*; see ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT INTERPRETER ORIENTATION MANUEL AND GLOSSARY at 30–31 (2014), <http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/federal-court-interpreter-orientation-manual.pdf> (stating court interpreters are paid based on a fee schedule that can be negotiated by the court interpreter and the interpreter is entitled to reimbursement for travel beyond a thirty-mile radius of their normal assigned duties).

227. Santos, *supra* note 225.

228. *See id.* (stating the budget has increased since 2004 from \$4.2 million to \$7.4 million).

229. *Id.*

230. *Id.*

231. *Id.*

232. Barbara J. Vigil, *Reader View: Courts need more money to do their job*, SANTA FE NEW MEXICAN, (Feb. 28, 2015 9:00 PM), [http://www.santafenewmexican.com/opinion/my\\_view/reader-view-courts-need-more-money-to-do-their-job/article\\_487b0ead-a025-5114-8bba-a32219959bcf.html#user-comment-area](http://www.santafenewmexican.com/opinion/my_view/reader-view-courts-need-more-money-to-do-their-job/article_487b0ead-a025-5114-8bba-a32219959bcf.html#user-comment-area).

2016] *JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS* 377

financial constraints, but . . . failure to comply involves costs as well.”<sup>233</sup> These costs involve exhausting additional judicial resources by burdening appellate courts with issues based on mere procedural deficiencies.<sup>234</sup> These figures seem less troubling given New Mexico’s judiciary budget comprises just under 3% of the state’s overall budget.<sup>235</sup>

### C. *Potential Solutions to the Problem*

New Mexico’s interpreter program needs to be restructured.<sup>236</sup> Currently, the program allocates funds between interpreter, juror and witness fees.<sup>237</sup> Restructuring the allocation of funds has been a primary goal for many lobby groups.<sup>238</sup> These groups contend that in order to meet the monetary demands of supporting additional judicial interpreter resources, alternative options must be explored.<sup>239</sup> One possible solution involves developing a separate funding stream exclusively for judicial interpreters.<sup>240</sup> As Esther Navarro-Hall, chairwoman of the National Association of Judiciary Interpreters and Translators, explains, “[w]e shouldn’t have to be pitted against jurors and witnesses every year at the end of the fiscal year.”<sup>241</sup> Because both of these competing interests are equally important, establishing separate funds should alleviate some of this tension.

In recent years, the National Center for State Courts proposed a federal grant that would assist state interpreter programs by providing monetary aide in areas such as certification and training.<sup>242</sup> Similarly, in 2009, Senator Herb Kohl (D-WI) introduced Senate Bill 1329<sup>243</sup> that would

233. Santos, *supra* note 225.

234. *Id.*

In places like Ohio, Kansas and Illinois, where immigrants speaking many different languages have settled in recent years, the courts struggle within financial constraints to meet their obligations under the Civil Rights Act of 1964, which requires them to provide interpreters in all civil and criminal proceedings. In Ohio, for example, the most recent survey of local courts showed that spending on interpreters had increased to \$1.1 million in 2010 from \$55,000 in 1998, fueled by profound demographic changes.

*Id.*

235. Vigil, *supra* note 232.

236. Santos, *supra* note 225.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. See, e.g., *Court Interpreter Legislation*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/Services-and-Experts/Government-Relations/Access-to-Justice/Court-Interpreter-Legislation.aspx> (last visited Sept. 13, 2015) (providing a summary of the bill introduced and its impact if approved).

243. State Court Interpreter Grant Program Act, S. 1329, 111th Cong. (2009).

have authorized \$10 million in grants to be awarded by the DOJ in each fiscal year.<sup>244</sup> “The highest state court of each state would [have been] eligible to apply for the funds.”<sup>245</sup> The bill incorporated language explaining that states applying for the grant would have received a base amount of \$100,000 and the remainder of the funds in the appropriations would be allocated to the states based on the percentage of individuals (5 years or older) who speak a language other than English at home.<sup>246</sup> The Bill was never approved and, for now, it seems that the economic burden of court interpreting programs must be shouldered by the states, especially in New Mexico, where noncompliance is not an option.<sup>247</sup> “Inadequately funding the judiciary undermines [the] ability to serve the public and fulfill [the] constitutional responsibility to provide fair, timely and impartial justice to all.”<sup>248</sup> New Mexico and states alike will have to dig deep to continue to fund this indispensable tool in their pursuit to increase access to the justice system for LEP speakers.

## X. CONCLUSION

The incorporation of LEP individuals on juries has been a proven success.<sup>249</sup> New Mexico’s language assistance program has set a standard, or at least a foundation, that should be closely followed to encourage LEP juror participation across the country. Both equal protection under the law and the Sixth Amendment guarantee that every criminal defendant is to be tried by an impartial jury. In a sense, effective interpreter assistance programs protect this constitutional guarantee by enabling *every* individual to participate in a jury panel representative of society as a *whole*.<sup>250</sup> LEP individuals should be encouraged and provided the same opportunities to participate in the meaningful aspects of our society. Often times, however, more focus is placed on efforts to disqualify these individuals by creating burdensome obstacles for them to overcome. In the context of fulfilling civic duties as a citizen, accessibility to language assistance programs ensures every individual, including those with LEP, are afforded the opportunity to exercise their basic fundamental rights as

---

244. See *Court Interpreter Legislation*, *supra* note 242 (explaining reduction of the overall funding went down from \$15 million due to fiscally austere times).

245. *Id.*

246. *Id.*

247. S. 3365 (112th): *State Court interpreter Grant Program Act of 2012*, GOVTRACK, <https://www.govtrack.us/congress/bills/112/s3365> (last visited Oct. 14, 2015).

248. Vigil, *supra* note 232.

249. See generally Chavez, *supra* note 167, at 303 (discussing New Mexico’s successful use of non-English speaking juries).

250. Rose, *supra* note 12, at 864.

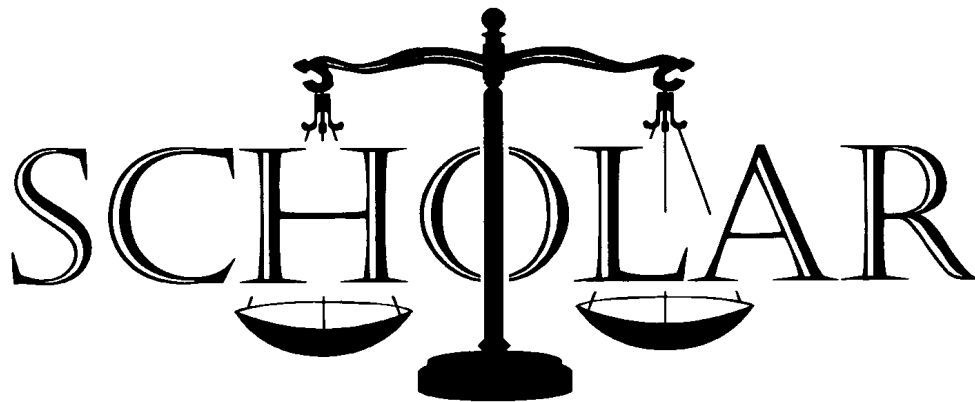
2016] *JUROR EXCLUSION OF LIMITED ENGLISH PROFICIENT SPEAKERS* 379

guaranteed by the U.S. Constitution.<sup>251</sup> Preservation of the integrity of the justice system, unabridged, must be provided in a comprehensive manner, not merely in one part of the legal proceedings or isolated to one part of the courthouse. LEP citizens should be integrated in public society, not disqualified from it.

---

251. *See id.* at 830 (citing *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127, 146 (1994)) (“[J]ury service is the most celebrated responsibility of U.S. citizenship. . . . Permitting LEP jurors to serve with the assistance of interpreters instills the value that sharing in the administration of justice is a phase of civic responsibility.”).





---

ST. MARY'S LAW REVIEW ON RACE AND SOCIAL JUSTICE

---

VOLUME 18

NUMBER 3

---

**THE SCHOLAR EDITORIAL BOARD**

JONCARLO SERNA  
*Editor in Chief*

TAYLOR ADAMS  
*Managing Executive Editor*

LAURA TANNENBAUM  
*Executive Editor*

MICHAEL McCANN  
*Associate Editor*

AGLAE EUFRACIO  
*Associate Editor*

BESSIE MUÑOZ  
*Symposium Editor*

BRITTANY BAKER  
*Solicitations Editor*

STEVEN GILMORE  
*Comments Editor*

**STAFF WRITERS**

JUAN BAZAN  
KRYSTAL BROWNING  
CHANDA CLEPPER  
KRISHNA DE LA CRUZ  
KEVIN DEANDA  
HANNAH DOMINGUEZ  
CLAUDIA GALAN  
STEPHANIE GALY  
GRACIELA GARCIA

ERIC MICHAEL GARZA  
MARTIN GARZA  
AUSTIN HAGEE  
MOLLY HUNT  
KARLY HOUCHIN  
ANTHONY JALILI  
JESUS JOSLIN  
MARY LARAKERS  
AUSTIN LOPEZ  
LISA MARTINEZ

LUIS MEDINA  
MATHEWS METYKO  
TRANG PHAM  
DANIA PULIDO  
ALICIA STOLL  
AIMEE STRITCHKO  
SVETLANA SUMINA  
SAMANTHA SCOTT  
J.D. VELA

**FACULTY ADVISORS**

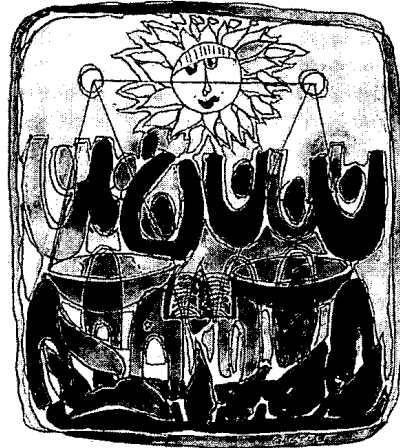
ANNE BURNHAM  
DAVID GREJARDO  
EMILY HARTIGAN  
ROBERT HU

ALBERT KAUFFMAN  
MIKE MARTINEZ, CHAIR  
ANA NOVOA  
DAYLA PEPI

ROBERT (BILL) PIATT  
ERICA B. SCHOMMER  
JOHN TEETER  
ANGELA WALCH

MARIA E. VEGA  
*Legal Administrative Assistant*

GUADALUPE VALDEZ  
*Legal Administrative Assistant*



**SUBSCRIPTIONS.** The current subscription rate is \$30 per volume for individuals, \$35 per volume for institutions, and \$15 per volume for students. Subscriptions will be renewed automatically unless the subscriber sends timely notice of termination. All notifications of change of address must be received a month prior to publication and must include both old and new addresses and proper zip codes. To place a subscription order contact:

William S. Hein & Co., Inc.  
1285 Main Street  
Buffalo, New York 14209  
(800) 828-7571  
<http://www.wshein.com>

**MANUSCRIPTS.** *The Scholar: St. Mary's Law Review on Race and Social Justice* is accepting papers. We seek scholarly articles that focus on social justice. The overriding purpose of *The Scholar* is to serve as an academic forum for legal issues that affect the disenfranchised groups that have been marginalized in legal discourse for so long.

We accept articles, comments, book reviews, student notes, essays and recent developments. Interested parties should send two copies of previously unpublished manuscripts in hard copy with endnotes. All submissions must also include a cover letter with title, author's name, address, daytime telephone, and fax number, or you may email your submission to [lawscholar@stmarytx.edu](mailto:lawscholar@stmarytx.edu). Materials cannot be returned.

Please mail your submissions to:

*The Scholar: St. Mary's Law Review on Race and Social Justice*  
c/o Solicitation Editor  
St. Mary's University School of Law  
One Camino Santa Maria  
San Antonio, Texas 78228-8606

**FORM.** Citations generally follow THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). This issue should be cited as 18 SCHOLAR \_\_\_\_ (2016).

**COPYRIGHT.** All articles copyright © 2016 by *The Scholar: St. Mary's Law Review on Race and Social Justice* except when expressly indicated.

## MISSION STATEMENT

The goal of *The Scholar* is giving “a voice to the voiceless.” *The Scholar: St. Mary’s Law Review on Race and Social Justice* strives to speak to all members of our society about issues of race and social justice: to inform them, to share with them, to educate them, and to grow with them.

Our primary goal is educating ourselves, and in the process, offering some different perspectives not often allowed or sought after in our society. *The Scholar* members will strive diligently and honestly to produce articles offering insights into the daily struggles of those marginalized in society.

We hope and anticipate that Articles published in *The Scholar* will be building blocks upon which a greater understanding of issues facing society is built. Our hope is that these building blocks will form bridges: bridges to bring together all the members in our society, bridges to connect all the groups that comprise our community, bridges to access self-discovery, and an understanding of the “other.”

We hope this law review’s work will be transformative; that it will educate, inform, and enlighten those who participate. We wish to create an environment that will allow everyone to learn, to teach, to share, to work together, and to contribute to the legal and educational communities.

Finally, we offer this law review as a sign of hope for a promising future and for better understanding of all of the members within our society.



### **In Appreciation . . .**

*The Scholar: St. Mary's Law Review on Race and Social Justice* Volume 18 Editorial Board expresses our sincere gratitude to:

The Sarita Kenedy East Law Library staff for patiently assisting our research and aiding us in locating even the most obscure sources;

The previous Editorial Boards and Staff Writers of *The Scholar* who worked tirelessly to continue the efforts of the founders and without whose dedication *The Scholar* would not be entering its seventeenth volume;

Stephen M. Sheppard, Dean of St. Mary's University School of Law, Mike Martinez, Jr., Anne M. Burnham, David Grenardo, Emily A. Hartigan, Robert H. Hu, Albert A. Kauffman, Ana M. Novoa, Dayla S. Pepi, Robert William (Bill) Piatt, John W. Teeter, Jr., Erica B. Schommer, and Angela C. Walch for their unyielding support.

Shauna Carmichael, Amanda E. Lopez, Laura Figueroa, and Mary Larakers for their contribution to this issue; and

Finally, we would like to thank our families, friends, and other loved ones, for their patience, understanding, and support as we seek to further the mission of *The Scholar*. They have done more to help ensure our success than they may ever realize.



Order through Hein!

*The Scholar:  
St. Mary's Law Review  
on Race and Social Justice*  
is available from Hein!

Subscriptions and individual volumes  
available! Contact Hein for details!

1-800-828-7571  
order@wshein.com



*The Scholar: St. Mary's Law  
Review on Race and Social  
Justice* is also available  
electronically in HeinOnline!

William S. Hein & Co., Inc.  
1235 Main Street, Buffalo, New York 14209  
Ph: 716.882.2600 » Toll-free: 1.800.828.7571 » Fax: 716.883.8100  
mail@wshein.com » wshein.com » heinonline.org

## ST. MARY'S UNIVERSITY SCHOOL OF LAW

### ADMINISTRATION

- STEPHEN M. SHEPPARD, *Dean*. B.A., University of Southern Mississippi; J.D., LL.M., J.S.D., Columbia Law School; Litt.M., Oxford University.
- FAYE M. BRACEY, *Assistant Dean for Career Services*. B.A., Vanderbilt University; J.D., St. Mary's University.
- CATHERINE CASIANO, *Director of Recruitment*. B.A., Boston College; J.D./M.B.A., St. Mary's University.
- ROBERT H. HU, *Law Library Director and Professor of Law*. LL.B., Beijing University, China; LL.M., M.L.S., Ph.D., University of Illinois at Urbana-Champaign.
- JOEL LAUER, *Executive Director for Law School Advancement*. B.A., M.A., University of Nevada at Las Vegas.
- JENNIFER R. LLOYD, *Director of Law Communications*. B.A., University of Washington Seattle; M.A., University of Texas at Austin.
- VICTORIA M. MATHER, *Associate Dean for Academic and Student Affairs and Professor of Law*. B.S., J.D., LL.M., University of Illinois at Urbana-Champaign.
- ANA M. NOVOA, *Associate Dean for Clinical Education and Public Interest and Professor of Law*. B.B.A., University of Texas at San Antonio; J.D., University of Texas at Austin.
- SUZANNE PATRICK, *Director of Career Services*. B.A., State University of New York at Albany; J.D., State University of New York at Buffalo.
- KEVIN ROBINOWICH, *Director of Academic Support*. B.A., University of Texas at Austin; J.D., St. Mary's University.
- PREYAL SHAH, *Director of Bar Studies*. B.A., Austin College; J.D., St. Mary's University.
- KATHRYN TULLOS, *Director of Assessment*. B.A., J.D., University of Texas at Austin.
- REYNALDO A. VALENCIA, *Associate Dean for Administration and Finance and Professor of Law*. A.B., A.M., Stanford University; J.D., Harvard University.
- SR. GRACE WALLE, F.M.I., *Campus Minister*. M.A., Boston College; D. Min., McCormick Theological Seminary.
- COLLANNE WEST, *Director of Alumni Relations and Development*. B.S., J.D., St. Mary's University.
- WILLIAM C. WILSON, *Assistant Dean and Director of Admissions*. A.B., Middlebury College; M.Ed., University of Vermont; Ph.D., University of Minnesota.

### FACULTY

- JEFFREY F. ADDICOTT, *Professor of Law*. B.A., University of Maryland; J.D., University of Alabama; LL.M., The Judge Advocate General's School; LL.M., S.J.D., University of Virginia.

- MICHAEL S. ARIENS, *Professor of Law*. B.A., St. Norbert College; J.D., Marquette University; LL.M., Harvard University.
- LAURA H. BURNEY, *Faculty-In-Residence*. B.A., Trinity University; J.D., St. Mary's University.
- ANNE M. BURNHAM, *Clinical Professor of Law*. B.A., University of Wisconsin–Madison; J.D., St. Mary's University.
- CHARLES E. CANTÚ, *Dean Emeritus and Distinguished South Texas Professor of Law*. B.B.A., University of Texas at Austin; J.D., St. Mary's University; LL.M., University of Michigan; M.C.L., Southern Methodist University.
- MARK W. COCHRAN, *Professor of Law*. A.B.J., University of Georgia; J.D., Vanderbilt University; LL.M., in Taxation, University of Florida.
- DAVID A. DITTFURTH, *Professor of Law*. B.A., J.D., LL.M., University of Texas at Austin.
- GENEVIEVE HÉBERT FAJARDO, *Clinical Professor of Law*. B.A., University of Texas at Austin; J.D., Columbia Law School.
- GEORGE L. FLINT, JR., *Professor of Law*. B.A., B.S., M.A., J.D., Ph.D., University of Texas at Austin; Nuc. E., Massachusetts Institute of Technology.
- RICHARD E. FLINT, *Professor of Law*. B.A., J.D., Ph.D., University of Texas at Austin.
- DAVID GREVARDO, *Assistant Professor of Law*. B.A., Rice University; J.D., Duke University.
- ANDRÉ HAMPTON, *Provost and Vice President for Academic Affairs and Professor of Law*. B.A., J.D., M.A., University of Texas at Austin.
- AMY HARDBERGER, *Assistant Professor of Law*. B.A., Earlham College; M.S. University of Texas at San Antonio; J.D., Texas Tech University.
- EMILY ALBRINK FOWLER HARTIGAN, *Professor of Law*. B.A., Swarthmore College; M.A., Ph.D., J.D., University of Wisconsin.
- THE HONORABLE PATRICK E. HIGGINBOTHAM, *Visiting Professor of Law*. B.A., LL.B. University of Alabama.
- VINCENT R. JOHNSON, *Professor of Law*. B.A., LL.D., St. Vincent College; J.D., University of Notre Dame; LL.M., Yale University.
- AMY H. KASTELY, *Professor of Law*. B.A., J.D., University of Chicago.
- ALBERT H. KAUFFMAN, *Professor of Law*. B.S., Massachusetts Institute of Technology; J.D., University of Texas at Austin.
- KAREN KELLEY, *Clinical Professor of Law*. B.A., Rice University; J.D., University of Texas at Austin.
- DORIE KLEIN, *Professor of Law*. B.A., Swarthmore College; M.A., University of Pennsylvania; J.D., Vanderbilt University.
- RAMONA L. LAMPLEY, *Assistant Professor of Law*. B.A., J.D., Wake Forest University.
- ALOYSIUS A. LEOPOLD, *Professor of Law*. B.A., J.D., St. Mary's University.
- CHENGLIN LIU, *Professor of Law*. LL.B., Shenyang Normal University, China; LL.M., Dalian University of Technology, China; LL.M., Lund University, Sweden; LL.M., J.S.D., Washington University in St. Louis; M.S., University of Illinois at Urbana-Champaign.

- LEE H. LYTTON, III., *Professor of Law*. A.B., St. Edward's University; J.D., St. Mary's University.
- COLIN P. MARKS, *Professor of Law*. B.S., University of Missouri-Columbia; J.D., University of Houston.
- DAYLA S. PEPI, *Clinical Professor of Law*. B.A., Southwest Texas State University; J.D., St. Mary's University.
- BILL PIATT, *Professor of Law*. B.A., Eastern New Mexico University; J.D., University of New Mexico.
- CHAD J. POMEROY, *Professor of Law*. B.S., J.D., Brigham Young University.
- GERALD S. REAMEY, *Professor of Law*. B.A., Trinity University; J.D., LL.M., Southern Methodist University.
- BERNARD D. REAMS, JR., *Professor of Law*. B.A., Lynchburg College; M.S., Drexel University; J.D., University of Kansas; Ph.D., St. Louis University.
- WILLY E. RICE, *Professor of Law*. B.A., University of Alabama; M.A., Ph.D., University of North Carolina at Chapel Hill; J.D., University of Texas at Austin.
- BONITA K. ROBERTS, *Professor of Law*. B.A., M.A., University of New Orleans; J.D., Loyola University New Orleans.
- ROBERTO ROSAS, *Instructor of Law*. B.S., J.D., Universidad de Guadalajara, Mexico; LL.M./S.J.D., Universidad Europea de Madrid, Spain.
- DAVID A. SCHLUETER, *Professor of Law*. B.A., Texas A&M University; J.D., Baylor University; LL.M., University of Virginia.
- JOHN M. SCHMOLESKY, *Professor of Law*. B.A., J.D., University of Wisconsin–Madison.
- L. WAYNE SCOTT, *Professor of Law*. B.A., Southwest Texas State College; M.A., Baylor University; J.D., University of Texas at Austin.
- STEPHANIE STEVENS, *Clinical Professor of Law*. B.A., J.D., St. Mary's University.
- ROBERT L. SUMMERS, JR., *Professor of Law*. B.A., Williams College; J.D., College of William and Mary; M.S.L.S., University of North Carolina at Chapel Hill; M.A., St. Mary's University; C.A.I.A., Bush Graduate School–Texas A&M University.
- JOHN W. TEETER, JR., *Professor of Law*. A.B., University of Illinois at Chicago Circle; J.D., Harvard University.
- LEE J. TERÁN, *Clinical Professor of Law*. B.A., University of Utah; J.D., University of Colorado.
- ANGELA C. WALCH, *Assistant Professor of Law*. A.B., J.D., Harvard University.

#### LAW LIBRARY ADMINISTRATION

- CHARLES S. FINGER, *Associate Director and Associate Professor*. B.A., State University College at Geneseo, New York; M.L.S., J.D., State University at Buffalo, New York.
- STACY FOWLER, *Technical Services Librarian and Associate Professor*. B.A., University of Texas at San Antonio; M.L.S., Texas Women's University; M.A., St. Mary's University.
- MIKE MARTINEZ, JR., *Reference Librarian and Associate Professor*. B.A., M.S.I.S., University of Texas at Austin; J.D., St. Mary's University.

WILHELMINA RANDTKE, *Electronic Services Librarian and Assistant Professor*. B.S., University of Florida; J.D., M.L.I.S., Florida State University.

LEE R. UNTERBORN, *Catalogue Librarian and Associate Professor*. B.A., St. Edward's University; M.S., University of North Texas; J.D., St. Mary's University; M.S.L.S., Case-Western Reserve University.

FANG WANG, *Reference and Special Collections Librarian*. B.M.L.S., B.A. Wuhan University; M.S.I.S. Florida State University.

#### ADJUNCT FACULTY

BRUCE E. ANDERSON

Graham D. Baker

AARON BARTON

BARRY H. BEER

THE HONORABLE HENRY J.

BEMPORAD

MICHAEL D. BERNARD

JOHN BOZADA

GAYLIA D. BRUNSON

THE HONORABLE JOHN W. BULL

THE HONORABLE REYNOLDS N. CATE

THE HONORABLE WAYNE A.

CHRISTIAN

DONNA F. COLTHARP

ALLEN T. CRADDOCK

MICHAEL C. DE GUZMAN

REBECCA FÉ DE MONTRÉVE-McMINN

RICHARD DURBIN

ROB EICHELBAUM

VANESSA L. ERPS

NANCY FARRER

EMMANUEL GARCIA

CRAIG A. GARGOTTA

JOSEPH H. GAY, JR.

GERALD H. GOLDSTEIN

NORMA GONZALES

ASHLEY RESSMAN GRAY

JUDITH A. GRAY

SHARON SCHARFF GREENWALD

CHARLES W. HANOR

CLAIRE G. HARGROVE

THE HONORABLE SID L. HARLE

DARYL HARRIS

REESE L. HARRISON, JR.

A. CHRIS HEINRICHS

PETER E. HOSEY

JERRY D. KING

BERNIE R. KRAY

SAMIRA LINEBERGER

MARSHALL B. LLOYD

ELLEN A. LOCKWOOD

PHILIP J. LYNCH

JUDY M. MADEWELL

Hector Q. Martinez

HAROLD J. McCracken

ALEX MILLER

SAM D. MILLSAP, JR.

GUINEVERE E. MOORE

ROBERT T. MOORE

ERIN MOSES

VALERIE L. NAJERA

DAN A. NARANJO

ANNE OHLRICH

JAMES M. PARKER, JR.

SUZETTE KINDER PATTON

R. MARK PAYNE

RICKY J. POOLE

J. CALEB RACKLEY

LUIS RAMIREZ-DAZA

P. SCOTT RAMELL

MARION M. REILLY

THE HONORABLE BERT C.

RICHARDSON

THE HONORABLE XAVIER

RODRIGUEZ

ROBERTO C. RONDERO DE MOSIER

JENNIFER ROSENBLATT

LESLIE J.A. SACHANOWICZ

CATHY SHEEHAN

REBECCA SIMMONS

PATRICIA F. SITCHLER

LISA C. SMITH

MARK STEVENS

KATHRYN SWINT

NICOLE THORNBRO

WILLIAM R. TOWNS

BETH WATKINS

DEBRA WEISS

DAVID D. WHITE

JON C. WOOD

JUDSON WOOD, JR.

KAREN LEE ZACHRY