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Of Pigeonholes and Prospective Jurors

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Perhaps it is stating the obvious to observe that our legal system relies on the use of language to resolve disputes. Courts depend upon oral and written representations to arrive at the truth and to afford justice to those who appear before them. We would recoil at the suggestion that in this most serious endeavor the incorrect use of language should be permitted or even encouraged by the courts. Yet, as a result of the decision of the United States Supreme Court in *Hernandez v. New York*,[1] the truth in jury trials may become obfuscated, and people who know more than one language may be easily precluded from jury service.

My inclination is to take the traditional approach by reciting the facts and holding of *Hernandez*. To some extent I will do that, but this writing is more than a case brief of *Hernandez*. Rather, it is the latest in a series of pleas[2] that courts and legislators begin to examine the nature of language itself, and consider the real interests at stake in attempting to formulate equitable approaches to language rights cases.

Courts have been unable or unwilling to take this type of approach because, in general, they have not understood the complex nature of language. Language is obviously a skill, but it is something more than that. From a sociological-linguistic point of view, it is more than a neutral tool for the communication of ideas. It is, instead, at least according to some, a perspective or a

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1. 111 S. Ct. 1859 (1991).

2. My "pleas" include the following: BILL PIATT, ONLY ENGLISH: LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990) [hereafter ONLY ENGLISH]; Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1 (1990) [hereafter *Attorney as Interpreter*]; Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885 (1986) [hereafter *Toward Domestic Recognition*]; Piatt, *Linguistic Diversity on the Airwaves: Spanish Language Broadcasting and the FCC*, 1 LA RAZA L.J. 1001 (1984) [hereafter *Spanish Language Broadcasting*]; PIATT, LANGUAGE ON THE JOB: BALANCING BUSINESS NEEDS AND EMPLOYEE RIGHTS (1993).

world view.[3] Language shapes the thoughts of its users, and affects people's perception of events and their meaning, not altogether unlike religion.[4] It is an inseparable aspect of culture.[5] Imposition of language represents attempted subordination of one culture to another.[6]

Yet, despite this complex function of language, when language becomes a factor in judicial or legislative determinations, it appears under the categories of race or national origin.[7] In the past, this author has demonstrated the resulting inconsistencies flowing from the efforts of courts and legislatures to afford remedies when language operates as a barrier to access to legal rights, such as the right to defend oneself in a criminal prosecution.[8] Similarly, cases involving access to basic human needs such as education and public assistance programs founder when language issues are raised.[9] Until the advent of a more comprehensive jurisprudence, based upon an analysis of the underlying interests at stake, courts, legislatures, parties and their attorneys will be required to follow the traditional approach of examining cases and applicable laws, applying those that are useful and attempting to distinguish those that are not. The most recent pro-

3. LANGUAGE, THOUGHT AND CULTURE 7 (Paul Henle ed., 1966).

4. International human rights documents place language in the same protected category as religion. For example, the United Nations Charter, to which the United States is a party, identifies one of the purposes of the U.N. to be that of achieving international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion . . . ." U.N. CHARTER art. 1, para 3.

Moreover, the Conference on Security and Cooperation in Europe, which concluded in Helsinki on August 1, 1975, resulted in a number of agreements. The United States participated in the two-year conference and signed, along with many other countries, the Final Act of the conference. That Act makes reference to a number of language rights guarantees. Part 1(d)VII of the Act, entitled "Respect for Human Rights and Fundamental Freedoms," provides in part: "The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all, without distinction as to race, sex, language or religion." Conference on Security and Cooperation in Europe, Final Act, Aug. 1, 1975, 14 I.L.M. 1293.

In 1981, Justice Cruz Reynoso of the California Supreme Court, a member of the Select Commission on Immigration and Refugee Policy (SCIRP), wrote in his dissenting report to a portion of the SCIRP report, "[W]e should no more demand English-language skills for citizenship than we should demand uniformity of religion." THOMAS ALEINKOFF & DAVID MARTIN, IMMIGRATION PROCESS AND POLICY 214 (2d ed. 1991).

5. Gutierrez v. Municipal Court of S.E. Judicial District, 838 F.2d 1031, 1039 (9th Cir. 1988), *vacated as moot*, 109 S. Ct. 1736 (1989) ("The primary language not only conveys certain concepts, but is itself an affirmation of the culture.") (citing *Toward Domestic Recognition*, *supra* note 2, at 894-99).

6. Mary McGroarty, *Bilingualism in the Workplace*, 511 ANNALS AM. ACAD. POL. & SOC. SCI. 162 (1990).

7. For a detailed examination of these determinations, see ONLY ENGLISH, *supra* note 2, and *Toward Domestic Recognition*, *supra* note 2.

8. *Id.*

9. *Id.*

nouncement by the Supreme Court on language issues highlights the uncertainties which will inevitably flow from forcing language rights into a narrow pigeonhole, rather than focusing on their impact upon underlying interests.

On May 28, 1991, the Supreme Court announced its opinion in *Hernandez*. The case involved a New York criminal trial where the prosecutor had used peremptory challenges to exclude two Latino, potential jurors who were bilingual. They were stricken, according to the prosecutor, because they had looked away from the prosecutor and had hesitated before responding affirmatively to the prosecutor's inquiry whether they would accept a translator as the final arbiter of some witness's responses, which were going to be given in Spanish and translated into English. Previous Supreme Court decisions[10] and a federal statute[11] make it unlawful to remove jurors from a criminal prosecution on the basis of race. In fact, in *Powers v. Ohio*,[12] an opinion handed down less than two months prior to its *Hernandez* decision, the Court found that a white defendant was denied equal protection where African-Americans were excluded from the jury.[13] Justice Kennedy wrote, as part of the majority opinion, that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."[14] With the exception of voting, he concluded, "for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[15]

Justice Kennedy also wrote the majority opinion in *Hernandez*. He noted, with apparent approval and citing noted sociology and linguistic experts, the complex function of language:

> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to spring and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. Grosjean, *The Bilingual as a Competent but Specific Speaker-Hearer*, 6 J. Multilingual & Multicultural Develop-

10. Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 111 S. Ct. 1364 (1991).
11. 18 U.S.C. § 243 (1948).
12. 111 S. Ct. 1364 (1991).
13. *Id.* at 1364.
14. *Id.* at 1366.
15. *Id.* at 1369.

> ment 467 (1985). This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sanchez, *Our Linguistic and Social Context, in* SPANISH IN THE UNITED STATES 9, 12 (J. Amastae & Elias-Olivares 1982); Dodson, *Second Language Acquisition and Bilingual Development: A Theoretical Framework*, 6 J. Multilingual & Multicultural Development 325, 326-327 (1985).[16]

Then, in this author's opinion, the Supreme Court halted what appeared to be the first steps at identifying the real issues at stake. It did not consider the extraordinary thing being asked of bilingual jurors: that if they hear words in Spanish which bring some images to mind, they must somehow forget those images and thoughts, and accept only the images and thoughts raised by the English language version offered by the court interpreter. Because the Court did not consider the extraordinary request being made, it made the conclusion that the delay in responding justified the jurors' removal. If the Court *had* understood the nature of the request, it might have concluded that hesitancy would be the only honest reaction from a layperson asked to put aside his/her first images and version of reality in absolute favor of a second, potentially inaccurate rendition.[17] The Court might have focused on the importance of the honor and privilege of jury duty for bilingual citizens and of the integrity of the courts, in accordance with its *Powers* decision. It might have considered the fact that if all attorneys, witnesses, and other jurors are monolingual, the *only* person in the courtroom who would know if a translation error had occurred would be a bilingual juror.[18] Yet such a juror, after *Hernandez*, apparently would be required to ignore the error. In fact, he or she would never even have the chance to serve as a juror unless he or she unhesitatingly promised *not* to reveal any translation errors to the court.[19] Instead of focusing on the real interests of guaranteeing that the truth

16. 111 S. Ct. at 1872.

17. Consider an individual who has learned from infancy to associate the word "*madre*" with the female adult who gave him or her birth. If that person is called to court as a juror and told by an incompetent translator that "*madre*" means "cloud" or some other word, that juror will not be able to stop the neurological processes that first brought the image of "mother" to mind. For courts to suggest that human beings can consciously purge themselves of that image is absurd.

18. *See Attorney as Interpreter, supra* note 2.

19. Footnote 3 of the opinion in *Hernandez* illustrates the removal of a bilingual juror who may very well have made a good faith effort to point out a translation error. 111 S. Ct. at 1866 n.3. Later in the opinion, the Court observed, "though petitioner did not suggest the alternative to the trial court here, Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the translation during the course of trial." *Id.* at 1868.

prevails in trials and that bilingual citizens participate in our democracy as jurors, the Court upheld Hernandez's conviction and the decision to exclude the bilingual jurors.

The Court determined that it need not address the argument that Spanish-speaking ability bears such a close relation to ethnicity that exercising a peremptory challenge on the basis of language was a violation of the equal protection clause, because the prosecutor had explained that the jurors' specific responses and their demeanor, and not their language proficiency alone, caused him to doubt their ability to defer to the official translation.[20] The Court noted that the lower court could have relied on the fact that the prosecutor defended his use of peremptory challenges without being asked to do so by the judge, that he did not know which jurors were Latinos, and that the ethnicity of the victims and the prosecution witnesses (Latinos) tended to undercut any motive to exclude Latinos from the jury.[21] However, the Court noted that it might be, for certain ethnic groups in some communities, that proficiency in a particular language like skin color should be treated as a surrogate for race under equal protection analysis.[22] Can discrimination on the basis of language be considered national origin discrimination or racial discrimination? The Supreme Court's answer is that it may be, depending upon the circumstances. The better inquiry would have been to determine the effect on the dignity of individuals and the integrity of the courts given the virtually automatic exclusion of bilingual jurors this case could produce, regardless of the ethnicity of victims and witnesses, and whether there could be a showing of intentional racial discrimination on the part of the prosecutor.

Of course, all is not lost with *Hernandez*. After all, the Court did take some important steps in identifying some sociological-linguistic perspectives on language. Further, zealous defense counsel can always attempt to rehabilitate the hesitating prospective bilingual juror by asking questions designed to elicit responses which show that the juror will follow the court's instructions and interpreters, and will attempt to inform the court if a serious error in translation has been made. The juror could also be asked to explain any hesitancy which might have occurred in response to a prosecutor's query concerning acceptance of an interpretor's translation. Perhaps the juror has never been in court before, does not understand the interpreting process and is hesitating, not out of reluctance to do what is required, but because of his or her unfamiliarity coupled with the extraordi-

20. *Id.* at 1867-68.
21. *Id.* at 1872.
22. *Id.*

nary nature of the request. Defense counsel should educate the court as well. The court should be made to understand the difficulty of the interpreting process under the best of circumstances,[23] and the benefits of utilizing a juror's bilingual skills to assist in the truth-finding process. Also, as explicitly set out in *Hernandez,* a prosecutor's persistence in the desire to exclude Spanish-speakers, despite the alternative of asking them to agree to discreet advisement of the trial judge regarding interpreting errors, can be taken into account by the court in determining whether to accept a race-neutral explanation by the prosecutor.[24]

This process, if successful, might cure the *Hernandez* problem, but it does not resolve larger concerns. The connection between language and race or national origin has acquired so much inertia in so many areas of the law that immediate change is unlikely. Further, until the change occurs, this author would not recommend removing the limited, and arguably analytically unsound, protection that these statutes and decisions afford. However, legislatures and courts should begin rethinking these issues and try to identify the real issues at stake.

We are an increasingly multilingual society. We need the talents and resources of all of our people. It is morally unjust, economically inefficient, and logically unsound to maintain archaic legal approaches to contemporary law and language concerns.[25] This is particularly urgent in the rendition of justice, where the truth may be sacrificed to ignorance, by the unreasonable demand that bilinguals, in effect, quit being bilingual if they wish to serve on a jury.

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23. *See generally* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM (1990); *Attorney as Interpreter, supra* note 2.

24. 111 S. Ct. at 1868.

25. *See generally* ONLY ENGLISH, *supra* note 2; *Attorney as Interpreter, supra* note 2; *Toward Domestic Recognition, supra* note 2; *Spanish Language Broadcasting, supra* note 2.