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A CHALLENGE TO THE ENGLISH-LANGUAGE REQUIREMENT OF THE JUROR QUALIFICATION PROVISION OF NEW YORK'S JUDICIARY LAW

Cynthia L. Brown

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I. INTRODUCTION

New York state law requires jurors to read, write, and speak the English language with a degree of proficiency.[1] The Hispanic[2] population in New York City has steadily increased from 16.3% in 1970 to 19.9% in 1980 to 24.4% in 1990.[3] United States Census Bureau statistics reveal that approximately half of the Hispanic-surnamed population over five years of age in New York, Bronx, Kings, Queens, and Richmond counties, speak Spanish as their primary language.[4] The

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1. N.Y. JUD. LAW § 510 (McKinney 1992). The section reads:
In order to qualify as a juror a person must:
1. Be a citizen of the United States, and a resident of the county.
2. Be not less than eighteen years of age.
3. Not have a mental or physical condition, or combination thereof, which causes the person to be incapable of performing in a reasonable manner the duties of a juror.
4. Not have been convicted of a felony.
5. Be intelligent, of good character, able to read and write the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire, and be able to speak the English language in an understandable manner.

2. The term "Hispanic" is used throughout this note to refer to all Spanish-speaking United States citizens, regardless of their country of origin. "Hispanic" is used by the U.S. Census Bureau for the same purpose. The author recognizes that others have argued in favor of other appellations such as "Latino" and "Latin American," the latter referring specifically to those from Central and South America as distinguished from those from Spain. Hispanics were selected for this analysis because they are among the largest non-English speaking group in New York City. Nonetheless, the same arguments could be extended to Asian Americans or any other non-English speaking group which constitutes a significant portion of the population.

3. David González, *Dominican Immigration Alters Hispanic New York*, N.Y. TIMES, Sept. 1, 1992, at A1.

4. *See* BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: SOCIAL AND ECONOMIC CHARACTERISTICS—NEW YORK 340-44 (1991) [hereinafter CENSUS] (Table 138: Nativity, Citizenship, Year of Entry, Area of Birth, and Language Spoken at Home: 1990). In New York County (Manhattan) 337,801 people were five years or older and spoke a language other than English, and that language was Spanish; 181,592 or 12.2% of the total population did not speak English very well. *Id.* at 343. In Bronx County, 428,376 people were five years or older and spoke a language other than English, and that language was Spanish; 208,991 or 17.4% of the total population did not speak English very well. *Id.* at 340. In Kings

exclusion of these non-English speaking Hispanic New Yorkers from jury duty by Section 510 of the New York Judiciary Law,[5] which lists juror qualification requirements, is the focus of this note.

This note will examine whether the New York juror qualification provision of New York's Judiciary Law, which bars non-English speaking citizens from jury service, violates not only the Sixth Amendment but also the Equal Protection Clauses of the United States and the New York State Constitutions.[6] The Sixth Amendment analysis examines whether the statute results in substantial or gross underrepresentation, if not systematic exclusion from jury pools of Hispanics, who constitute a cognizable group of qualified citizens.[7] The effect of this would be to deny the defendant a fair and impartial trial by a jury drawn from a cross section of the community.[8]

The Equal Protection Clause analysis examines whether the statute is presumptively unconstitutional because: 1) the State fails to treat similarly-situated individuals alike with respect to the legislature's objectives in enacting the law;[9] 2) the legislature acted for an impermissible

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County (Brooklyn), 382,469 people were five years or older and spoke a language other than English, and that language was Spanish; 180,508 or 7.8% of the total population did not speak English very well. *Id.* at 342. In Queens County, 330,098 people were five years or older and spoke a language other than English, and that language was Spanish; 173,643 or 8.9% of the total population did not speak English very well. *Id.* at 344. In Richmond County (Staten Island), 19,804 people were five years or older and spoke a language other than English, and that language was Spanish; 6,948 or 1.8% of the total population did not speak English very well. *Id.* For general information on population and housing, see BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS—NEW YORK 107 (1991) (Table 4: Sex, Race, and Hispanic Origin: 1990). The 1990 population figures for the New York area are: New York County population, 1,487,536; Bronx County population, 1,203,789; Kings County population, 2,300,664; Queens County population, 1,951,598; Richmond County (Staten Island) population, 378,977. *Id.*

5. *See* N.Y. JUD. LAW § 510 (McKinney 1992).

6. U.S. CONST. amend. VI; U.S. CONST. amend. XIV §1; N.Y.CONST. art. I, § 11:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

7. *See* discussion *infra* part II.B-C.

8. *See* discussion *infra* part III.A.

9. *See infra* notes 189-202 and accompanying text.

purpose;[10] or 3) the State is denying Hispanic citizens a fundamental right by assuming that their lack of knowledge of the English language makes them incapable of performing jury service.[11]

II. RIGHT TO TRIAL BY JURY DRAWN FROM A CROSS SECTION OF THE COMMUNITY

A. *The Cross-Section Requirement*

A criminal defendant is entitled to a jury drawn "at random from a fair cross section of the community in the district or division wherein the court convenes."[12] The Supreme Court has consistently held this to be a fundamental right[13] guaranteed by the Sixth Amendment.[14] Furthermore, the Supreme Court has suggested that non-discriminatory jury selection, which is mandated by both the Equal Protection and Due Process Clauses of the Fourteenth Amendment,[15] is an essential element in a democratic system.[16] In *Thiel v. Southern Pacific*,[17] the Court wrote:

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10. *See infra* notes 203-210 and accompanying text.

11. *See* discussion *infra* part VIII.

12. 28 U.S.C. § 1861 (1988 & Supp. V 1993).

13. *See, e.g.*, Holland v. Louisiana, 493 U.S. 472 (1990) (holding that a criminal defendant has standing to challenge exclusion of jurors resulting in a violation of the fair cross-section requirement, whether or not he is a member of the excluded class); Taylor v. Louisiana, 419 U.S. 522, 525 (1975) (striking down a law exempting women from jury service on the basis that it violated the fair cross-section requirement).

14. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . . " U.S. CONST. amend. VI.

15. The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

16. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 85-86 (1942) (holding, in a case where only women from the local League of Women Voters were selected for jury lists, that "our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class"); Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879) (ruling that a statute excluding Blacks from serving on juries violates the Equal Protection Clause of the Fourteenth Amendment).

17. 328 U.S. 217 (1946) (ruling that the informal practice of excluding daily wage earners from jury service without their consent was illegal).

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. (citation omitted). This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. *But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.* Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[18]

It is a well-established principle that the state cannot systematically or purposefully deny members of a defendant's race or group, or those of any other group, the right to participate as jurors, because a jury from which distinct groups have been systematically excluded is not representative of the community.[19] The Supreme Court has consistently required that jury selection systems at both the federal and state court levels draw jurors from a fair cross section of the community.[20] While

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18. *Id.* at 220 (emphasis added).

19. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 481-82 (1954) (declaring that a prima facie case of discrimination existed when no Mexican Americans had served on county juries for a twenty-five year period, even though they comprised a substantial percentage of the county's population); *Ex parte* Virginia, 100 U.S. 339, 348 (1879) (holding that a county court judge may not exclude segments of the community from jury duty).

20. *See, e.g.*, Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 330 (1970) (holding that members of a group systematically excluded from jury service—African Americans—have standing to attack juror selection laws); Brown v. Allen, 344 U.S. 443, 473-74 (1953) (recognizing the authority of states to specify qualifications for prospective state jurors, "so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty"); Ballard v. United States, 329 U.S. 187, 193-94 (1946) (declaring that women may not be excluded from federal juries because their exclusion makes the jury less representative of the community); Thiel v. Southern Pac. Co. 328 U.S. 217, 220 (1946) (addressing the common practice of excluding daily wage earners from lists of prospective jurors, the Court stated that "prospective jurors shall be selected by court officials without systematic and intentional exclusion . . . . Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society.").

allowing "greater latitude" to the States "in fashioning their jury selection procedures,"[21] the Court has nonetheless insisted that the state court "protect the federal constitutional rights of all" by utilizing sources for jury lists that "reasonably reflect[] a cross-section of the population suitable in character and intelligence for that civic duty."[22]

B. *Cognizability and Its Relationship to the Fair Cross-Section Requirement*

The Supreme Court views juries as a safeguard against the exercise of arbitrary power and the means by which the common sense judgment of the community is provided.[23] Consistent with this concept is the requirement that juries be "drawn from a source fairly representative of the community. . . ."[24] Ideally, juries would reflect a true cross section, but that is not constitutionally mandated.[25] Accordingly, the cross-section requirement does not mean "that petit juries actually chosen must mirror the community."[26] "What is required is a jury system that is free of discrimination against properly cognizable groups."[27] These cognizable groups are distinct categories of people who are capable of being singled out for different treatment under the law.[28] Neither an exact statistical mirror nor perfectly proportional representation of all identifiable classes or groups of a community is required to satisfy the cross-section requirement.[29] The selection process, however, must be reasonably designed to produce a fair cross section.[30] While significant

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21. Alexander v. Louisiana, 405 U.S. 625, 637 n.4 (1972) (Douglas, J. concurring).

22. *Carter*, 396 U.S. at 332-33. (Stewart, J., *quoting* Brown v. Allen, 344 U.S. 433, 474 (1953). This note considers the state court jury selection process as administered in New York City.

23. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

24. *Id.* at 538.

25. United States v. Butera, 420 F.2d 564, 572 (1st Cir. 1970) (holding that the Constitution's mandate for non-discriminatory jury selection is not frustrated simply by the existence of certain inadvertent disparities arising from an otherwise fair system).

26. *Taylor*, 419 U.S. at 538.

27. *Butera*, 420 F.2d at 572.

28. *See* Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).

29. *See* Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

30. United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973) (holding that 18 to 21 year olds do not have a constitutional right to serve on juries, and that they do not constitute a "cognizable group" for jury selection purposes). *See also* United States v. Van Allen, 208 F. Supp. 331, 334 (S.D.N.Y. 1962) (holding that defendants failed to

disparities in the exclusion of certain groups from jury pools may not automatically be considered unconstitutional, they do suggest discrimination; once this inference is raised, the State must negate it by showing that the disparities are not the result of discrimination.[31]

1. Supreme Court Test

In *Duren v. Missouri*,[32] the Supreme Court enunciated a three-prong test under which a defendant can establish a prima facie violation of the "cross-section" principle.[33] First, the exclusion of a cognizable or distinctive group in the community must be demonstrated.[34] Second, it must be shown that representation of this group in the venire or jury pool is not fair and reasonable in relation to the number of such people in the community.[35] Third, it must be established that the group's underrepresentation is the result of a systematic exclusion of the group from the jury selection process.[36]

The three prongs of the *Duren* test are satisfied by the New York statute's effect on the jury participation of non-English speaking Hispanics. First, the English-speaking requirement results in the exclusion of 48.1% of the Hispanic community, which is 12% of the entire population of New York City.[37] Second, the census statistics show that 25% of the population of New York City is Hispanic and 48.1% of that population is excluded under the language requirement of the statute.[38] The exclusion of 48.1% of Hispanics is not fair and reasonable in relation to the total population of Hispanics in New York.[39] Third, the fact that such a large

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meet their burden of demonstrating that the use of voter registration lists as a source of names for prospective jurors was not designed to reasonably produce a jury representative of a cross-section of the community).

31. *See Butera*, 420 F.2d at 569.

32. 439 U.S. 357 (1979) (affirming the position that women may not be systematically excluded from jury service).

33. *Id.* at 364.

34. *Id.*

35. *Id.* at 364-65. To fulfill this part of the test defendant Duren provided the Court with statistics showing that women made up 54% of Jackson County and women made up only approximately 15% of the jury venires.

36. *Id.* at 364-67. Defendant Duren satisfied this part of the test by showing the underrepresentation of women in every weekly venire for a period of almost a year.

37. *See* CENSUS, *supra* note 4.

38. *Id.*

39. *See* Duren v. Missouri, 439 U.S. 357, 365-67 (1979).

percentage[40] of such a significant portion of the City's population is automatically eliminated by statute from jury service on the basis of language alone,[41] undoubtedly qualifies as "systematic exclusion."[42] It is highly unlikely that such a juror selection system could result in juries that are fairly representative of the Hispanic community in New York City.[43] Therefore, the three elements set forth in *Duren* for establishing a prima facie violation of the cross-section requirement are satisfied.

2. An Application of the Cognizability Principle

The members of a cognizable group must share common attitudes, ideas, or experiences,[44] and exist as "a community of interest which cannot be adequately protected by the rest of the populace."[45] Recognizing that cognizability is not a static concept that can be precisely defined, the Court of Appeals for the Ninth Circuit declared that "cognizability will necessarily vary with local conditions."[46] For instance, demographics may lead one group to be considered cognizable in one geographic area, but not in another.[47] Variations in geographical representation, either between counties or between rural and urban areas, may be significant in some districts and not in other areas.[48]

The idea that cognizability depends on demographics and geography formed the basis of a recent Suffolk County court opinion.[49] The defendant in that case, who was both African American and American Indian,[50] claimed a violation of his Sixth Amendment right to a fair trial[51]

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40. *See* CENSUS, *supra* note 4.

41. *See* N.Y. JUD. LAW § 510 (McKinney 1992).

42. *See Duren*, 439 U.S. at 366-67.

43. *See infra* notes 76-85 and accompanying text.

44. *See* United States v. Guzman, 337 F. Supp. 140, 143 (S.D.N.Y. 1972).

45. *Id.* at 144.

46. United States v. Potter, 552 F.2d 901, 903 (9th Cir. 1977) (holding that neither persons aged 18 to 34, nor persons with an education level of high school level or less constituted a cognizable group).

47. *Id.* at 903-04.

48. *Id. See also* Taylor v. Lousiana, 419 U.S. 522, 537 (1975) (considering the same issue, the Court wrote, "[c]ommunities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.").

49. People v. Hobson, N.Y. L.J., Oct. 8, 1992, at 29 (Cty. Ct. Suffolk Cty.), *aff'd*, 584 N.Y.S.2d 967 (App. Div. 1992).

50. *Hobson*, N.Y. L.J. at 29.

51. *Id.*

and his Fourteenth Amendment right to equal protection under the United States Constitution.[52] He asserted that the jury pool selection process in Suffolk County resulted in an underrepresentation of African Americans and American Indians.[53] The court held that the American Indian population, which comprised only 00.2% of the county's population was "a group too small to be considered in this analysis and whose non-appearance in the average jury panel should be expected."[54] Census statistics submitted in the case indicated that African Americans comprised 6.3% of the total Suffolk County population.[55] With respect to this figure the court said:

> although blacks constitute a distinctive group in the community . . . , it cannot be shown that the representation of this group in the jury pool is not fair and reasonable in relation to the number of persons in this community or that representation was the result of systematic exclusion of the group in the jury selection process.[56]

Consequently, the court denied the defendant's request for a hearing on the issue of the county's allegedly unconstitutional jury selection practices.

C. *Hispanics — A Cognizable Group*

Courts have held Hispanics to be a cognizable group.[57] A federal district court in New York in *United States v. Guzman*[58] established certain standards for determining whether a group should be considered cognizable.[59] Among its attributes, the group must have a definite composition and its membership must not shift from day to day, nor may its members be arbitrarily selected.[60] Second, there must be a "common

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *See, e.g.*, United States *ex rel.* Leguillou v. Davis, 115 F. Supp. 392, 397 (D.V.I. 1953) (classifying people of Puerto Rican descent as a cognizable group); Montoya v. People, 345 P.2d 1062 (Colo. 1959) (determining that people with Spanish surnames are a cognizable group).

58. 337 F. Supp. 140 (S.D.N.Y. 1972).

59. *Id.* at 143-44.

60. *Id.* at 143.

thread which runs through the group" and gives it cohesion.[61] Finally, there must exist the "possibility that exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved."[62] In addition to these factors, courts have required that the group, "in some objectively discernible and significant way, is distinct from the rest of society,"[63] and that the group's interests cannot be adequately represented by other members of the populace.[64] In other words, from the group's perspective, there is a kind of "internal cohesion,"[65] and from society's point of view, the group is recognized as identifiable and distinct.[66]

As a group, Hispanics display the characteristics of cognizability that are outlined in *Guzman*.[67] In *Hernandez v. Texas*[68] the Supreme Court, in determining that Hispanics (specifically those of Mexican and Latin American descent) form a cognizable group, wrote the following:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"— that is, based upon differences between "white" and "Negro."[69]

Notwithstanding the preference of some members within the larger, overall Hispanic community for specific labels of self-expression based upon their country of origin (referring to themselves, for example, as

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61. *Id.*

62. *Id.* at 144.

63. United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977).

64. *Id.*

65. *Id.*

66. *Id.* at 905.

67. *See* United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y. 1972).

68. 347 U.S. 475 (1954).

69. *Id.* at 478.

Dominicans, Colombians, Puerto Ricans, etc.), for purposes of cognizability, Hispanics constitute a separate group or class in society, which is distinct from and identifiable by other groups in New York City.[70] In spite of their different terms of self-identification, indicating the place from which they emigrated, communities like Dominicans and Puerto Ricans recognize the shared cultural, linguistic, ethnic, and historical bonds which link them together as a larger, cohesive group.[71] Because of these unique characteristics, Hispanics are a group whose interests cannot adequately be represented by other members of the jury pool or panel.[72]

D. *The Unfair Impact of the Juror Qualification Provision of New York's Judiciary Law on Hispanics*

A statute which either by definition or by administrative enforcement denies jury service to a large segment of the population violates constitutional guarantees.[73] In *Washington v. Davis*[74] the Supreme Court held that disparate impact alone, without a showing of discriminatory purpose, was not sufficient to establish a violation of the Equal Protection Clause.[75] Nevertheless, while a statute such as Section 510 of the New York Judiciary Law[76] may on its face appear neutral, its effect may be the enforcement of "a clear pattern, unexplainable on grounds other than race."[77]

> [A] system which persistently produce[s] substantial and recognized underrepresentations of sociologically distinct groups would not be insulated from attack simply because it was fair on

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70. David González, *What's the Problem with 'Hispanic'? Just Ask a 'Latino'*, N.Y. TIMES, Nov. 15, 1992, at D6 (citing the results from the Latino National Political Survey, in which people living in the United States in 1989 and 1990 were asked how they identified themselves. The choices were the following: place of origin (Mexican, Puerto Rican, Cuban); pan-ethnic names (Hispanic, Latino, Spanish, Spanish-American, Hispano); or American. The largest percentage of those interviewed referred to themselves by their place of origin).

71. *See* González, *supra* note 3, at B4.

72. *See* United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977).

73. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 481-82 (1954); Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

74. 426 U.S. 229 (1976).

75. *Id.* at 241.

76. *See supra* note 1.

77. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977).

> its face. Moreover, mere protestations or even evidence of subjective good faith would not dispel the inference that those who administer the system had purposed the results which they knew the system was producing.[78]

If the result of the juror selection system bespeaks discrimination, then regardless of the stated intention of the state jury commissioner, there is *de facto* discrimination.[79]

The New York statutory prohibition barring non-English speakers from jury duty[80] creates precisely this type of *de facto* discrimination. Its administration, if not its intent, impacts disproportionately on Hispanics because, as United States Census Bureau statistics demonstrate, it results in the exclusion from jury service of nearly fifty percent of New York City's Hispanic population,[81] which accounts for 12% of the city's total population.[82] There are those who argue that such differential effects warrant heightened judicial scrutiny because they tend to reflect unconscious, irrational racial prejudice.[83]

E. *Jury Selection for New York's Supreme Court*

New York City currently selects its jurors by randomly drawing names from three sources: the Department of Motor Vehicles licensed driver list,[84] the New York State income taxpayers list,[85] and the Board of Elections voters registration list.[86] According to Norman Goodman,

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78. United States v. Butera, 420 F.2d 564, 574 (1st Cir. 1970).

79. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 704-08 (12th ed. 1991) (defining *de facto* discrimination as "governmental action that is racially neutral in its language, administration and purpose but which has a disadvantaging impact or effect").

80. *See supra* note 1.

81. *See* CENSUS, *supra* note 4. The figures show that 48.1% of New York City's Hispanic population is excluded from jury service.

82. *See id.* The figures show that 25% of the total population of New York City is Hispanic. The figures also show that 48.1% of the Hispanic population does not speak English very well. Therefore, 48.1% of 25% of the total population is excluded from jury service, equaling approximately 12% of the city's total population.

83. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

84. *See* N.Y. JUD. LAW § 506 (McKinney 1992).

85. *Id.*

86. *Id.* In 1994, § 506 of the Judiciary Law was amended to add two additional sources of prospective juror names: recipients of social service assistance and recipients of unemployment benefits. *See* N.Y. JUD. LAW § 506 (McKinney Supp. 1995). By mid-summer of 1995, use of these additional sources will be incorporated into New York

County Clerk of the Supreme Court, and Commissioner of Jurors, New York County, juror qualification questionnaires are mailed to persons on a list compiled from these three sources.[87] The completed questionnaires are then returned to Mr. Goodman's office, and those persons not disqualified or exempt under the Judiciary Law are placed on the county's qualified list.[88]

Mr. Goodman stated that it is assumed that anyone who fills out and returns the questionnaire, which is written entirely in English, speaks English.[89] He added, however, that such is not always the case; many non-English speakers complete the questionnaire with the assistance of another, and it is not until the non-English speaker is actually called for jury duty that the determination is made that he does not speak English.[90] At that point the person is dismissed from jury service.[91]

Section 510 of the New York Judiciary Law[92] discriminates against Hispanics by interfering with the exercise of their fundamental right as citizens to perform jury duty.[93] Writing for the Supreme Court in *Carter*

City's juror selection processs. Telephone Interview with Anthony Manisero, Principal Management Analyst, Office of Court Administration, N.Y. State Unified Court System (Apr. 21, 1995).

87. Telephone Interview with Mr. Goodman (Oct. 5, 1992) [hereinafter Goodman]. The information is contained on the instruction sheet accompanying the questionnaire mailed to prospective jurors. It reads: "Dear Prospective Juror: Your name has been selected at random for future service as a juror in this county." According to information provided by Nancy Wesley, New York State Board of Elections, Registration Department, tax and Motor Vehicles records have been used more than those for voter registration.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* In addition to random selection, New York City has had a juror "hotline" number since October of 1993. People can call this number to offer suggestions and comments, or to volunteer for jury service. Telephone Interview with Martha Pérez, Junior Court Analyst, Office of Court Administration, N.Y. State Unified Court System (Apr. 21, 1995). Some Hispanics who call to volunteer for jury service are turned away precisely because it is perceived that they do not speak English well enough and would need an interpreter. *Id.*

92. *See* N.Y. JUD. LAW § 510 (McKinney 1992).

93. *See* Penn v. Eubanks, 360 F. Supp. 699, 702 (D. Ala. 1973) (holding that "[j]ury service on the part of citizens of the United States is considered under our law in this country as one of the basic rights and obligations of citizenship. Jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of race or sex or income."). A standard of strict judicial scrutiny applies to legislation that impinges upon a right deemed to be "fundamental" by the Court. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S.

v. Jury Commission of Greene County,[94] Justice Stewart compared jury service to the right to vote, which is a fundamental right. The following passage clearly expresses the status the Court ascribed to jury service:

> Whether jury service be deemed a right, a privilege, or a duty, the state may no more extend it to some of its citizens and deny it to others . . . than it may invidiously discriminate in the offering and withholding of the elective franchise.[95]

The exclusion of minorities like Hispanics is contrary to the tradition and purpose of the jury system, "to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts."[96] The Supreme Court has consistently warned against the danger of excluding any group from jury service. This concern was clearly articulated in *Peters v. Kiff*:[97]

> [A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and the laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process . . . .
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> [T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases . . . . When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a

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1, 17 (1973) (establishing guidelines for scrutinizing legislative schemes allegedly constituting violations of the Equal Protection Clause).

94. 396 U.S. 320 (1970).

95. *Id.* at 330.

96. Ballard v. United States, 329 U.S. 187, 195 (1946).

97. 407 U.S. 493 (1972) (holding that qualified jurors cannot be excluded because of race). Although this case was decided on due process grounds, Justice Marshall spoke of the "kinds of harms that flow from discrimination in jury selection." *Id.* at 498.

perspective on human events that may have unsuspected importance in any case that may be presented.[98]

The value of including as many different groups as possible in the jury selection process and, consequently, having the jury pool be as broadly based as possible, cannot be overstated.[99] The result will be a pool of potential jurors who reflect a vast array of distinct attitudes, perspectives, and experiences.[100] This assortment of outlooks and values will then be carried over to the jury that is eventually empaneled.[101] The effect is a tendency to weaken or even eliminate any one group's biases or prejudices.[102] Furthermore, the more groups included in the process, the greater the sense of legitimacy from both the defendant's and society's points of view.[103] For these reasons, it is imperative that there not be a blanket exclusion on Spanish-speaking Hispanics and other non-English speakers.

III. WHOSE RIGHTS ARE BEING INFRINGED UPON?

A. *Right of the Accused to a Fair Trial by a Jury of His Peers*

Both citizens and the accused are entitled to the inclusion of cognizable groups in the jury pool, from which the panel will be drawn.[104] Discriminatory jury selection harms the entire community.[105] The Sixth Amendment guarantees a defendant the right to a fair trial by an impartial jury of his peers. From the defendant's perspective, the real danger in compromising the representative quality of

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98. *Id.* at 502-04.

99. *See Ballard*, 329 U.S. at 195.

100. *See id.* at 194.

101. *See* People v. Guzman, 478 N.Y.S.2d 455, 464 (N.Y. Sup. Ct. 1984), *aff'd*, 555 N.E.2d 259 (N.Y. 1990).

102. *See* John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1138-39 (1978).

103. *Id.* at 1139-40.

104. *See* Peters v. Kiff, 407 U.S. 493, 500 (1972) (finding by Justices Marshall, Douglas and Stewart that all defendants, whether or not they are members of the excluded group, and those potential jurors who are members of the group systematically excluded, have standing to attack the juror selection process).

105. *See* McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of *certiorari*, arguing that discriminatory jury selection harms the entire community).

the jury is that the result can be the oppression of "those accused individuals who by chance are numbered among unpopular or inarticulate minorities."[106] Consequently, a defendant has standing to challenge exclusion resulting in a violation of the cross-section requirement, whether or not he is a member of the excluded class.[107] The cross-section requirement is not one that can be taken lightly:

> We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident. But it is no less real or meaningful for our purposes. If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate that right even though the effect of the violation has not yet put in a tangible appearance. Otherwise that right may be irretrievably lost in a welter of evidentiary rules.[108]

In New York City it is indeed unfair that defendants are tried by juries which fail to include a representative number of members of the non-English speaking Hispanic community, given the fact that they constitute such a significant segment of the city's population.[109]

B. *Citizens' Right to Jury Service*

The United States and New York Constitutions guarantee citizens certain privileges and immunities.[110] Traditionally, the right to vote and the right to serve on a jury have been counted among the fundamental rights of citizens.[111] "[J]ury service is the most direct contact that a

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106. Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J. dissenting).

107. *See, e.g.*, Taylor v. Lousiana, 419 U.S. 522, 526 (1975) (permitting a male defendant to raise the exclusion of women); Peters v. Kiff, 407 U.S. 493, 498-99 (1972) (allowing a white defendant to challenge a conviction on the grounds that Blacks had been systematically excluded from jury service).

108. Fay v. New York, 332 U.S. 261, 300 (Murphy, J., dissenting).

109. *See* CENSUS, *supra* note 4.

110. U.S. CONST., art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. amend. XIV; N.Y. CONST. art. I, § 1.

111. *See* N.Y. CONST. art. I, § 1; People v. Kern, 554 N.E.2d 1235, 1242 (N.Y. 1990) (holding that the citizens of New York state have a civil right to serve as jurors).

citizen has with his government and, next to voting, about the only chance he has to participate in it as a basic decision-maker."[112] New York Civil Rights Law section 13 provides that "[n]o citizen of the state possessing all other qualifications . . . shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color, national origin or sex . . . ",[113] and the New York State Constitution provides for equal protection of the laws.[114] The United States Congress has recognized jury duty as a right, and has made disqualification in federal or state courts a crime if it is based on race, color, or previous condition of servitude.[115] In *Thiel v. Southern Pacific Co.*,[116] the Supreme Court stated that "[j]ury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power."[117]

Courts have consistently upheld the right of all United States citizens to serve on a jury regardless of race,[118] gender,[119] religion,[120] national origin,[121] ethnicity,[122] or economic status.[123] Both government and private actions may be brought by those improperly

112. Ashby, *supra* note 102, at 1140.

113. N.Y. CIV. RIGHTS LAW § 13 (McKinney 1992).

114. N.Y. CONST. art. I, § 11.

115. 18 U.S.C. § 243 (1988 & Supp. V 1993).

116. 328 U.S. 217 (1946).

117. *Id.* at 224.

118. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545, 556-57 (1979) (holding that a criminal defendant's right to equal protection of the laws is denied when he is indicted by a grand jury from which members of a racial group have been purposefully excluded); Peters v. Kiff, 407 U.S. 493, 503-05 (1972); Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

119. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 537 (1975); Ballard v. United States, 329 U.S. 187, 193-94 (1946); *see also* United States v. Butera, 420 F.2d 564, 571 (1st Cir. 1970) (holding that a 30% underrepresentation of women raised an inference of unlawful discrimination); People v. Moss, 366 N.Y.S.2d 522, 527-29 (N.Y. Sup. Ct. 1975) (holding that a statute entitling women to exemption from jury service violated defendant's right to equal protection because there was no compelling state interest that required such exemption solely for reasons of sex).

120. *See* United States v. Flynn, 106 F. Supp. 966, 979-80 (S.D.N.Y. 1952) (prohibiting jury selection sytems that deliberately or systematically exclude people based on sex, race, economic, occupational or social status, or religion).

121. *See id.*

122. *See* Hernandez v. Texas, 347 U.S. 475, 479 (1954) (holding that exclusion of persons of Mexican descent from jury service is unconstitutional).

123. *See* Thiel v. Southern Pac. Co., 328 U.S. 217, 222 (1946).

excluded from jury service.[124] Writing for the majority of the Supreme Court in *Duren v. Missouri*,[125] Justice White emphasized:

> [T]he constitutional guarantee to a jury drawn from a fair cross section of the community requires that States exercise proper caution in exempting broad categories of persons from jury service . . . . [A]ny category expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair-cross-section requirement—such as women—runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement.[126]

New York City's non-English speaking Hispanics are precisely such a group; deprived of the the fundamental right to serve jury duty by the English language requirement of section 510 of New York Judiciary Law.[127]

IV. THE STATE'S INTEREST AND ALLOCATING THE BURDEN OF PROOF

The State may prescribe juror qualifications and provide reasonable exclusions from jury service[128] as "long as it may be fairly said that the jury lists or panels are representative of the community."[129] New York state law allows individuals in certain categories to claim exemptions from jury service[130] and also provides that members of other groups be

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124. *See* Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970) (allowing citizens, excluded from a jury list, to commence a suit for a violation of their civil rights).

125. 439 U.S. 357 (1979).

126. *Id.* at 370-71.

127. *See supra* note 1.

128. *See, e.g.*, Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 331-37 (1970) (approving a statute which allows only those persons reputed to be honest, intelligent and esteemed in the community for their integrity, good character, and sound judgement to serve as jurors); Fay v. New York, 332 U.S. 261, 296 (1947) (approving "blue ribbon" juries for certain cases); Rawlins v. Georgia, 201 U.S. 638, 640 (1906) (approving a statutory exemption for lawyers, ministers, doctors, and railroad engineers).

129. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

130. N.Y. JUD. LAW § 512 (McKinney 1992):
Each of the following persons is exempt from service as a juror upon claiming exemption therefrom:
1. A member of the clergy or Christian Science practitioner officiating as such and not following any other calling;

disqualified from service.[131] However, once the defendant has challenged the empaneled jury and has established a prima facie case of a violation of his constitutional right to a jury drawn from a cross section of the community, "the State . . . bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest."[132] The State therefore must rebut the presumption of unconstitutionality by producing enough

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2. A licensed physician, dentist, pharmacist, optometrist, psychologist, podiatrist, registered nurse, practical nurse, embalmer or a Christian Science nurse exempt from licensing by subdivision of section sixty-nine hundred eight of the education law, regularly engaged in the practice of his profession;
3. An attorney regularly engaged in the practice of law as a means of livelihood;
4. A police officer as defined in section 1.20 of the criminal procedure law, or an official or correction officer of any state correctional facility or of any penal correctional institution who is defined as a peace officer in subdivision twenty-five of section 2.10 of the criminal procedure law, or a member of a fire company or department duly organized according to the laws of the state or any political subdivision thereof and performing duties therein; or an exempt volunteer fireman, as defined in section two hundred of the general municipal law;
5. A sole proprietor or principal manager of a business, firm, association or corporation employing fewer than three persons, not including such proprietor or manager, who is actually engaged full-time in the operation of such business as a means of livelihood;
6. A person seventy years of age or older;
7. A parent, guardian or other person who resides in the same household with a child or children under sixteen years of age, and whose principal responsibility is to actually and personally engage in the daily care and supervision of such child or children during a majority of the hours between eight a.m. and six p.m., excluding any period of time during which such child or children attends school for regular instruction;
8. A person who is prosthetist or an orthotist by profession or vocation.
9. A person who is a licensed physical therapist regularly engaged in the practice of his or her profession.

131. N.Y. JUD. LAW § 511 (McKinney 1992):
Each of the following persons is disqualified from serving as a juror:
1. Members in active service in the armed forces of the United States;
2. Elected federal, state, city, county, town or village officers;
3. The head of a civil department of the federal, state, city, county, town or village government, members of a public authority or state commission or board, and the secretary to the governor;
4. A federal judge or magistrate or a judge of the unified court system.

132. Duren v. Missouri, 439 U.S. 357, 368 (1979).

evidence to justify its use of a particular juror qualification or classification scheme.[133]

The State's interest is to protect the right of "[b]oth the defense and the prosecution . . . to a fair trial before an impartial jury, that is, a jury drawn from a cross-section of the community."[134] Although the jury must be competent to exercise its role as factfinder, New York courts have recognized that the individuals selected to perform this vital task may have limitations.[135] The courts have thus upheld the right of the deaf to serve as jurors, finding them as competent as hearing jurors.[136] The Guzman court viewed the deaf as a distinct segment of the community whose interests must be represented on juries.[137] Similarly, one can argue that the presence of Spanish-speaking Hispanics and other non-English speaking people on New York City juries would not hinder the State in achieving its goal of ensuring the defendant a fair trial.[138] On the contrary, the inclusion of such groups would undoubtedly help the State to better meet its objective of providing a representative cross section of the community on juries in New York City.[139]

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133. *See* Castaneda v. Partida, 430 U.S. 482, 495 (1977) (stating that once the defendant has made out a prima facie case, the burden shifts to the state to rebut that case); *see also Duren*, 439 U.S. at 368 (asserting that the state has the burden of justifing the infringment of an defendant's right to an impartial jury).

134. *See* People v. Guzman, 478 N.Y.S.2d 455, 462 (Sup. Ct. 1984), *aff'd*, 555 N.E.2d 259 (N.Y. 1990).

135. *Guzman*, 478 N.Y.S.2d at 462. (considering the jurors' limitations, the trial court wrote that "[w]e live in an imperfect world and the jury system is our imperfect attempt to deal with that world. The best we can do is to try to find twelve citizens, imperfect as they are, to listen, observe, consider, discuss, and reach the best verdict, the fairest verdict, they know how, given their imperfections. That is the most we can ask . . . .").

136. *See id.*

137. *Id.* at 459-62.

138. *See Guzman*, 555 N.E.2d at 261-62 (stating that the equal protection right of citizens to sit on the jury did not conflict with the due process rights to the defendant).

139. *See* People v. Guzman, 478 N.Y.S.2d 455, 459 (Sup. Ct. 1984) The court stated that "exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Id* at 465.

V. ANALOGIZING THE HEARING IMPAIRED AND NON-ENGLISH SPEAKERS: THE RIGHT TO JURY DUTY AND THE ABILITY TO MEET ITS REQUIREMENTS

In New York and other jurisdictions, the right to serve as a juror has been extended to the hearing impaired.[140] In *People v. Guzman*,[141] a prospective juror described by the New York Supreme Court as "profoundly deaf,"[142] having met all the other criteria of the juror qualification provision of New York's Judiciary Law,[143] was allowed to serve as a juror.[144] The Court of Appeals considered whether a hearing impairment or deafness *per se* is a sufficient reason to disqualify prospective jurors from jury service.[145] Agreeing with the trial court's reasoning, the Court of Appeals affirmed the decision that an otherwise qualified deaf person may not be dismissed for cause solely on the basis of his deafness.[146] Deaf people were held to be a cognizable group, the members of which must be included in the pool of potential jurors.[147] In *United States v. Dempsey*,[148] the Tenth Circuit used identical reasoning to find that the presence of a hearing impaired juror did not deprive the defendant of a fair and impartial trial by jury .[149]

In *Guzman*, the Court of Appeals affirmed the New York Supreme Courts's holding that jury service is a fundamental civil right[150] that is conditioned upon one factor: an individual's ability to give the defendant

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140. *See, e.g.*, United States v. Dempsey, 830 F.2d 1084, 1090 (10th Cir. 1987), (holding that a juror's deafness does not disqualify him from service on a federal jury); DeLong v. Brumbaugh, 703 F. Supp. 399, 402 (W.D. Pa. 1989) (maintaining that a deaf woman was qualified to serve as a juror); *Guzman*, 555 N.E.2d at 262 (holding that the hearing impaired could not automatically be excluded from jury service).

141. 555 N.E.2d at 259.

142. *See Guzman*, 478 N.Y.S.2d at 457.

143. *See* N.Y. JUD. LAW § 510 (McKinney 1992); *supra* note 1.

144. *See Guzman*, 478 N.Y.S.2d at 462, 467 (holding that deafness did not render a juror who could read lips and could sign English incapable of performing the functions of a juror).

145. *See Guzman*, 555 N.E.2d at 260.

146. *Id.* at 263.

147. *See Guzman*, 478 N.Y.S.2d at 465, *aff'd*, 555 N.E.2d 259 (N.Y. 1990). (stating that the exclusion of deaf persons from the jury pool would be contrary to state and federal law),

148. 830 F.2d 1084 (10th Cir. 1987).

149. *Id.* at 1088.

150. *See Guzman*, 478 N.Y.S.2d at 464-65.

a fair trial.[151] Deafness did not necessarily make a person "incapable of performing in a reasonable manner the duties of a juror."[152] Hence, such sensory impairment should not automatically be grounds for disqualification.[153] In the trial court's view, the deaf juror who was being challenged for cause by the defense, would "do as fine a job or better than many of the hearing jurors."[154] This conclusion was reached by the judge after having observed and listened to the potential juror during voir dire.[155] According to the Court of Appeals, this determination, as well as most questions concerning juror qualifications, are matters that should be left to the trial court's discretion.[156] The Court of Appeals held that the trial court's analysis and ultimate determination was proper.[157]

A. *The Hearing Impaired Must be Able to Carry Out the Duties of a Juror*

In *Guzman* the Court of Appeals disagreed with the defendant's contention that the deaf man in question could not perform the duties of a reasonable juror.[158] The court enumerated those duties: "to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court."[159] Like the trial court, the Court of Appeals was satisfied that the deaf individual, through the aid of an interpreter, could in fact

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151. *See* People v. Guzman, 555 N.E.2d 259, 261 (N.Y. 1990).

152. N.Y. JUD. LAW § 510 (McKinney 1992); *see also Guzman*, 555 N.E.2d at 261.

153. *See Guzman*, 555 N.E.2d at 262.

154. *Guzman*, 478 N.Y.S.2d at 462; *see also* United States v. Dempsey, 830 F.2d 1084, (10th Cir. 1987). In comparing the deaf juror's abilities with those of the other jurors, the circuit court stated, "[m]any jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence. A defendant is not entitled to a perfect trial, but only a fair one." *Id.* at 1088.

155. *See Guzman*, 555 N.E.2d at 262.

156. *Id.* (stating that the disqualification of the juror is the trial court's decison and is based on its own observations of the juror).

157. *Id.*

158. *Id.*

159. *See Guzman*, 555 N.E.2d at 261.

adequately perform his jury duties.[160] Using similar analysis, the *Dempsey* court reached the same conclusion holding that a deaf person can "fulfill the juror's functions of understanding the evidence and fairly evaluating [the] defendant's guilt on the charged offenses."[161]

B. *Interpreter's Role and Presence*

The defense in *Guzman* objected to the use of an interpreter on several grounds.[162] First, the interpreter might inaccurately transmit testimony or fail to interpret everything that is said by all parties during the testimony, especially when more than one person speaks at a time.[163] The Court of Appeals' response was that there was no greater danger of this with a deaf juror than with a hearing juror, either of whom may fail to be alert throughout the proceedings.[164] With respect to the question of the interpreter's accuracy, the trial court wrote:

> [T]he court administration should . . . examine and define the qualifications necessary and impose standards; we should then proceed as we do with court appointed foreign language interpreters. When any non-English speaking witness (including a defendant) testifies the entire jury, the judge, the attorneys, the court reporter and, consequently, all future appellate courts, are dependent on the English record made by that interpreter. If we do not trust the skills of that person then we have no trial at all.[165]

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160. *Id.* at 262. *See generally* Michael B. Goldblas, Note, *Due Process: The Deaf and the Blind as Jurors*, 17 NEW ENG. L. REV. 119 (1981) (asserting that the inclusion of the deaf and hearing impaired in jury service does not violate the defendant's due process rights because deaf jurors are capable of effectively performing the duties and the responsibilities of a juror with the aid of a sign language interpreter).

161. United States v. Dempsey, 830 F.2d 1084, 1089 (10th Cir. 1987). *See generally* Harold Craig Manson, Comment, *Jury Selection: The Courts, The Constitution, and the Deaf*, 11 PAC. L.J. 967, 983 (1980) (arguing that "actual trial experience has shown deaf jurors to be essentially similar to hearing jurors in terms of rendering a fair consideration of a case").

162. *See Guzman*, 555 N.E.2d at 262.

163. *Id.*

164. *Id.* Regarding this point, the court said it was "unlikely that mistakes or omissions would occur with significantly greater frequency than they do with hearing jurors, who may be distracted or inattentive at times." *Id.*

165. *See* People v. Guzman, 478 N.Y.S.2d 455, 462 (Sup. Ct. 1984).

Second, the defense argued that the deaf juror could not evaluate the credibility of witnesses because he could not perceive vocal inflections tones and nuances, which are necessary to make such a determination.[166] Not convinced that this was a disadvantage, the Court of Appeals rejected this argument as too speculative and stated that "the ring of truth need not be heard to be recognized."[167]

Third, the defendant asserted that the interpreter's presence would be "too disruptive to both the trial and the deliberative process."[168] The fear was that the interpreter's presence in the jury room would inhibit frank discussion during deliberations and violate the confidentiality of the deliberative process.[169] This was also the focus of the defense argument in *Dempsey*.[170]

The trial court in *Guzman* concluded that such concerns were unsupported,[171] and found that the interpreter would not have the effect of stifling debate among the jurors.[172] The court believed that a competent interpreter would abide by ethical constraints,[173] limit himself to the neutral role of "communications facilitator,"[174] and follow the court's specific instructions and warnings against the impropriety of participating in the jury's deliberation.[175]

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166. *See Guzman*, 555 N.E.2d at 262.

167. *Id.*

168. *See Guzman*, 478 N.Y.S.2d at 460.

169. *See Guzman*, 555 N.E.2d at 263 (stating that the sign language interpreter's presence would not have a negative impact on deliberations).

170. United States v. Dempsey, 830 F.2d 1084, 1089 (10th Cir. 1987) (defining three areas of concern with respect to the interpreter's presence: whether it "would increase the likelihood of post-trial revelations of the jury deliberations or enhance challenges to the verdict; . . . would inhibit the jury's deliberations; and . . . whether the interpreter might unlawfully participate in the jury deliberations").

171. *See Guzman*, 478 N.Y.S.2d at 460.

172. *See Guzman*, 478 N.Y.S.2d at 462; *see also Dempsey*, 830 F.2d at 1090 (rejecting defense's argument of the possibility of the interpreter having a "chilling" effect on jury deliberations). *But see* Eckstein v. Kirby, 452 F. Supp. 1235, 1244 (E.D. Ark. 1978) (holding that the presence of the sign language interpreter during jury deliberations "violates the secrecy of the jury room and thereby deprives an accused person of their right to trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution . . . ").

173. *See Guzman*, 478 N.Y.S.2d at 466.

174. *Id.*

175. *Id.*; *see also Dempsey*, 830 F.2d at 1087, 1090-91 (stating that the judge should instruct the interpreter not to express ideas, opinions or make any observations during jury deliberations).

In response to the argument that non-jurors are not permitted in the jury room during deliberations, the New York Court of Appeals called for a flexible rather than rigid rule in order to accommodate a deaf juror.[176] Interestingly, the court thought it was far more likely that court personnel, such as bailiffs, would have an adverse effect on the deliberations.[177]

VI. ALLOWING INTERPRETERS FOR NON-ENGLISH SPEAKING JURORS

The arguments justifying the use of hearing impaired jurors apply with equal force to non-English speakers. Like the hearing impaired, non-English speaking jurors would require an interpreter throughout the proceedings and during jury deliberations. The same ethical constraints and competency standards required by the courts for interpreters working with the hearing impaired and non-English speaking defendants and witnesses would apply to interpreters working with non-English speaking jurors.[178] The trial court would administer an oath requiring the

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176. *See* People v. Guzman, 555 N.E.2d 259, 262 (N.Y. 1990).

177. *Id.*

178. *See, e.g., Dempsey,* 830 F.2d at 1090; *Guzman,* 478 N.Y.S.2d at 466. *See also* CAL. R. CT. § 18.3. The Standards of Professional Conduct for Court Interpreters are:

> (a) [Accurate interpretation] A court interpreter's best skills and judgment should be used to interpret accurately without embellishing, omitting, or editing.
> (b) [Conflicts of interest] A court interpreter should disclose to the judge and to all parties any actual or apparent conflict of interest. Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest. A conflict may exist if the interpreter is acquainted with or related to any witness or party to the action or if the interpreter has an interest in the outcome of the case. An interpreter should not engage in conduct creating the appearance of bias, prejudice, or partiality.
> (c) [Confidentiality] A court interpreter should not disclose privileged communications between counsel and client. A court interpreter should not make statements about the merits of the case during the proceeding.
> (d) [Giving legal advice] A court interpreter should not give legal advice to parties and witnesses, nor recommend specific attorneys or law firms.
> (e) [Professional relationships] A court interpreter should maintain a professional relationship with court officers, parties, witnesses, and attorneys. A court interpreter should strive for professional detachment.
> (f) [Continuing education and duty to the profession] A court interpreter should, through continuing education, maintain and improve his or her interpreting skills and knowledge of procedures used by the courts. A court interpreter should seek to elevate the standards of performance of the interpreting profession.

interpreter to interpret the proceedings verbatim and not interfere with the deliberations nor reveal the confidences of the jury room.

Just as it has been argued that the cross-section requirement should be extended to the hearing impaired,[179] so too should it include greater numbers of Hispanics. Furthermore, fair public policy demands a move away from automatically foreclosing members of a significant segment of society from jury service simply because they must take an interpreter into the jury room.[180] The law should adapt to society's changing realities and accommodate those groups in communities that may have been ignored in the past.[181] In *Guzman*, the trial court stated:

> No longer can we lump all deaf persons together and discard them in a faceless silent heap, as in the past, on the assumption that they are all the same—inept and unable to fulfill this requirement of citizenship.
>
> The truth of the matter is that "they" like blacks, Jews, and women, to name but a few, are not all the same . . . .[182]

This reasoning could apply with equal force if "Hispanic" were substituted for "deaf." The inclusion of these groups has the positive effect of expanding the jury pool and ensuring defendants a jury of their peers.[183]

VII. TREATING LIKES ALIKE: THE EQUAL TREATMENT PRINCIPLE

The equal treatment principle is the substantive constitutional principle which requires that those similarly situated will be treated alike with

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179. *See* Eric R. Benton, Comment, *Constitutional Law: Systematic Exclusion in the Jury Selection*, 19 WASHBURN L.J. 160, 166 (1979) (stating that it was wrong to exclude a group from the jury selection process because it was unfair to defendants to be tried by a jury which lacks an important section of their communities); *see* Manson, *supra* note 161, at 989 (arguing that a state has no justification for excluding a deaf person from participation in jury service).

180. *See Dempsey*, 830 F.2d at 1091.

181. *See* People v. Guzman, 478 N.Y.S.2d 455, 460, 467 (N.Y. Sup. Ct. 1984).

182. *Id.* at 460.

183. *Id.* at 463-65 (stating that the formerly excluded cognizable group will bring to the jury pool their distinct experiences, and that the state can not subject a defendant to a trial by a jury which has been selected in a discriminatory manner); *see* Benton *supra* note 179, at 166.

respect to legislative purpose.[184] Under this principle, the legislature is free to pursue whatever purpose it chooses and the principle is invoked only to ensure that the legislature is rationally pursuing its own stated purposes.[185] Judicial application of the equal treatment principle is referred to as rationality review.[186] The relevant inquiry is whether a challenged classification rationally furthers the purpose identified by the State.[187] In other words, do the legislative means genuinely promote the articulated governmental purposes?[188]

If, as *Guzman* holds, it is incumbent upon the State to provide an interpreter for deaf jurors, why does not the same obligation exist for Hispanics and other non-English speaking cognizable groups of citizens? Why should an interpreter be permitted in one set of circumstances, but not the other? Arguably, given the interpreter's role of communication facilitator, there would be no more danger posed by a foreign-language interpreter than by an interpreter for the deaf.[189] This appears to be a case of likes not being treated alike, which is forbidden by the equal treatment principle.[190]

Both the *Guzman* and *Dempsey* courts minimized this issue by insisting that what is dispositive is the fact that the deaf jurors know English, and therefore meet the statutory language requirement for jury

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184. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949). In his concurring opinion, Justice Jackson wrote, "I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose." *Id.* at 115 (Jackson, J., concurring).

185. *See* GUNTHER, *supra* note 79, at 601-03, 608-12.

186. *See id.* at 601-03, 608-12 (stating "that there be some 'rational' connection between classification and objectives of the state policy statute").

187. *See id.* at 602-03, 609.

188. *See id.* at 602-03.

189. *See generally* U.S. v. Dempsey, 830 F.2d 1084 (10th Cir. 1987) (stating that sign language interpreters do no inhibit jury deliberations); *see also* People v. Guzman, 555 N.E.2d 259, 261-62 (N.Y. 1990) (finding the sign language interpreter to be a neutral figure, having little effect on the jurors); *see supra* notes 168-78 and accompanying text.

190. *See* Craig v. Boren, 429 U.S. 190, 208-10 (1976) (finding that a state statute violated the Equal Protection Clause where it prohibited the sale of beer to males, between the ages of 18 and 20, but permitted the sale to females in the same age group); McDonald v. Board of Election Comm'r of Chicago, 394 U.S. 802, 807-09 (1969) (stating that the classifications derived from providing a fundamental right, such as voting, to one class of persons, yet denying the same right to another class must bear some rational relationship to a legitimate state interest); *see also* GUNTHER, *supra* note 79, at 609-11.

service.[191] Therefore, an interpreter would sign English rather than American Sign Language,[192] which is the functional equivalent of a foreign language.[193] This is a specious distinction because, in either case, only the deaf juror and the interpreter know or are able to decipher the interpreted language.[194]

One might uphold the distinction by arguing that deafness is an immutable trait, while the inability to speak English is not.[195] However, there are those who warn against being too quick to assume that language acquisition is a viable possibility for everyone.[196] "For adults in particular, especially those with limited financial resources, learning a new language may be extremely difficult or impossible. The immutability of a trait suggests that courts should guard vigilantly against the traits becoming the basis of discriminatory state actions."[197]

Guzman suggested that at least one of the policies underlying Section 510 of New York's Judiciary Law is to increase the number of people available for jury service.[198] The Supreme Court has recognized the States' interest in establishing qualifications for jury service.[199] In *Brown*, Justice Reed, writing for the majority, stated that "States should decide for themselves the quality of their juries as best fits their situation *so long as the classifications have relation to the efficiency of the jurors and are equally administered.*"[200] Among the legislative goals of juror

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191. *See Dempsey*, 830 F.2d at 1087, 1091; *Guzman*, 478 N.Y.S.2d at 457-58, 464-65.

192. *See Dempsey*, 830 F.2d at 1087; *Guzman* 478 N.Y.S.2d at 457.

193. *See Guzman*, 478 N.Y.S.2d at 457.

194. *See, e.g.*, Goldblas, *supra* note 160, at 135-38; Manson, *supra* note 161, at 977, n.75 (explaining that the deaf and hearing impaired communicate either through American Sign Language, ("Sign"), which is the preferred method; "Sign-English hybrid languages"; or by other modes of deaf communication. No matter which method is used to communicate with English speakers, a qualified interpreter is required, just as with any foreign language).

195. *See* Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1354-55 (1987).

196. *Id.*; *see also* George Judson, *Integration Is Issue of Language and Geography*, N.Y. TIMES, Mar. 27, 1993, at L26 (writing that "studies suggest that Hispanic people across the country take an extra generation to make the transition to English, in part because . . . migration keeps Spanish alive in their neighborhoods").

197. *See* Note, *supra* note 195, at 1354-55.

198. *See* People v. Guzman, 478 N.Y.S.2d 455, 458 (Sup. Ct. 1984).

199. *See, e.g.*, Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 332-33 (1970); Brown v. Allen, 344 U.S. 433, 474 (1953).

200. *Brown*, 344 U.S. at 473 (emphasis added).

qualification statutes are increasing the number of potential jurors[201] and promotion of efficient fact-finding[202] while ensuring that the defendant receives a fair trial. If these are the State's objectives, then giving deaf people the right to serve with the benefit of an interpreter while denying the same right and benefit to Hispanics and other non-English speakers is *per se* discriminatory under equal treatment principle analysis.[203] Furthermore, discrimination of this type appears to be based on ancestry and ethnic origin (which is inextricably linked to language), and is presumptively unconstitutional because the State has acted for an impermissible purpose.[204] In this context, the burden of proof is on the State to rebut the presumption that it has acted for an impermissible purpose.[205]

VIII. IS A FUNDAMENTAL RIGHT BEING VIOLATED?

The next relevant inquiry in deciding whether an equal protection violation exists is whether the statutory discrimination infringes upon a fundamental right either explicitly or implicitly protected by the Constitution.[206] A right may be considered "fundamental" for constitutional purposes whether or not it is expressly mentioned in the Constitution.[207] For example, the Supreme Court has held that

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201. *See* People v.Guzman, 555 N.E.2d 259, 261 (N.Y. 1990) (stating that the purpose of the statute was to eliminate automatic exclusions of disabled persons, thus enlarging the jury pool); *see supra* text accompanying notes 140-447.

202. *See Guzman,* 478 N.Y.S.2d at 261 (stating that the statute only requires the prospective juror to be capable of doing what jurors are supposed to do, which is to ascertain the facts); *see also* Goldblas, *supra* note 160, at 136-38, 142-44 (noting that a deaf individual can ascertain all of the factual information derived from the trial and actively participate in jury deliberations through the sign language interpreter).

203. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 110, 115 (1949) (holding that the state may treat individuals differently only if the classification has a rational relationship to the legislative purpose of the statute).

204. *See* Hernandez v. Texas, 347 U.S. 475, 478-82 (1954) (holding that the exclusion of Mexican descendants from jury service, based on their national origin, is prohibited by the Fourteenth Amendment).

205. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 368 (1979); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17-18 (1973); *Hernandez*, 347 U.S. at 481; Eckstein v. Kirby, 452 F. Supp. 1235, 1240 (E.D. Ark. 1978).

206. *See San Antonio*, 411 U.S. at 17 (mandating strict judicial scrutiny for legislation that impinges upon such a fundamental right).

207. *See Eckstein*, 452 F. Supp. at 1241 (stating that fundamental rights include those rights implicitly protected by the Constitution, as opposed to constitutional rights which are the freedom of religion, press, assembly and petition).

fundamental rights include such rights as the first amendment right to freedom of speech,[208] the right of a criminal defendant to due process and a fair trial,[209] the right to vote,[210] the right to privacy,[211] and the right to interstate travel.[212] Fundamental rights "are those that are preservative of other rights, . . . or are so basic to freedom that the Court has felt they must be protected against all statutory incursions."[213] Jury service, which the Supreme Court has equated in importance with the right to vote,[214] should be included among these fundamental rights.[215] Strict scrutiny, the highest standard of judicial review, is warranted whenever a "fundamental right" is at stake.[216] Questions of jury selection must therefore be governed by the "compelling state interest" test.[217]

The Supreme Court has not come up with a precise mathematical formula[218] for determining how "substantial"[219] the under-representation in the jury pool must be in order to be considered unconstitutional.[220] One test which has been used is a comparison of the degree of representation of a particular group to that group's percentage of the total population.[221] However, in some cases the Court has

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208. *See* Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972).

209. *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189, 195 (1971); Tate v. Short, 401 U.S. 395, 397-399 (1971); Williams v. Illinois, 399 U.S. 235, 240-242 (1970); Gideon v. Wainright, 372 U.S. 335, 340 (1963).

210. *See, e.g.*, Harper v. Virginia Bd. of Educ., 383 U.S. 663, 665 (1966); Reynolds v. Sims, 377 U.S. 533, 554 (1964).

211. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

212. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

213. *See* Jon M. Van Dyke, *Jury Service Is A Fundamental Right*, 2 HASTINGS CONST. L.Q. 27, 28 (1975).

214. *See supra* notes 93-96 and accompanying text.

215. *See generally* Van Dyke, *supra* note 213.

216. *See id.* at 27-28.

217. *See id.* at 27.

218. *See* Alexander v. Louisiana, 405 U.S. 625, 630 (1972); Benton, *supra* note 179, n.51, at 165.

219. *See Alexander*, 405 U.S. at 630; Ashby, *supra* note 102, at 1152-53.

220. *See, e.g.*, Martha Craig Daughtrey, *Cross Sectionalism in Jury Selection Procedures after* Taylor v. Louisiana, 43 TENN. L. REV. 1, 16-17, 81 (1975); Ashby, *supra* note 102, at 1152-53.

221. *See* Benton, *supra* note 179, at 164.

shunned mathematical computations, and relied upon judicial intuition.[222] New York State statutes and local practices in New York City which result in *de facto* discrimination against or exclusion of Hispanics and interfere with their exercise of a fundamental right are unconstitutional under accepted analysis.[223] The jury selection procedures themselves are not neutral; the English-language requirement discriminates against an ethnic group and is by definition not neutral.[224] A criminal defendant "is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice."[225] His right to a jury trial necessarily includes a jury drawn from a panel which contains a representative cross section of the community.[226] Hispanic defendants in New York City are denied this right by the English language requirements of Section 510 of the New York's Judiciary Law.

The harm is twofold: large numbers of a class of otherwise qualified citizens are precluded from exercising their right to participate in the judicial process by serving jury duty,[227] and defendants are denied juries that reflect a cross section of their community.[228] This violates both the Sixth and Fourteenth Amendments. The reasoning found in an 1879 Supreme Court decision regarding the right of African Americans to serve on juries is applicable today when considering the right of non-English speaking Hispanics to serve on a jury, for as the Court wrote:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an

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222. *See id.* at 165 n.51 (commenting that courts find statistical analysis refutable, rebuttable, and too technical and elaborate).

223. *See* GUNTHER, *supra* note 79, at 704.

224. *See* Alexander v. Louisiana, 405 U.S. 625, 630 (1972) (stating that "the selection procedures themselves were not racially neutral. The racial designation on both the questionnaire and the information card provided . . . for racial discrimination.").

225. *Id.* at 628.

226. *See, e.g.*, Peters v. Kiff, 407 U.S. 493, 502-03 (1972) (holding that a defendant is denied due process where he is tried by a jury which has purposefully excluded a discernible race of people from jury service).

227. *See supra* text accompanying notes 110-27.

228. *See supra* text accompanying notes 104-09.

impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[229]

IX. CONCLUSION

Under Section 510 of New York's Judiciary Law[230] with its English-language requirement, Hispanics (and other language minorities) cannot exercise the fundamental right they have as citizens to participate equally in the important judicial process of serving jury duty. They are unconstitutionally denied equal access to that fundamental right based on language. The State should be required to take the appropriate, ameliorative measures necessary to help such language minorities overcome this language barrier. This could be done by providing certified interpreters, as has been done for the deaf and hearing impaired.[231]

Assuming that the non-English speaking prospective juror is otherwise qualified and capable of performing the duties of a juror, the most important being the ability to provide a fair trial, there is no compelling reason why such an individual should continue to be denied the right to perform this very significant civil duty.[232] As it now stands, the juror qualification provision of New York's Judiciary Law predetermines the incapacity of non-English speakers to effectively carry out the functions of jurors.

There is no compelling policy reason or overriding state interest[233] that warrants this blanket exclusion of Spanish-speaking Hispanics from the jury pool. Just as deafness does not *per se* make a person incapable of rendering satisfactory jury service, a lack of knowledge of the English language does not in and of itself make anyone, who is otherwise qualified, incompetent to sit on a jury.[234] An insufficient grasp of the English language does not preclude a person from serving as a reasonable juror, nor would it automatically affect the rights of the defendant. In light of the fundamental rights being denied both non-English speaking

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229. *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

230. *See supra* note 1.

231. *See, e.g.*, United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987); People v. Guzman, N.Y.S.2d 455 (N.Y. Sup. Ct. 1984), *aff'd*, 555 N.E.2d 259 (N.Y. 1990); *see also* Goldblas, *supra* note 160, at 135-37; Manson, *supra* note 161, at 976-83 (suggesting that an interpreter could speak quietly into a microphone and the jurors could wear headphones).

232. *See Guzman*, N.Y.S.2d at 464-65 n.38.

233. *See* Manson, *supra* note 161, at 987-88.

234. *See* Goldblas, *supra* note 160, at 133-44.

Hispanic defendants and citizens, Section 510 of the New York's Judiciary Law should be amended to remove the non-English speaker exclusion.

Cynthia L. Brown