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## **Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico**

Andrea Freeman  
*California Western School of Law*

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# LINGUISTIC COLONIALISM: LAW, INDEPENDENCE, AND LANGUAGE RIGHTS IN PUERTO RICO

by ANDREA FREEMAN\*

## INTRODUCTION

In March 2008, after a two-year grand jury investigation, the federal government indicted then-governor of Puerto Rico, Aníbal S. Acevedo Vilá, leader of the pro-Commonwealth Popular Democratic Party (PDP), on nineteen counts of campaign finance fraud.<sup>1</sup> Members of the pro-statehood New Progressive Party (NPP) clamored for Acevedo Vilá's impeachment.<sup>2</sup> Attempting to imbue the subsequent proceedings with the appearance of neutrality, the court brought in United States District of New Hampshire Judge Paul Barbadoro to try the case. On an island where over eighty percent of the population votes in gubernatorial elections, it would be virtually impossible to find a jury of individuals without strong ties to either the PDP or the NPP.<sup>3</sup> Nonetheless, Judge Barbadoro preemptively announced that he would deny all motions for a change of venue and declared his intention to brook few delays in the commencement of the trial. His statements satisfied the public's desire for a speedy resolution of the drama that had been brewing on the island for many months,<sup>4</sup> but in the federal courthouse, they mandated immediate attention to a serious problem.

At the time of Barbadoro's announcement, the entire federal jury pool for the District of Puerto Rico numbered fewer than five hundred people<sup>5</sup> out of the island's four million inhabitants.<sup>6</sup> Due to the English-language requirement for

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\* Teaching Fellow, California Western School of Law, San Diego, [afreeman@cwsl.edu](mailto:afreeman@cwsl.edu). Many thanks to Luis Fuentes-Rohwer at Indiana University Maurer School of Law, Steven Macias at the University of Oregon School of Law and to my colleagues at California Western, Ruben Garcia, Tom Barton, and William Aceves, for their insightful comments on earlier drafts of this essay. I am also indebted to my friends and colleagues in Puerto Rico, particularly Jorge Sierra, Gerardo Vasquez, Ryan Lozar, José Antonio Fusté, and Sarah Spiegel.

1. Kirk Semple, *U.S. Issues Indictment of Governor in Puerto Rico*, N.Y. TIMES, Mar. 28, 2008, at A16.

2. *Id.*

3. See Aníbal S. Acevedo Vilá, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/people/a/anibal\\_s\\_acevedo\\_vila/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/a/anibal_s_acevedo_vila/index.html) (last updated Mar. 24, 2009) ("Governor's races are always impassioned in Puerto Rico, where a mind-boggling 80-plus percent of voters turn out on Election Day.").

4. See David Johnston, *Puerto Rico's Governor, Under Inquiry, Sees Politics*, N.Y. TIMES, Nov. 2, 2007, at A24 (quoting Acevedo Vilá's statement that the investigation had already been ongoing for two and a half years).

5. Interview with José Antonio Fusté, Chief Judge, D.P.R. (March 2008).

6. *Puerto Rican Population*, UNITED STATES CENSUS 2010, <http://2010.census.gov/mediacenter/portrait-of-america/puerto-rican-population.php> (last visited Nov. 12, 2010).

jurors,<sup>7</sup> this pool was smaller than ones from which courts often draw to create a jury for only one controversial case. Not only was the pool impossibly small, it was also highly imbalanced, consisting almost entirely of the island's elite: a group of financially secure, educated individuals, many of whom had studied in the United States.<sup>8</sup> In short, the jury pool did not represent a cross section of the community, as required by the Sixth Amendment<sup>9</sup> and federal law.<sup>10</sup>

The district court faced another language-rights challenge preceding the November 2008 election, in which Acevedo Vilá still intended to run, in spite of his pending trial.<sup>11</sup> A group of minority English-speakers, eager to participate in this controversial election, moved the court to order Puerto Rico's election committee to print ballots in English and Spanish for the first time.<sup>12</sup> Granting this request, the district court invoked the Voting Rights Act, a statute that, read literally, bestows no rights on minority English-speakers.<sup>13</sup> The law was not written to accommodate this group whose existence legislators failed to anticipate. The court also ordered bilingual ballots based on the Equal Protection clause of the Fourteenth Amendment.<sup>14</sup> To support this aspect of the decision, the court labeled "natives of the continental United States" a racial minority based on the association between English and national origin in Puerto Rico.<sup>15</sup>

Analysis of the deprivation of Sixth Amendment rights in Puerto Rico and the absurdity of applying the Voting Rights Act to an English minority or creating a racial category of continental Americans reveals the injustice inherent in Puerto Rico's current status. After exploring the tension between federal and constitutional

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7. 28 U.S.C. § 1865(b)(2)-(3) (2006).

8. Cf. José Julián Álvarez González, *Law, Language, and Statehood: The Role of English in the Great State of Puerto Rico*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 289, 290 (Christina Duffy Burnett & Burke Marshall eds., 2001) (stating that fluency in English reflects socioeconomic class).

9. U.S. CONST. amend. VI; see *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975) ("Both in the course of exercising its supervisory powers over trials in federal courts and in the constitutional context, the Court has unambiguously declared that the American concept of a jury trial contemplates a jury drawn from a *fair cross section of the community*." (emphasis added)).

10. 28 U.S.C. § 1861 ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.").

11. John Marino, *Embattled Puerto Rico Governor Seeks Re-election*, REUTERS (Apr. 7, 2008, 5:08 PM), <http://www.reuters.com/article/idUSN2743592420080427> (last visited Nov. 12, 2010).

12. *Diffenderfer v. Gómez-Colón*, 587 F. Supp. 2d 338, 341 (D.P.R. 2008), *vacated*, 587 F.3d 445 (1st Cir. 2009), *aff'g corrected order on reconsideration*, 606 F. Supp. 2d 222 (2009).

13. *Diffenderfer*, 587 F. Supp. 2d at 343 ("Because we find that the Spanish-only ballots violate the Voting Rights Act . . . we grant the injunctive relief requested . . ."); 42 U.S.C. § 1973b(f)(2) (2010) ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.").

14. *Diffenderfer*, 587 F. Supp. 2d at 343. The relief requested included an injunction requiring Puerto Rico to print bilingual Spanish- and English-language ballots for the 2008 elections. *Id.* at 340.

15. *Id.* at 347 ("While groups of people who share a linguistic background do not always correspond to any definite racial or ethnic group, this case implicates the electoral rights of English speakers in a predominantly Spanish-speaking jurisdiction. In Puerto Rico, use of English is frequently identified with natives of the continental United States, as a distinct national category apart from native-born Puerto Ricans, for whom Spanish remains their mother tongue.") (citations omitted).

law and the linguistic reality of Puerto Rico, this Essay will therefore call for a dramatic change in Puerto Rico's relationship with the United States to prevent further contradictions and inequities.

Part I reviews and analyzes courts' attempts to reconcile the conflict between the statutory English-language requirement for federal jurors,<sup>16</sup> Puerto Rico's almost entirely Spanish-speaking population, and the Sixth Amendment's constitutional mandate. This part consists of three sub-parts: a description of Puerto Rico's linguistic landscape in comparison with that of the United States, a history of fair cross section challenges pertaining to the District of Puerto Rico, and a comparative look at fair cross section<sup>17</sup> challenges in the Ninth Circuit. Part II examines the tension between language and constitutional rights through the lens of one case, *Diffenderfer v. Gómez-Colón*.<sup>18</sup> In this challenge to the policies of Puerto Rico's election commission, the district court relied on the Voting Rights Act, the Equal Protection clause, and the First Amendment to order the printing of bilingual ballots for the 2008 gubernatorial election.<sup>19</sup> In light of the legal gymnastics and concessions required to reach the courts' holdings on both of these matters, this Essay concludes that the state of linguistic colonialism presently existing between the United States and the Commonwealth of Puerto Rico is legally and morally untenable.

## I. THE ENGLISH-LANGUAGE REQUIREMENT AND THE SIXTH AMENDMENT

To qualify for jury service in a federal district court, a person must be able to speak English and to read, write, and understand it "with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form."<sup>20</sup> Both the United States Constitution, under the Sixth Amendment, and federal law, under 28 U.S.C. § 1861, require federal jury pools to represent a cross section of the community in which judicial proceedings occur.<sup>21</sup> Nonetheless, courts have consistently rejected challenges to the English-language requirement as it applies to the District of Puerto Rico, where the requirement excludes approximately eighty percent of the district's population from federal jury service and renders the remaining pool relatively homogenous with regard to class and education levels.<sup>22</sup> Although the

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16. 28 U.S.C. § 1865(b)(2)-(3).

17. See 28 U.S.C. § 1861 (2006) ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.")

18. 587 F. Supp. 2d 338.

19. *Id.* at 343.

20. 28 U.S.C. § 1865(b)(2)-(3).

21. See 28 U.S.C. § 1861 ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."). The statutory and constitutional analyses are the same. *United States v. Grisham*, 63 F.3d 1074, 1077 (11th Cir. 2007).

22. See, e.g., *Miranda v. United States*, 255 F.2d 9, 16 (1st Cir. 1958) (rejecting a challenge to the English-language requirement stating that it is "reasonable and indeed necessary to the proper

First Circuit's response to this question is consistent with outcomes reached in other circuits facing fair cross section challenges,<sup>23</sup> marked cultural and linguistic differences likely render this symmetry irrelevant to the correctness of the First Circuit's analysis.

In other federal judicial districts, most notably in the Ninth Circuit, defendants have failed to establish a prima facie case of unconstitutional underrepresentation based on a comparison of the percentage of Spanish speakers, or "Hispanics," on a jury and the number of jury-eligible Hispanics in the community.<sup>24</sup> The law has developed with a narrow focus on whether the proper point of comparison is the whole or the jury-eligible population, without reaching the issues of whether underrepresentation is due to systematic exclusion, and, if so, whether significant national interests balance out the harm of that exclusion.<sup>25</sup> In contrast, cases arising in Puerto Rico, an island almost entirely populated by Spanish speakers, have focused entirely on whether significant national interests justify the conceded exclusion of the majority of the population from jury service.

Part I begins with a description of Puerto Rico's linguistic landscape as well as the statistics and court rules relevant to an inquiry into the effect of the English-language requirement. It then reviews the most significant First Circuit and District of Puerto Rico cases analyzing and establishing the constitutionality of the English-language requirement in the face of fair cross section challenges. Next, it traces the development of fair cross section law in the Ninth Circuit where, due to the high

functioning of the court as a member of the federal judicial system"); *United States v. Benmuhar*, 658 F.2d 14, 20 (1st Cir. 1981) (holding that the national-language interest encompassed in the English proficiency requirement is significant and did not deny defendant his Sixth Amendment right to a representative jury), *cert. denied*, 457 U.S. 1117 (1982); *United States v. Aponte-Suárez*, 905 F.2d 483, 492 (1st Cir. 1990) (asserting "the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language.") (citation omitted), *cert. denied*, 498 U.S. 990 (1990); *United States v. González-Vélez*, 466 F.3d 27, 40 (1st Cir. 2006) (citing its own ruling in finding jurors must be proficient in English and denying defendant's claim for violation of his Sixth Amendment rights). Although there are currently no statistics demonstrating this assertion, one scholar believes that Puerto Ricans eligible for jury service are also racially homogeneous. See Jasmine Gonzales Rose, *Language Rights In Puerto Rico*, HARV. C.R.-C.L. L. REV. (forthcoming 2011).

23. See, e.g., *United States v. Torres-Hernandez*, 447 F.3d 699, 702 n.1 (9th Cir. 2006) (noting that to be "jury eligible" one must, among other things, be able to speak English (citing 28 U.S.C. § 1865(b)(1)-(3))).

24. See, e.g., *id.* at 705-06 ("[A] 2.0 percentage point absolute disparity between the percentage of jury-eligible Hispanics and the percentage of Hispanics on [the defendant's] grand jury venire was constitutionally insignificant).

25. See, e.g., *id.* at 701. "A district court need not and may not take into account Hispanics who are ineligible for jury service to determine whether Hispanics are underrepresented on grand jury venires. To establish a prima facie violation of the Sixth Amendment's guarantee that grand juries reflect a fair cross-section of the community, a defendant must prove in part 'that the representation of [an allegedly underrepresented] group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community.'" *Id.* (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Because the court found the defendant failed to satisfy the second *Duren* element—that representation of the distinctive group in the community in venires from which juries are selected is unfair and unreasonable in relation to the number of such persons in the community—the court did not reach *Duren's* third element—that the underrepresentation of a distinctive group in the community is due to systematic exclusion of the group in the jury selection process. *Id.* at 703 n.6.

number of Spanish speakers in the Circuit, courts have generated the greatest amount of law on this issue. Finally, it compares the reasoning and results of fair cross section cases in these two circuits and concludes that the law as applied in the First Circuit is unjust.

#### *A. Puerto Rico's Linguistic Landscape*

In most states the majority of residents meet the federal jury service requirements: citizenship, age of majority, no felony record, and English proficiency.<sup>26</sup> Even in California, the state with the greatest percentage of Spanish speakers after Puerto Rico, Spanish speakers represent only approximately one quarter of the state's population, and although there are no accurate statistics showing the number of non-citizens living in the state, it is unlikely that they comprise over half of the population.<sup>27</sup> Conversely, eighty percent of Puerto Ricans identify themselves as unable to communicate effectively in English.<sup>28</sup>

As demographics in the United States continue to change, the question of whether statistically significant underrepresentation on juries of group members who make up the majority of a state's residents may eventually become relevant to courts outside the District of Puerto Rico.<sup>29</sup> Currently, however, Puerto Rico's situation is unique, requiring different analysis and different results. On the mainland United States, non-English-speaking children must learn English at school and often attend special programs to accelerate this process.<sup>30</sup> Scholastic success and, in most instances, the acquisition of gainful employment depend on a firm grasp of the English language. Most daily transactions, such as banking, purchasing goods, navigating public transportation systems and roads, and

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26. 28 U.S.C. § 1865 (b)(1) (A person is qualified to serve on a grand jury or a petit jury in the district court unless, among other factors, he "is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district."); *id.* § 1865 (b)(5) (A person is qualified to serve on a grand jury or a petit jury in the district court unless, among other factors, he "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored."); *id.* § 1865 (b)(2)-(3).

27. ALEJANDRA LOPEZ, STAN. UNIV., CTR. FOR COMPARATIVE STUDIES IN RACE AND ETHNICITY CALIFORNIANS' USE OF ENGLISH AND OTHER LANGUAGES: CENSUS 2000 SUMMARY 1 (2003), available at [http://www.stanford.edu/dept/csre/reports/execsum\\_14.pdf](http://www.stanford.edu/dept/csre/reports/execsum_14.pdf).

28. *Selected Social Characteristics in the United States: Puerto Rico: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow "FACT Sheet" hyperlink; under "state" tab, select "Puerto Rico;" follow "GO" hyperlink; then follow "show more" Social Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics Puerto Rico*] (Of the 95.3% of Puerto Ricans who speak a language other than English at home, 81.2% speak English less than "very well.").

29. Some studies indicate that Hispanics may comprise one in three Americans by the year 2042. See, e.g., *U.S. Minorities Will Be the Majority by 2042*, Census Bureau Says, AMERICA.GOV (Aug. 15, 2008), <http://www.america.gov/st/peopleplace-english/2008/August/20080815140005xkrennef0.1078106.html>. It is difficult to estimate what percentage of this majority might not be jury-eligible due to the age, English proficiency, and citizenship requirements of 28 U.S.C. § 1865(b).

30. For example, in 1998 California passed Proposition 227, the English in Public Schools Initiative Statute, requiring California public schools to teach "Limited English Proficient" (LEP) students in special, virtually all-English classes, eliminating previous bilingual ones. Enrollment in an LEP class was not expected to last for more than a year. Cal. Prop. 227 §1 (1998) (codified at CAL. EDUC. CODE § 305).

accessing social services, require a high degree of competency in English. Although there are many insulated communities in the United States, particularly in larger cities, where social and business interactions occur exclusively in a language other than English, stepping outside these communities requires some degree of language assimilation.<sup>31</sup>

Puerto Rico's linguistic landscape is precisely the opposite. Although wealthy Puerto Ricans, particularly those who were born or educated in the continental United States, often send their children to the island's few private English schools, the majority of Puerto Rican children receive an education exclusively in Spanish.<sup>32</sup> Although an English class is part of most schools' curriculum, without immersion all but the most exceptional students retain little of what they learn in school.<sup>33</sup> Spanish is the language of the workplace in Puerto Rico.<sup>34</sup> Newspapers, radio, television, and film are in Spanish (or subtitled in Spanish).<sup>35</sup>

All Commonwealth legal proceedings take place in Spanish.<sup>36</sup> Puerto Rican law schools teach in Spanish,<sup>37</sup> and the Puerto Rico bar exam is in Spanish.<sup>38</sup> Although English is a requirement for all jobs with the federal government, fluency varies greatly. Aside from formal court proceedings, which federal law mandates must take place in English, almost all communication within federal buildings occurs in Spanish.<sup>39</sup> In the federal courts, defendants, witnesses, and *pro se* parties speak to the Spanish-speaking judges and juries in Spanish.<sup>40</sup> Lawyers argue in

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31. See, e.g., Rob Paral, *The Polish Community in Metro Chicago*, POLISH AM. ASS'N 12 (June 2004), [http://www.robparal.com/downloads/Polish Community in Chicago.pdf](http://www.robparal.com/downloads/Polish%20Community%20in%20Chicago.pdf) (showing the presence of large, insulated Polish community in Chicago).

32. See 1990 P.R. Laws 68 § 1.02 (West, Westlaw through PR-Legis 3RS 68) ("It is hereby provided that education shall be imparted in Spanish, the vernacular language. English shall be taught as a second language.").

33. The situation is similar to the teaching of French in Canada, an officially bilingual country. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 16(1) (U.K.) ("English and French are the official languages of Canada and have equality of equal rights and status and privileges as to their use in all institutions of the Parliament and government of Canada."). Although every Canadian child studies French in school, very few retain enough of the language to enable them to work or live in French.

34. Álvarez González, *supra* note 8, at 291.

35. *Id.* (detailing the dominance of the Spanish language in Puerto Rican media). The English language paper, *The San Juan Star*, stopped publishing after almost fifty years in 2009.

36. See *People v. Superior Court*, 92 P.R. 580, 589-90 (1965) (stating that Spanish is and will continue to be the language used in judicial proceedings); P.R. R. CRIM. P. 96(d) (requiring criminal jurors "to read and write the Spanish language"); P.R. R. CIV. P. 8.5 (requiring use of Spanish in pleadings, motions, petitions and other papers).

37. See, e.g., *Requisitos de Admisión (Juris Doctor Admission Requirements)*, PONTIFICIA UNIVERSIDAD CATÓLICA DE PUERTO RICO, [http://207.150.249.35/derecho/index.php?option=com\\_content&view=article&id=48&Itemid=58&lang=es](http://207.150.249.35/derecho/index.php?option=com_content&view=article&id=48&Itemid=58&lang=es) (last visited Nov. 12, 2010) (requiring Spanish and English fluency for admission to Pontifical Catholic University of Puerto Rico's law school).

38. *Preguntas Más Frecuentes (Frequently Asked Questions)*, LA RAMA JUDICIAL DE PUERTO RICO, <http://www.ramajudicial.pr/junta/faq.htm> (last visited Nov. 12, 2010). The examinations are written in Spanish, but can be answered in English or Spanish. *Id.* (original in Spanish).

39. 48 U.S.C. § 864 ("All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language.").

40. See *Jackson v. Garcia*, 665 F.2d 395, 396 n.1 (1st Cir. 1981) ("Although 1 L.P.R.A. § 51, enacted in 1902, provides that English and Spanish 'shall be used indiscriminately' in the

varying degrees of English proficiency. An interpreter translates the Spanish testimony for the benefit of the court reporter, who creates an English transcript. The reviewing court will base its decision on the English record, but the judge and jury in the district court inevitably reach their conclusions based on the testimony they heard in their native tongue. In their chambers, judges communicate with lawyers, the press, their staff, and their Spanish-speaking clerks in Spanish, and secretaries and court employees conduct office business in Spanish. A small number of law clerks and other employees within the federal system, such as Assistant United States Attorneys, come from the mainland. Puerto Ricans usually speak English in their presence.

According to the District of Puerto Rico's website, every four years, after an election, the court randomly selects jurors from certified lists of registered voters.<sup>41</sup> The court mails out questionnaires to these individuals explaining the grounds for both automatic excusal and excusal upon request.<sup>42</sup> The website states that "[m]ost people that are able to read, write, speak, and understand the English language are qualified to become jurors."<sup>43</sup>

A 2006 United States Census Bureau survey reported that 95.3% of Puerto Rico's population speak a language other than English at home, with 95.2% speaking Spanish at home.<sup>44</sup> Other states with significant numbers of Spanish speakers trailed far behind in the percentage who speak a language other than English at home: 33.7% in Texas,<sup>45</sup> 35.8% in New Mexico,<sup>46</sup> 42.4% in California,<sup>47</sup> 27.9% in Arizona,<sup>48</sup> 27.3% in Nevada,<sup>49</sup> 25.8% in Florida,<sup>50</sup> and

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Commonwealth courts, the Supreme Court of Puerto Rico has interpreted that statute to authorize Spanish alone, with interpreters when needed . . .") (citing *People v. Superior Court*, 92 P.R. at 590); Gonzales Rose, *supra* note 22. As of August 2010, there was one native English-speaking judge in the District of Puerto Rico, Magistrate Judge Bruce McGiverin.

41. *Jury Service Information*, U.S. DIST. COURT FOR THE DIST. OF P.R., [http://www.prd.uscourts.gov/courtweb/gp\\_JuryService.aspx](http://www.prd.uscourts.gov/courtweb/gp_JuryService.aspx) (last visited Nov. 12, 2010). The selection method accords with the Federal Jury Service and Selection Act, which designates voter registration lists as the main, but not exclusive, source of potential juror selection. 28 U.S.C. § 1863(b)(2).

42. Automatic excusal applies to active or reserve members of the armed forces, firefighters, police or law enforcement agents, and public officials in the executive, legislative, or judicial branches of the federal, state, or municipal government. *Id.* Excusal upon request is available to people aged seventy or over, individuals who have served in the last two years, clergy members, teachers, full time students, people responsible for the full time care of children under ten or an elderly or handicapped dependent, practicing physicians or dentists, health services professionals, practicing attorneys, and volunteer safety personnel in a public agency. *Id.*

43. *Id.*

44. *Selected Social Characteristics Puerto Rico*, *supra* note 28.

45. *Selected Social Characteristics in the United States: Texas: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow "FACT Sheet" hyperlink; under "state" tab, select "Texas;" follow "GO" hyperlink; then follow "show more" Social Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics Texas*].

46. *Selected Social Characteristics in the United States: New Mexico: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow "FACT Sheet" hyperlink; under "state" tab, select "New Mexico;" follow "GO" hyperlink; then follow "show more" Social Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics New Mexico*].

47. *Selected Social Characteristics in the United States: California: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow "FACT Sheet" hyperlink; under "state" tab, select "California;" follow "GO" hyperlink; then follow "show more" Social Characteristics hyperlink) (last

28.9% in New York.<sup>51</sup> The percentage of Puerto Ricans who speak a language other than English at home who speak English at a level less than “very well,” a fact that likely would exclude them from jury service, was 81.2%.<sup>52</sup> For Californians that number was 19.9%,<sup>53</sup> 14.5% for Texans,<sup>54</sup> 13.2% for New Yorkers,<sup>55</sup> 13.0% for Nevadans,<sup>56</sup> 12.1% for Arizonans,<sup>57</sup> 11.7% for Floridians,<sup>58</sup> and 10.2% for New Mexicans.<sup>59</sup> Only 39.7% of Puerto Ricans in the labor force were employed, with 45.3% living below the poverty level.<sup>60</sup> Regarding education, 66.4% of Puerto Ricans twenty five years old and over had at least a high school degree and 21% had at least a bachelor’s degree<sup>61</sup>—a percentage drastically lower than the United States’ average educational attainment.<sup>62</sup>

Conducting court proceedings in English on an island where the vast majority of participants in the legal system can communicate more effectively in their native tongue is a manifestation of the colonialist relationship that began when the United States acquired Puerto Rico from Spain in the Spanish American War in 1898.<sup>63</sup>

visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics California*].

48. *Selected Social Characteristics in the United States: Arizona: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow “FACT Sheet” hyperlink; under “state” tab, select “Arizona;” follow “GO” hyperlink; then follow “show more” Social Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics Arizona*].

49. *Selected Social Characteristics in the United States: Nevada: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow “FACT Sheet” hyperlink; under “state” tab, select “Nevada;” follow “GO” hyperlink; then follow “show more” Social Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics Nevada*].

50. *Selected Social Characteristics in the United States: Florida: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow “FACT Sheet” hyperlink; under “state” tab, select “Florida;” follow “GO” hyperlink; then follow “show more” Social Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics Florida*].

51. *Selected Social Characteristics in the United States: New York: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow “FACT Sheet” hyperlink; under “state” tab, select “New York;” follow “GO” hyperlink; then follow “show more” Social Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Selected Social Characteristics New York*].

52. *Selected Social Characteristics Puerto Rico*, *supra* note 28.

53. *Selected Social Characteristics California*, *supra* note 47.

54. *Selected Social Characteristics Texas*, *supra* note 45.

55. *Selected Social Characteristics New York*, *supra* note 51.

56. *Selected Social Characteristics Nevada*, *supra* note 49.

57. *Selected Social Characteristics Arizona*, *supra* note 48.

58. *Selected Social Characteristics Florida*, *supra* note 50.

59. *Selected Social Characteristics New Mexico*, *supra* note 46.

60. *Selected Economic Characteristics in the United States: Puerto Rico: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow “FACT Sheet” hyperlink; under “state” tab, select “Puerto Rico;” then follow “show more” Economic Characteristics hyperlink) (last visited Nov. 12, 2010) [hereinafter *Economic Characteristics Puerto Rico*].

61. *Selected Social Characteristics Puerto Rico*, *supra* note 28.

62. *Selected Social Characteristics in the United States: 2006-2008*, U.S. CENSUS BUREAU, <http://www.factfinder.census.gov> (follow “FACT Sheet” hyperlink; then follow “show more” Social Characteristics hyperlink) (last visited Nov. 12, 2010). Nearly eighty-five percent of the U.S. population age twenty-five and older has attained a high school education or higher, and almost twenty-eight percent of the U.S. population age twenty-five or older has attained a bachelor’s degree or higher. *Id.*

63. See Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformation Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921, 927-30

The First Circuit has justified upholding this tradition by putting the federal justice system's interest in consistency above the constitutional mandate that parties face a jury derived from a cross section of their community, and has not considered alternative means of satisfying the Sixth Amendment, such as translation.<sup>64</sup> A comparison between the First Circuit's Sixth Amendment jurisprudence as applied to cases arising in Puerto Rico and fair cross section law in other circuits suggests that this reasoning is not legally sound.

### *B. Fair Cross Section Challenges in the First Circuit*

In 1958, the First Circuit first entertained the question of whether the systematic exclusion of non-English speakers from federal juries in Puerto Rico was constitutional.<sup>65</sup> The defendant in *Miranda v. United States*<sup>66</sup> was a Puerto Rican attorney convicted of subornation of perjury during the trial of three servicemen he represented in a burglary case.<sup>67</sup> Miranda argued that his indictment was defective because individuals who could not speak and understand English were systematically excluded from the grand jury.<sup>68</sup> The court disagreed, holding that the provision that "all pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language" was necessary to the proper functioning of the court.<sup>69</sup> The court declared that "it is reasonable that a court conduct its proceeding in a single language and it is obviously essential that the judge, the counsel and all the jurors have a working knowledge of that language if the judicial machinery is to function efficiently."<sup>70</sup> The court failed to entertain the idea that, in light of the fact that the judge, attorneys, and jurors all spoke Spanish, with proficiency in English ranging from good to poor, conducting proceedings in Spanish would in fact achieve the greatest efficiency.<sup>71</sup> The court also did not consider any issues beyond efficiency.

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(2001) (giving a brief history of the events of the Spanish American War, noting that the United States "declared Puerto Rico its own as a 'war indemnity'" during treaty negotiations with Spain, and describing the war's result as "the United States' first step to colonialism").

64. See, e.g., *United States v. Rivera-Rosario*, 300 F.3d 1, 5 (1st Cir. 2002) ("It is clear, to the point of perfect transparency, that federal court proceedings must be conducted in English."); *Aponte-Suárez*, 905 F.2d at 491-92 (asserting that the "overwhelming national interest" is served by conducting proceedings in the District of Puerto Rico in English, which requires jurors to be proficient in English); *Benmuhar*, 658 F.2d at 19-20 (holding that a significant state interest in "having a branch of the national court system operate in the national language" is advanced by the English proficiency requirement); *Miranda*, 255 F.2d at 16 (upholding the reasonableness of juror English-language proficiency requirement in federal district courts).

65. *Miranda*, 255 F.2d at 16-17.

66. 255 F. 2d 9 (1st Cir. 1958).

67. *Id.* at 11.

68. *Id.* at 16.

69. *Id.* (citing 48 U.S.C. § 864).

70. *Id.* at 16-17.

71. In 1952 President Truman appointed Clemente Ruiz-Nazario as the first Puerto Rican judge to serve on the District Court of Puerto Rico. *Clemente Ruiz Nazario*, U.S. DIST. COURT FOR THE DIST. OF P.R., [http://www.prd.uscourts.gov/CourtWeb/bios\\_judge\\_Nazario.aspx](http://www.prd.uscourts.gov/CourtWeb/bios_judge_Nazario.aspx) (last visited Nov. 12, 2010). After that date, all appointed judges were bilingual. See *Judges for the United States District Court for the District of Puerto Rico 1899-Present*, U.S. DIST. COURT FOR THE DIST. OF P.R.,

In the 1968 case *United States v. Valentine*,<sup>72</sup> the District Court of Puerto Rico faced an attack on the constitutionality of the statutory requirement that proceedings be conducted in English, the statutory English-language requirement for jurors, and the failure of grand and petit juries to constitute a cross section of the community.<sup>73</sup> The defendants had been indicted for refusing to submit to induction into the United States Armed Forces.<sup>74</sup> The court noted Puerto Rico's unique status as the only "state or territory in which the primary language of a majority of the American citizens resident therein is other than English."<sup>75</sup> Significantly, the court stated that forcing nonresidents to litigate through interpreters would "compromise[]" and "unreasonably restrict[]" the court's function of "offering an opportunity to nonresidents of resorting to a tribunal not subject to local influence."<sup>76</sup> The court did not demonstrate similar sympathy for Puerto Rican residents who, by virtue of the court's decision to uphold the constitutionality of the statutes,<sup>77</sup> have been compelled to litigate virtually all of their cases through interpreters.

The court viewed the use of Spanish during proceedings as a significant limitation on the ability of the Attorney General, his staff, and judges from other districts sitting by designation to participate in judicial proceedings in the district.<sup>78</sup> The court also decried "the strong possibility of injustice through distortion of meaning in translation" of federal statutes written in English,<sup>79</sup> along with "the body of law developed throughout the rest of the federal system."<sup>80</sup> The court acknowledged in a footnote that appeals from the Commonwealth required translation, but dismissed potential injustice arising from distortion of meaning of those translations with the assertion that "the final judgments of the commonwealth courts are infrequently subject to federal review, and such review rarely raises questions whose resolution necessitates a precise parsing of the language appearing in the record."<sup>81</sup> The court likely did not anticipate that, over forty years later, the federal court would engage in extensive review of Commonwealth cases. Also, despite noting that the annotated laws of Puerto Rico and its supreme court cases are translated into English, the court failed to acknowledge the fact that these

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[http://www.prd.uscourts.gov/CourtWeb/bios\\_intro.aspx#List](http://www.prd.uscourts.gov/CourtWeb/bios_intro.aspx#List) (pointing out that only Puerto Ricans were appointed after Judge Nazario); *Rivera-Rosario*, 300 F.3d at 5 (proclaiming that judges must conduct federal court proceedings in English). In 1958, when the First Circuit decided *Miranda*, the sole district court judge, the Honorable Clemente Ruiz-Nazario, was a native Spanish speaker. See *Clemente Ruiz Nazario*, supra note 71 (noting that a second federal judge for Puerto Rico was not appointed until 1965).

72. 288 F. Supp. 957 (D.P.R. 1968).

73. *Id.* at 961-62.

74. *Id.* at 961.

75. *Id.* at 963.

76. *Id.* at 964 (citing *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

77. See *id.* at 963 ("It does not follow, however, that because proceedings in local courts are conducted in Spanish, proceedings in [federal] court must also be conducted in that language. This court is not a local court of Puerto Rico. . . . [I]t is a United States district court.").

78. *Valentine*, 288 F. Supp. at 964.

79. *Id.*

80. *Id.* at 965.

81. *Id.* at 964 n.9.

translations are often poor, and thus of little assistance to federal clerks and judges conducting review.<sup>82</sup>

Declaring a defendant's right to a fair trial to be personal, not collective, the court stated that it is "no more of a constitutional violation to try non-English speaking defendants in English in [Puerto Rico's district] court than to try other non-English speaking defendants in English in any other federal district court."<sup>83</sup> Rejecting the defendants' contention that the English-language requirement represented an unjust qualification for jury service, the court asserted that there is no constitutional requirement that "juries be drawn from a cross section of the *total* population without the imposition of any qualifications."<sup>84</sup>

In 1981, in *United States v. Benmuhar*,<sup>85</sup> a Puerto Rican defendant convicted of arson argued before the First Circuit that the Supreme Court's decision in *Duren v. Missouri*<sup>86</sup> demanded an outcome different from the result in *Miranda*<sup>87</sup> and a holding that the jury selection process violated his Sixth Amendment right to a jury comprised of a fair cross section of the community.<sup>88</sup> Reversing the Missouri Supreme Court, *Duren* held that the systematic exclusion of women from jury service in Missouri violated the Constitution's fair cross section requirement, as jury venires included, on average, less than fifteen percent female jurors.<sup>89</sup> *Duren* laid out three factors necessary to establish a *prima facie* case of unconstitutional jury disproportionality:

- (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.<sup>90</sup>

After a defendant successfully establishes a *prima facie* case of disproportionality, the government has the opportunity to show that no constitutional violation has occurred by demonstrating that the jury qualification "manifestly and primarily"

82. See *id.* at 965 n.10 (recognizing the availability of English translations of local laws, which the court contrasted against the poor prospect for Spanish translations of federal laws without making mention of the quality of the local translations).

83. *Id.* at 965.

84. *Valentine*, 288 F. Supp. at 965 (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)). *Valentine* noted that, traditionally, juries are a representative body of the community drawn from qualified individuals, denial of jury service on the basis of race—an impermissible qualification—results in the exclusion of "otherwise qualified groups" in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 965 n.13.

85. 658 F.2d 14.

86. 439 U.S. 357.

87. 255 F.2d 9. See *supra* text accompanying notes 65-71 (discussing *Miranda*, which held that a Puerto Rican defendant's indictment was not defective despite the fact that non-English speakers were excluded from the grand jury, because all federal legal proceedings must be conducted in English).

88. *Benmuhar*, 658 F.2d at 19 (citing *Duren*, 439 U.S. at 364).

89. *Duren*, 439 U.S. at 360.

90. *Id.* at 364.

advances a “significant state interest.”<sup>91</sup>

Although the First Circuit did not explore this issue, the second prong of this test leaves open the question of whether representation should be measured by comparing the number of group members in jury venires with the number of group members in the community as a whole, or solely with jury-eligible group members. In a district completely made up of group members, such as Spanish speakers in Puerto Rico, this distinction is simply not relevant.

The Court did discuss the potential exclusion of some group members from the statistical analysis, however, as it pertained to the ultimate inquiry into whether a constitutional violation occurred, as opposed to the initial establishment of a *prima facie* case. The Court noted that “[s]tates remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.”<sup>92</sup> Nonetheless, where a significant state interest in their implementation provides “adequate justification,” these exemptions may result in disproportionate exclusion that passes constitutional muster.<sup>93</sup> Missouri suggested, but failed to demonstrate, that other exemptions furthering significant state interests, such as those for individuals over age sixty-five, teachers, and government workers, caused the underrepresentation. The state’s failure to offer any substantial justification for the underrepresentation of women on juries led the Court to believe that the exclusion of women resulted from the systematic application of their automatic exemption.<sup>94</sup>

In *Benmuhar*, the defendant identified nine distinctive groups that he claimed did not have fair and reasonable representation on Puerto Rican juries: San Juan area residents; women; professional-managerial white collar workers; industrial farming and fishing workers; unemployed and/or retired housewives; people with eighth grade or lower educations; people with more than a high school education; whites; and blacks.<sup>95</sup> The defendant attributed all of this alleged disproportionality to the English-language requirement.<sup>96</sup> Applying the *Duren* test and the reasoning of *Valentine*, the court held that the English-language requirement primarily and manifestly advanced the government’s significant interest in “having a branch of the national court system operate in the national language.”<sup>97</sup>

Although the court upheld the requirement, it labeled its judgment “a narrow one” and expressed no opinion “as to the ability of Congress to achieve different results through legislation or as to a case in which the appellant identified and the government did not respond to policy accommodations that could achieve the national language interest without the need for such an English proficiency

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91. *Id.* at 367-68.

92. *Id.* at 367 (quoting *Taylor*, 419 U.S. at 538).

93. *Id.* at 371.

94. *Id.* at 368-69 (“Assuming, *arguendo*, that the exemptions mentioned by the court below would justify failure to achieve a fair community cross section on jury venires, the State must demonstrate that these exemptions caused the underrepresentation complained of.”).

95. *Benmuhar*, 658 F.2d at 19 n.2.

96. *Id.* at 19 (arguing that “systematic exclusion” is the result of the only “systematic” characteristic—the requirement to be proficient in English either in reading and writing, or speaking).

97. *Id.* at 19-20.

requirement for jurors.”<sup>98</sup> Despite *Benmuhar*’s narrow holding, however, the First Circuit applied it to a new challenge to the composition of grand and petit juries nine years later.<sup>99</sup>

The defendants in *United States v. Aponte-Suárez*<sup>100</sup> argued that their indictment was defective because the grand and petit jurors lacked proficiency in English and sought to prove that English proficiency among Puerto Ricans had declined to such an extent that this decline created an adverse effect on Puerto Rican federal juries.<sup>101</sup> The court applied the *Duren* test,<sup>102</sup> concluding that even if the defendants proved the existence of a smaller pool of eligible jurors and systematic exclusion in the jury selection process, “the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language.”<sup>103</sup>

The First Circuit followed *Aponte-Suárez* in *United States v. Flores-Rivera*,<sup>104</sup> dismissing the defendant’s contention that the exclusion of two-thirds of Puerto Rico’s population from federal jury duty violated his Fifth and Sixth Amendment rights.<sup>105</sup> In 2002, in response to a suggestion that Puerto Rico’s district court provide simultaneous translation to prevent exclusion of the poor from the petit juror pool, the First Circuit rejected the defendants’ contention that *Benmuhar* relied on the fact that its defendants did not propose any viable alternatives to the current system.<sup>106</sup> In the same year, the First Circuit declared that “[i]t is clear, to the point of perfect transparency, that federal court proceedings must be conducted in English.”<sup>107</sup> Analyzing a challenge to the introduction into evidence of Spanish transcripts based on the district court’s finding that the English translations were inaccurate, the court pronounced that “[t]he policy interest in keeping the District of Puerto Rico as an integrated part of the federal judiciary is too great to allow parties to convert that court into a Spanish language court at their whim.”<sup>108</sup> It further explained:

98. *Id.* at 20.

99. *Aponte-Suárez*, 905 F.2d at 492 n.4 (citing § 1865(b)(2)-(3) for the position that federal law requires grand and petit jurors both to speak English and to possess the reading, writing, and comprehension skills necessary to complete a juror qualification form).

100. 905 F.2d 483.

101. *Id.* at 491-92 (noting that the defendants supported this position with “newspaper accounts claiming a decline in English proficiency among the general population of Puerto Rico”).

102. *See supra* text accompanying note 90 (quoting the *Duren* test).

103. *Id.* at 492 (citing *Benmuhar*, 658 F.2d at 19).

104. 56 F.3d 319 (1st Cir. 1995).

105. *Id.* at 326; *see also* *United States v. Escobar-de Jesús*, 187 F.3d 148, 166 (1st Cir. 1999) (treating the challenge to the constitutionality of the English requirement for jurors as having been decided in *Aponte-Suárez* just as *Flores-Rivera* did).

106. *United States v. Dubón-Otero*, 292 F.3d 1, 17 (1st Cir. 2002) (concluding that the national language interest, and not the lack of any viable alternative, justifies conducting proceedings only in English in the District Court of Puerto Rico (citing *Flores-Rivera*, 56 F.3d at 326)).

107. *Rivera-Rosario*, 300 F.3d at 5.

108. *Id.* at 5, 8 n.9.

With a disturbing frequency, district courts in Puerto Rico have allowed parties to offer briefs, documents, and testimony in Spanish without translation. Though we recognize that most jurors, and even judges, in Puerto Rico may be more comfortable speaking in Spanish than in English, district courts must be faithfully committed to the English-language requirement. If not, the District of Puerto Rico risks disassociating itself from the rest of the federal judiciary. More importantly, appellate courts cannot properly review district court convictions on the basis of translations, later claimed as evidence, that were neither read nor heard by the jury.<sup>109</sup>

More recently, rejecting a Sixth Amendment claim based on a defendant's contention that public-housing residents have been systematically excluded from Puerto Rico federal juries, the First Circuit reasserted the validity of the English-language requirement based on "the overwhelming national interest served by the use of English in a United States court."<sup>110</sup> In spite of Puerto Rico's unique demographics rendering the effects of disproportionality more extreme than in any other district that has contemplated similar challenges, the First Circuit's commitment to upholding the constitutionality of the English-language requirement has become increasingly entrenched.

### *C. Fair Cross Section Challenges in the Ninth Circuit*

Other circuit and district courts located in areas with large Spanish-speaking communities have faced similar challenges by defendants alleging unconstitutional underrepresentation of Spanish speakers, or "Hispanics," on the juries they faced.<sup>111</sup> In these cases, the English-language requirement, though often comprising one factor in the analysis, has not been the sole concern. In communities made up largely of immigrants from Spanish-speaking countries such as Mexico, other jury qualifications, such as United States citizenship, have caused courts to grapple with the question of whether the analysis under *Duren's* second prong, seeking to determine if representation is "fair and reasonable in relation to the number of such persons in the community,"<sup>112</sup> should be based on the total number of community members or the subset of eligible jurors within that community.<sup>113</sup> The Ninth

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109. *Id.* at 20-21; see also *United States v. González-Maldonado*, 115 F.3d 9, 18 n.3 (1st Cir. 1997) (stating that the use of English is necessary for the creation of an appellate record because appellate judges do not have the benefit of an official translator enjoyed by district court judges).

110. *González-Vélez*, 466 F.3d at 38, 40 (quoting *Aponte-Suárez*, 905 F.2d at 492).

111. See, e.g., *United States v. Artero*, 121 F.3d 1256, 1260 (9th Cir. 1997) ("Artero argues that the grand jury that indicted him was not a fair cross section of the population, because it underrepresented persons of Hispanic ethnicity."); *Torres-Hernandez*, 447 F.3d at 702 ("[Torres-Hernandez] argued that, in violation of the Sixth Amendment, the systematic exclusion of Hispanics in Southern District of California grand jury venires had resulted in a grand jury that did not represent a fair cross-section of the community.").

112. *Duren*, 439 U.S. at 364.

113. See, e.g., *Artero*, 121 F.3d at 1261-62 ("If Hispanics in Imperial and San Diego Counties were less likely than others to be citizens, then non-citizenship rather than systematic exclusion of qualified individuals would explain both lower percentages of registered voters and lower representation in the jury wheel."). The fact that these issues arise in the context of immigrant communities also accounts for

Circuit has generated the greatest amount of law on this issue, ultimately denying every fair cross section challenge it considered based on the conclusion that only jury-eligible members are relevant to the analysis and the challengers' inability to establish unconstitutional underrepresentation grounded in the resulting statistical comparison.<sup>114</sup>

In *United States v. Esquivel*,<sup>115</sup> the defendant, charged with bringing an illegal alien into the United States, challenged the partiality of the jury based on the fair cross section requirement of the Sixth Amendment<sup>116</sup> and the Equal Protection clause of the Fourteenth Amendment.<sup>117</sup> The court agreed with the government that, to establish a prima facie case of a Sixth Amendment violation under *Duren*'s second prong, the relevant Hispanic community with which the percentage of Hispanics on the jury should be compared, should include only jury-eligible community members.<sup>118</sup> Calculating the number of Hispanic citizens in the Southern District of California over eighteen years of age according to census data significantly reduced the total relevant population, rendering the defendant unable to establish an unconstitutional disparity.<sup>119</sup>

The next year, in *United States v. Artero*,<sup>120</sup> the defendant, convicted of smuggling marijuana across the border and possession with intent to distribute, challenged the representation of Hispanics on the grand jury that indicted him.<sup>121</sup> Noting that the Southern District of California judges had stated that the two counties comprising the district, both of which bordered Mexico, "would likely have many Hispanic residents who had not yet attained citizenship or English proficiency, because they had only recently come to the United States," the Ninth

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the use of the word "Hispanic" to describe a racial/ethnic category, as opposed to "Spanish speaker," which, in Puerto Rico, differentiates potential jurors solely on the basis of their language skills.

114. See, e.g., *Torres-Hernandez*, 447 F.3d at 701-02 ("We hold that, to determine whether Hispanics are underrepresented to an unconstitutional degree in venire, a district court must rely on that evidence which most accurately reflects the judicial district's actual percentage of jury-eligible Hispanics. Because the district court here used the most accurate data presented to it by the parties—data that excluded segments of the Hispanic population ineligible for jury service—we affirm Torres-Hernandez's conviction and sentence.").

115. 88 F.3d 722 (9th Cir. 1996).

116. *Id.* at 724-26.

117. *Id.* at 727. Fourteenth Amendment challenges to the grand jury selection process are analyzed according to the standard set forth in *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). *Id.* at 725. To establish a prima facie case under *Castaneda*, an appellant may demonstrate discrimination in jury selection by showing: (1) that he/she is part of a recognizable, distinct class, (2) underrepresentation exists by measuring the size of the group in the general population against the size of the group called to serve as grand jurors over a significant period of time. *Id.* (citing *Castaneda*, 430 U.S. at 494).

118. *Id.* at 726-27 (concluding that in order to calculate the statistical data required to prove the second prong of the *Duren* test—that the jury pool is an inaccurate representation of the community—the court limits the general population pool to those eligible to serve on juries by taking judicial notice of 1990 census data showing the number of jury-eligible individuals).

119. *Esquivel*, 88 F.3d at 727; *Artero*, 121 F.3d at 1261 ("Once the category of Hispanics was narrowed down to those Hispanics eligible to serve on juries, the disparity dropped from the defense claim of 14.5% to 4.9%."). The *Esquivel* court assumed that all of these individuals had sufficient fluency in English to qualify for jury service. *Esquivel*, 88 F.3d at 727.

120. 121 F.3d 1256.

121. *Id.* at 1257, 1260.

Circuit concluded that “the percentage of Hispanics eligible for federal jury service in those two counties was likely to be lower than the ratio for the general population.”<sup>122</sup> The court rejected the defendant’s expert’s testimony regarding the likely Hispanic population of the counties because the demographer did not answer the “right question” of “whether Hispanics *eligible to serve on federal juries* were unreasonably underrepresented because of systematic exclusion.”<sup>123</sup>

Acknowledging *Duren*’s failure to make this distinction, the court commented that, “in *Duren*, there was no reason to doubt the usefulness of comparing the percentage of women summoned for jury service to the percentage in the district, because there is no reason to think women would be disproportionately ineligible to serve on juries.”<sup>124</sup> The court contrasted this situation with that of immigrants in border counties and ports of entry, explaining that “[i]t took many of our ancestors a while to learn English and become citizens.”<sup>125</sup> The court also announced that, in reaching its conclusion, it was following the Fifth Circuit’s holding in *United States v. Fike*<sup>126</sup> that “the pertinent inquiry is the pool of [members of the relevant group] in the district who are eligible to serve as jurors.”<sup>127</sup>

Eight years later, in *United States v. Rodriguez-Lara*,<sup>128</sup> the Ninth Circuit reached a different conclusion.<sup>129</sup> Charged with being a deported alien found in the United States, and appearing pro se, the defendant moved to dismiss his indictment based on the underrepresentation of Hispanics in the jury pool of the Fresno Division of the Eastern District of California and sought appointment of a demographic expert to assist him in developing this claim.<sup>130</sup> The district court denied the motion, holding that, based on evidence submitted by the government, the defendant could not demonstrate underrepresentation in relation to “the subset of the population meeting *all* the federal juror-eligibility requirements.”<sup>131</sup>

The Ninth Circuit disagreed with the district court’s use of the jury-eligible population as the measure of comparison to establish a prima facie case. Emphasizing *Duren*’s use of the word “community” without modification and the Court’s subsequent reiteration of this standard in *Teague v. Lane*,<sup>132</sup> the court stated

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122. *Id.* at 1261.

123. *Id.* (emphasis added).

124. *Id.* at 1262 (citing *Duren*, 439 U.S. at 365-66).

125. *Id.* at 1262.

126. 82 F.3d 1315 (5th Cir. 1996), *overruled by* *United States v. Brown*, 161 F.3d 256 (5th Cir. 1998).

127. *Artero*, 121 F.3d at 1262 (quoting *Fike*, 82 F.3d at 1321 (analyzing representation of African-Americans on a venire panel under *Duren*)). Courts in other districts have reached similar conclusions. *See, e.g.,* *Silva v. Sec’y, Dep’t of Corr.*, No. 8:06-cv-2257-T-17TBM, 2008 U.S. Dist. LEXIS 102759, at \*17 (M.D. Fla. Dec. 10, 2008) (stating that “any claim of under-representation would still require an accounting of such factors as citizenship, prior felony conviction, as well as the ability to speak and understand English.”).

128. 421 F.3d 932 (9th Cir. 2005).

129. *See id.* at 947 (finding the district court abused its discretion when it denied the defendant’s motion to appoint an expert to establish his Sixth Amendment cross section claim in light of the strength of the showing the defendant established even *without* an expert).

130. *Id.* at 937-38.

131. *Id.* at 938.

132. 489 U.S. 288 (1989).

that the “weight of Supreme Court and circuit authority teaches that, for purposes of the prima facie case, the proportion of the distinctive group in the jury pool is to be compared with the proportion of the group in the whole community.”<sup>133</sup> The court distinguished *Esquivel* on the grounds that, in *Esquivel*, the record contained population data broken down by age, then acknowledged a conflict in the circuit between the line of cases it cited to support its position and *Artero*, as well as a decision following *Artero*, *Sanders v. Woodford*.<sup>134</sup> The court dismissed *Artero* as wrongly decided, identified a Ninth Circuit case decided eight years before *Artero*, *United States v. Sanchez-Lopez*,<sup>135</sup> as binding authority on the issue, and held that a defendant’s prima facie case for a fair cross section claim may rely on a comparison to total population data or, where available in the record, age-eligible population data.<sup>136</sup> The court bolstered its holding with its view that requiring defendants to sort out from the general population figures the number of individuals not fluent in English would impose a potentially insuperable burden on fair cross section claimants.<sup>137</sup>

The Ninth Circuit resolved the conflict between *Artero* and *Rodriguez-Lara* in *United States v. Torres-Hernandez*<sup>138</sup> when it held that a district court need not and may not take into account Hispanics who are ineligible for jury service to determine whether Hispanics are underrepresented on grand jury venires.<sup>139</sup> To support this ruling, the court relied on *Esquivel*’s principle that “[w]hen presented with various types of data to determine whether Hispanics are underrepresented on grand jury venires, a court must rely on the statistical data that best approximates the percentage of jury-eligible Hispanics in the district.”<sup>140</sup> In light of both *Artero*’s and *Rodriguez-Lara*’s approval of *Esquivel*, the Ninth Circuit’s reasoning appears sound.<sup>141</sup>

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133. *Rodriguez-Lara*, 421 F.3d at 941 (citing *Duren*, 439 U.S. at 364 n.21, 365 n.23, and *Teague*, 489 U.S. at 301 n.1). The court also found related support in *Castaneda*, 430 U.S. at 495-96, *Turner v. Fouche*, 396 U.S. 346, 359 (1970), and *Alexander v. Louisiana*, 405 U.S. 625, 627 (1972). *Rodriguez-Lara*, 421 F.3d at 941.

134. *Id.* at 942-43 (citing *Esquivel*, 88 F.3d at 726-27, *Artero*, 121 F.3d at 1261-62, and *Sanders v. Woodford*, 373 F.3d 1054, 1069-70 (9th Cir. 2004), *rev’d on other grounds*, *Brown v. Sanders*, 546 U.S. 212 (2006)); *see also Sanders*, 373 F.3d at 1069-70 (faulting the defendant’s expert for “his assumption that every adult Hispanic person in Kern County who was not a legal, registered immigrant from Mexico was a jury-eligible United States citizen,” which likely “substantially overstated” the underrepresentation of Hispanics in the jury venire).

135. 879 F.2d 541 (9th Cir. 1989).

136. *Rodriguez-Lara*, 421 F.3d at 943. *Rodriguez-Lara* relies on *Sanchez-Lopez*’s discussion of *Castaneda*’s acceptance of total population figures to establish a prima facie case of an equal protection violation and on *Sanchez-Lopez*’s interpretation of *Duren* to “suggest[ ]” that where the government does not present evidence to challenge a defendant’s statistics, it could assume that the statistics were valid. *Sanchez-Lopez*, 879 F.2d at 547.

137. *Rodriguez-Lara*, 421 F.3d at 943 n.9.

138. 447 F.3d 699.

139. *Id.* at 701.

140. *Id.* at 704.

141. *See Artero*, 121 F.3d at 1260-61 (approving of *Esquivel*’s rule that the relevant consideration in a fair cross section challenge to Hispanic jury representation is the number of jury-eligible Hispanics in the district); *Rodriguez-Lara*, 421 F.3d at 942 (citing *Esquivel* to support the conclusion that defendants may not rely on statistical data reflecting the total population when more refined data on the jury-eligible

Interestingly, the Ninth Circuit never analyzed a fair cross section challenge on its merits due to defendants' consistent failure to establish a prima facie case. If the court had held that a constitutional violation occurred, it could have easily remedied the situation by assembling a new and more representative jury, simply by drawing on more group members in the community, of which there would presumably be a sufficient number of jury-eligible individuals. This solution is not available in the District of Puerto Rico. Absent a legal remedy for the differential treatment, the imposition of federal law in the territory becomes questionable. Part II explores this dilemma further by examining the District of Puerto Rico's manipulation of federal and constitutional law to mete out justice to a minority it identified as the island's English speakers.

## II. A CASE STUDY

As explored above, most federal law is based on an underlying assumption that United States citizens are, or should be, English-speaking. As a result, courts' interpretations of federal and constitutional law as applied to Puerto Rico may be convoluted and even entirely inapposite to plain or well-established meaning. *Diffenderfer*, a 2008 District of Puerto Rico case concerning voters' rights, illustrates this problem well.<sup>142</sup> This Part dissects the *Diffenderfer* opinion and explains how the case reflects another dimension of the conflict between language, statutory, and constitutional rights.

In *Diffenderfer*, plaintiffs brought a 42 U.S.C. § 1983 class action suit on behalf of "eligible voters in Puerto Rico who do not speak Spanish" against the state election commission and its four commissioners seeking an injunction that would require the commission to print bilingual ballots in Spanish and English for the highly contentious 2008 gubernatorial election.<sup>143</sup> According to the 2000 census, the number of affected voters was approximately 362,000 out of the island's population of approximately four million, or nine percent.<sup>144</sup> Ruling in plaintiffs' favor, the district court held that Spanish-only ballots violated the Voting Rights Act (VRA), the Equal Protection clause of the Fourteenth Amendment, and the First Amendment.<sup>145</sup>

The VRA provides that no standard, practice, or procedure "shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."<sup>146</sup> Rights protected under this statute include casting a ballot, and having such ballot counted properly.<sup>147</sup> The critical question in a claim arising under the

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population is available).

142. See *Diffenderfer*, 587 F. Supp. 2d at 345, 347, 350 (construing federal and constitutional laws to protect the Puerto Rican "English-monolingual community" as a language minority group that is similar to a national, ethnic, or racial minority group and comprises a significant percentage of the eligible voters in Puerto Rico).

143. *Id.* at 341-42.

144. *Id.* at 341 n.2.

145. *Id.* at 343.

146. Voting Rights Act of 1965, 42 U.S.C. § 1973b(f)(2) (2006).

147. *Id.* § 1973(c)(1).

VRA “is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process[.]”<sup>148</sup> The VRA also specifically prohibits the use of English-only ballots where more than five percent of the citizens of voting age belong to a minority language group.<sup>149</sup> For purposes of the VRA, the term “language minorities” or “language minority group” means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.<sup>150</sup>

*Diffenderfer* acknowledged that, in light of the VRA’s specificity about qualifying linguistic minorities, the court could not apply the statute according to its explicit terms.<sup>151</sup> Nonetheless, deferring to the Supreme Court’s instruction in *Chisom v. Roemer*<sup>152</sup> that the VRA “should be interpreted in a manner that provides ‘the broadest possible scope’ in combating discrimination,” the court decided “to look to the spirit and the intent of the law” and accordingly held that Spanish-only ballots violated section two of the VRA.<sup>153</sup> Stating that the existence of an English-monolingual minority group was “clearly not contemplated by Congress,” the court chose to write this group into the VRA, adding a fifth group to the definition of language minorities.<sup>154</sup>

*Diffenderfer* alternatively held that a Spanish-only ballot system discriminates against Plaintiffs on the basis of their national origin, ethnicity, and/or race in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>155</sup> Courts analyze racial classifications imposed by a government entity under strict scrutiny, requiring the classification to be narrowly tailored to further a compelling government interest.<sup>156</sup> Other classifications are subject to rational basis review, requiring the regulation to be rationally related to a legitimate state interest.<sup>157</sup> The *Diffenderfer* court held that the decision to print ballots only in Spanish failed to survive either level of review.<sup>158</sup>

Strict scrutiny applies not only to racial classifications, but also to fundamental rights, such as the right to vote, when the burden on this right is severe.<sup>159</sup> *Diffenderfer* based its strict scrutiny analysis on its assertion that the English-only ballot system encompassed both racial discrimination and a threat to

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148. *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986) (plurality opinion).

149. 42 U.S.C. § 1973b(f)(3).

150. *Id.* § 1973l(c)(3).

151. *Diffenderfer*, 587 F. Supp. 2d at 344.

152. 501 U.S. 380 (1991).

153. *Diffenderfer*, 587 F. Supp. 2d at 345 (quoting *Chisom*, 501 U.S. at 403).

154. *Id.*

155. *Id.*

156. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) (holding that “all racial classifications [imposed by the government] . . . must be analyzed by a reviewing court under strict scrutiny.” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))) (emphasis added).

157. *See Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)) (discussing the deferential, or rational basis, standard of review for non-suspect classifications).

158. *Diffenderfer*, 587 F. Supp. 2d at 346.

159. *See Clingman v. Beaver*, 544 U.S. 581, 592 (2005) (“Instead, as our cases since *Tashjian* have clarified, strict scrutiny is appropriate only if the burden is severe.”).

voting rights, concluding that under those circumstances, the defendants need not prove intentional discrimination.<sup>160</sup> The court briefly discussed the history of anti-American sentiment on the island, and explained that the “use of English is frequently identified with natives of the continental United States, as a distinct national category apart from native-born Puerto Ricans . . . .”<sup>161</sup> The court then drew the conclusion that, “in the context of the Commonwealth of Puerto Rico, membership in a linguistic group is essentially identical to a national, ethnic, or even racial classification,” making strict scrutiny appropriate.<sup>162</sup> There is little precedent for this pronouncement. Stating that the defendants had not put forth any compelling interests to justify the existing ballot system, the court held that Spanish-only elections did not withstand strict scrutiny.<sup>163</sup>

The court also determined that Spanish-only ballots would not survive the highly deferential rational basis test because the defendants justified the Spanish-only ballots based on the impracticality and high cost of creating new ones within the tight deadline before the election.<sup>164</sup> The court rejected this argument, based on testimony from the printer contracted to make the ballots that he could in fact create bilingual ballots in time.<sup>165</sup> Even if the paper stock that was ordinarily used was unavailable, the court saw no reason that the printer could not obtain other suitable stock.<sup>166</sup>

Finally, the court analyzed the Spanish-only ballots under the First Amendment. Describing the complexity of the ballot instructions, the court declared that “[r]equiring non-Spanish speakers to navigate these ballots entirely in Spanish effectively limits the political participation of a significant percentage of Puerto Rico’s eligible voters.”<sup>167</sup> The court also noted, however, that the ballots were likely to create confusion among Spanish speakers as well, as demonstrated by a heated dispute over contested ballots in the 2004 election.<sup>168</sup> Relying on the First Circuit’s holding that “federal intervention into a state election was appropriate where a significant percentage of the qualified and voting electorate was, in effect, denied its vote,” the court implied that the defendants had substantial First Amendment interests at stake by summarizing the many different methods of marking the ballot and the many different sets of instructions for voting for each office.<sup>169</sup> The court again examined the defendants’ proffered reasons for the Spanish-only ballot, increased costs and the difficulty of meeting the printing deadline before the election.<sup>170</sup> Dismissing these logistical reasons for the second

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160. *Diffenderfer*, 587 F. Supp. 2d at 346 (citing *Coalition for Educ. v. Bd. of Elections*, 370 F. Supp. 42, 55 (S.D.N.Y. 1974)).

161. *Id.* at 347.

162. *Id.*

163. *See id.* (“The Spanish-only ballot system clearly does not withstand strict scrutiny. Defendants have proposed no compelling interests which Spanish-only elections serve to protect.”).

164. *Id.* at 347-48.

165. *Id.* at 348.

166. *Diffenderfer*, 587 F. Supp. 2d at 348.

167. *Id.* at 350.

168. *Id.* at 349 n.10 (citing *Roselló-González v. Calderón-Serra*, 398 F.3d 1, 4-7 (1st Cir. 2004)).

169. *Id.* at 349 (quoting *Calderón-Serra*, 398 F.3d at 16); *id.* at 349-50.

170. *Id.* at 350.

time, the court held that “[t]he increase in cost alone does not justify a substantial burden on Plaintiffs’ First Amendment right to express themselves by voting” and declared the Spanish-only ballots unconstitutional.<sup>171</sup>

The election commission complied with the injunction by printing bilingual ballots,<sup>172</sup> and in April 2009 the district court ordered the defendants to pay the plaintiffs’ attorneys’ fees.<sup>173</sup> The defendants appealed both the underlying decision and the award of attorneys’ fees.<sup>174</sup> While the appeal was pending, Puerto Rico enacted Law No. 90, mandating the use of bilingual ballots in all future Puerto Rican elections, Law No. 90 rendering the appeal on the merits moot.<sup>175</sup>

The First Circuit vacated the district court’s opinion “because it was rendered moot by an independent, intervening act of legislation.”<sup>176</sup> It also ruled that, because the plaintiffs successfully obtained the relief they sought in the district court, they remained prevailing parties for purposes of attorneys’ fees,<sup>177</sup> and affirmed the fees award without examining the merits of the case.<sup>178</sup>

The timing of the passage of Law No. 90 and the First Circuit’s subsequent ruling likely afforded the plaintiffs a windfall. Although the district court’s decision was fair, the court lacked the authority to reach its result under the statutes and constitutional principles it invoked. It is therefore highly unlikely that the opinion would have survived First Circuit review on the merits. As the court acknowledged, the VRA does not cover individuals in the plaintiffs’ unique position.<sup>179</sup> Specifically, the court stated that Puerto Rico is not a covered jurisdiction under section four of the Act, which forbids certain jurisdictions from denying any citizen the right to vote based on any test or device, including language-based instruments.<sup>180</sup> It further noted that section two is equally unavailing because the Act does not include English speakers in its definition of a language minority.<sup>181</sup> The VRA could therefore not support an order to print bilingual ballots.

In its Equal Protection analysis, *Diffenderfer* cited only one case to support its proposition that “in the context of the Commonwealth of Puerto Rico, membership in a linguistic group is essentially identical to a national, ethnic, or even racial classification” and that, therefore, it was appropriate to apply strict scrutiny to the election commission’s refusal to print bilingual ballots.<sup>182</sup> Without precedent to

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171. *Diffenderfer*, 587 F.Supp. 2d at 350.

172. *Diffenderfer v. Gómez-Colón*, 587 F.3d 445, 450 (1st Cir. 2009).

173. *Diffenderfer v. Gómez-Colón*, 606 F. Supp. 2d 222, 230 (D.P.R. 2009).

174. *Diffenderfer*, 587 F.3d at 449.

175. *Id.*

176. *Id.* at 451.

177. *See id.* at 454 (“They not only obtained the injunctive relief they sought. They also obtained the desired practical outcome of their suit through the operation of that injunction: the Commission in fact distributed bilingual ballots in the November 2008 elections.” (footnote omitted)).

178. *See id.* (“We recognize that the defendant did not have the chance to seek to reverse the court’s injunction on appeal on the ground that it was based on an error of law.”).

179. *Diffenderfer*, 587 F. Supp. 2d at 345.

180. *Id.* at 344.

181. *Id.*

182. *Id.* at 347. *But see id.* (“In Puerto Rico, use of English is frequently identified with natives of the continental United States, as a distinct national category apart from native-born Puerto Ricans, for whom Spanish remains their mother tongue.”); *id.* (“Because the policy burdens the rights of monolingual

establish the application of strict scrutiny under these circumstances, only the court's rational basis review was proper.<sup>183</sup> Under rational basis review, the commission's decision was valid unless it bore no rational relationship to its legitimate interests.<sup>184</sup> One of the proffered reasons for the commission's decision, heightened costs, rationally relates to its interest in conducting elections at the least possible expense, and would therefore likely survive rational basis review upon appeal.

Finally, the court's First Amendment analysis relied on the fact that the Puerto Rican election ballot "is complex and difficult to understand."<sup>185</sup> The court described four methods of voting (straight, mixed, candidate, and write-in), and three different types of ballots (governor and resident commissioner, state legislature, and municipal legislature), each of which comes with a different set of instructions.<sup>186</sup> The result of this elaborate voting scheme, the court concluded, was that "requiring non-Spanish speakers to navigate these ballots entirely in Spanish effectively limits the political participation of a significant percentage" of Puerto Rican voters.<sup>187</sup> The fact that the ballots presented equivalent obstacles to communicating Spanish voters' intentions, however, weakens the court's language-based arguments and suggests that a challenge to the overall presentation of the ballots, in a different context, would be a more appropriate method to resolve this particular problem.

The merits of the *Diffenderfer* plaintiffs' claims and the court's opinion are moot, but the legal contortions in which the court engaged to reach its desired result leave a lasting impression. The necessity of rewriting a statute and creating a new Equal Protection category stems from the same problem identified in the fair cross section analysis above. The proper application of constitutional and federal law in Puerto Rico does not lead to equitable outcomes.

## CONCLUSION

Language is at the heart of the debate concerning Puerto Rico's relationship with the United States.<sup>188</sup> Faced with the choice between giving Puerto Rico

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English speakers to vote on the basis of their nationality and/or race, strict scrutiny is appropriate." (citing *Coal. for Educ.*, 370 F. Supp. at 55)).

183. The Supreme Court has stated that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (plurality opinion). The First Circuit may have held that this was one of those cases.

184. See *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592 n.39 (1979) ("[L]egislative classifications are valid unless they bear no rational relationship to the State's objectives. State legislation 'does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect.'" (quoting *Wash. v. Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979)) (citations omitted)).

185. *Diffenderfer*, 587 F. Supp. 2d at 349.

186. *Id.* at 349-50.

187. *Id.* at 350.

188. For an excellent discussion of the effect of language issues on the relations between Puerto Rico and the United States, and the impact of language on Puerto Rico's possibility of attaining statehood, see generally José Julián Álvarez González, *Law, Language, and Statehood: The Role of English in the*

independence and embracing it as a full state, the American government has adopted a third option—a Commonwealth status that likely no one envisioned would last over a hundred years.<sup>189</sup> A 1998 referendum conducted on the island determined Puerto Ricans' position regarding their relationship with the United States. When faced with a choice between statehood and independence, 50.3% of the voters selected "none of the above," 46.5% voted for statehood, and 2.5% voted for independence.<sup>190</sup> In similar referenda conducted in 1967 and 1993, Puerto Ricans chose the option to retain their current political status over both statehood and independence.<sup>191</sup> In 2009, Puerto Ricans elected as governor Luis G. Fortuño, Acevedo Vilá's rival.<sup>192</sup> The election of a pro-statehood governor was accompanied by a push for a new referendum, one that some believe might finally result in a majority vote for statehood.<sup>193</sup> These referenda, however, are non-binding, and any future change to Puerto Rico's status will require Congressional approval.<sup>194</sup>

The imposition of English as the official language on this Spanish-speaking island that would almost certainly accompany a transition from Commonwealth to state would wreak havoc on all of Puerto Rico's institutions and present a logistical nightmare. The alternative, allowing a state to function in a language other than English, would pose another substantial set of challenges. Both the present situation and possible statehood thus relegate the island to a status of linguistic colonialism, a problem to which no solution, save independence, presents itself. Any other option deprives Puerto Ricans of either their language and culture, or certain fundamental constitutional and statutory rights.<sup>195</sup>

There are myriad and complex explanations for the United States' reluctance to relinquish its ownership of Puerto Rico. These include a desire to control the

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*Great State of Puerto Rico*, 17 LAW & INEQ. 359 (1999).

189. Cf. ALEXANDER ODISHELIDZE & ARTHUR LAFFER, PAY TO THE ORDER OF PUERTO RICO 60 (2004) ("Puerto Rico is neither a nation nor a state. It occupies a shadow-land, a kind of Limbo, where each and every aspect of its affairs, from law enforcement, to banking, to citizenship, to federal program eligibility, to taxation, is handled in a way peculiar to the island and its unique history.").

190. José Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 19 (1999).

191. Dwyer Arce, *U.S. House Approves Puerto Rico Status Referendum Bill*, JURIST (Apr. 30, 2010), <http://jurist.law.pitt.edu/paperchase/2010/04/us-house-approves-bill-on-puerto-rico.php> (last visited Nov. 12, 2010).

192. Damien Cave, *Puerto Rico Governor Promises Changes*, N.Y. TIMES, Nov. 28, 2008, at A28. Acevedo Vilá was acquitted of all the charges against him in March 2009, after he lost the election for governor to Fortuño. Damien Cave & Omayra Sosa-Pascual, *Puerto Rico Ex-Governor is Acquitted of Graft*, N.Y. TIMES, Mar. 21, 2009, at A13

193. See Arce, *supra* note 191 ("[A bill passed by the U.S. House of Representatives in April 2010] would establish a two-step referendum, the first of which would ask voters in Puerto Rico whether they wanted to change the status of the island. If the option to change the island's status won, a second referendum would be held, giving voters the option of statehood, independence, 'sovereignty in association with the United States,' or maintaining the present status. Puerto Rican Governor Luis Fortuño (R), along with the leaders of the territorial legislature, have expressed their support for the bill and eventual statehood.").

194. *Id.*

195. Cf. Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157, 160-63 (2008) (summarizing and criticizing arguments in favor of granting Puerto Rico representation in Congress without necessarily becoming a state).

island's resources and to maintain a supply of fresh military personnel to fight in its overseas wars, and the tax breaks enjoyed by the major American pharmaceutical companies on the island.<sup>196</sup> Puerto Ricans, in turn, have ample reasons to desire a strong connection to the United States, including annual injections of federal funds and massive job creation by the federal government.<sup>197</sup> Puerto Ricans must weigh these benefits with the potential loss of their linguistic and cultural identity, while the United States grapples with possible challenges to its language laws if a change in Puerto Rico's status results in mass migration or immigration to the mainland.

These issues do not lend themselves to easy resolution. But it is clear that Puerto Ricans should not have to struggle for basic legal rights such as a jury drawn from a fair cross section of the community and the ability to communicate in their own language in their courts. To this end, while the question of Puerto Rico's status remains pending, the United States should implement changes in the law that would lead to a more equitable system.<sup>198</sup>

To ensure that the District of Puerto Rico complies with the Sixth Amendment and its statutory equivalent, Congress should amend the Jury Service and Selection Act to exempt Puerto Rico from the English-language requirement for federal jurors. Puerto Rico's district courts should function bilingually, with federal provision of interpretation into either Spanish or English for all parties, witnesses, attorneys, court reporters, clerks, judges, and observers. The transition to a bilingual court would be relatively simple due to the fact that the infrastructure for interpretation is already in place. To facilitate proceedings in Spanish, the court would, in most cases, need only to interpret the record from Spanish to English for the First Circuit's use on appeal. To continue the existing proceedings in English but allow monolingual Spanish speakers to serve as jurors, the court could provide interpretation to jurors through the same mechanism currently in place to translate the testimony of Spanish-speaking witnesses and give Spanish-speaking defendants and parties simultaneous translation.

This is not an entirely radical proposition, as a United States court currently operates bilingually. New Mexico state courts provide translation for Spanish jurors to ensure that all members of the community may serve on a jury.<sup>199</sup> Their system

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196. See ODISHLIDZE, *supra* note 189, at 61 (“[I]ndustries on the island, particularly U.S. pharmaceutical companies, have enjoyed a targeted tax break that essentially relieved them of all U.S. corporate income tax on their earnings there.”); DICK THORNBURGH, *PUERTO RICO'S FUTURE: A TIME TO DECIDE* 6 (2007) (stating that Puerto Rico bears special military significance for the United States, being its southernmost military “stronghold” and ranking “alongside the top five U.S. states in per capita military service.”); cf. Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1150 n.139 (1997) (“The United States acquired direct control over Puerto Rico to ‘provide uninhibited access to its territory, its resources and even its people for military purposes.’” (quoting Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U. P.R. 225, 316 (1996))).

197. See ODISHLIDZE, *supra* note 189, at 59-75 (providing figures and statistics on U.S. spending on Puerto Rico in various fields, including housing, nutrition assistance, education, transportation and vocational training).

198. For a thorough discussion of recommendations to convert the District of Puerto Rico into a fully bilingual court, see Gonzales Rose, *supra* note 22.

199. *Id.*

works well and has not generated complaints of inaccuracy or inefficiency.<sup>200</sup> Additionally, federal courts have long allowed translation for deaf jurors.<sup>201</sup>

Another potential benefit of a bilingual court would be that greater participation in the federal judiciary would increase Puerto Ricans' investment in the system and reduce hostility that has historically manifested itself in violent protests and other forms of resistance, including the attempted shooting of First Circuit Judge Juan Torruella.<sup>202</sup> Some Puerto Ricans already recognize certain advantages to the presence of the federal court, such as a plethora of high-paid jobs and the ability to shift the burden of prosecuting drug crimes from the Commonwealth courts. To others, the federal court represents the most oppressive aspect of Puerto Rico's colonial status because the court has the unchecked power to impose lengthy sentences that defendants must serve in federal prisons. The United States' attempt to seek the death penalty against some defendants has been a source of continuous controversy, as it flies in the face of Puerto Rico's clear constitutional mandate that "the death penalty should not exist."<sup>203</sup>

In addition to amending the Jury Service and Selection Act to allow for bilingual federal courts on the island, Congress should incorporate protections for minority English speakers into the Voting Rights Act and amend Title VII to protect individuals in Puerto Rico from discrimination based on language.<sup>204</sup> For its part, when faced with future constitutional and statutory challenges, the federal judiciary should strive, with flexibility and creativity, to balance national interests with Puerto Rican rights without sacrificing either, even if the result is a different rule for the Commonwealth than the one applicable to the incorporated states. To maintain the integrity of American law and the dignity of Puerto Rico's citizens, the United States should act swiftly and decisively to conform federal law to the realities of Puerto Rico and end linguistic colonialism.

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200. *Id.*

201. *Id.*

202. See e.g., *Thousands Mark Island's Status as Commonwealth*, ORLANDO SENTINEL, July 26, 2006, at A6 (reporting that on the fifty-fourth anniversary of Puerto Rico's status as a U.S. Commonwealth, supporters of Puerto Rico's independence gathered with pro-independence speeches, protests, and egg-throwing); *5 Women Sentenced in Vieques Bombing Protest*, HOUS. CHRON., Apr. 11, 2002, at A18 (reporting that members of Puerto Rico's pro-independence party did not defend federal trespassing charges brought against them because they do not recognize U.S. federal court authority in Puerto Rico).

203. See Adam Liptak, *Puerto Ricans Angry That U.S. Overrode Death Penalty Ban*, N.Y. TIMES, July 17, 2003, available at <http://www.nytimes.com/2003/07/17/us/puerto-ricans-angry-that-us-overrode-death-penalty-ban.html>.

204. Compare 42 U.S.C. § 2000e-2 (prohibiting employment discrimination only on account of "race, color, religion, sex, or national origin"), with 42 U.S.C. § 1973b(f)(2) ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."). Puerto Rico is not a covered jurisdiction under section four of the VRA. *Diffenderfer*, 587 F. Supp. 2d at 344. Lengthier discussion of these proposals is beyond the scope of this essay, but it is the author's hope that others will formulate precise amendments and advocate for their implementation.

