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THE SOCIAL PSYCHOLOGY OF PEREMPTORY CHALLENGES: AN EXAMINATION OF LATINO JURORS

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INTRODUCTION

In the United States, the Latino population is growing at a rapid pace. Currently, there are over 35 million Latinos living in the country.[1] Moreover, the Pew Hispanic Center estimates that soon 17 million Hispanics will be U.S. Citizens over the age of 18 and thus, eligible to vote in future elections.[2] The U.S. Census Bureau estimates that by the year 2050 there will be over 102 million Latinos living in the United States.[3] Latino citizens, as all citizens, are guaranteed certain rights. For example, when a citizen is accused of a crime, he or she has the right to remain silent.[4] Moreover, individuals charged with a crime have the right to an attorney. Importantly, according to the Sixth Amendment of the U.S. Constitution, the accused "shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed."[5] The Seventh Amendment provides for "the right of trial by jury" in civil cases.[6] Unfortunately, these guarantees are not being applied in a fair and equitable manner in the United States.

Throughout United States history, the U.S. Supreme Court has decided matters relating to discrimination of recognizable groups. For example, in 1954, the Supreme Court ruled that the practice of excluding Mexican-Americans from jury service violated the Constitution.[7] In *Taylor v. Louisiana*, the U.S. Supreme Court ruled that excluding women from jury service was unconstitutional.[8] With respect to the former group, in 2000, a study of criminal and civil juries in the cities of Dallas and Houston, Texas, revealed that Latinos comprised only between 7% to 12% of the jury pools studied while comprising nearly 33% of the population of those cities.[9] The shocking lack of Latinos in Texas jury pools has drawn the attention of the Texas Supreme Court.[10] The Texas Supreme Court decided to address this issue

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1. U.S. Census Bureau, U.S. Census (2000).

2. Pew Hispanic Center, Hispanics and the 2006 Election (Oct. 17, 2006), *available at* http://pewhispanic.org/files/factsheets/24.pdf.

3. U.S. Census Bureau, 2004, "U.S. Interim Projections by Age, Sex Race, and Hispanic Origin."

4. U.S. Const. amend. V.

5. U.S. Const. amend. VI.

6. U.S. Const. amend. VII.

7. *Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that a Texas county with a sizeable Mexican-American presence where six thousand jurors were called over a twenty-five year period and not a single Mexican-American ever served on a jury violated the equal protection clause of the Fourteenth Amendment).

8. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

9. C. Walters, Michael D. Marin, & Mark Curriden, *Jury of our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319 (2005) (arguing that the jury system in Texas fails to provide cross-sectional representation in jury pools).

10. Misc. Docket No. 06-9057 ORDER CREATING TASK FORCE ON JURY ASSEMBLY & ADMINISTRATION, (July 11, 2006) (finding that "[t]he jury's role in the legal system is critical. Given the importance of its function, the jury must be chosen from a fair cross section of the community, and the procedures for selecting the pool of prospective jurors must be fair and open. Juror source pools must be assembled so as to assure representativeness and inclusiveness, and selection procedures must be thoroughly random.")

by convening a blue ribbon committee of judges, lawyers, court personnel, and politicians to study the problem and to provide recommendations to rectify it.

Unfortunately, there are multiple causes for the lack of Latino jurors. For instance, the citizenship requirement and the English language requirement, among other things, have contributed to Latino jury under-representation.[11] Regrettably, U.S. Supreme Court jurisprudence only exacerbated this problem.

In *Hernandez v. New York,* the Supreme Court held that a prosecutor's use of peremptory challenges to eliminate bilingual jurors was not a *per se* violation of the Equal Protection clause.[12] It is difficult to quantify the impact of *Hernandez*. While it may not have directly resulted in prosecutors striking more prospective Latinos jurors, it does not appear that the decision increased Latino juror representation. Because progress for Latinos has been slow, perhaps it is time we implement Justice Marshall's suggestion from *Batson v. Kentucky*. There the court stated that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."[13]

There is no denying the dubious history of peremptory challenges in the United States. Scholars often refer to the peremptory challenge as a jury selection tool that has played an integral part in American judicial history."[14] Peremptory challenges allow counsel to reject a prospective juror without offering a reason for doing so.[15] The tool can be used as a mechanism to eliminate members of the jury pool who seem distracted, angry, unhappy, frustrated, or hostile.[16]

In modern American jurisprudence, attorneys, judges, and academics are studying and discussing the use of peremptory challenges. For many, the problem with peremptory challenges revolves around equity and due process concerns. Others argue that the real struggle is about prejudices, stereotypes, and biases of the courts. Some commentators believe that attorneys prefer biased jurors when it suits their needs. Ultimately, many factors dictate which juror will be selected. The decision making process utilized by attorneys is often based on demographics followed by socio-psychological factors. Some socio-psychological variables include physical attractiveness, attitudes, social categorization, and personality.

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11. *See* Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 158 (2005).

12. *Hernandez v. New York*, 500 U.S. 352, 361 (1991) (finding a race neutral justification for striking Spanish speaking jurors under the idea that they were unlikely to accept official translation of Spanish testimony).

13. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986).

14. J.S. Chambers, *Applying the Brake: Religion and the Preemptory Challenge*, 70 INDIANA L. J. 569, 569 (1995).

15. *Swain v. Alabama*, 380 U.S. 202, 211-12 (1965).

16. J. Woodard & K. Fisher, *Peremptory Challenges: Preserving the Impartial Jury*, 24 DEFENSE RESEARCH INSTITUTE 24 U.S. Govt. Printing Office, Washington, D.C. (1996).

Gender, race, marital status, and occupation are also considered by an attorney in determining whether to strike a prospective juror.[17] However, it is important to note that these variables cannot predict future juror behavior.[18]

This article posits that Latino jury under-representation is the result of socio-psychological prejudices that undermine the individual and ultimately lead to discriminatory behavior by members of the legal system. Part I of this article examines historical cases affecting peremptory challenges. Part II examines various socio-psychological factors, which affect attorneys during *voir dire*. Part III examines cases where attorneys have displayed discriminatory behavior in courtrooms throughout the United States. Part IV examines the future of peremptory challenges. The article concludes by suggesting peremptory challenges should no longer be utilized in the American trial court system.

I. HISTORY OF PEREMPTORY CHALLENGES

The peremptory challenge has a long and controversial history. Peremptory challenges were utilized in Roman times when participants were allowed to summon 100 triers and reject 50 of them.[19] The peremptory challenge came with the colonists when they arrived to the New World.[20] England abolished the use of preemptory challenges in 1988.[21] In *Stilson v United States,*[22] the Supreme Court determined that there is no constitutional right to peremptory challenges.[23] Interestingly, the Supreme Court also held that peremptory challenges are essential to the fairness of trial by jury.[24]

In 1879, the Supreme Court addressed purposeful discrimination in *Strauder v. West Virginia.*[25] In that case, an African-American male was indicted for murder. At the time, West Virginia had a statute that restricted African-American males from serving on a jury.[26] Strauder argued that the preclusion of African-American men from juries violated the Equal

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17. *See* C. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW AND HUM. BEHAV., 1, 3, 7-8 (1987).
18. *See* M.J. Saks, What do Jury Experiments Tell us About How Juries (Should) Make Decisions? 6 S. CAL. INTERDISCIPLINARY L. J. 1 (1997).
19. W. Forsyth, *History of Trial by Jury*, 144 (1875).
20. J. Vandyke, *Jury Selection Procedures*, 148-49 (1977).
21. G. Thomas Munstermann, *What are they up to now? Looking Back and Forward to England: The Auld Report, Jury News Research Service*, 17 COURT MANAGER 1 (2002) (comparing reforms in the English jury system with similar initiatives in the United States).
22. *Stilson v. United States*, 250 U.S. 583 (1919).
23. *Id.* At 586.
24. *See Lewis v United States*, 146 U.S. 370, 376 (1892).
25. *See Strauder v. West Virginia*, 100 U.S. 303 (1879).
26. *Id.* at 304.

Protection clause of the Fourteenth Amendment.[27] The Supreme Court held that the statute discriminated "in the selection of jurors . . . against negroes because of their color, which amounted to a denial of the equal protection of the laws to a colored man when he is put upon trial."[28] Following the *Strauder* ruling, "criminal defendants continued to challenge discriminatory jury selection practices."[29]

Another major case concerning peremptory challenges came eighty-six years later. In *Swain v. Alabama,*[30] an African-American defendant was convicted of rape.[31] The prosecutor struck all of the African-Americans in the venire.[32] The defendant claimed that the prosecutor's use of peremptory challenges was discriminatory and violated his equal protection rights.[33] Astonishingly, in a six to three decision, the Supreme Court held that the prosecutor did not violate the Equal Protection clause of the Fourteenth Amendment.[34] In addition, the court suggested that any defendant that wanted to question the discriminatory use of peremptory challenges must demonstrate a discriminatory pattern over a period of time.[35]

After the *Swain* decision, a debate ensued over the controversial practice of using preemptory challenges.[36] While some scholars called for an end to peremptory challenges,[37] others advocated its retention.[38] Approximately nineteen years after *Swain*, the Supreme Court revisited the discriminatory practice of peremptory challenges in *Batson v. Kentucky*.[39]

In *Batson*, an African-American male was indicted on charges of second-degree burglary and receipt of stolen goods. The prosecutor struck all African-Americans from the venire, leaving a jury composed of all whites.[40] The jury found the defendant guilty.[41] On appeal, the defendant argued that his Fourteenth Amendment right of equal protection had been violated.[42] The Supreme Court overruled its earlier decision in *Swain v. Alabama*[43] and

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27. *See Strauder v. West Virginia*, 100 U.S. 303 (1879).
28. *Id.* at 310.
29. P. Griffin, *Jumping on the Ban Wagon: Minetos v. City University of New York and the Future of the Peremptory Challenge*, 81 MINN. L. REV. 1237, 1244 (1997).
30. *Swain v. Alabama*, 380 U.S. 202 (1965).
31. *Id.*
32. *Id.* at 210.
33. *Id.*
34. *Id.* at 222.
35. *See Id.* at 224.
36. J. Coleman, *The Evolution of Race in the Jury Selection Process*, 48 RUTGERS L. REV. 1105, 1122 (1996).
37. G. Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks From Juries*, 27 HOWARD L. J. 1571 (1984).
38. B. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CINN. L. REV. 1139, 1175 (1993).
39. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).
40. *Id.* at 83.
41. *Id.*
42. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).
43. *Id.* at 100.

held that the defendant and the community both suffer when courts condone race-based peremptory challenges.[44]

The Supreme Court articulated a three-step process to determine if peremptory challenges were administered in a prejudicial and racial manner.[45] To begin, a defendant must establish a prima facie case of purposeful discrimination in the selection of the petit jury.[46] Once a prima facie case has been established, the prosecutor must provide a race neutral explanation for striking jurors.[47] Finally, the trial court will decide if the challenge was purposeful discrimination.[48] The Supreme Court in *Batson* listed three rationales for disallowing jury selection discrimination: first, to protect the rights of defendants;[49] second, was to protect the rights of a potential juror to serve;[50] third, the Court wanted to safeguard the integrity of the criminal justice system.[51] Moreover, the Court opined that discrimination in the jury selection process would leave verdicts open to criticism from the general population and advance prejudice and discrimination in society.[52]

Batson is problematic because it requires a finding of "purposeful" discrimination. *Black's Law Dictionary* defines "purposely" as acting "intentionally; designedly; consciously; knowingly."[53] At first blush, this appears to be entirely reasonable. After all, no one will argue with the fact that some discrimination is committed purposefully. However, a closer examination reveals *Batson*'s folly. The Court presupposes that all discrimination is committed intentionally, designedly, consciously, or knowingly. The reality is that "purposeful" discrimination is just the tip of the discrimination iceberg. In *Batson*, the majority laid bare a fundamental misunderstanding of social psychology.[54]

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44. *See Batson*, 476 U.S. at 87 (held that Swain was overruled to the extent that petitioner had to establish systematic pattern of discrimination in jury selection).
45. *Id.* at 96.
46. *Id.*
47. *Id* at 97.
48. *Id* at 98.
49. *Id.* at 86.
50. *Id.* at 87.
51. *Id.*
52. *Id.* at 87-88.
53. Henry C. Black, BLACK'S LAW DICTIONARY (6th ed. 1991).
54. *But see* Batson, 476 U.S. at 105 (Justice Marshall dissenting says that he would go farther in eliminating discrimination as prosecutors could still exercise preemptory challenges in a discriminatory manner as long as "they hold discrimination down to an 'acceptable' level").

II. SOCIO-PSYCHOLOGICAL FACTORS

Roscoe Pound, former Dean of Harvard Law School, argued that judges had to take into consideration the sociological consequences of their decisions.[55] Pound wrote that the law had to satisfy the need for stability *and* change. Furthermore, if jurists were to understand both needs simultaneously, they would need to expand their study to embrace the social sciences.[56] If the majority in *Batson* wanted to truly protect the rights of defendants and potential jurors, and safeguard the integrity of the criminal justice system, they should have followed Dean Pound's advice and looked to the social sciences for assistance in understanding the psychology of discrimination.

The *Batson* folly lies primarily with the processes of requiring the prosecutor to provide a race neutral justification for executing preemptory challenges and requiring the judge to find that the purpose for the challenge was discriminatory. However, as other scholars have noted, courts are "dealing with discrimination that is invisible."[57] In essence, the Supreme Court held that the only type of discrimination that is not permitted is conscious discrimination. It does not seem plausible to believe that a prosecutor can only practice conscious discrimination. Social psychologists would argue that most discrimination is unconscious. Therefore, it does not seem likely that a prosecutor would offer anything but a race neutral justification for striking a juror from the jury pool.[58]

Within the field of psychology there exists a branch known as social psychology. "Social psychology is the scientific field that seeks to understand the nature and causes of individual behavior and thought in social situations."[59] When prosecutors enter the courtroom and participate in *voir dire*, many socio-psychological factors influence them. The focus of this section is to examine how these factors influence an attorney's decision to select or exclude a Latino juror.

Attitudes influence social thought. In courtrooms throughout the United States, attorneys as well as jurors have personal opinions about capital punishment, abortion, war, homosexuality, immigration, language, and ethnicity. To operate under the pretext that these attitudes remain out of the courtroom is naive and dangerous. According to Ellsworth, "atti-

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55. Roscoe Pound, *A Survey of Social Interest*, 57 HARV. L. REV. 1 (1943).

56. *Id.*

57. Clare Sheridan, *Peremptory Challenges: Lessons from Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 77, 89 (2005).

58. A prosecutor could purposely discriminate and knowingly provide a phony race neutral justification. However, absent an admission by the prosecutor, this would be virtually impossible to prove.

59. R. Baron & D. Byrne, *Social Psychology*, 6 (Prentice Hall 8th ed.1997).

tudes rarely exist in isolation, rather they come as bundles or constellations."[60] To illustrate, a person's attitude toward capital punishment is related to a constellation or bundle of other attitudes. For example, a person who favors capital punishment is more likely to be concerned with high crime rates, exhibit less sympathy for a criminal or civil defendant, be suspicious of defense attorneys, and favor prosecutors and plaintiffs.

A second factor that may be present is social categorization. This view operates on the premise that people place society into two separate groups. According to Baron: "An individual views others as belonging either to their own group (the in-group) or to another group (the out-group). Such distinctions are based on many dimensions including race, religion, gender, age, ethnic background, occupation[,] and income."[61] Equally important to this view is the belief that a person who is considered within the in-group is thought to possess positive characteristics; whereas, persons in the out-group are thought to possess undesirable characteristics.[62] Furthermore, "in the social categorization process, research indicates that readily apparent physical features are the most common way to classify people, especially in the initial stages of impression formation."[63]

Social categorization principles apply to the interactions occurring regularly in courtrooms across the country. From the moment a panel of jurors enters the courtroom, attorneys are fixated and seek to categorize them. Often, this behavior is manifested via stereotypes. According to Barron: "Stereotypes are beliefs to the effect that all members of specific social groups share certain traits or characteristics; stereotypes are cognitive frameworks that strongly influence the processing of incoming social information."[64] In the jury selection process, many cognizable groups enter and exit the courtroom. This includes Mexican-Americans, Puerto Ricans, Cubans and Central Americans. It is safe to suggest that attorneys develop a mental framework that stereotypes each group. Moreover, even members of a group that the attorney has never previously encountered could be subjected to stereotyping.[65] Information is important to the stereotyping process; information that is deemed more important to an existing stereotype is processed faster than other insignificant information.[66]

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60. Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts, in* Inside the Juror: The Psychology of Juror Decision Making, 49 (Reid Hastie ed.,1993).

61. Baron & Byrne, *supra* note 59, at 207.

62. A.J. Lambert, *Stereotypes and Social Judgment: The Consequences of Group Variability*, 68 J. OF PERSONALITY& SOC. PSYC. 388-403 (1995).

63. S. Franzoi, *Social Psychology*, 91 (McGraw Hill 1996).

64. Baron & Byrne, *supra* note 59, at 208.

65. *Id.*

66. J. H. Dovido, N. Evans & R.B. Tyler, *Racial Stereotypes: The Contents of Their Cognitive Representation*, 22 J. OF EXPERIMENTAL SOC. PSYCH. 22 (1986).

The last factor to be examined is discrimination, which is prejudice in action.[67] In the majority of instances, individuals who have unpleasant feelings toward other persons or groups do not make their feelings known.[68] Often, there are deterrents in order to stop this behavior. Even though the days of "restricting members of various groups on buses or in movie theatres, or barring them from public restaurants, schools, or neighborhoods — all common practices in the past — have now largely vanished in many countries," courtrooms in the United States are still subject to attitudes, social categorization, stereotypes, and prejudicial discrimination.[69]

Initially, it might be difficult to see the connection between social psychology and Latino juror under-representation; however, there are human dynamics that must be recognized. Unfortunately, this human factor has contributed to the advancement of discriminatory practices in the use of peremptory challenges before and after *Batson*. The purpose of the next section is to examine cases since *Batson*, which help illustrate the nexus between socio-psychological factors and the law.

III. *BATSON* TO THE PRESENT

Approximately five years after *Batson*, the Supreme Court decided to address the issue of peremptory challenges again. In *Powers v. Ohio*,[70] the court held a defendant does not have to be of the same race to object to the use of peremptory challenges.[71] There, the defendant, a male Caucasian, was indicted for murder. During jury selection, the prosecutor struck all African-Americans from the jury.[72] On appeal, the Supreme Court stated the defendant had cause to object on behalf of the jurors.[73] Ultimately, the Supreme Court reasoned that allowing defendants to challenge the prosecutor's actions for striking potential jurors of a different color may enhance the jurors' rights.[74]

Within months, the Court was addressing the use of peremptory challenges in civil cases. In *Edmonson v. Leesville Concrete Company*,[75] an African-American construction worker was injured during a job site accident and sued the construction company.[76] During

67. Baron & Byrne, *supra* note 59.
68. *Id.*
69. *Id.* at 198.
70. *Powers v. Ohio*, 499 U.S. 400 (1991).
71. *Id.*
72. *Id.* at 403.
73. *Id.* at 415.
74. *Id.* at 414.
75. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).
76. *Id.*

voir dire, Leesville utilized two of its challenges to dismiss African-American venire members.[77] The plaintiff requested the court make Leesville offer some reason for its strikes. The District Court denied the plaintiff's request stating that *Batson* did not apply to civil matters.[78] The Supreme Court held, "[d]iscrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial."[79]

Another case involving improper peremptory challenges is *Di Donato v. Santini*.[80] Here, the issue of gender came before a California appellate court. The case involved a "wife who brought suit against her former husband, seeking damages for husband's alleged refusal to share profits of joint business ventures as well as an order requiring [her former] husband to accord her full title to [the] single-family residence."[81] During voir dire, the defendant struck six female jurors out of eight.[82] The plaintiff-wife challenged the husband's use of challenges as a violation of the Fourteenth Amendment's Equal Protection Clause.[83] The appellate court held:

> We conclude that in light of the prima facie showing made by appellants, the trial court erred, both in denying appellants motion to dismiss the jury panel without first requiring respondent to demonstrate that his peremptory challenges were exercised on a neutral basis related to the particular case, and in hearing the motion only after the jury had been selected and sworn. This error compels reversal of both judgments.[84]

Another landmark peremptory challenge case of 1991 is *Hernandez v. New York*.[85] There, petitioner was "convic[ted] on two counts of attempted murder and two counts of criminal possession of a weapon."[86] The issue before the court was the prosecutor's use of peremptory challenges to strike four Latino venire members.[87] The prosecutor stated his reason for exclusion was the concern for the Latinos ability to "listen and follow the inter-

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77. Edmonson, 500 U.S. at 614.

78. *Id.* at 617.

79. *Id.* at 619.

80. *Di Donato v. Santini*, 283 Cal. Rptr. 751 (Cal.Ct. App.1991).

81. *Id.*

82. *Id.* at 754.

83. *Id.* at 753.

84. *Id.* at 764.

85. *Hernandez v. New York*, 500 U.S. 352, (1991) (holding that trial court was justified in concluding that the prosecution did not discriminate on the basis of race when they peremptorily challenged Latino Spanish-speaking juror because he was not likely to defer to the official translation).

86. *Id.* at 355.

87. *Id.* at 356.

preter."[88] Ultimately, the Supreme Court did not lay fault on the prosecutor because he "offered a race-neutral basis for these peremptory strikes."[89]

In 1992, the Supreme Court heard *Georgia v. McCollum*.[90] In this case, three Caucasians were charged with assaulting two African-Americans.[91] Before jury selection, "the prosecution moved to prohibit respondents from exercising peremptory challenges in a racially discriminatory manner."[92] The respondents argued that the circumstances of their case gave them the right to exclude African-Americans citizens from the jury pool.[93] In response, the Supreme Court held, "that the constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."[94]

Two interesting cases the following year were *State v. Davis* and *United States v. Santiago-Martinez*. In the former, an African-American man was indicted for robbery and peremptory challenges based on the religion of venire members were at issue.[95] During *voir dire*, the prosecutor excused one African-American juror.[96] According to the prosecutor, the juror was struck because he was a Jehovah's Witness not because he was African-American.[97] On appeal, the Supreme Court of Minnesota held that this particular use of a peremptory challenge was not purposefully discriminatory.[98] Thus, in Minnesota, the attempt to extend *Batson* to include religion failed.

In *U.S. v. Santiago-Martinez*, the issue revolved around peremptory challenges against obese jurors.[99] Here, two defendants were arrested and charged with knowingly and willfully possessing cocaine with the intent to distribute.[100] The defendant questioned the prosecutor's use of peremptory challenges of three obese jurors. Counsel for the defense argued the prosecutors were purposely excluding obese jurors that might be sympathetic to the defense.[101] Ultimately, the trial court and Ninth Circuit Court of Appeals agreed on the

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88. *Hernandez v. New York*, 500 U.S. 352, (1991) (holding that trial court was justified in concluding that the prosecution did not discriminate on the basis of race when they peremptorily challenged Latino Spanish-speaking juror because he was not likely to defer to the official translation).
89. *Id.* at 361.
90. *Georgia v. McCullom*, 505 U.S. 42 (1992).
91. *Id.* at 44.
92. *Id.* at 44-45.
93. *Id.* at 45.
94. *Id.* at 59.
95. *State v. Davis*, 504 N.W. 2d 767 (Minn. 1993).
96. *Id.* at 768.
97. *Id.*
98. *Id.* at 771.
99. *State v. Davis*, 58 F.3d 422 (1993).
100. *Id.*
101. *Id.*

central issue. The Ninth Circuit opined, "the equal protection analysis in *Batson* does not apply to prohibit peremptory strikes on the basis of obesity."[102]

The landmark case of *J.E.B. v. Alabama Ex Rel. T.B.* (1994), involved peremptory challenges based on gender. There, "on behalf of relator *T.B.*, the mother of a minor child, respondent state of Alabama filed a complaint for paternity and child support against petitioner *J.E.B.*"[103] During trial, the state used nine of its ten peremptory strikes to remove male jurors. As a result, the selected jurors were all female.[104] The Supreme Court held "equal opportunity to participate in the fair administration of justice is fundamental to our democratic system."[105] In addition, the Supreme Court stated, "[t]he equal protection clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man."[106]

In *Purkett v. Elem*, Elem, an African-American respondent, was convicted of second-degree robbery.[107] During voir dire, Elem questioned the "prosecutor's use of peremptory challenges to strike two black men from the jury panel, an objection arguably based on *Batson*."[108] Interestingly, the prosecutor stated:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt, hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also had a mustache and a goatee type beard. Those are the only two people on the jury . . . with facial hair. . . . And I don't like the way they look, with the way the hair is cut, both of them. And the mustaches and beards look suspicious to me.[109]

The court responded by stating the second step of the *Batson* test is to offer any neutral explanation whether silly, superstitious, or implausible.[110] Thus, the prosecutor satisfied the requirement.

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102. *State v. Davis*, 58 F.3d 422 (1993).
103. *J.E.B. v Alabama Ex Rel. T.B.*, 511 U.S. 127 (1994).
104. *Id.* at 129.
105. *Id.* at 145.
106. *Id.* at 146.
107. *Purkett v. Elem*, 514 U.S. 765 (1995).
108. *Id.* at 766.
109. *Id.* at 771.
110. *Id* at 775.

In *People v. Morales*,[111] the Appellate Court of Illinois ruled that a prosecutor could use a peremptory challenge to strike a Latino juror that lived in a neighborhood permeated with gangs and gang activity.[112] However, the court also ruled that the use of a peremptory challenge to strike a Latino juror with a thick Spanish accent was pretext for race discrimination.

In *Lewis v. Bennett,* the prosecutor offered explanations like "inattentiveness," being "single with four children" and "terse" responses for using peremptory challenges to strike two African-American jurors.[113] Conversely, the prosecutor was primarily concerned with selecting jurors who "gave full attention; [were] married, ha[d] children, [are] a member of the community. That's what I'm looking for."[114] The trial judge granted the prosecutor's peremptory challenges and the appeal court upheld the judge's ruling.

In 2003, the Supreme Court once again revisited the issue of peremptory challenges in *Miller-El v. Cockrell.*[115] There, the prosecution used its peremptory strikes to strike ten of eleven eligible African-American jurors. In this capital case, the prosecutor used a more aggressive form of questioning towards African-American jurors than toward other jurors. Justice Kennedy, who delivered the majority opinion, suggested that "the manner in which members of the venire were questioned varied by race."[116] Ultimately, the Court concluded that "even though the prosecution's reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and biased on racial considerations."[117]

This case is perhaps the best illustration of the *Batson* folly. *Batson's* logic is that "purposeful" discrimination is the only discrimination worth ameliorating. Again, given the findings in the realm of social psychology, most discriminatory behavior is done unconsciously, so purposefulness will be difficult if not impossible to show.

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111. *People v. Morales*, 719 N.E.2d 261 (1999) (holding that reasonable jurists could disagree on whether the prosecutor's use of peremptory challenges was purposeful discrimination).

112. *Id.* at 261.

113. *Lewis v. Bennett*, 435 F.Supp.2d 184 (2006) (crediting prosecutor's "inattentive" justifications for peremptory challenges as race-neutral justification).

114. *Id.* at 191.

115. *Hernandez v. New York*, 537 U.S. 322 (2003).

116. *Id.* at 332.

117. *Id.* at 343.

IV. SOCIO-PSYCHOLOGICAL FACTORS IN ACTION

As discussed *infra*, a prosecutor's attitudes, and use of stereotypes can produce biases. If those biases remain unchecked they can blossom into discrimination. *Batson's* progeny provide tangible examples of this.

In *Hernandez v. New York*, the U.S. Supreme Court promoted a stereotype that bilingual jurors are incapable of following the official translation and being a capable juror.[118] In *People v. Morales*, the prosecutor used a peremptory challenge to remove a Latino juror who lived in a neighborhood with gangs and gang activity.[119] Again, the court permitted this discrimination based on a clear example of social categorization and stereotypes. Due to the jurors address, prosecutors concluded that the juror might be overly sympathetic to and identify too closely with the defendant. Using the social psychology framework, we can see that the prosecutor viewed jurors from gang-infested neighborhoods as "out-group persons" and therefore not suitable for jury service. Moreover, the prosecutor's attempt to strike a Latino juror with a thick Spanish accent in the same case illustrates the depth and breadth of the stereotype and broadens the "out-group persons" to include venire persons with Spanish accents.

In *Lewis v. Bennett* we are given a clear illustration of the "in-group" and "out-group" principles at play. There, the prosecutor associated positive characteristics to the in-group (Whites) and negative characteristics to the out-group (Blacks). The in-group "gave full attention, were married, had children, were members of the community" while the out-group was "inattentive," "single with four children," and provided "terse" responses.[120]

In *Miller-El v. Cockrell,* the Supreme Court found: 1) disparate questioning along racial lines; 2) questionable use of jury shuffling; and 3) historic evidence of racial discrimination by the District Attorney's office.[121] Nonetheless, the Court still had difficulty concluding that the prosecution's use of peremptory challenges was purposeful discrimination based on race. For example, in his concurrence, Justice Scalia described this as a "very close case."[122] Justice Thomas, the sole dissenter, was "not persuaded" and found "no purposeful discrimination."[123]

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118. Hernandez, 537 U.S. at 352.
119. *People v. Morales*, 719 N.E.2d at 269.
120. *Lewis v. Bennett*, 435 F.Supp.2d at 191.
121. *Miller-El v. Cockrell*, 537 U.S. 322 at 344-46.
122. *Id.* at 348.
123. *Id.* at 354.

V. FUTURE OF PEREMPTORY CHALLENGES

The under-representation of Latinos on juries is the result of socio-psychological concepts that undermine the individual and ultimately lead to discriminatory behavior by members of the legal system. In courts throughout the United States, attorneys are peremptorily challenging venire persons in a discriminatory manner. Latinos are no exception. As demonstrated, this behavior is not new. Before *Batson*, such conduct occurred routinely. However, since the *Batson* decision, others rights have been violated. The driving mechanism for this behavior are socio-psychological factors such as attitude, social categorization, stereotypes, and discrimination. Ultimately, it does not appear likely that courts will always be able to regulate a problem that frequently occurs on the unconscious level. Therefore, perhaps it is time to eliminate the use of peremptory challenges in all criminal and civil trials.