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## Batson Challenges and the Jury Project: Is New York Ready to Eliminate Discrimination From Criminal Jury Selection?

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# **BATSON CHALLENGES AND THE JURY PROJECT: IS NEW YORK READY TO ELIMINATE DISCRIMINATION FROM CRIMINAL JURY SELECTION?**

The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.<sup>1</sup>

Americans have long regarded the right to “trial by jury” as fundamental and inalienable.<sup>2</sup> The underlying purpose of this right is to eliminate potential prejudice and bias and to establish fair and impartial juries.<sup>3</sup> To attain this end, both the prosecution

<sup>1</sup> *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922).

<sup>2</sup> See U.S. CONST. amend. VI. The Sixth Amendment provides that: “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 . . . .” *Id.*; *Nebraska Press Ass’n. v. Stuart*, 427 U.S. 539, 572 (1976) (White, J., concurring) (noting that right to fair trial by jury of one’s peers is unquestionably sacred and precious safeguard embodied in Bill of Rights); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (noting that “trial by jury in criminal cases is fundamental to the American scheme of justice”); see also *Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (stating that right of jury trial in civil cases is “fundamental and sacred” [that it] “should be jealously guarded by the courts” (quoting *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942))); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979).

[I]n the Declaration of Rights adopted by the first Continental Congress in October of 1774, it is recognized that the right of trial by jury was so important to the Colonists that its deprivation was a leading grievance leading to the break with England by stating that “the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”

*Id.* (quoting *JOURNALS OF CONTINENTAL CONGRESS* 69 (1904)); *Green v. United States*, 356 U.S. 165, 215 (1958) (Black, J., dissenting) (stating that jury service guards rights of all parties and preserves democratic element of law).

<sup>3</sup> See 21A AM. JUR. 2D *Criminal Law* § 686 (1981) (stating that “the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors, and that due process requires that the accused receive a trial by an impartial jury . . . free from outside influences” (citing *Turner v. Louisiana*, 379 U.S. 466, 471 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966)); see also *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992) (recognizing constitutional guarantee of impartial jury and fair trial); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (indicating that purpose of jury is to guard against exercise of arbitrary power by protecting defendant against overzealous or mistaken prosecutor or biased response of judge); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (stating that American tradition of trial by jury contemplates impartial jury drawn from cross-section of community).

and defense attorneys rely, in part, on peremptory challenges.<sup>4</sup> A peremptory challenge is defined as the "right to challenge a juror without assigning, or being required to assign, a reason for the challenge."<sup>5</sup> Although the right to use peremptory challenges is

<sup>4</sup> See Angela J. Mason, Note, *Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge's Coffin?*, 29 GA. L. REV. 493, 493 (1995). American lawyers not only regard the peremptory challenge as a means of empaneling a fair and impartial jury but also as a means of exercising their instincts. *Id.*; Jay M. Zitter, Annotation, *Use of Peremptory Challenges to Exclude Ethnic & Racial Groups, Other Than Black Americans, from Criminal Jury—Post-Batson State Cases*, 20 A.L.R. 5TH 398, 413 (1994) (noting that considerable amounts of time and energy are spent in attempting to achieve satisfactory jury by both prosecutors and defense counsel); see also J. Suzanne B. Chambers, Note, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569, 570-73 (1995) (describing process involved in putting jury together). Attorneys rely on "suspicion, experience, stereotypes, and instinct" when employing the peremptory challenge. *Id.* at 572; Brian E. Leach, Comment, *Extending Batson v. Kentucky to Gender and Beyond: The Death Knell for the Peremptory Challenge?*, 19 S. ILL. U. L.J. 381, 383 (1995) (explaining that peremptory challenges are one of criminally accused's most important privileges). But see Herald P. Fahringer, "In the Valley of the Blind"—*Jury Selection in a Criminal Case*, 3 TRIAL DIPL. J. 34, 34 (1980) (stating that attorneys strive for favorability and not impartiality in jury selection); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 230-36 (1986) (expressing view that peremptory challenges are not used by attorneys to create impartial juries but favorable juries). But cf. Felice Banker, Note, *Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges from Jury Selection*, 3 J.L. & POL'Y 605, 610 (1995). The English Parliament did away with the prosecutor's peremptory in 1305. *Id.* Due to jury stacking by attorneys, the 1988 Criminal Justice Act of Parliament "abrogated the defendant's right to use peremptory challenges entirely." *Id.* See generally Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369, 371-74 (1992) (discussing downfall of peremptory challenge in England).

<sup>5</sup> See BLACK'S LAW DICTIONARY 1136 (6th ed. 1990); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (stating that peremptory challenges allow parties to exclude persons who otherwise would satisfy requirements for service on petit jury); *United States v. Carlton*, 456 F.2d 207, 208 (5th Cir. 1972) (per curiam) (indicating that, by definition, peremptory challenge can be made without assigning cause); *United States ex rel. Dixon v. Cavell*, 284 F. Supp. 535, 537 (E.D. Pa. 1968) (noting that peremptory challenges, by definition, may be exercised by counsel within their discretion); George F. Gabel, Jr., Annotation, *Use of Peremptory Challenges to Exclude Ethnic and Racial Groups, Other than Black-Americans, from the Criminal Jury—Post-Batson Federal Cases*, 110 A.L.R. FED. 690, 695 (1994) (recognizing that right of peremptory challenges is right of rejection that is exercised without inquiry into motive). See generally Banker, *supra* note 4, at 609-10 (noting that English common law allowed criminal defendant 35 peremptory challenges while prosecution was allowed unlimited number of strikes); Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 953 (1994) (explaining that practice of allowing peremptory challenges was rooted in English common law and transported into American colonies); Mason, *supra* note 4, at 496-97 (describing origin and development of peremptory challenges in United States).

not constitutionally guaranteed,<sup>6</sup> both federal<sup>7</sup> and state statutes provide for their use.<sup>8</sup>

The United States Supreme Court addressed the discriminatory use of the peremptory challenge during jury selection in *Batson v. Kentucky*.<sup>9</sup> In *Batson*, a prosecutor used his peremptory chal-

<sup>6</sup> See *McCullum*, 112 S. Ct. at 2358 (indicating that peremptory challenges are not constitutionally protected fundamental rights); *Swain v. Alabama*, 380 U.S. 202, 214-17 (1965) (explaining that peremptory challenges, although not incorporated in United States Constitution, were considered right in American Colonies); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 346, 346 (Katz ed. 1979) (discussing how peremptory challenges were permitted to be exercised by defendant in capital cases); 21A AM. JUR. 2D *Criminal Law* § 684 (1981) (stating that "[a]lthough there is no language in the Constitution that requires the right to peremptory challenges, such a challenge is one of the most important of the rights secured to the accused").

<sup>7</sup> See 28 U.S.C. § 1870 (1994) (stating that both plaintiff and defendant are permitted three peremptory challenges in federal civil cases); FED. R. CRIM. P. 24(b). The Federal Rules of Criminal Procedure provide that:

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to six peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to three peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

*Id.*; see also *Bell v. Baker*, 954 F.2d 400, 403 (6th Cir. 1992) (Nelson, J., concurring) (stating that tradition of peremptory challenges for prosecution and defendant was reflected in federal statute enacted by same Congress that proposed Bill of Rights). See generally JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* 269 (2d ed. 1990) (outlining jury selection process and use of peremptory challenge); V. HALE STARR & MARK MCCORMICK, *JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAWS AND METHODS* 52-55 (2d ed. 1993) (same).

<sup>8</sup> See, e.g., N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1993). The statute provides, in pertinent part:

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.
2. Each party must be allowed the following number of peremptory challenges:
  - (a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected.
  - (b) Fifteen for the regular jurors if the highest crime charged is a class B or C felony, and two for each alternate juror to be selected.
  - (c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

*Id.*; see also N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1993) (providing reasons why courts may grant parties challenges for cause in criminal cases); N.Y. JUD. LAW § 510 (McKinney 1992) (setting forth qualifications needed to be eligible to serve as juror). See generally Leach, *supra* note 4, at 384 (noting that right to exercise peremptory challenges is statutorily guaranteed in most states).

<sup>9</sup> 476 U.S. 79 (1986); see *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 (1994) (recognizing that discriminatory use of peremptories would result in unfair verdicts); *Georgia v. McCollum*, 112 S. Ct. 2348, 2357 (1992) (acknowledging prior holding of Court that deemed discriminatory use of peremptory challenges by defendant violation of equal protection); *Powers v. Ohio*, 499 U.S. 400, 401 (1991) (noting that discriminatory use of peremptory challenges causes cognizable injury to defendant); *Holland v. Illinois*, 493 U.S. 474, 502 (1990) (recognizing necessity of trial courts to be aware of discriminatory abuses of

lenges to strike all four African-American persons on the venire, resulting in a jury composed of only white persons.<sup>10</sup> The Court held that the prosecution's use of racially based strikes violated the Equal Protection Clause of the Fourteenth Amendment.<sup>11</sup> The Court's creation of the "Batson Challenge"<sup>12</sup> subjected the exclusively procedural subject of peremptory challenges to an influx of substantive commentary.<sup>13</sup> Recently, the peremptory challenge

peremptory challenges); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (enforcing mandate of equal protection through awareness of possible discriminatory use of peremptory challenges); *Swain*, 380 U.S. at 203-05 (establishing that deliberate denial of particular juror based on race violates Equal Protection Clause, but this discrimination may not be assumed or merely asserted). See generally David B. Sweet, Annotation, *Supreme Court's Views As to Use of Peremptory Challenges to Exclude From Jury Persons Belonging to Same Race As Criminal Defendant*, 90 L. Ed. 2d 1078, 1080 (1988) (discussing how traditional use of peremptory challenges was modified by Supreme Court for constitutional reasons).

<sup>10</sup> *Batson*, 476 U.S. at 83. In *Batson*, a jury of whites convicted a black defendant of second degree burglary and receipt of stolen goods. *Id.* at 82-83. The defendant, on appeal to the United States Supreme Court, argued, that the prosecutor's use of the peremptory challenge to strike all persons from the jury violated his right to equal protection of the laws as secured by the Fourteenth Amendment. *Id.* at 83.

<sup>11</sup> See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*; *Batson*, 476 U.S. at 89. The Court reversed and remanded the case, holding that the Equal Protection Clause did not permit the prosecutor to challenge jurors due to their race or on the belief that African-American jurors as a group would be unable to impartially consider the State's case against an African-American defendant. *Id.*

<sup>12</sup> See *Hernandez v. New York*, 500 U.S. 352, 376 (1991) (Steven, J., dissenting) (referring to *Batson* challenge as defendant's mode of challenging peremptories in jury selection); *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (recognizing *Batson* challenge as dispositive method for challenging alleged discriminatory use of peremptories). The "Batson Challenge" is a catch phrase that refers to the procedural framework, that the Supreme Court put forward in *Batson*, to assist lower courts in deciding if prosecutor's have violated the Equal Protection Clause in their use of peremptory challenges in criminal cases. *Id.*

<sup>13</sup> See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156-57 (1989) (talking about several Supreme Court decisions regarding jury selection process); Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1142-43 (1993) (discussing need for *Batson* to be extended to gender-based peremptory challenges); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 808-10 (1989) (arguing that defendant's use of racially based peremptory challenges should be allowed, while prosecution's use of said challenges should be prohibited); Bonnie L. Mayfield, *Batson and Groups Other Than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377, 396-01 (1988) (discussing possible expansion of *Batson* through use of strict scrutiny review in jury selection process); Jere W. Morehead, *Prohibiting Race-Based Peremptory Challenges: Should the Principle of Equal Protection Be Extended to Private Litigants?*, 65 TUL. L. REV. 833, 841-48 (1991) (advocating use of peremptory challenges in civil cases); Joel H. Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 COLUM. HUM. RTS. L. REV. 177, 178 (1991) (arguing that injury to excluded juror and community outweighs any injury to defendant); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 727 (1992) (arguing that harm to excluded juror[s] takes precedence over harm to community); Deborah Zalesne & Kinney Zalesne, *Saving the Peremptory Challenge: The Case for a Narrow Interpretation of McCollum*, 70 DENV. U. L. REV. 313, 321-22 (1993) (arguing that harm to defendant takes precedence over harm to excluded jurors and black defendant's

debate has prompted a range of responses, from staunch disapproval of the Court's restrictions on these challenges<sup>14</sup> to calls for the elimination of the peremptory challenge.<sup>15</sup> Since the peremptory challenge is not guaranteed by the Constitution, legislatures have the power to address definitively the problems arising from their use.<sup>16</sup> In the face of legislative inaction, however, Judith S. Kaye, Chief Judge of the New York State Court of Appeals, commissioned a study in 1994, known as the Jury Project, to examine all aspects of the jury system.<sup>17</sup>

This Note recognizes the discretion available to the states in developing the peremptory challenge and suggests measures which should be taken by both New York State and the entire country to eliminate class-based forms of discrimination in jury selection. Part One examines the United States Supreme Court decisions that comprise *Batson* and its progeny, as well as lower federal and state court decisions that have expanded the *Batson* rule. Although *Batson* and subsequent cases sought equal protection for

use of race-based strikes should be preserved); Robert L. Harris Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1060 (1991) (explaining that protection of all qualified jurors from discrimination is of utmost importance).

<sup>14</sup> See, e.g., Chambers, *supra* note 4, at 595-96 (noting use of *Batson* to eliminate racial and gender discrimination is warranted, but extension to peremptory challenges based on religion should not be allowed); Leach, *supra* note 4 (arguing that *Batson* should not be extended beyond race-based peremptory challenges).

<sup>15</sup> See, e.g., Banker, *supra* note 4, at 607 (asserting that New York legislature should abolish peremptory challenges to ensure elimination of discrimination from jury selection process); Gerald A. Bunting & Lesley A. Reardon, Note, *Once More into the Breach: The Peremptory Challenge after Edmonson v. Leesville Concrete Co.*, 7 ST. JOHN'S J. LEGAL COMMENT. 329, 358 (1991) (explaining that *Batson* and its offspring provide uneven protection and that best alternative to achieve fair and impartial juries is elimination of peremptory challenges); Carlson, *supra* note 5, at 1003-04 (stating that replacement of existing, watered down peremptory challenge with expanded challenges for cause system would best promote fair and impartial juries); Gurney, *supra* note 4, at 244 (arguing that *Batson* does not go far enough and abrogation of peremptory challenges is required for impartial juries); Jonathan B. Mintz, Note, *Batson v. Kentucky: A Halfstep in the Right Direction (Racial Discrimination and Peremptory Challenges under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1046 (1986) (calling for elimination of peremptory challenge to ensure constitutional protection of minorities); David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of Batson's Three Harms and the Peremptory Challenge*, 94 ANN. SURV. AM. L. 203, 204 (1995) (suggesting that three harms from discriminatory use of peremptory challenges, harm to defendant, harm to excluded juror and harm to community, can only be avoided by eliminating peremptory challenges).

<sup>16</sup> See *supra* notes 6-8 and accompanying text (describing how peremptory challenges are not constitutionally guaranteed rights, but are rights secured through federal and state statutes).

<sup>17</sup> THE JURY PROJECT: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 66 (1994) [hereinafter THE JURY PROJECT] (suggesting that reduction in number of peremptory challenges will reduce number of *Batson* violations while preserving peremptory challenge as useful tool of attorneys).

all parties in both criminal and civil jury selection, this Note asserts that this line of jurisprudence has replaced the attainable goal of equal protection with the elimination of discrimination against selective groups. Part Two focuses on New York's treatment of *Batson* and discusses the Jury Project's report and recommendations to the Chief Judge of the State of New York. This Note will analyze the Jury Project, concluding that its proposals will only perpetuate discrimination in the jury selection process. Finally, Part Three seeks an alternative to the ineffectual recommendations of the Jury Project and instead advocates that New York should eliminate the peremptory challenge and implement the "Revised For-Cause Challenge" system.

## I. THE PEREMPTORY CHALLENGE AND THE SUPREME COURT

### A. *The Pre-Batson Era*

In 1880, just twelve years after the Fourteenth Amendment was enacted,<sup>18</sup> the Supreme Court faced the issue of whether an African-American man had the right to serve on a jury.<sup>19</sup> In *Strauder v. West Virginia*,<sup>20</sup> at the trial level, an all white jury convicted the defendant, an African-American, of murder.<sup>21</sup> On appeal, the Supreme Court addressed the constitutionality of a West Virginia statute which provided that only white male citizens over the age of twenty-one were eligible for jury service.<sup>22</sup> The Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment, and stated that the right of every white man to be judged by a jury of his peers should not be withheld from African-American men.<sup>23</sup> The *Strauder* Court did not address the issue of

<sup>18</sup> See U.S. CONST. amend. XIV (interpreting equal protection clause of Fourteenth Amendment to prevent prosecution and defendant from exercising peremptory challenges in discriminatory fashion). The Fourteenth Amendment was ratified on July 28, 1868. *Id.*

<sup>19</sup> *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880).

<sup>20</sup> 100 U.S. 303 (1880).

<sup>21</sup> *Id.* at 304.

<sup>22</sup> *Id.* at 305. The Court held that the exclusion of black males from a jury solely on the basis of race was "repugnant to the Constitutional guarantee of the Equal Protection Clause afforded by the Fourteenth Amendment." *Id.* at 310.

<sup>23</sup> *Id.* at 309. The Court stated that "the very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id.* at 308.

peremptory challenges, but it subjected the American jury selection process to judicial review and constitutional challenges.<sup>24</sup>

Eighty-five years later, in *Swain v. Alabama*,<sup>25</sup> the Supreme Court first addressed the discriminatory nature of peremptory challenges. In *Swain*, the Supreme Court faced the issue of whether the prosecutor's use of peremptory challenges to exclude blacks from the jury violated the equal protection rights of an African-American defendant.<sup>26</sup> The defendant, a nineteen-year old African-American convicted of the rape of a white woman, was sentenced to death by an all-white jury.<sup>27</sup> The record revealed that the prosecutor used peremptory challenges to strike six African-Americans on the jury panel.<sup>28</sup> The trial court denied the defendant's motions to strike the jury venire and to void the jury based on the prosecutor's invidious discrimination in the jury selection process.<sup>29</sup> The Alabama Supreme Court affirmed the conviction.<sup>30</sup>

The United States Supreme Court affirmed and refused to restrict a prosecutor's right to use peremptory challenges if the purpose was to create a favorable jury.<sup>31</sup> The *Swain* Court intended to protect the peremptory challenge's utility in creating fair and impartial juries.<sup>32</sup> The Court reasoned that a defendant must establish a prima facie case of purposeful discrimination by proving

<sup>24</sup> See *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (stating that *Strauder* laid down groundwork for Court's efforts to eliminate discrimination from jury selection process); *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) (reasoning that jury should be free from bias for or against defendant to ensure that "scales of justice between defendant and state are evenly held"); *Neal v. Delaware*, 103 U.S. 370, 397 (1881) (holding that state's officers could not disqualify blacks from jury service solely for want of intelligence, experience or moral integrity).

<sup>25</sup> 380 U.S. 202 (1965).

<sup>26</sup> *Id.* at 209.

<sup>27</sup> *Id.* at 203.

<sup>28</sup> *Id.* at 205. Even though the defense established that no black person had served on a jury in Talladega, Alabama for over fifteen years, the Supreme Court held that this absence did not prove a systematic pattern of exclusions. *Id.* at 226.

<sup>29</sup> *Id.* at 203.

<sup>30</sup> *Swain v. Alabama*, 380 U.S. 202, 203 (1965).

<sup>31</sup> *Id.* at 224. The Court reasoned that the selection of prospective jurors can be somewhat haphazard, but "an imperfect system is not equivalent to purposeful discrimination based on race." *Id.* at 209. However, the Court also acknowledged that it was not deemed a justified end to strike blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial," or to deny blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* at 224.

<sup>32</sup> *Id.* at 222. The Court defended the peremptory challenge as a necessary tool to enable prosecutors and defendants to strike jurors when unable to challenge for cause. *Id.* at 219-20. The Court noted "while challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for real or imagined partiality that is less easily designated or demonstrable." *Id.* at 220 (citation omitted).



that the prosecutor had manipulated the peremptory challenge system.<sup>33</sup> A defendant must show that a prosecutor had previously engaged in the practice of continually removing African-Americans who had been chosen as qualified jurors.<sup>34</sup> Based on that standard, the Supreme Court could not conclude that the defendant's equal protection rights had been violated in the absence of proof of purposeful discrimination beyond the facts of the case at bar.<sup>35</sup> Placing such a high burden of proof on defendants allowed prosecutors to use the peremptory challenge discriminatorily and without fear of constitutional reprise.<sup>36</sup> Despite *Swain*, however, several states abandoned that rationale and lowered the standards of proof by which to establish the discriminatory use of peremptory challenges.<sup>37</sup>

### B. *Batson v. Kentucky*

Twenty years after *Swain*, in *Batson v. Kentucky*,<sup>38</sup> the Supreme Court finally attempted to remedy the discriminatory use of peremptory challenges. The *Batson* Court held that the prosecutor's exercise of racially motivated peremptory challenges

<sup>33</sup> *Id.* at 223-24.

<sup>34</sup> *Id.* at 223.

<sup>35</sup> *Swain v. Alabama*, 380 U.S. 202, 224-28 (1965).

<sup>36</sup> See, e.g., *People v. Wheeler*, 583 P.2d 748, 767-68 (Cal. 1978) (noting that in jurisdictions where court records do not reflect jurors' race and where voir dire proceedings are not transcribed, the *Swain* burden would be insurmountable); see also Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 365 (1990). The court explained that *Swain* "imposed a nearly insurmountable burden on defendants attempting to establish the discriminatory use of peremptory challenges" *Id.* at 365. The court went on to note that "in the twenty-one years after *Swain*, only two cases succeeded in establishing a prima facie showing of discriminatory use of peremptory challenges by the prosecution." *Id.* (citing *State v. Brown*, 371 So. 2d 751, 754 (La. 1979); *State v. Washington*, 375 So. 2d 1162, 1164-65 (La. 1979)).

<sup>37</sup> See, e.g., *Riley v. State*, 496 A.2d 997, 1012 (Del. 1985) (stating that use of peremptory challenges to exclude jurors solely on basis of race violated criminal defendant's right to impartial jury under Art. I, § 7 of the Delaware Constitution), *cert. denied*, 478 U.S. 1022 (1986); *State v. Neil*, 457 So. 2d 481, 487 (Fla. 1984) (accepting rationale formulated in *Wheeler* but confining it to race-based challenges); *Commonwealth v. Soares*, 387 N.E.2d 499, 515-16 (Mass.) (holding that peremptory challenges based on "group bias" were not allowable; listing sex, race, color, creed or national origin as groups that could not form basis for exclusion from jury), *cert. denied*, 444 U.S. 881 (1979); *Wheeler*, 583 P.2d at 761. The California Supreme Court held that challenges based on a "group bias" were discriminatory and defined "group bias" as a presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." *Id.* The Court reasoned that the party objecting to the peremptory challenge must "establish that the persons excluded are members of a cognizable group" and that "a strong likelihood" exists "that such persons are being challenged because of their group association rather than any specific bias." *Id.* at 764.

<sup>38</sup> 476 U.S. 79 (1986).

violated the Equal Protection Clause of the Fourteenth Amendment.<sup>39</sup> In *Batson*, a Kentucky trial court convicted the defendant of second-degree burglary and receipt of stolen goods.<sup>40</sup> On appeal to the Supreme Court of Kentucky, the defendant claimed that his Sixth Amendment right to a jury drawn from a cross section of the community had been violated.<sup>41</sup> The Court, however, relying on *Swain*, upheld the convictions.<sup>42</sup> On certiorari to the United States Supreme Court, Justice Powell stated that *Swain* needed to be reexamined due to the "burden placed on a criminal defendant" alleging discriminatory exclusion of jury members through the use of peremptory challenges.<sup>43</sup> The Court rejected the heavy burden of proof promulgated by *Swain*, and brought to fruition that Court's emphasis on securing equal protection for the defendant.<sup>44</sup> Under the *Batson* standard, the defendant need not prove the prosecution's systematic practice of excluding African-Americans from the petit jury.<sup>45</sup> The defendant's prima facie case for a claim of discrimination can be based "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."<sup>46</sup>

To establish a prima facie case of purposeful discrimination in the selection of the jury, the Court placed the initial burden of proof on the defendant to show a pattern of challenges directed against potential African-American jurors.<sup>47</sup> The burden then

<sup>39</sup> See *Batson*, 476 U.S. at 89. The Court proclaimed that "the state may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process' . . ." *Id.* at 88 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)); see also *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (stating that barring groups of people from jury service based not on their inability to serve as jurors, "but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an 'appearance of unfairness'").

<sup>40</sup> See *Batson*, 476 U.S. at 83.

<sup>41</sup> See *id.*; see also *supra* notes 37-38 and accompanying text (discussing how state courts departed from *Swain* rationale).

<sup>42</sup> See *Batson*, 476 U.S. at 84.

<sup>43</sup> *Batson v. Kentucky*, 476 U.S. 79, 82 (1986). Under *Swain*, the burden of proof was on the defendant to show that the prosecution improperly exercised its peremptory challenges. *Id.* at 91. The defendant was required to put forth evidence that the prosecution had "repeatedly str[uck] blacks over a number of cases." *Id.* at 92. The *Batson* Court characterized this as placing a "crippling burden of proof" on defendants. *Id.*

<sup>44</sup> *Id.* at 84 n.4. The Court recognized that the "resolution of petitioner's claim properly turns on application of equal protection principles." *Id.*

<sup>45</sup> *Id.* at 96.

<sup>46</sup> *Batson*, 476 U.S. at 96.

<sup>47</sup> *Id.* at 93. The Court explained that in an equal protection case, the burden is on the defendant to prove purposeful discrimination. *Id.*; see, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (noting that party alleging intentional discrimination carries initial burden of proof); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967)

shifts to the prosecution to provide a race-neutral explanation for the peremptory challenges.<sup>48</sup> The Court stated that it would not permit explanations to consist of assumptions that African-American jurors will be partial to African-American defendants or of affirmances from the prosecutor that the jurors were struck in good faith.<sup>49</sup>

### C. Federal and State Treatment of the Batson Rationale

In *Holland v. Illinois*,<sup>50</sup> the Court considered extending the *Batson* rationale to jurors who were of a race different from the criminal defendant.<sup>51</sup> In *Holland*, the petitioner, a white man, alleged that the prosecution's use of peremptory challenges to strike two African-American jurors violated his Sixth Amendment right to a fair trial.<sup>52</sup> The Court held that the Sixth Amendment did not restrict the exclusion of a racial group through the use of peremptory challenges.<sup>53</sup> In so holding, the Court reasoned that the ab-

(stating that defendant must establish prima facie case that members of his race were "substantially underrepresented" on venire from which his jury was selected and that jury selection practice provided opportunity for discrimination); *Batson*, 476 U.S. at 96. The defendant "first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* (citation omitted). The Court followed the standard articulated in *Castaneda v. Partida*, 430 U.S. 482, 494 (1977), in which it was held that the defendant must demonstrate that he is a member of a racial group with potential for being singled out for differential treatment. *Id.* Second, the defendant is "entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). Finally, the defendant must show that the facts, including any relevant circumstantial evidence, raise an inference that the prosecutor was motivated to use peremptory challenges to exclude persons from the jury due to their race. *Batson*, 476 U.S. at 96. The court noted that the trial court should take into account "any other relevant circumstances." *Id.* "The trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case." *Id.* at 95 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972)).

<sup>48</sup> See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). The Court emphasized that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Id.*

<sup>49</sup> See *id.* at 97-98. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Id.* at 98 (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)). "The prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising said challenges." *Id.* at 98 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

<sup>50</sup> 493 U.S. 474 (1990).

<sup>51</sup> *Id.* at 476.

<sup>52</sup> See *id.* at 477-78. The petitioner sought to establish a prima facie violation of the Sixth Amendment based on the prosecution's effort to exclude potential black jurors by using peremptory challenges. *Id.*

<sup>53</sup> *Id.* at 487. The Court reasoned that the Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of

sence of an equal protection claim mandated that it only address the Sixth Amendment claim as to the possible denial of a trial by an impartial jury.<sup>54</sup>

In *Powers v. Ohio*,<sup>55</sup> however, the Court expanded the *Batson* holding to include situations in which excluded jurors are of a different race than the criminal defendant.<sup>56</sup> In expanding the *Batson* protection to encompass the rights of the potential jurors, the Court placed the "equal protection" of all persons involved in the administration of justice on the highest pedestal.<sup>57</sup>

In its continued expansion of the *Batson* holding, the Supreme Court, in *Georgia v. McCollum*,<sup>58</sup> prohibited the discriminatory use of peremptory challenges by criminal defendants.<sup>59</sup> The Court

innumerable other generalized characteristics." *Id.*; see also *Free v. Peters*, 778 F. Supp. 431, 437 (N.D. Ill. 1991) (stating that *Holland* does not establish right to "venire drawn from a fair cross section of a racially balanced community"). Writing for the Court in *Holland*, Justice Scalia reasoned that "[w]e decline to convert *Batson* from an unexplained departure to an unexplained rule." *Holland*, 493 U.S. at 487 n.3. Justice Scalia was referring to Justice Stevens' contention that an equal protection violation may be present in *Holland*. *Id.* Justice Scalia noted that very rarely, with the exception of *Batson*, does the Court grant *certiorari* on an issue involving one constitutional provision and decide the case based on another constitutional provision which has neither been briefed nor argued. *Id.*

<sup>54</sup> *Holland*, 493 U.S. at 487-88.

<sup>55</sup> 499 U.S. 400 (1991).

<sup>56</sup> See *id.* at 402. In *Powers*, a white defendant was convicted of murder after the prosecution excluded seven blacks from the jury through the use of peremptory challenges. *Id.* at 402-03. On appeal to the Supreme Court, the defendant argued that the equal protection rights of the excluded jurors had been violated by the prosecution's discriminatory use of its peremptory challenges. *Id.* In reversing the conviction, the Court held that a criminal defendant has third-party standing to object to the prosecution's racially motivated use of peremptory challenges even if the defendant and the excluded jurors are not of the same race. *Id.* at 416; see also *Carlson*, *supra* note 5, at 960 (discussing criteria required to support third-party standing).

<sup>57</sup> *Powers*, 499 U.S. at 416. The Court held that "[i]t remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." *Id.*; see also *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (holding that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral" and constitutional); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) (extending right to challenge racially discriminatory peremptory challenges to private litigants in civil trials).

<sup>58</sup> 112 S. Ct. 2348 (1992).

<sup>59</sup> See *id.* at 2353. The Court reasoned that regardless of who uses peremptory challenges in a discriminatory manner, the resulting harm is the same in every case and "the juror is subjected to open and public racial discrimination." *Id.* In *McCollum*, white defendants were charged with assaulting two blacks. *Id.* at 2351. The prosecution moved to prohibit the defense from excluding blacks from the jury and exercising its peremptory challenges in a discriminatory manner. *Id.* The trial court denied the prosecution's motion and the Supreme Court of Georgia affirmed. *Id.* at 2352.

reasoned that this was a natural extension of the "equal protection" provided by *Batson*.<sup>60</sup>

The Supreme Court further extended the *Batson* holding to include the prohibition of gender-based peremptory strikes in *J.E.B. v. Alabama ex rel. T.B.*<sup>61</sup> The Supreme Court concluded that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."<sup>62</sup> The Court, in applying heightened equal protection scrutiny,<sup>63</sup> noted that race- or gender-based discrimination in the jury process causes harm to the litigants, community, and individual jurors who are excluded from the judicial process.<sup>64</sup>

The Supreme Court, however, has refused to address whether peremptories should be expanded further to encompass religious-based peremptories.<sup>65</sup> In *State v. Davis*,<sup>66</sup> the Supreme Court of Minnesota affirmed the trial court's decision to allow a peremptory challenge of a juror on religious grounds.<sup>67</sup> Interestingly, the Minnesota court decided this case prior to the *J.E.B.* decision.<sup>68</sup> In its ruling, the Minnesota court stressed that the Supreme Court had never hinted that the *Batson* ruling should be extended beyond race.<sup>69</sup> In a dissent to the denial of certiorari, Justice Clarence Thomas asserted that the above reasoning was no longer valid because the United States Supreme Court had extended *Batson* and thus, must address the consequences of limiting the use of peremptory challenges.<sup>70</sup>

<sup>60</sup> *McCullum*, 112 S. Ct. at 2353. Regarding the harm to the community, the Court reasoned that, "[b]e it the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could undermine the very foundation of our system of justice—our citizens' confidence in it." *Id.* at 2354.

<sup>61</sup> 114 S. Ct. 1419 (1994). In *J.E.B.*, the defendant in a paternity and child support action objected to the prosecution's peremptory challenges on the ground that they were exercised against male jurors solely because of gender. *Id.* at 1421-22. The trial court rejected the defendant's claim and an all-female jury found him to be the father in question. *Id.* at 1422.

<sup>62</sup> *See id.* at 1421; *see also id.* at 1422 (listing various federal and state courts that have passed judgment on gender-based peremptory challenges).

<sup>63</sup> *See id.* at 1425-26. The Court, in dispelling any query into the value of peremptory challenges as well as the need to eliminate discrimination in the courtroom, reasoned that the only question to consider was "whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury." *Id.* at 1426.

<sup>64</sup> *Id.* at 1427.

<sup>65</sup> 114 S. Ct. 2120 (1994).

<sup>66</sup> 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994).

<sup>67</sup> *See id.* at 772.

<sup>68</sup> *Id.* at 768.

<sup>69</sup> *Id.*

<sup>70</sup> *See Davis*, 114 S. Ct. at 2120-2122. Some courts have been in favor of expanding *Batson* to religion. *Id.*; *United States v. Greer*, 939 F.2d 1076, 1086 (5th Cir. 1991), (explaining that *Batson* applied to race, religion, and national origin) *cert. denied*, 113 S. Ct. 1390

The Supreme Court has never enunciated procedures for lower courts to apply *Batson*, because of the many different jury selection procedures on the state and federal level.<sup>71</sup> Many states, including New York, have defined individual methods for establishing a prima facie case of discrimination.<sup>72</sup> Many federal and state courts are beginning to expand the definition of a "cognizable racial group" by suggesting a more inclusive definition to eliminate discrimination from jury selection, in accordance with the rights provided under the Equal Protection Clause.<sup>73</sup> Opposing judges, interpreting the holding of *Batson* narrowly, assert that ex-

(1993); *State v. Gilmore*, 511 A.2d 1150, 1159-60 (N.J. 1986) (holding that covered classes within *Batson* include creed); *cf. Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (holding Jewish people are protected group under 42 U.S.C. § 1982 (Supp. V 1993)); *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (finding Jewish people as cognizable group for purposes of Sixth Amendment cross-section analysis), *cert. denied*, 493 U.S. 994 (1989); *see also* Mason, *supra* note 4, at 537 (concluding that United States Supreme Court, as evidenced by its refusal to review *Davis*, "has no desire to continue sliding down the slippery slope the *Batson* progeny created"). *But see* Chambers, *supra* note 4, at 609-10 (arguing that *Batson* and *J.E.B.* should not be extended to religion in order to preserve peremptory challenge as necessary tool in eliminating potential jurors with religious biases).

<sup>71</sup> *See* *Batson v. Kentucky*, 476 U.S. 79, 96-97, 99 n.24 (1986); *see also* STARR & McCORMICK, *supra* note 7, at 39-40 (1985) (discussing wide range of different procedures for conducting voir dire examination nationwide).

<sup>72</sup> *See, e.g.,* *People v. Childress*, 81 N.Y.2d 263, 266-67, 614 N.E.2d 709, 711, 598 N.Y.S.2d 146, 148-49 (1993) (establishing minimum requirements to make out prima facie case of discrimination); *People v. Bolling*, 79 N.Y.2d 317, 324, 591 N.E.2d 1136, 1141, 582 N.Y.S.2d 950, 955 (1992) (explaining that showing of discrimination could be proved if member of one group were excluded while others with similar characteristics had been accepted for jury panel); *People v. Jenkins*, 75 N.Y.2d 550, 554 N.E.2d 47, 50, 555 N.Y.S.2d 10, 13 (1990) (holding that pattern of strikes during voir dire can raise inference of discrimination); *see also* *Dunham v. Frank's Nursery & Crafts*, 919 F.2d 1281, 1287 (7th Cir. 1990) (noting that amount of peremptory challenges allowed in single party civil cases is set by statute, while trial judge has broad discretion in determining number and allocation of peremptories in multiparty civil cases), *cert. denied*, 501 U.S. 1205 (1991); *People v. Scott*, 70 N.Y.2d 420, 425, 516 N.E.2d 1208, 1211, 522 N.Y.S.2d 94 (1987).

<sup>73</sup> *See* *United States v. Biaggi*, 909 F.2d 662, 677 (2d Cir. 1990) (finding prima facie case of discrimination when government used its peremptories to exclude Hispanics), *cert. denied*, 499 U.S. 904 (1991); *United States v. Ruiz*, 894 F.2d 501, 506-07 (2d Cir. 1990) (recognizing that Hispanic persons are cognizable racial group for purposes of *Batson*); *United States v. Romero-Reyna*, 889 F.2d 559, 561 (5th Cir. 1989) (holding Hispanics to be cognizable group for purposes of applying rule in *Batson*), *cert. denied*, 494 U.S. 1084 (1990).

The *Batson* definition has also been held to include Native Americans. *See* *United States v. Roan Eagle*, 867 F.2d 436, 440-41 (8th Cir. 1987) (finding that actions of prosecutor in exercising peremptory challenges against American-Indians was violation of *Batson*), *cert. denied*, 490 U.S. 1028 (1989); *United States v. Chalan*, 812 F.2d 1302, 1313-14 (10th Cir. 1987) (finding prima facie case of discrimination by striking American Indians), *cert. denied*, 488 U.S. 983 (1988).

In a pre-*Batson* decision, young people were found to be a cognizable group. *See* *Ciudadnos Unidos v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807, 819-20 (5th Cir. 1980) (holding that young people are cognizable group), *cert. denied*, 450 U.S. 964 (1981).

panding the "cognizable racial group" would eradicate the peremptory challenge.<sup>74</sup>

## II. NEW YORK AND THE PEREMPTORY CHALLENGE

### A. *The New York Response to Batson*

In response to a lack of guidance from the federal courts, New York has developed its own line of case law that aims to reduce racial discrimination in jury selection.<sup>75</sup> In criminal cases, New York has established that neither prosecutors nor defendants may use peremptory challenges to exclude prospective jurors on the basis of membership in a "cognizable racial group."<sup>76</sup> In addition to federal constitutional bases, the Equal Protection and Civil Rights Clauses of the New York State Constitution also support the proposition that racially discriminatory peremptory challenges are invalid.<sup>77</sup>

<sup>74</sup> See *Batson*, 476 U.S. at 123-27 (Burger, C.J., dissenting) (arguing that Courts' "hybrid" equal protection analysis requiring defendant to prove discrimination and state to provide neutral explanation transforms peremptory challenge into challenge for cause); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1435 (1994) (Rehnquist, C.J., dissenting) (reasoning that under Equal Protection Clause, peremptory challenges should be given more weight when sex, and not race, is issue). Courts have found that Italian-Americans do not constitute a "cognizable racial group." See also *United States v. Bucci*, 839 F.2d 825, 833 (1st Cir. 1988) (holding that appellant must demonstrate that ethnic group in question is subjected to discriminatory treatment which begins to qualify the ethnicity as a "cognizable group"), *cert. denied*, 488 U.S. 844 (1988), *appeal after remand*, 884 F.2d 1483 (1989), *cert. denied*, 493 U.S. 1086 (1990); *United States v. Sgro*, 816 F.2d 30, 33 (1st Cir. 1987) (finding defendant failed to prove he was a member of a cognizable racial group and further, refusing to decide whether *Batson* includes ethnic as well as racial groupings), *cert. denied*, 484 U.S. 1063 (1988). *But see* *United States v. Biaggi*, 673 F. Supp. 96, 100-03 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (1988), *cert. denied*, 489 U.S. 1052 (1989) (taking judicial notice that Italian-Americans were cognizable racial group under all common law standards, reasoning that they shared common experiences, culture, religious practices, and culinary practices). Other courts have held that *Batson* should not be extended to religious groups. See *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (holding prosecution's use of peremptory challenges toward Jehovah Witness not prohibited by *Batson*), *cert. denied*, 114 S. Ct. 2120 (1994); *Cesarez v. Texas*, 857 S.W.2d 779, 783 (Tex. Ct. App. 1993) (limiting *Batson* to racial discrimination).

<sup>75</sup> See *supra* notes 71-74 and accompanying text.

<sup>76</sup> See *People v. Scott*, 70 N.Y.2d 420, 423-25, 516 N.E.2d 1208, 1211, 522 N.Y.S.2d 94, 96-97 (1987) (applying *Batson* to prosecutors); *People v. Kern*, 75 N.Y.2d 638, 656-57, 554 N.E.2d 1235, 1246, 555 N.Y.S.2d 647, 657-58 (applying *Batson* to defendants), *cert. denied*, 498 U.S. 824 (1990).

<sup>77</sup> See N.Y. CONST. art. 1, § 11. This provision of the New York State Constitution provides that:

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

*Id.*; N.Y. CIV. RIGHTS LAW § 13 (McKinney 1993). This section of New York Civil Rights Law provides that "[n]o citizen of the state possessing all other qualifications which are or

New York courts have extended the definition of a "cognizable racial group" beyond the standards announced by the Supreme Court.<sup>78</sup> The New York State Court of Appeals, as well as the Appellate Divisions of the Supreme Court of the State of New York, have held that a combination of race and gender or status as a "non-African-American" constitutes a prima facie case of discrimination for a *Batson* challenge.<sup>79</sup> In *People v. Bennett*,<sup>80</sup> the Appellate Division, Second Department, reversed Bennett's conviction on the grounds that the prosecutor had exercised peremptory challenges to eliminate African-American women from the jury panel in a discriminatory manner.<sup>81</sup> Further, in *People v. Duncan*,<sup>82</sup> the Fourth Department also held that the use of peremptory challenges against African-American venirewomen was a prima facie case of discrimination.<sup>83</sup> In *People v. Stiff*,<sup>84</sup> the Second Department announced that "non-blacks" constitute a "cognizable racial group" for *Batson* purposes.<sup>85</sup> In *Stiff*, the defendant's counsel had exercised peremptory challenges to exclude a white male, an Asian male, a Hispanic male, a white female, and a Hispanic female from jury service.<sup>86</sup> Utilizing a Supreme Court ruling con-

may be required or prescribed by law, shall be disqualified to serve as a . . . petit juror in any court of this state on account of race . . ." *Id.*

<sup>78</sup> See *People v. Bennett*, 206 A.D.2d 382, 384, 614 N.Y.S.2d 430, 432 (2d Dep't 1994) (holding that although prosecutor provided race-neutral reason for challenge, prima facie case of discrimination against African-American women was established); *People v. Duncan*, 177 A.D.2d 187, 194-95, 582 N.Y.S.2d 847, 852 (4th Dep't 1992) (finding that use of peremptories against African-American women was prima facie case of discrimination).

<sup>79</sup> See *People v. McCoy*, 210 A.D.2d 508, 509, 620 N.Y.S.2d 463, 464 (2d Dep't 1994) (finding that defense's use of all their peremptory challenges to exclude white males, while black males with similar characteristics were not challenged, made prima facie showing of discrimination); *People v. Stiff*, 206 A.D.2d 235, 240-41, 620 N.Y.S.2d 87, 91 (2d Dep't 1994) (explaining that non-blacks were "cognizable racial group" and it was unconstitutional for either party to utilize peremptory challenges to impanel jury of single race); *People v. Holmes*, 209 A.D.2d 543, 543, 618 N.Y.S.2d 836, 837 (2d Dep't 1994) (holding that prima facie case of discrimination was established when eight or nine peremptory challenges were used against African-American women); *People v. Garcia*, 163 Misc. 2d 245, 247-48, 620 N.Y.S.2d 237, 240 (Sup. Ct. Bronx County 1994) (holding that exclusion of Eastern European white females was evidence of prima facie case of discrimination). *But see* *People v. Drcelik*, 212 A.D.2d 725, 725, 622 N.Y.S.2d 807, 807 (2d Dep't 1995) (holding that bare allegation that number of white males were excluded will not create showing of discrimination); *People v. Liguori*, 149 A.D.2d 624, 625-26, 540 N.Y.S.2d 291, 293 (2d Dep't 1989) (finding that defendant had not proven membership in cognizable racial group because of his Italian-sounding surname).

<sup>80</sup> 206 A.D.2d 382, 614 N.Y.S.2d 430 (2d Dep't 1994).

<sup>81</sup> *Id.* at 384, 614 N.Y.S.2d at 432.

<sup>82</sup> 177 A.D.2d 187, 582 N.Y.S.2d 847 (4th Dep't 1992).

<sup>83</sup> *Id.* at 194-95, 582 N.Y.S.2d at 852.

<sup>84</sup> 206 A.D.2d 235, 620 N.Y.S.2d 87 (2d Dep't 1994).

<sup>85</sup> *Id.* at 240-41, 620 N.Y.S.2d at 91.

<sup>86</sup> *Id.* at 236, 620 N.Y.S.2d at 89.



cerning grand jury challenges,<sup>87</sup> the court held that it is unconstitutional for either party to exercise peremptory challenges to empanel a jury of one single race.<sup>88</sup>

### B. *The Jury Project's Streamlining of Jury Selection*

In its present form, the procedures for voir dire are set forth in statutorily prescribed steps.<sup>89</sup> Once a panel of prospective jurors has been drawn, the defendant may challenge the seated pool on grounds that the jury selection procedure deviated from the Criminal Procedure Law guidelines, resulting in prejudice to the defendant.<sup>90</sup> Once a hearing is completed concerning the propriety of the entire procedure, the attorneys begin to examine the prospective jurors, individually or collectively, regarding their qualifications and possible conflicts or biases as jury members.<sup>91</sup> The scope of voir dire examination is completely within the discretion of the court.<sup>92</sup> After, or during, the questioning, attorneys can make a "challenge for cause."<sup>93</sup> A challenge for cause is an objection to a potential juror on grounds specifically prescribed by the statutes.<sup>94</sup> Once all challenges for cause have been ruled upon by the

<sup>87</sup> See *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) citing *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954) (holding cognizable racial group to be any group that is "recognizable" and "singled out for different treatment under the laws").

<sup>88</sup> *Stiff*, 206 A.D.2d at 240-41, 620 N.Y.S.2d at 91.

<sup>89</sup> See N.Y. CRIM. PROC. LAW § 270 (McKinney 1993).

<sup>90</sup> See N.Y. CRIM. PROC. LAW § 270.10(1) (McKinney 1993). This section provides that: A challenge to the panel is an objection made to the entire panel of prospective trial jurors returned for the term and may be taken to such panel or to any additional panel that may be ordered by the court. Such a challenge may be made only by the defendant and only on the ground that there has been such a departure from the requirements of the judiciary law in the drawing or return of the panel as to result in substantial prejudice to the defendant.

*Id.*

<sup>91</sup> See N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 1993).

<sup>92</sup> *Id.* § 270.15(1)(c). This section provides that "[t]he scope of such examination shall be within the discretion of the court. After the parties have concluded their examinations of the prospective jurors, the court may ask such further questions as it deems proper regarding the qualifications of such prospective jurors." *Id.*

<sup>93</sup> See *id.* § 270.15(2).

<sup>94</sup> See *id.* § 270.20. This section of the New York Criminal Procedure Law states that: A challenge for cause is an objection to a prospective juror and may be made only on the ground that:

- a) He does not have the qualifications required by the judiciary law; or
- b) He has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial; or
- c) He is related within the sixth degree by consanguinity or affinity to the defendant, or to the person allegedly injured by the crime charged, or to a prospective witness at the trial, or to counsel for the people or for the defendant; or that he is or was a party adverse to any such person in a civil action; or that he has complained against or been accused by any such person in a criminal action; or that he bears some other relation-

judge, peremptory challenges, objections to a prospective juror for no stated reason, are made.<sup>95</sup>

In a recent effort to revamp the jury selection system in New York, Chief Judge Judith S. Kaye of the New York State Court of Appeals formed a commission called the "Jury Project."<sup>96</sup> In support of its efforts to streamline the number of peremptory challenges allowed, the Jury Project rebuked critics of peremptories who argue that peremptory challenges have outlived their usefulness in criminal litigation.<sup>97</sup> The Jury Project believed that while peremptories could be used as a tool for racial discrimination, the United States Supreme Court's action in *Batson* and subsequent cases had reduced the likelihood of discrimination.<sup>98</sup> In terms of numbers, the report stressed that the New York system, in its current form, permits more peremptory challenges than most states and more than the number recommended by American Bar Association.<sup>99</sup> The reduction of peremptories allowed, asserted the Jury Project, would mitigate discrimination in jury selection and reduce the number of prospective jurors necessary for criminal trials.<sup>100</sup> The Jury Project's report summarized that the reduced number of peremptories would not affect the representativeness or

ship to any such person of such nature that it is likely to preclude him from rendering an impartial verdict; or

d) He was a witness at the preliminary examination or before the grand jury or is to be a witness at the trial; or

e) He served on the grand jury which found the indictment in issue or served on a trial jury in a prior civil or criminal action involving the same incident charged in such indictment; or

f) There is a possibility that the crime charged is punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of the death penalty as to preclude him from rendering an impartial verdict.

*Id.*

<sup>95</sup> See *id.* § 270.25. This section states that "[a] peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service." *Id.*

<sup>96</sup> See Gary Spencer, *Kaye Plans Jury System Reforms*, N.Y. L.J., Aug. 26, 1993, at 1.

<sup>97</sup> See THE JURY PROJECT, *supra* note 17, at 66 (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965)); see also Harold P. Fahringer, *The Fate of Peremptory Challenges*, N.Y. L.J., Nov. 11, 1993, at 2 (arguing that use of *Batson* challenges in discriminatory manner occurs only 10% of time in criminal trials). But see Paul J. Cambria Jr., *Jury System is Examined: Criminal Justice Section Addresses Issues of Peremptories*, N.Y. L.J., Jan. 24, 1994, at S4 (asserting that little time would be saved by reduction in peremptories and tool of fairness would be eliminated as false solution).

<sup>98</sup> See THE JURY PROJECT, *supra* note 17, at 66.

<sup>99</sup> See *id.* The report further adds that the exceptionally large number of peremptory challenges uses up an inordinate number of jurors, thereby over-taxing the jury pool. *Id.*

<sup>100</sup> See *id.* The report estimated an approximate reduction of 90,000 juror days in New York state, with 64,000 in the five boroughs of New York City. *Id.*

impartiality of juries.<sup>101</sup> The recommendations of the Jury Project have been submitted to the New York State Legislature for action<sup>102</sup> resulting in heavy lobbying by both proponents and opponents of peremptory challenge reduction.<sup>103</sup>

After studying the jury selection process in New York, Judge Kaye's "Jury Project" suggested a revision of the state's peremptory challenge system as it applies in both criminal and civil trials.<sup>104</sup> The Jury Project's report recommended that, in criminal cases, the number of peremptory challenges should be reduced from twenty to fifteen for class A felonies, fifteen to ten for class B and C felonies, and ten to seven for class D and E felonies.<sup>105</sup> The report also suggested that judges should have authority to allow additional peremptory challenges in appropriate cases.<sup>106</sup>

In addition, the Jury Project has suggested a reduction in the number of peremptory challenges in civil cases as well.<sup>107</sup> The commission recommended an amendment to the CPLR to permit three peremptory challenges for each "side" in a civil action, plus an additional challenge for every two alternate jurors.<sup>108</sup>

A reduction in the number of peremptory challenges, as suggested by the Jury Project, neither promotes the anti-discrimination theme of *Batson* nor provides a system to facilitate effective jury selection.<sup>109</sup> Supreme Court Justice Thurgood Marshall was correct when he explained that the only effective method of elimi-

<sup>101</sup> See *id.* at 68.

<sup>102</sup> See E. Leo Milonas, *Action By the Legislature Is Key to Reform*, N.Y. L.J., May 2, 1994, at S3 (arguing that reduction in peremptory challenges as suggested by JURY PROJECT will have to be enacted by legislature); Judith S. Kaye, *It is Time to Reform Jury System and Effort Involves Change on the Part of Everyone*, N.Y. L.J., Jan. 25, 1995, at S1 (explaining difficulty of instituting change and need for New York Bar Association and Legislature to support reforms).

<sup>103</sup> See Gary Spencer, *Bar's Delegate's Vote to Oppose Statewide Rules on Voir Dire*, N.Y. L.J., June 28, 1994, at 1 (explaining that House of Delegates voted to retain current number of peremptories despite JURY PROJECT's suggestions); Gary Spencer, *Far-Reaching Jury Changes Adopted*, N.Y. L.J., Oct. 25, 1994, at 1 (quoting Erie County District Attorney Kevin M. Dillon as stating that peremptories do not slow down trials, judges slow down trials).

<sup>104</sup> See THE JURY PROJECT, *supra* note 17, at 64-65; see also Gary Spencer & Daniel Wise, *Plan to Re-Vamp Jury System Unveiled: Six-Month Study Urges 80 Specific Changes in Process*, N.Y. L.J., Apr. 4, 1994, at 1 (explaining how proposed reduction in peremptories has been opposed by both prosecutor and defense groups).

<sup>105</sup> See THE JURY PROJECT, *supra* note 17, at 65.

<sup>106</sup> See *id.* at 69-70.

<sup>107</sup> *Id.* at 70.

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., *Gilchrist v. State*, 627 A.2d 44, 55 (1993) (Wilner, C.J., concurring); *Alen v. State*, 596 So. 2d 1083, 1083-85 (Fla. Dist. Ct. App. 1992).

nating racial discrimination from jury selection was to dispose of peremptory challenges.<sup>110</sup> By attempting a half-solution at eliminating discrimination, the jury selection process has continued to grow more inefficient and more discriminatory towards the jurors necessary for its success.<sup>111</sup>

### III. REVISED CHALLENGES FOR CAUSE ARE THE SOLUTION FOR NEW YORK

Judges and legal commentators have advocated the abandonment of the peremptory challenge system in favor of a revamped "challenge for cause" system in jury selection.<sup>112</sup> The underlying presumption of challenges for cause is that every juror without a bias may serve. Under the reduced peremptory challenge system, any potential juror can still be denied their right based upon whim or bias.<sup>113</sup> The challenge for cause system would create an open

<sup>110</sup> See *Batson v. Kentucky*, 476 U.S. 76, 106-07 (1986) (Marshall, J., concurring). Justice Marshall reasoned 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." *Id.* Justice Marshall suggested that prosecutors could not only lie to the court, but to themselves, in efforts to provide race-neutral explanations. *Id.* at 106; see also *King v. County of Nassau*, 581 F. Supp. 493, 501-02 (E.D.N.Y. 1984) (reasoning that attorneys confronted with *Batson*-like restrictions would deceive court with respect to their motives); *State v. Washington*, 375 So. 2d 1162, 1163-64 (La. 1979) (noting that prosecutors have disclosed to courts their regular practice of excluding blacks from juries).

<sup>111</sup> See BLACKSTONE, *supra* note 6, at 346-47 (explaining dual function of peremptory challenges as both protective and offensive devices). *But see* Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 67 (1992) (asserting that peremptory challenges serve to benefit criminal defendants by allowing them to eliminate potential jurors who could be biased).

<sup>112</sup> See *Alen v. Florida*, 596 So. 2d 1083, 1083, 1088-89 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring) (stating that elimination of peremptories is more favorable than "prolonged case-by-case strangulation . . . over a period of many years which in the end will efficiently eviscerate the peremptory challenge or, at best, result in a convoluted and unpredictable system of jury selection"); Carlson, *supra* note 5, at 1003-04 (calling for elimination of peremptory challenges and endorsing expanded system of challenges for cause); James H. Druff, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555, 1596 (1985) (arguing in favor of eliminating peremptory challenges); James J. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528; Jonathan B. Mintz, Comment, *Batson v. Kentucky: A Half Step in the Right Direction*, 72 CORNELL L. REV. 1026, 1046 (1987) (concluding that elimination of peremptory challenges can eliminate discrimination from jury selection); Jeff Rosen, *Jurymandering: A Case Against Peremptory Challenges*, NEW REPUBLIC, Nov. 30, 1992, at 15 (explaining benefits of abolishing peremptory challenges and citing dramatic benefits that doing so could achieve); see also Frederick L. Brown et al., *The Peremptory Challenge As a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 206-11 (1978).

<sup>113</sup> See Charles J. Ogletree, *Just Say No: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1132-34 (1994) (stating that eliminating peremptory challenges is most efficient method for alleviating racially questionable strikes); see also Robert M. O'Connell, *The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433, 433 (1991) (supporting

forum for jury selection, requiring lawyers to support "strikes" with reasonable and objective concerns as to a potential juror's ability to be impartial.<sup>114</sup> The decision to strike a juror should not be founded upon a lawyer's "gut" reaction, and judges would be required to make affirmative and objective decisions concerning the legitimacy of challenges.<sup>115</sup> Under such a system, the defendant could still strike those jurors whom he thinks would produce an unfair trial, but jurors would not be excluded from their civic right and duty because of their membership in a "cognizable racial" group.<sup>116</sup> While one flaw of the challenge for cause system is that jurors can still mislead and lie about potential conflicts, the continued use of peremptory challenges in a discriminatory manner has a greater potential for injury to the criminal justice system.<sup>117</sup>

In *People v. Bolling*,<sup>118</sup> New York Court of Appeals Judge Joseph W. Bellacosa called upon the New York legislature to reexamine the peremptory system. Judge Bellacosa suggested that the time has come to eliminate discrimination in jury selection rather than merely reviewing the problem.<sup>119</sup> It is submitted that

proposition that peremptory challenges are continually used on racial or ethnic grounds); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 567-69 (1992) (predicting demise of peremptory challenge due to its collision with equal protection principles).

<sup>114</sup> See Broderick, *supra* note 4, at 400; Carlson, *supra* note 5.

<sup>115</sup> See Ogletree, *supra* note 113, at 1134 (stating that judge need not share lawyer's belief, but must find it to be reasonable).

<sup>116</sup> See Gurney, *supra* note 4, at 230-36 (arguing that fairest system for all parties would be one based solely on challenges for cause); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 44-45 (1988) (discussing need to protect rights of both defendants and jurors).

<sup>117</sup> See Carlson, *supra* note 5, at 1003-04 (recognizing advantages and disadvantages of expanded challenge for cause system, and concluding it is superior to maintaining peremptory challenges); Lawrence Elmen Jr., Note, *Peremptory Challenges After Batson v. Kentucky: Equal Protection under the Law or an Unequal Application of the Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 481, 537-38 (1994) (explaining that modified system of challenges for cause can stem growing racism in jury selection and peremptories in particular); Ogletree, *supra* note 113, at 1132-37.

<sup>118</sup> 79 N.Y.2d 317, 591 N.E.2d 1136, 582 N.Y.S.2d 950 (1992).

<sup>119</sup> *Id.* at 331, 591 N.E.2d at 1145-46, 582 N.Y.S.2d at 959-60. Quoting *Batson*, the court noted:

It is time for the Legislature to come to terms with the undisputed fact that 'peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate' and that the *Batson* effort has failed to fulfill its stated goal of eradicating invidious discrimination from the jury selection process. *Id.*; see also *People v. Hernandez*, 75 N.Y.2d 350, 359, 552 N.E.2d 621, 625, 553 N.Y.S.2d 85, 89 (1990) (Titone, J., concurring); 1990 REPORT OF ADVISORY COMMITTEE ON CRIMINAL LAW & PROCEDURE, reprinted in 1990 N.Y. Laws 2856-57 (concluding that, after extensive study on jury selection in New York State, there should be reduction in number of per-

the Jury Project's recommendations are only temporary solutions in the fight to eliminate all discrimination from jury selection. The most effective and equitable solution would be a system based solely on challenges for cause.<sup>120</sup>

#### CONCLUSION

Peremptory challenges, strictly defined as "without cause", can no longer exist in a society that is rightfully cognizant of potential biases which may be cloaked under the guise of peremptory strikes. The Supreme Court first denounced the discriminatory use of peremptory challenges in the famed *Batson* decision. Since then, federal and state courts, lacking Supreme Court guidance, have expanded the definition of a "cognizable racial group" in a confusing myriad of decisions. In addition, Chief Judge Kaye's Jury Project has proposed a reduction in the number of peremptory challenges in both criminal and civil matters in New York. Such a reduction neither eliminates discrimination from jury selection nor creates a more efficient process. The peremptory challenge system in New York should be replaced with an expanded system of challenges for cause. This system would allow for an equal representation on the jury panel from the society at large, protect the defendant's right to a fair trial, and maintain the ordinary citizen's right to serve on a jury.

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emptions permitted in order to improve efficiency of jury system); William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CR. REV. 97, 134.

<sup>120</sup> See Broderick, *supra* note 4, at 422 (arguing that increased use of challenges for cause coupled with elimination of peremptory challenges would end practice that has violated constitutional right of service on jury); Carlson, *supra* note 5, at 1003-04 (noting that an expanded challenge for cause system would negate invidious discrimination and create more predictable jury system resulting in less appellate reversals); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1137 (1995) (advocating that revised for-cause challenge system that considers individual behavior and is granted more often would enhance openness, rather than secrecy, in jury selection process); Ogletree, *supra* note 113, at 1133-35 (asserting that strengthened challenge for cause system can reduce racism in jury selection by requiring trial judges to reject facially neutral explanations that have little nexus to juror's ability to decide case).

